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HIMACHAL SERIES

(April, 2017)

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SUBJECT INDEX

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Code of Civil Procedure, 1908- Section 96- A suit for redemption was filed, which was decreed and a preliminary decree for redemption was passed- it was directed that the principal money be deposited along with interest @ 6% per annum within three months– an appeal was preferred, which was allowed on the ground that plaintiffs had failed to deposit the mortgage amount within the specified period – aggrieved from the decree, second appeal has been filed- held in appeal that the judgment and decree were passed on 16.12.1995- period of three months was granted to deposit the money – however, a stay order was issued by the Appellate Court prior to the expiry of the period – there was no willful disobedience on the part of the plaintiffs in not complying with the decree- the Appellate Court had wrongly allowed the appeal- judgment and decree of appellate court set aside.(Para-14 to 18) Title: Tripta Devi and ors. Vs. Chuni Lal and ors. Page-581

Code of Civil Procedure, 1908- Section 114- An application for seeking permission to produce evidence was filed which escaped the notice of the Court- it was contended that additional evidence was necessary for adjudication of the dispute pending between the parties – the appeal could not have been decided without deciding the application – hence, it was prayed that order be reviewed and the appeal be decided afresh- held that jurisdiction to review an order or judgment should be exercised sparingly - a party cannot seek review of judgment on merits- review is permissible on the discovery of new evidence or when there is some error or mistake apparent on record – the dismissal of appeal without considering the application under Order 41 Rule 27 is an error apparent on the face of record – petition allowed – the judgment recalled and matter posted for hearing on merits.(Para-4 to 7) Title: Sauju and ors. Vs. Gulab Singh &ors. Page-725

Code of Civil Procedure, 1908- Section 151- The evidence of the defendants was ordered to be closed but certified copies of judgment and decree passed in previous suit were received in evidence – it was contended that the document could not have been received without recalling the order- held that the certified copies of the judgment and decree are per se admissible- permission was sought to produce the documents, which was granted – therefore, no illegality was committed by the exhibition of the documents- petition dismissed. (Para-3 to 5) Title: Singho Ram and others Vs. Balbir Singh and others Page-726

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment of the objection was filed, which was dismissed- subsequently, the objection was also dismissed by the Trial Court- aggrieved from the order, present revision has been filed- held that the order passed in the application had merged in the final order- if the order on application was wrong, it would affect the final order as well–revision allowed.(Para-3 to 7) Title: Surjit Singh Vs. Harmohinder Singh & others Page-736

Code of Civil Procedure, 1908- Order 6 Rule 17- Order 8 Rule 6A- A civil suit for recovery of arrears of rent along with interest and also the use and occupation charges was filed – separate applications for pleading a counter-claim and amendment of written statement were filed by the tenant – the applications were dismissed by the Trial Court- aggrieved from the order, present revision has been filed – held that earlier an order of eviction was passed against the tenant on the ground of arrears of rent- he had not filed any counter-claim and had not taken any plea resisting the petition- the order of eviction was successfully executed- the tenant is estopped from raising any counter-claim– further the application for amendment could have been filed after the commencement of trial on establishing sufficient cause for not seeking the amendment earlier - the documents sought to be filed with the counter-claim were also available earlier- the counter-claim is also barred by the provision of Order 2 Rule 2 of C.P.C. – petition dismissed. (Para-2 to 7) Title: Naresh Sharma Vs. Shiv Ram Sharma Page-537

Code of Civil Procedure, 1908- Order 21 Rule 30- An execution for recovery of money was filed- the notice was served upon the daughter of J.D.- however, the process server did not record that

J.D. could not be found at the residence within a reasonable time – hence, the service was not proper- however, the ex-parte order was not sought to be set aside by the J.D. - further, the property was ordered to be sold and the notice required under Order 21 Rule 66 (2) was not served – however, the compliance of Order 21 Rule 54(1A) was made- hence, no prejudice was caused to the J.D. – petition dismissed. (Para- 2 to 6) Title: Parma Nand Vs. Kasturi Lal & others Page-488

Code of Civil Procedure, 1908- Order 21 Rule 37- Petitioner/judgment debtor was ordered to be detained in civil imprisonment for a period of two months- aggrieved from the order, the present revision petition has been filed – held that the judgment debtor can be ordered to be detained in civil imprisonment on service of show cause notice to him and after giving an opportunity of being heard- judgment debtor pleaded that he is a man of no means and is not in a position to satisfy the decree – there is no evidence that judgment debtor had disposed of his property after institution of the suit or had neglected to pay the decretal amount intentionally and deliberately – merely because judgment debtor does not have any movable and immovable property is not sufficient to detain him – order set aside. (Para- 7 to 12) Title: Ashok Kumar Vs. Social Mutual Benefits Company Ltd. Page-477

Code of Civil Procedure, 1908- Order 22 Rule 4- Respondent No.30 died during the pendency of the appeal before the Appellate Court, while the respondent No.38, 50 and 51 had died during the pendency of the civil suit before the Trial Court- the judgments passed by the Courts are nullity – hence, they are set aside and matter remanded to the Appellate Court. (Para-2 to 5) Title: Jai Kishan and others Vs. Mehar Chand and others Page-668

Code of Civil Procedure, 1908- Order 26 Rule 9- An application for demarcation was filed pleading that the defendant had encroached upon suit land by raising construction during the pendency of suit – he had also cut a Biuhal tree- application was filed to determine the extent of encroachment – demarcation was conducted by the Field Kanungo after filing the application- the demarcation report was affirmed by the Competent Authority – Trial Court dismissed the application on the ground that there was no necessity of demarcation by the Court in view of the demarcation having been conducted by the Revenue Authorities, - aggrieved from the order, present petition has been filed- held that once the demarcation has been conducted, no permission to demarcate the land afresh can be granted – Trial Court had rightly dismissed the application – petition dismissed.(Para-4 and 5) Title: Jai Chand Vs. Jagdish Chand Page-877

Code of Civil Procedure, 1908- Order 43 Rule 1(d)- An ex-parte decree was passed against the appellant – they filed an application for setting aside ex-parte decree along with an application for condonation of delay – the application for condonation of delay was dismissed – aggrieved from the order, present appeal was filed – it was contended that appeal is not maintainable- held that an appeal lies against the order dismissing the application for condonation of delay- objection overruled and appeal ordered to be listed for arguments. (Para-3 to 8) Title: M/s Isotech Electrical & Civil Projects (P) Ltd. and another Vs. M/s Sturdy Industries Ltd. (D.B.) Page-815

Code of Civil Procedure, 1908- Order 47 Rule 1- Section 114- An application was filed for review of the judgment passed by the Court vide which the appeal filed by the petitioner was dismissed with a cost of Rs.10,000/- - it was pleaded that there is an error apparent on the face of record as the Court had wrongly concluded that allotment was not questioned – held that review proceedings are not similar to the appeal – an error which is self-evident can be called to be an error apparent on the face of record – the error which is to be established by long drawn reasoning is not an error apparent on face of record – it was contended that the order was challenged in a civil suit before Learned Civil Judge- however, no declaration was sought regarding its invalidity – the Court had rightly concluded that the order was not challenged- the review petition is an abuse of the process of the Court- hence, dismissed with the cost of Rs.50,000/-.(Para-7 to 22) Title: Balbir Singh Vs. State of H.P. and others (D.B.) Page-662

Code of Criminal Procedure, 1973- Section 169- An FIR was registered for the commission of offences punishable under Sections 419, 420, 467, 468 read with Section 34 of I.P.C – the police filed a cancellation report- notice was issued to the complainant but complainant had died prior to issuance of the notice- notice was issued to general power of attorney- held that a general power of attorney had expired on the death of the complainant and general power of attorney could not have represented the complainant during the proceedings – order set aside. (Para- 2 to 5) Title: Hitesh Bisht and others Vs. State of H.P. Page-812

Code of Criminal Procedure, 1973- Section 228- Police filed a charge sheet for the commission of offence punishable under Section 307 of I.P.C- the Court framed the charge- aggrieved from the order, present revision has been filed- held that the Court is not required to make a formal opinion that accused is certainly guilty of the commission of offence– the Court had not properly appreciated the material on record- revision allowed- order of the Trial Court set aside.(Para- 6 to 23) Title: Varun Bhardwaj Vs. State of H.P. Page-847

Code of Criminal Procedure, 1973- Section 439- Accused has been charged for the commission of offences punishable under Sections 364-A, 420 and 342 read with Section 120-B of I.P.C and Section 66 (d) of I.T. Act, 2000- an FIR was registered on the basis of complaint made by A stating that he was made to travel to Delhi on the pretext of taking him abroad but he was taken to Bagdogra and forced to part with a sum of Rs.22 lakhs- he was kept in confinement and was physically assaulted- petitioner seeks bail on the ground that witnesses examined by the prosecution do not establish the charged offences and he is in custody for more than one year, he is permanent resident of Himachal Pradesh and is a student having bright future- held that the grant or refusal of bail lies in the discretion of the Court- the primary purposes of bail are to relieve the accused in imprisonment, to relieve the State of the burden of keeping him pending trial and to keep the accused constructively in the custody of the Court- accused has wrongly stated that he is permanent resident of Himachal Pradesh- he is actual resident of Orissa – petitioner was traced and brought back from his native place after the lapse of two years- there is nothing on record to establish that petitioner has got roots in the society-hence, he is not entitled to the concession of the bail- petition dismissed. (Para-8 to 13) Title: Amit Jha Vs. State of Himachal Pradesh Page-527

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the accused for the commission of offences punishable under Sections 376, 354-A, 328 and 506 of I.P.C. and Sections 4 and 8 of POCSO Act – the petitioner filed an application seeking bail pleading that he is innocent and has been falsely implicated – he is behind bar for a long time and he be released from custody – held that the Court has to consider nature of crime, seriousness of the offence, character of the evidence, circumstances of the case, possibility of securing the presence of the accused, apprehension of the witnesses being tampered with and the larger interest of the public – prosecutrix had made material improvements in her statement- no injury was found on her person- there was delay in recording the FIR – hence, the bail application allowed and petitioner ordered to be released on bail of Rs.25,000/- with one surety for the like amount.(Para-7 to 10) Title: Rahul Thakur @ Lucky Vs. State of Himachal Pradesh Page-684

Constitution of India, 1950- Article 226- A process for filling 500 temporary posts of Transport Multipurpose Assistantswas initiated – it was contended that notification and rules are in violation of Section 45 of Road Transport Corporation Act, 1950- the applications were allowed and the process was held to be bad – aggrieved from the order, the present writ petition has been filed – held that preliminary objections were raised, which went to the root of the case- the locus standi of the applicants was challenged – no discussion was made regarding the objection- the writ petition allowed, order of the Tribunal set aside and matter remanded to the Tribunal for disposal in accordance with law. (Para- 7 to 9) Title: Himachal Road Transport Corporation and another Vs. Bhupinder Singh and another (D.B.) Page-818

Constitution of India, 1950- Article 226- An application was filed for placing on record the identity card and other documents to show that the status of the petitioner was not of a trainee but of a workman – the Labour Court did not pass any order on the application but non suited the petitioner on the ground that he was unable to prove his status as a workman - held that the Labour Court should have passed an order on the application and should not have non-suited the petitioner without considering his application- writ petition allowed and award of the Labour Court set aside- matter remanded with a direction to decide the same afresh after passing an order on the application. (Para-4 and 5) Title: Mukesh Kumar Vs. M/s Ansysco through its MD Page-814

Constitution of India, 1950- Article 226- Deceased was standing- he was caught by electric wire, which was hanging very low- deceased was shifted to Hospital but he succumbed to the injuries- a writ petition was filed for seeking compensation- held that where there is prima facie evidence of negligence, the Court cannot grant relief in exercise of writ jurisdiction- deceased was a boy of 13 years whose life was curtailed due to accident- there is violation of right of life- respondent stated that deceased had died due to his own negligence but a person undertaking an activity involving hazardous or risky exposure to human life, is liable to compensate other person for the injury sustained by the other person – contributory negligence is no defence in such situation considering the age of the deceased, respondent directed to pay a compensation of Rs.6 lacs with interest @ 7.5% per annum. (Para-7 to 18) Title: Rekha Vs.The H.P. State Electricity Board & another Page- 558

Constitution of India, 1950- Article 226- **Industrial Disputes Act, 1947-** Section 25- The workman was engaged as field man in the year 1989 on daily wage basis- he was posted as conductor in a truck- he made a representation against his postings and his services were terminated – a reference was made and the Industrial Tribunal dismissed the claim of the workman- aggrieved from the order, present writ petition was filed- held thatthe workman had failed to prove that he had completed 240 days in the preceding 12 months period- it was proved by the respondents that workman was habitual absentee and did not respond to the notices issued by the Corporation to join his duties and his services were rightly terminated – the Writ Court has limited jurisdiction while deciding the writ petition and it cannot re-appreciate the evidence – the Industrial Tribunal had rightly dismissed the reference- writ petition dismissed.(Para-14 to 24) Title: Prem Singh Vs. H.P. State Forest Development Corporation Page-432

Constitution of India, 1950- Article 226- Petitioner applied for an appointment as anganwari worker – petitioner was declared selected while respondent No.4 was kept in the waiting list – respondent No.4 preferred objection before Competent Authority – a writ petition was filed, in which a direction was issued to decide the representation of respondent No.4 within two months – Deputy Commissioner set aside the appointment of the petitioner on the ground that marks were not awarded properly – aggrieved from the order, present writ petition has been filed- held that the reasoning of the Deputy Commissioner on the basis of broad guidelines is not sustainable as no guidelines were brought to the notice of the Court – there is no practice or law to bind interview committee to award certain minimum percentage of marks in an interview- the Court will not sit in appeal over the assessment of an individual candidate- writ petition allowed- order of the Deputy Commissioner set aside.(Para-19 to 24) Title: Reeta Devi Vs. State of Himachal Pradesh & others Page-788

Constitution of India, 1950- Article 226- Petitioner has done his B.Sc. in Medical Laboratory Technology from Janardhan Rai Nagar, Rajasthan Vidyapith University, Udaypur- he applied for registration but the registration was declined – aggrieved from the order of non-registration, the present writ petition was filed – the respondent pleaded that the university is not competent to run extension Centre/study Centre/learning Centre outside the State of its origin – the University did not have recognition to run the course in the year 2005 – the recognition was given in the

year 2007-08- the degree obtained by the petitioner is not valid – held thata person cannot be registered as a paramedical practitioner unless he possesses a recognized qualification- Centre in Kurukeshtra was an authorized Distance Education Study Centre of the University - ex post facto approval/recognition was granted till 2005 – thereafter provisional approval was granted for the year 2007-08 – the qualification gained by the petitioner between 2005 to 2007 cannot be said to be recognized- respondent No.2 had rightly declined the recognition to the petitioner – writ petition dismissed.(Para-6 to 22) Title: Arvind Sharma Vs. State of Himachal Pradesh and another Page-585

Constitution of India, 1950- Article 226- Petitioner has purchased the land from the previous owners who were inducted as non-occupancy tenants and had become the owners on the commencement of H.P. Tenancy and Land Reforms Act- the petitioner constructed a site office and a store after obtaining permission from Municipal Corporation, Nahan- the respondent directed the Jawans to obstruct the passage leading to the land in dispute – demarcation was conducted and the path was found to be owned by M.C., Nahan- army jawans trespassed into the suit land and demolished the site office, store and retaining wall – FIR was registered – the petitioner restarted the construction but it was also demolished - a civil suit was filed, which was decreed- proceedings for eviction of the petitioner were initiated under Public Premises (Eviction of Unauthorized Occupants) Act, 1971 and an order of eviction was passed – an appeal was filed, which was dismissed- aggrieved from the order, present writ petition has been filed- held that the land was in the ownership of the State Government - proprietary rights could not have been conferred upon the tenants – the plea of the petitioner that he had acquired ownership from the previous owner is not tenable- the petitioner is a trespasser – civil court has already held the Government to be the owner and liberty was granted to initiate proceedings for eviction of the tenants in accordance with law – the appeal was dismissed – hence, the proceedings for eviction under the Act are maintainable – the orders passed by the estate officer and appellate authority are legal – writ petition dismissed.(Para-8 to 18) Title: Manish Kumar Aggarwal Vs. Union of India &ors.(D.B.) Page-700

Constitution of India, 1950- Article 226- Petitioner was appointed as a clerk in H.P. Vidhan Sabha Secretariat- he was promoted and was placed against the post of Superintendent (Ex-Cadre) in the year 2000- Himachal Pradesh Vidhan Sabha Secretariat (Recruitment and Condition of Service) Amendment Rules, 2008 were notified in the year 2008 – eight posts of Section Officers were to be filled on the basis of seniority – petitioner was promoted as Superintendent Grade-II on 1.7.2009 – respondent No.2 who was shown at Serial No.6 was promoted as Section Officer w.e.f. 1.4.2008 on notional basis – notional promotion of respondent No.2 was regularized and he was promoted on regular basis as Section Officer w.e.f. 1.10.2010 – respondent No.2 was wrongly promoted against ST category – respondent No.1 stated in the reply that the promotion was made in accordance with 13 points roster and in accordance with the instructions issued by Government from time to time – held that actual representation of incumbents belonging to different categories in a cadre isto be determined at the time of initial operation of the roster – any excess representation is to be adjusted at the time of future recruitment – respondent no.1 had wrongly adjusted a candidate belonging to ST category against the post meant for unreserved category – ST candidate was to be adjusted against 7threplacement point and was adjusted against 6th replacement point – respondent No.2 could not have been adjusted against the reserved post for ST as it was already occupied by ST candidate- the petitioner was not unfit and was entitled to promotion – writ petition allowed- direction issued to consider the case of the petitioner for promotion in accordance with law and if the petitioner is found entitled to promotion, to grant him the consequential relief. (Para-9 to 20) Title: Ran Singh Vs. Himachal Pradesh Vidhan Sabha, Shimla and another Page-594

Constitution of India, 1950- Article 226- Petitioner was appointed as anganwadi worker- her appointment was quashed and set aside in an appeal filed by respondent No.6- the petitioner filed an appeal, which was initially allowed but the order was set aside in review- aggrieved from the

order, the present writ petition has been filed- held that Divisional Commissioner had set aside his order in review but there is no provision of review in the scheme – writ petition allowed and the order passed by Divisional Commissioner set aside. (Para-8 and 9) Title: Ruma Devi Vs. State of H.P.& others Page-564

Constitution of India, 1950- Article 226- Petitioner was appointed as Lecturer – she applied for extraordinary leave for three years and did not turn up to join her services after 15.3.1999 – she claimed the arrears on account of revision of pay till the date of service –held that no representation was made by the petitioner seeking revision of her pay- no explanation was given for the delay on the part of the petitioner – writ petition dismissed.(Para-8 to 15) Title: Neelam Sharma Vs. Baba Balak Nath Temple Trust & Others Page-542

Constitution of India, 1950- Article 226- Petitioner was selected as a drawing master by PTA – respondent No.5 filed a complaint before Inquiry Committee stating that merit was ignored at the time of selection – the Inquiry Committee concluded that the proper procedure was not adopted by the PTA and held the appointment of the petitioner to be bad- an appeal was filed before Deputy Commissioner, which was dismissed- a writ petition was filed and the matter was remitted to the Inquiry Committee who concluded that petitioner had secured 8th position while the complainant had secured 6th position – the appointment was not proper – aggrieved from the report, present writ petition was filed – held that the appointment of the petitioner is not in accordance with the direction issued by the Government – the Inquiry Committee had rightly concluded that petitioner was not the most meritorious person- writ petition dismissed.(Para-8 to 12) Title: Kamal Kishore Vs. State of H.P. & Others Page-533

Constitution of India, 1950- Article 226- Petitioner worked as Balwari teacher in Balwari Centre, Bathmana- respondent No.3 sanctioned an Anganwadi Centre – applications were invited from the eligible candidates- petitioner submitted her candidature but the respondent No.3 refused to entertain her application- respondent No.6 was appointed by way of transfer- notification was issued to fill up the post, which had fallen vacant due to the transfer- she filed an appeal, which was rejected as time barred- a further appeal was filed, which was also dismissed as time barred- aggrieved from the orders, present writ petition has been filed- held that clause 4 of the terms and conditions reads that under the ICDS programme there is no provision of transfer of Anganwadi Workers/ Helpers as these are honorary workers- it has been stated that in case of marriage of Anganwadi workers or helpers, if any vacancy exists, she would be transferred or adjusted in that Anganwadi Centre - only a female who is resident of the Village/Ward, where Anganwadi Centre is located or who belongs to feeder area is eligible for appointment- adjustment of respondent No.6 by way of transfer is arbitrary and colourable exercise of power- once the discretionary power had been exercised by adjustment, it was not incumbent to adjust her again- application for second adjustment is contrary to guidelines – petition allowed- direction issued to initiate the process to fill up the post of Anganwadi worker. (Para-7 to 20) Title: Manju Sharma Vs. State of Himachal Pradesh and others Page-483

Constitution of India, 1950- Article 226- Respondent is a consumer of electricity supplied by the petitioner and had agreed to pay the tariff levied upon it in accordance with the prevalent rules – the petitioner sought demand and energy charges from the respondent- a dispute was raised before Forum for Rederessal for Grievances of HPSEB Consumers, who decided that the final claim raised by the petitioners is not based upon actual figures and facts - aggrieved from the order, present writ petition has been filed – held that respondent had agreed to pay the electricity tariff as per the prevalent rules - it had sought assured contract demand of 754.08 KVA– demand and energy charges were in accordance with the prevalent rates – there is no infirmity in the demand of charges from the respondent- petition allowed.(Para-2 to 4) Title: HPSEB and others Vs. Agro Industrial Packaging India Ltd. Page-875

Constitution of India, 1950- Article 226- Respondents invited expression of interest for construction, operation/maintenance and running of parking complexes in Shimla under Public Private Partnership Mode (PPP) – petitioners submitted the expressions of interest which were accepted – sanction for construction of complex was accorded subject to conditions - a dispute arose, which was referred to Arbitrator who commenced proceedings – separate writ petitions were filed by the petitioners – held that the matter was referred to the sole arbitrator in accordance with the request for proposal – the arbitrator was bound to proceed in accordance with law and to pronounce the award within stipulated time – reference was made prior to the amendment in Arbitration and Conciliation Act and will not apply to the pending arbitral proceedings – writ petition is not maintainable and proceedings in accordance with Arbitration and Conciliation Act have to be taken regarding the arbitration matters- the High Court does not have the power to intervene in the proceedings/orders passed by Arbitral Tribunal – petition dismissed.(Para-15 to 51) Title: M/s P K Construction Co and another Vs. The Shimla Municipal Corporation and others (D.B.) Page-706

Constitution of India, 1950- Article 226- The father of the petitioner was having a shop-cum-residence, which was acquired for the construction of Bhakra Dam Project – compensation of Rs.556/- was paid to him and he fell in the definition of oustee – the petitioner claimed that he was entitled for allotment of plot in new Bilaspur Township but no plot was allotted to him - hence, he filed the writ petition- held that no document was placed on record to show that the petitioner had raised the issue from 1979 till 30th August, 2011, the date of filing of writ petition – the petition is hopelessly barred by time – the relief cannot be granted to a person who does not approach the Court within time- petition dismissed.(Para-6 to 14) Title: Durga Dass Sharma Vs. State of H.P. &Others Page-530

Constitution of India, 1950- Article 226-Respondent No.4 was engaged by the petitioner – a dispute arose between different societies, which was ultimately referred to Divisional Commissioner- work was re-distributed and the petitioner was left with no work – a decision was taken to remove respondent No.4- a demand was raised by respondents No. 4 and 5– Labour Inspector-cum-Conciliation Officer directed the petitioner to re-engage the respondents No. 4 and 5– aggrieved from the order, present writ petition has been filed – held that conciliation had not taken place and the Conciliation Officer has no adjudicatory powers- his duties are administrative and not judicial – petition allowed – order of the Labour Officer set aside.(Para-5 to 8) Title: The Kohinoor Sarvahitkari Parivahan Sahkari Sabha Samiti Vs. State of Himachal Pradesh and others Page-630

Constitution of India, 1950- Article 226-The Notification providing calendar for preparation of electoral roll has been issued- any aggrieved person can approach the authority for inclusion/exclusion of the names from the rolls – parties can file their claims/objections, which would be considered by the authority concerned – petition disposed of. (Para-2 to 6) Title: Om Prakash Vs. State Election Commission Himachal Pradesh & others (D.B.) Page-882

Contempt of Courts Act, 1971- Section 12- A consent order was passed by the Writ Court directing the respondents to convene a general house in the presence of Assistant Registrar of the Co-operative Societies after following due process of law- a contempt petition was filed pleading that the respondents have not obeyed the order passed by the Writ Court – held that the respondent had taken all possible steps for convening of general house – the petitioners frustrated the managing committee meeting so that general house meeting could not be held – the respondents have not violated the order passed by writ court- Contempt petition dismissed.(Para-7 to 15) Title: Shyam Lal & Others Vs. Praveen Verma & Others (D.B.) Page-437

‘E’

Employees Compensation Act, 1923- Section 4- S was employed as additional foreman-cum-driver with H.P. Power Corporation Limited – he died while discharging his duties- Commissioner

assessed the compensation as Rs.2,71,120/- and awarded the same without interest- aggrieved from the award, present appeal has been filed- held that where an employer is in default in paying due compensation, the Commissioner shall award the interest @ 12% per annum or higher – the interest of 12% per annum is statutory and has to be awarded along with compensation- appeal allowed- interest awarded @ 12% per annum from a date after one month when the same fell due. (Para- 2 to 5) Title: Hazar Mani Vs. The Secretary, H.P. State Electricity Board & another Page-641

'H'

H.P. Excise Act, 2011- Section 39- A vehicle was seized for transporting 7 bottles of English Wine - An application for release of vehicle was filed, which was dismissed by the Trial Court- aggrieved from the order, present revision has been filed- held that there is provision of confiscation of the vehicle under Section 60 of the Act – however, this power can be exercised only after final adjudication of the case – this provision is not relevant while deciding the interim custody of the vehicle - there is no bar for the interim release of the vehicle – the order set aside and direction issued to the Trial Court to decide the same afresh.(Para-7 to 16) Title: Kuldeep Singh Vs. State of H.P. Page-670

H.P. Urban Rent Control, 1987- Section 14- An eviction petition was filed on the ground of arrears of rent, the premises being more than 100 years old having outlived its life, the premises having become unfit and unsafe for human habitation, the tenant having sublet the premises and the premises being required bonafide for reconstruction, which cannot be carried out without vacating the building – the petition was allowed by the Rent Controller- an appeal was filed, which was allowed and the order of the Rent Controller was set aside- held in revision that the eviction petition has been filed for eviction of the tenant from the ground floor but no eviction petition was filed for eviction of the tenant residing on the upper floor- the premises is owned by various co-owners and all of them have not been impleaded- the Appellate Authority had not taken into consideration the relevant factors while deciding the appeal- revision allowed and order of Appellate Authority set aside.(Para-8 to 12) Title: Anil Kumar Vs. Vijay Kumar and another Page-632

Himachal Pradesh Panchayati Raj Act, 1994- Section 163- Petitioner was elected as ward panch- election was challenged before authorized officer by filing an election petition- petitioner was held to be disqualified to hold the post- an appeal was filed, which was dismissed- aggrieved from the order, present writ petition has been filed- held that election petition filed before the prescribed authority was beyond the period of limitation as election petition can be filed within thirty days only- authorized officer erred in entertaining the petition after the period of limitation- writ petition allowed and the order of disqualification of the petitioner set aside subject to payment of cost of Rs.10,000/-. (Para- 13 to 25) Title: Veena Devi Vs. State of Himachal Pradesh and others Page-523

Hindu Adoption and Maintenance Act, 1956- Section 18 and 23- Trial Court granted interim maintenance of Rs.1,000/- per month to each of the plaintiffs/applicants- aggrieved from the order, the present petition was filed- held thatTrial Court had relied upon the pleadings to grant interim relief- although issues have been framed, parties were not called upon to produce the evidence – the reliance placed upon the pleadings is improper as in case of dismissal of main suit, recovery proceedings would have to be initiated – petition allowed- order of the Trial Court set aside. (Para-3 and 4) Title: Sanjay Kumar Vs. Sumna Kumari & others Page-464

Hindu Marriage Act, 1955- Section 13- Wife filed a petition on the ground that her husband is a known patient of Schizophrenia and had treated her with cruelty – the husband pleaded that he was suffering from depression, which is curable – the petition was dismissed – aggrieved from the order, the present appeal has been preferred- held that wife has to prove that the disease with which the spouse is suffering is not curable and it is not possible to live with the ailing spouse –

the Doctor was not examined to prove the nature of ailment – it was not proved that the disease was not curable – the respondent suffered first attack after 4½ years of marriage, which reveals that respondent was not suffering from the attacks regularly – the husband is prepared to live with the petitioner in a matrimonial home- the divorce petition was rightly dismissed- appeal dismissed.(Para-9 to 15) Title: Suchita Bhaik Vs. Rajesh Kumar Bhaik Page-452

'I'

Income Tax Act, 1961- Section 260-A- Respondent is an assessee and a credit institution within the meaning of Section 2(5A) of the Interest Tax Act, 1974- assessee failed to furnish the return within the stipulated period- a notice was issued on which return was filed – an assessment order was passed raising tax demand – Commissioner of Income Tax set aside the assessment - an appeal was filed which was dismissed as infructuous – however, penalty was imposed upon the assessee by the Deputy Commissioner of Income Tax – an appeal was filed and the penalty was modified – separate appeals were filed against this order- the Appellate Authority cancelled the order of penalty – aggrieved from the order, an appeal was filed before the High Court – the matter was remanded to Assessing Authority, who imposed the fresh penalty- appeal was preferred against this order, which was dismissed – further appeal was allowed – aggrieved from the order of Appellate Authority, the present appeal has been filed- held that penalty can be imposed against assessee in case the Assessing Officer comes to a definite conclusion that assessee had concealed particulars of chargeable interest or had furnished inaccurate particulars of such interest- the return was accepted in its entirety – advance tax was paid by the assessee before the closure of Financial year – return was delayed on account of non-availability of return form - there was no concealment on the part of the assesse- assesse had furnished complete particulars of income in the profit and loss account – the Tribunal had passed the order rightly- appeal dismissed.(Para-15 to 24) Title: Commissioner of Income Tax, Shimla Vs. M/s H.P. State Co-operative Bank Ltd., Shimla (D.B.) Page-797

Indian Forest Act, 1927- Section 52-A- The vehicle of the respondent was seized for transporting the forest produce – an application for release of vehicle was filed before Authorized Officer-cum-Divisional Forest Officer, which was rejected- a revision was filed before Additional Sessions Judge, which was converted into an appeal and the order of Authorized Officer was set aside – aggrieved from the order, present revision has been filed- held that no report of seizure was made to the Authorized Officer – a challan was filed before the Magistrate who had jurisdiction to release the vehicle – order of release can be passed by a Court which had taken cognizance of the charge sheet- however, in the peculiar facts and circumstances of the case, the order of Authorized Officer upheld.(Para- 8 to 12) Title: State of Himachal Pradesh Vs. Prakash Chand Page-765

Indian Partition Act, 19- Section 4- Plaintiff filed a civil suit seeking partition of the property pleading that the property is jointly owned by large number of co-sharers and it is difficult to enjoy the same- the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that when a partition is sought, the entire joint property owned by the co-owners must be brought into hotchpot for division amongst the co-sharers –however, partial partition is permissible in certain circumstances provided that no prejudice is caused to the other side – the Appellate Court had made a general observation that the suit was bad for partial partition and no prejudice was pointed out –appeal allowed – judgment of the Appellate Court set aside and that of the Trial Court restored. (Para- 15 to 38) Title: Pradeep Chand Sharma and others Vs. Budhi Devi and others Page-545

Indian Penal Code, 1860- Section 279- Accused was driving a tanker with a high speed in a rash and negligent manner – the accused was tried and acquitted by the Trial Court – an appeal was filed, which was dismissed- held in revision that there are contradictions regarding the vehicle being driven by the witnesses – this fact was ignored by the Courts – revision allowed – orders of the Courts set aside.(Para-9 to 13) Title: Ravinder Kumar Vs. State of H.P. Page-784

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a Maruti van in a rash and negligent manner and hit P who died at the spot – the accused was tried and convicted by the Trial Court- an appeal was filed which was also dismissed – held in appeal that the prosecution version was proved by PW-1 - PW-4 and PW-5 did not support the prosecution version – however, none of the witnesses had identified the accused – owners said that he had employed three persons as drivers and the possibility of some other person driving the vehicle at the time of accident cannot be ruled out- it was not proved that rashness and negligence of the accused had caused the accident- revision allowed- accused acquitted.(Para-9 to 16) Title: Karam Chand Vs. The State of Himachal Pradesh Page-756

Indian Penal Code, 1860- Section 279 and 337- Complainant and her aunt were going to temple in a bus – when the complainant tried to get down from the bus, the conductor whistled - the complainant fell down and sustained injuries – the accused was tried and acquitted by the Trial Court- held in appeal that presence of PW-2 was suspect due to which the whole prosecution case also became suspect- it was admitted by the complainant in cross-examination that there was a heavy congestion of the passengers – possibility of complainant having fallen down cannot be ruled out –the Trial Court had correctly appreciated the evidence- appeal dismissed.(Para-9 to 13) Title: State of H.P. Vs. Hukam Chand and another Page-576

Indian Penal Code, 1860- Section 279 and 338- Accused was driving HRTC Bus in a rash and negligent manner – he struck driver side of the bus with a wall due to which minor R sustained injury on his arm – the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that photographs show that there was sufficient space for driving the bus after keeping sufficient distance from the wall – there are scratches on the back side of the bus starting from the rear tyre of the bus – scratches were also visible on the wall against which the driver side of the bus was struck – this shows that the bus was taken to the extreme right side of the Road due to which child sustained injuries – it was the duty of the accused driving the bus to keep in mind the possibility of the passengers having some part of their body outside of the bus – rashness and negligence of the accused was duly proved- revision dismissed. (Para-10 to 14) Title: Jiwa Nand Vs. State of Himachal Pradesh Page-878

Indian Penal Code, 1860- Section 279, 337 and 201- Accused was driving a truck in a rash and negligent manner – the complainant was riding a scooter- the truck hit the scooter from the side as a result of which the complainant sustained injuries- accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed- held in appeal that it was duly proved that accused was driving the truck - accused had sped away from the spot which is inconsistent with his innocence – the Appellate Court had wrongly held that the identity of the accused was not established – the appeal allowed- judgment of Appellate Court set aside and judgment of Trial Court restored. (Para-9 to 12) Title: State of H.P. Vs. Pradeep Singh Page-579

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a bus – he took it to the wrong side and the bus fell down – the complainant sustained injuries – the accused was tried and acquitted by the Trial Court- held in appeal that according to mechanical expert the steering and braking system of the vehicle had suffered break down– he was not cross-examined at all- hence, the defence version is probable – Trial Court had rightly acquitted the accused- appeal dismissed.(Para-9 to 11) Title: State of H.P. Vs. Bhim Singh Page-502

Indian Penal Code, 1860- Section 279, 337 and 338-Accused was driving a truck in a rash and negligent manner and hit the car causing hurt to the occupants of the car- the accused was tried and acquitted by the Trial Court- held in appeal that the injured has supported the prosecution version – his testimony was not shaken in cross-examination- no mechanical defect was found in the vehicle- the Trial Court had not properly appreciated the evidence- appeal allowed and judgment of Trial Court set aside- accused convicted of the commission of offences punishable

under Sections 279, 337 and 338 of I.P.C. (Para-9 to 12) Title: State of Himachal Pradesh Vs. Roop Lal Page-733

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a bus in a rash and negligent manner – the bus hit a car due to which one occupant of the car sustained injuries and one occupant died at the spot- the accused was tried and acquitted by the Trial Court- held in appeal that the vehicles were moved after the accident and site plan does not reflect the position at the time of accident– however, the pieces of glass were found in the middle of the road, which shows that bus was being driven on inappropriate side of the road – identity of the accused was established – the Trial Court had not properly appreciated the evidence- appeal allowed- judgment of the Trial Court set aside.(Para-9 to 13) Title: State of H.P.Vs. Narender Chand Page-627

Indian Penal Code, 1860- Section 279, 337, 338, 304-A and 201-Accused was driving a truck in a rash and negligent manner – the truck hit S, who sustained injuries below the abdomen – the accused was tried and acquitted by the Trial Court- held in appeal that the testimonies of the prosecution witnesses did not establish that accused had an opportunity to see the deceased and despite that he had hit the deceased– the author of the FIR was not examined- no blood stain was found on the tyre of the truck – the prosecution case became suspect due to all these infirmities – the Trial Court had properly appreciated the evidence- appeal dismissed.(Para- 9 to 14) Title: State of Himachal Pradesh Vs. Manohar Lal Page-449

Indian Penal Code, 1860- Section 302- Dead body of wife of accusedwas found- it was revealed that accused had murdered the deceased by giving multiple blows with a rod- accused was subjecting the deceased to cruelty for more than 10 years- accused was tried and convicted by the Trial Court- held in appeal that incident was witnessed by PW-14 who called PW-1, PW-2, PW-3, R and also K to the spot- they did not support the prosecution version- witnesses to the recovery also did not support the prosecution version- Trial Court had relied upon the circumstantial evidence to convict the accused, whereas, it was a case of direct evidence – it was not obligatory for the accused to explain the presence of the blood stains- further, prosecution witness has stated that accused took the deceased on his lap and tried to wake her, which would explain the presence of blood on the person of the accused - the possibility of involvement of others cannot be ruled out- it was not established that weapon of offence contained the blood of the deceased- prosecution evidence did not prove the guilt of the accused- Trial Court had erred in convicting the accused- appeal allowed and accused acquitted. (Para-6 to 41) Title: Rajender Kumar Vs. State of Himachal Pradesh (D.B.) Page-566

Indian Penal Code, 1860- Section 326 and 506- Complainant and accused are residing in the same building – the room of the accused is above the room of the complainant - complainant noticed that water was dripping from the room of the accused , which was falling on her bed – the complainant went to the room of the accused to complain about this fact- the accused started abusing her – her husband came on the spot – the accused took out a knife and stabbed the husband of the complainant – the accused was tried and convicted for the commission of the offence punishable under Section 326 of IPC – an appeal was preferred, which was dismissed – held in revision that medical evidence proved the injuries – the statement of accused was not recorded prior to recovery and the recovery is not admissible – there are contradictions in the statements of PW-2 and PW-6- report of the FSL did not say that the blood found on the knife belonged to the accused – the possibility of sustaining injury by falling upon nails cannot be ruled out – the Courts had wrongly convicted the accused – appeal allowed – judgments of the Courts set aside- accused acquitted of the offences charged. (Para-9 to 18) Title: Dharam Chand Vs. State of H.P Page-480

Indian Penal Code, 1860- Section 363, 366 and 376- Prosecutrix was returning from School – she was kidnapped by the accused with an intent to compel her to marry him- she was sexually

assaulted against her will in the house of the uncle of the accused- police was informed- prosecutrix and accused were recovered – the accused was tried and acquitted by the Trial Court- aggrieved from the judgement, present appeal has been filed- held that prosecutrix was proved to be aged 16 years 11 months and 12 days on the date of incident – Medical Officer found the evidence of sexual intercourse – the prosecutrix had not complained to any person in the bus that she was being taken away forcibly– prosecutrix had a mobile phone but did not complain to any person – hence, her consent was proved – she had left the home voluntarily- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-6 to 31) Title: State of Himachal Pradesh Vs. Subhkaran (D.B.) Page-831

Indian Penal Code, 1860- Section 363, 366, 376(2) and 506(1)- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989-** Section 3(2)(v)-**Protection of Children from Sexual Offences Act,, 2012**- Section 6-Prosecutrix belongs to scheduled caste- accused used to harass her on the way to school- one day the accused took her to the upper storey of his sweet shop and raped her under threat – the accused took one photograph of her and used to abuse her by threatening to show the photograph – the accused and another boy came to the house of the prosecutrix and threatened the prosecutrix and her sister - they raised alarm on which people gathered- the accused was tried and convicted by the Trial Court for the commission of offence punishable under Section 363- the accused was acquitted of the commission of remaining offences- aggrieved from the acquittal, the State filed the present appeal- held that there are inconsistencies in the statement of the prosecutrix and her mother regarding the incident, which were not explained – the prosecution case became suspect due to these discrepancies – no explanation was provided for the delay in lodging the FIR – sister of the prosecutrix was not examined and no explanation was provided for the same – the Trial Court had taken a reasonable view while acquitting the accused – appeal dismissed.(Para-8 to 20) Title: State of Himachal Pradesh Vs. Gorkha alias Vijay Kumar (D.B.) Page-727

Indian Penal Code, 1860- Section 376- Prosecutrix left the house at 9:30 A.M. on the pretext that her result was to be declared on internet – she returned at 1:30- P.M. but did not disclose the reason for late arrival – Subsequently, she told that accused had taken her to hotel during day time and had raped her – the accused was tried and acquitted by the Trial Court- held in appeal that prosecutrix did not support the prosecution version – the testimonies of the parents were not satisfactory – the prosecutrix was more than 16 years of age at the time of incident – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-8 to 17) Title: Roma Sharma Vs. Sameer Beg and another (D.B.) Page-761

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to the son of the respondent – respondent used to taunt the deceased for not delivering a male child and for not giving gifts- respondent used to quarrel with the deceased on insignificant issues- the deceased got burnt – the accused was tried and acquitted by the Trial Court –aggrieved from the order, the present appeal has been filed – held that witnesses except PW-16 turned hostile – there are discrepancies in the testimony of PW-16 – the deceased had also made contradictory statements in the dying declaration due to which the dying declaration cannot be relied upon – an inference can be drawn that the deceased may have put herself on fire on account of daily quarrel but a suspicion cannot take the place of proof – the abetment or cruelty has not been established – the prosecution had failed to prove its case beyond reasonable doubt and the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para- 8 to 35) Title: State of Himachal Pradesh Vs. Bimla Devi (D.B.) Page-508

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to the accused – the accused started harassing the deceased for not delivering a child and for not bringing sufficient dowry- a son was born but the harassment continued – the deceased committed suicide- the accused was tried and acquitted by the Trial Court- aggrieved from the order, present appeal has been filed- held in appeal that prosecution has to establishinstigation by the accused to commit

suicide or conspiracy with others for the commission of the suicide- PW-2 and PW-3 did not support the prosecution version- testimonies of PW-1 and PW-8 are vague and there is no reference to the time, place and manner of harassment – the statements are not sufficient to prove the prosecution version- Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 22) Title: State of Himachal Pradesh Vs. Raj Kumar (D.B.) Page-825

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased S was married to accused M – the accused treated her with cruelty – she consumed poison and committed suicide – the accused was tried and acquitted by the Trial Court- held in appeal that parties were married for 9 years – according to prosecution cruelty started after 5-6 months of the marriage- the cause of cruelty was not given – the deceased was asked to return to her matrimonial home, which shows that that the situation was not grave otherwise Panchayat would not have asked her to return to her matrimonial home – the children of the deceased were not associated to prove the cruelty – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-6 to 17) Title: State of H.P. Vs. Madan Lal & ors. (D.B.) Page-505

Indian Penal Code, 1860- Section 498-A- Complainant was married to the petitioner – petitioner and the other accused started maltreating the complainant- she was not provided with clothes and shoes and when she demanded them, petitioner and other accused misbehaved with her – she was told that she had not brought any dowry – she replied that her parents were poor and unable to give anything – petitioner and other accused started beating the complainant - the matter was reported to the police- petitioner and other accused were tried - petitioner was convicted by the Trial Court while other accused were acquitted- an appeal was preferred, which was dismissed – aggrieved from the judgment, present petition has been filed – held that the Court has very limited power to re-appreciate the evidence while exercising revisional jurisdiction- however, where there is failure of justice or misuse of judicial mechanism, it is the duty of the High Court to prevent miscarriage of justice – no specific allegation of cruelty was made against the petitioner- no specific allegation of demand of dowry was made against the petitioner – there was delay in reporting the matter to the police for which no explanation was provided – the allegations were made against all members of the family and once the members of the family were acquitted, there was no occasion for convicting the petitioner on the same set of evidence – the Courts had wrongly convicted the accused – revision allowed and accused acquitted. (Para- 10 to 27) Title: Ramesh Chand Vs. State of Himachal Pradesh Page-687

Indian Penal Code, 1860- Section 498-A read with Section 34- Prosecutrix was married to accused- she was being tortured for not bringing sufficient dowry- dressing table, sewing machine, refrigerator etc. were given to the accused by the father of the prosecutrix, who is a labourer – the accused continued to harass her and demanded Rs. 2 lacs for enabling the husband of the prosecutrix to start a business –the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed and the accused was acquitted- held in appeal that there was delay in recording of FIR, which was not properly explained – no specific time of making the demand was given – the evidence of the prosecutrix that accused attempted to assault her is not trustworthy- the Appellate Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 12) Title: State of Himachal Pradesh Vs. Sanjiv Kumar and others Page-838

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that K had executed a Will in her favour– defendant No.1 executed a sale deed in favour of defendant No.2 in order to deprive the plaintiff of her rightful property – mutation was wrongly attested in favour of the defendant on the basis of the forged will – defendant No.1 pleaded that K was his legally wedded wife and had executed a Will in her sound disposing state of mind – suit was dismissed by the Trial Court- an appeal was filed which was dismissed – held in second appeal thatversion of the plaintiff that K was unmarried was not proved – the version of the defendant that K was married to defendant No.1 was duly proved – the Will of the plaintiff was shrouded in suspicious circumstances while

the Will of the defendant was duly proved- the Courts had dealt with the matter in a proper manner- appeal dismissed.(Para-14 to 38) Title: Loti Vs. Balak Ram &Another Page-648

Indian Succession Act, 1925- Section 63- Plaintiffs filed a civil suit pleading that plaintiffs and proforma defendants are owners in possession of the suit land – the Will set up by defendant No.1 is a fake document- the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that the Will was executed on 3.2.1986 and was registered on 5.2.1986 – the witnesses appeared before the Court in the year 2000 after more than 14 years – human memory can fade with the passage of time and due allowance has to be given to this fact – however, the Will was not produced at the time of attestation of mutation – the reason for disinheriting natural heir was not given - beneficiary had taken an active participation in the execution of the Will – scribe of the Will was not examined – attesting witness has not stated that the testator had put his signatures in his presence- the Courts had rightly appreciated the evidence- appeal dismissed.(Para-9 to 12) Title: Gurbax Singh Vs. Kaushalya Devi & Ors. Page-806

Industrial Disputes Act, 1947- Section 25- K was engaged by Nagar Panchayat on 5.9.1999- he was disengaged on 30.6.2004 – he approached the authority under Industrial Disputes Act, which set aside the disengagement and directed re-engagement with consequential benefits- aggrieved from the said order, present writ petitionhas been filed – held that K was engaged for a work, which was continuously available – however, the nomenclature was contract assignment – some other person was engaged after dis-engaging K- the benefit of the legislation cannot be denied by using clever phraseology – no error was committed by the Labour Court by directing the re-engagement of K – however, keeping in view the fact that the work has been outsourced, direction issued to pay compensation of Rs.1 lac to K with interest @ 7.5% per annum from the date of award of Labour Court. (Para- 6 to 25) Title: Nagar Panchayat Santokhgarh Vs. Kamal Dev Page-678

Industrial Disputes Act, 1947- Section 25- The workman was employed as a helper on daily wage basis for a period of one month – the employment continued and the workman completed 240 days each year during the period of employment – his services were terminated by an oral order without assigning any reason- a reference was made and the Labour Court ordered the reinstatement of the workman with seniority and continuity of service – however, he was not held entitled for the back wages– aggrieved from the award, present writ petition has been filed- held that workman was employed on 12.12.1995 – an office order regarding the appointment being co terminus with the tenure of chairman was issued on 5.2.1997 –the order issued in 1997 cannot govern the appointment made in the year 1995 - workman had completed more than 240 days in a calendar year and a notice under Section 25-F was required to be issued prior to the termination of his services – no notice was issued – the award was rightly passed – High Court has limited jurisdiction to re-appreciate the facts while deciding writ petition - no error of law was pointed out - writ petition dismissed.(Para-8 to 11) Title: HP State Civil Supplies Corporation Ltd. Vs. Presiding Judge and another Page-642

'L'

Land Acquisition Act, 1894- Section 30- The land was acquired and a reference was made under Section 30 – Reference Court declared respondent No.3 to be the person entitled for compensation on the basis of entries in the jamabandi and missal hakiat – held in appeal that a reference was made under Section 28-A of the Act – petition under Section 30 was not forwarded to the reference Court – hence reference court had no jurisdiction to adjudicate the entitlement of respondent No.3 – it was wrongly held that respondent No.3 was gairmaurusi over the acquired land – appeal allowed and the award of the reference Court modified. (Para-3 to 6) Title: Umesh Chand Thakur & others Vs. Land Acquisition Collector and others Page-496

'M'

Motor Vehicles Act, 1988- Section 149- Claimant sustained injuries in an accident involving two cars - it was specifically pleaded that the drivers of both the cars were driving the vehicles rashly and negligently, which caused the accident – the Tribunal held both the drivers to be rash and negligent – the insurer had not led any evidence to absolve itself of liability – the injured had remained on leave for more than six months – the Tribunal had awarded just compensation- appeal dismissed. (Para-7 to 15) Title: Deputy Commissioner, Bilaspur Vs. Mahender Kumar & others Page-605

Motor Vehicles Act, 1988- Section 149- Deceased died in a motor vehicle accident- claimants filed a claim petition, which was allowed- aggrieved from the award, present appeal has been filed contending that deceased was travelling as gratuitous passenger and Insurer is not liable – held that claimants had specifically pleaded that deceased had boarded the vehicle with his luggage and other household goods – this fact was admitted by the owners – thus, it was rightly held by the Tribunal that Insurer is liable – appeal dismissed. (Para-6 to 12) Title: Oriental Insurance Company Vs. Sunita Devi and others Page-622

Motor Vehicles Act, 1988- Section 149- It was contended by the Insurer that licence of the owner/insured-cum-driver had expired on 17.12.2007 – accident took place on 6.1.2008 and the Tribunal wrongly held the Insurer to be liable – held that as per proviso to Section 14 of Motor Vehicles Act, 1988 licence continues to be effective for a period of 30 days from the date of its expiry – the accident had taken place within 30 days from the date of expiry and the licence was valid – there was no requirement of endorsement – the insurer was rightly saddled with liability- appeal dismissed.(Para-12 to 33) Title: Oriental Insurance Company Vs. Achari Devi and others Page-614

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not possess a valid driving licence – held that owner/insured –cum- driver had a valid and effective driving licence to drive the offending vehicle – endorsement was not required and insurer was rightly saddled with liability- appeal dismissed. (Para-10 to 12) Title: Bajaj Allianz General Insurance Company Limited Vs. Shrimati Reshma and others Page-603

Motor Vehicles Act, 1988- Section 166- The Tribunal held that the deceased had contributed to the cause of accident as he was carrying two pillion riders in violation of Section 128(1) – held that Section 128 clearly provides that the driver of two wheeled motorcycle shall not carry more than one person in addition to himself – the deceased had violated this provision by carrying two pillion riders- the Tribunal had rightly saddled the insurer of the vehicle with liability to the extent of 70% - however, Tribunal fell in error in deducting 1/3rd towards personal expenses – claimants were four in number and 1/4th was to be deducted towards personal expenses – his salary was Rs.19,400/- per month after deducting 1/4th amount towards personal expenses, claimants have suffered loss of dependency to the extent of Rs.14,550/- per month – age of the deceased was 42 years and multiplier of 14 is applicable – thus, claimants are entitled to Rs.14,550 x 12 x 14= Rs. 24,44,400/- under the head loss of income- claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses – since the deceased had contributed towards the accident to the extent of 30%, therefore, compensation of Rs.17,39,080/- awarded in favour of the claimants with interest @ 7.5% per annum. (Para- 7 to 24) Title: Sabita Sharma and others Vs. Amrit Pal Singh and others Page-623

'N'

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.5 kg. charas – the accused was tried and acquitted by the Trial Court- held in appeal thatthere are cuttings and over writings in record, which have not been properly explained – the witnesses had not given the detail of material particulars – PW-5 supported the prosecution version – the defence version was

probablized by defence witnesses- the prosecution evidence creates doubts about the fairness of investigation – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 21) Title: State of Himachal Pradesh Vs. Mahesh Verma (D.B.) Page-518

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 450 grams charas – the accused was tried and convicted by the Trial Court- held in appeal that the testimonies of prosecution witnesses are credible and confidence inspiring – independent witnesses have not supported the prosecution version- however, they admitted their signatures on the seizure memos and are estopped from denying the contents of the same – samples were connected to the contraband recovered – option was given to the accused to get his premises searched by Executive Magistrate or Gazetted Officer – however, the accused consented for search by the police- the prosecution case was proved and the accused was rightly convicted- appeal dismissed.(Para-9 to 13) Title: Fanki Ram Vs. State of H.P. Page-466

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kg 600 grams charas- the accused was tried and convicted by the Trial Court- held in appeal that testimonies of eye witnesses are corroborating each other –the prosecution version cannot be doubted due to the fact that witnesses have turned hostile – the accused has to establish his innocence under Section 35 of N.D.P.S. Act, which he hasfailed to do- link evidence is complete- the prosecution has proved the guilt of the accused beyond reasonable doubt and the accused was rightly convicted- appeal dismissed. (Para- 5 to 15) Title: Jog Raj Vs. State of Himachal Pradesh (D.B.) Page-781

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.460 kg. of charas- the accused was tried and convicted by the Trial Court- held in appeal that police officials supported the prosecution version – the fact that independent witness had turned hostile is not sufficient to doubt the prosecution version- minor contradictions will also not make the prosecution case suspect – the plea of alibi was not established –link evidence was proved – the Trial Court had rightly appreciated the evidence – appeal dismissed. (Para-4 to 14) Title: Umed Singh Vs. State of H.P. (D.B.) Page-794

Negotiable Instruments Act, 1881- Section 138- Accused and his mother approached the complainant offering to sell their land- an agreement was executed and an amount of Rs.1 lac was paid as earnest money – it was found subsequently that there was some litigation pertaining to the land and the agreement was cancelled – the accused subsequently obtained an amount of Rs.10,000/- as loan and issued a cheque for Rs.1,10,000/- - the cheque was dishonoured- the amount was not paid despite notice – hence, the complaint was filed before the Magistrate who convicted and sentenced the accused – an appeal was preferred, which was allowed on the ground that the accused was unrepresented on the date of examination and the proceedings were not proper – the matter was remanded to the Trial Court for fresh adjudication- held in revision that no application was filed for deferring the cross examination of the complainant and his witnesses- no grievance was raised that accused was prejudiced by the absence of his counsel – no prayer was made to appoint a counsel as amicus curiae, which means that accused was satisfied with the proceedings– revision allowed and order of Appellate Court set aside. (Para-9 to 23) Title: Yangain Singh Vs. Vijay Kumar Page-744

Negotiable Instruments Act, 1881- Section 138- Accused was convicted by the Trial Court for the commission of offence punishable under Section 138 of N.I. Act- an appeal was filed, which was dismissed for non-appearance of the counsel – held that the Court should not have dismissed the appeal for want of appearance and should have issued the warrants to procure the presence of the appellant – revision allowed and order of the Appellate Court set aside. (Para-1 to 3) Title: Kishori Lal Vs. Gian Chand & another Page-593

Negotiable Instruments Act, 1881- Section 138- Complainant handed over Rs.60,000/- to the accused and accused issued a cheque for the return of the amount- cheque was dishonoured – notice was issued but the amount was not paid – accused was tried and convicted by the Trial Court- an appeal was filed, which was partly allowed and the sentence was modified – held in revision that the power of revision can be exercised, when there is failure of justice or misuse of judicial mechanism or where procedure, sentence or order is not correct- issuance of cheque and signature on the same were admitted – advancing of money was also proved – the defence taken by the accused that cheque was issued as a security was not established – the accused was rightly convicted in these circumstances - revision dismissed.(Para-7 to 14) Title: Sunil Dutt Vs. Mohan Lal Page-659

'P'

Partition Act, 1893- Section 4- Plaintiff filed a civil suit for partition of the joint property – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that jamabandi shows that parties are recorded to be the joint owners – oral evidence also proved the joint ownership – prior partition was not proved – the preliminary decree was rightly passed- appeal dismissed. (Para- 11 to 20) Title: Govind Ram (Deceased) through LRs. Vs. Beli Ram and others Page-840

Public Premises (Eviction of Unauthorized Occupants) Act, 1971- Section 4 and 9- Various eviction petitionswere filed by Union of India seeking eviction and recovery of damages on account of unauthorized use and occupation of railway land situated in Shimla- the petitions were partially allowed and the appeals were dismissed- aggrieved from the order, writ petitions were filed- held that the respondents are in possession prior to the commencement of the Public Premises Act –the provision of the Act cannot be made applicable to them – the eviction petition were not maintainable – liberty granted to the petitioners to proceed against the respondents in accordance with the law.(Para-15 to 22) Title: Union of India Vs. M/S Krishna Coal Company Page-740

'R'

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- Section 24- The Land was acquired, compensation was deposited and possession was taken – the acquisition was challenged by the petitioner pleading that the land was not utilized and amount of compensation was not paid to the claimant – held that the Act was notified on 1.1.2004 before which date all actions were completed by the acquirer and beneficiaries- the actions taken under the earlier Act are saved by the saving clause – writ petition dismissed. (Para-3 to 7) Title: Surjit Singh Vs. Land Acquisition Collector, H.P. Housing and Urban Development Authority, Shimla Page-601

'S'

Specific Relief Act, 1963- Section 20- Plaintiff entered into an agreement with the defendant for the sale of land for a total consideration of Rs.44,000/- - an amount of Rs.30,000/- was paid as part payment- the defendant failed to execute the sale deed in favour of the plaintiff – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that there was no requirement of obtaining prior permission from TCP – plaintiff had presented himself before sub-registrar and had issued a legal notice for the execution of the sale deed – sub-registrar had directed the parties to appear before him on the next day and the plaintiff failed to appear before the sub-registrar - the Courts had wrongly held that plaintiff was ready and willing to perform his part of the agreement – appeal allowed- judgments and decree passed by the Court set aside and suit of the plaintiff dismissed. (Para-14 to 33)Title: Tara Chand and others Vs. Madan Lal Page-768

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit seeking declaration that order of ejectment passed by the Collector is wrong, illegal, null and void and he be declared owner in possession of the suit land – the suit was decreed by the Trial Court- an appeal was filed, which was allowed- held in appeal that the First Appeal is a valuable rights of the parties – the First Appellate Court is required to address itself to all issues and decide the appeal by giving reasons – no reasons were given for differing with the findings of the Trial Court – documents relied upon by the defendants were not referred – the judgment set aside- matter remanded to the Appellate Court for a fresh decision.(Para-8 to 12) Title: Joginder Singh & another Vs. State of H.P. Page-606

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that suit land is ancestral and coparcenary property of the parties – sale deeds executed in respect of the same are illegal, null and void and not binding on the rights of the parties – the suit was decreed by the Trial Court- an appeal was filed, which was partly allowed- aggrieved from the judgment, present appeal has been filed – held that the suit land was proved to be ancestral – the land was alienated without any legal necessity – the Courts had rightly appreciated the evidence- appeal dismissed. (Para- 14 to 19) Title: Chandermani Vs. Mia Ditta and others Page-750

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that half share of the suit land was owned by K and remaining half share was owned by D- plaintiff was recorded as tenant without the payment of rent with the consent of the owners – original owner D died and his daughter 'C' gifted her 1/4th share in favour of the plaintiff – plaintiff remained in possession as tenant over the remaining share- defendant purchased half share and became co-owner- after the death of the plaintiff, his legal heirs succeeded to him- defendant is threatening to interfere with the suit land on the basis of revenue entries- suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that the original owner was survived by four co-sharers including the plaintiff- one co-sharer had gifted 1/4th share to the plaintiff- plaintiff became owner of half share- entries were made during settlement after proper verification – original plaintiff was not recorded as a tenant after 1958-59 and the name of the legal representatives to the extent of half share is wholly misconceived – no bilateral agreement was proved- Courts had dealt with evidence in a proper manner- appeal dismissed. (Para-10 to 29) Title: Girdhari Lal & Another Vs. Amin Chand Page-441

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land and defendant is interfering with the same without any right to do so- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that Courts had relied upon the report of the Local Commissioner, who had found no encroachment on the suit land – however, the demarcation was not conducted in accordance with law – appeal allowed and suit of the plaintiff decreed. (Para-7 to 12) Title: Gian Chand (since deceased) through his legal heirs Vs. Janki Devi & others Page-462

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendant from interfering in the suit – it was pleaded that plaintiff had purchased 41/97th Share in the suit land –he had constructed a septic tank and two latrines over the land by spending Rs.30,000/- - the defendant has no right over the suit land but is interfering with the same- he demolished the septic tank and two latrine sheets – the defendant pleaded that construction was started without getting the suit land demarcated – the latrine and septic tank were constructed over the passage- the suit was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held in second appeal that plaintiff and defendant had purchased the share from the original vendor – plaintiff had not purchased any specific portion of the suit land- the plaintiff was found to be encroacher in the demarcation – plaintiff had purchased 4 biswas of land but was found in possession of 4.10 biswa of the land – plaintiff was not present at the time of the incident and the testimony of his witness is not

satisfactory – the Courts had dealt with the evidence properly- appeal dismissed.(Para-12 to 27) Title: Vs. Ved Parkash Page-455

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for permanent prohibitory injunction for restraining the defendant from taking away timber or any other part of the deodar tree felled from his land – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed and the suit was decreed – held in second appeal that the trees were found to be standing on the land owned by the plaintiff in demarcation- plaintiff had filed an application for permission to fell the trees apprehending danger to his life and property- trees were felled by the defendant - however, this would not give ownership to the defendants - a notification was issued for handing over the trees to the Forest Corporation- however, this notification will apply to the trees owned by the defendant and not to the trees standing on the private land- the Appellate Court had rightly passed the judgment- appeal dismissed.(Para-9 to 22) Title: M.C. Shimla Vs. Mathu Ram and Another Page-821

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he alongwith his brother is in settled possession of the suit land, which was given to them by S- defendant No.1 is stated to have purchased part of the suit land from S but the same is paper transaction – possession was not delivered to the purchaser – the defendants started interfering in the suit land – hence, the suit was filed – the suit was dismissed by the Trial Court – an appeal was filed, which was allowed- held in second appeal thatS had filed a civil suit against the plaintiff and his brother in which plaintiff and his brother were held to be in possession of the suit land - the sale deed was executed before the final judgment was delivered in the suit – S had no authority to execute the sale deed – the Appellate Court had rightly held that the plaintiff was in possession and was entitled to protect his possession – appeal dismissed.(Para-16 to 29) Title: Balia & Others Vs. Ganga Ram Page-470

Specific Relief Act, 1963- Section 38- Plaintiffs claimed right of passage through the edges (mainds) by way of custom – he further pleaded that the passage was blocked by the defendants without any right to do so- the defendants denied the existence of passage – held that wazib-ul-arj shows the existence of custom of using the passage through the edges – oral evidence also proved the existence of the passage – courts had rightly appreciated the evidence - appeal dismissed. (Para-7 to 15) Title: Brestua & ors. Vs. Rajinder Singh & ors. Page-637

'W'

Workmen Compensation Act, 1923- Section 4- H was employed by B – he died as a result of accident during the course of employment- the Commissioner awarded compensation of Rs.4,50,000/- along with interest @ 12 % per annum – solatium was awarded @ 30% - held in appeal that Insurance Company is liable to pay the compensation even if the driving licence is not valid- the Act does not provide for the grant of solatium @ 30% but only provides for the payment of penalty and interest – appeal allowed – the award passed by Commissioner modified.(Para- 2 to 10) Title: National Insurance Company Ltd. Vs. Vidya Devi & another Page-499

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'V'

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Vinay Tyagi. v. Irshad Ali alias Deepak and Ors., (2013) 5 SCC 762
Vinod Bhandari v. State of Madhya Pradesh, (2015) 11 SCC 502
Vipin Jaiswal Versus State of Andhra Pradesh, (2013) 3 SCC 684

'Y'

Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312

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

Prem Singh ….Petitioner
Versus
H.P. State Forest Development Corporation ….Respondent

CWP No.2826 of 2011.
Judgment Reserved on: 03.03.2017
Date of decision: 07.03.2017

Constitution of India, 1950- Article 226- **Industrial Disputes Act, 1947-** Section 25- The workman was engaged as field man in the year 1989 on daily wage basis- he was posted as conductor in a truck- he made a representation against his postings and his services were terminated – a reference was made and the Industrial Tribunal dismissed the claim of the workman- aggrieved from the order, present writ petition was filed- held thatthe workman had failed to prove that he had completed 240 days in the preceding 12 months period- it was proved by the respondents that workman was habitual absentee and did not respond to the notices issued by the Corporation to join his duties and his services were rightly terminated – the Writ Court has limited jurisdiction while deciding the writ petition and it cannot re-appreciate the evidence – the Industrial Tribunal had rightly dismissed the reference- writ petition dismissed.(Para-14 to 24)

Cases referred:
Mool Raj Upadhyaya vs. State of H.P. and Others, 1994 Supp(2) SCC 316
Bhuvnesh Kumar Dwivedi vs. M/s.Hindalco Industries Ltd. 2014 AIR SCW 3157

For the Petitioner: Mr.P.P. Chauhan, Advocate.
For the Respondent: Mr.P.P. Singh, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant Civil Writ Petition filed under Article 226 of the Constitution of India, petitioner has laid challenge to the award dated 17.1.2011 (Annexure P-1) passed by learned Industrial Tribunal-cum-Labour Court, Shimla, H.P. *(for short 'Tribunal')* in Reference No.52 of 2008, whereby reference has been answered against the petitioner.

2. Briefly stated facts, as emerged from the record, are that the petitioner-workman was engaged by respondent-Forest Corporation as Field-man in the year 1989 on daily wage basis and was initially posted at Nankhari Sub Division of Forest Corporation. As per averments contained in this petition as well as in the impugned award dated 17.1.2011, petitioner continuously worked for more than 240 days in each calendar year till 2003, whereafter, he was transferred from Forest Division Nankhari to Forest Division Rampur. As per petitioner-workman, his service conditions were changed arbitrarily and illegally and he was posted as conductor in Truck of Forest Corporation. He informed the Divisional Manager, Forest Corporation that it was not possible for him to travel with the Truck to distant places and thereafter his services were terminated by Forest Corporation on 15.1.2015 in violation of the provisions of Section 25-F of the Industrial Disputes Act *(for short `Act')*. Petitioner-workman claimed before the Tribunal below that during his service of 14 years, he had completed 240 days in each calendar year and he had good service record, but his services were terminated in illegal manner by the Forest Corporation that too in violation of provisions of Section 25-F of the Act.

3. In the aforesaid background, petitioner-workman sent demand notice to Forest Corporation seeking his re-engagement with consequential benefits, but in vain. Accordingly, he approached Conciliation Officer, Rampur to seek redressal of his grievance. Since conciliation efforts failed, appropriate Government sent reference under Section 10 of the Act for adjudication to the Tribunal below in the following terms:-

> *"Whether the termination of services of Shri Prem Singh S/o Shri Mohan Lal, daily wages Field man w.e.f. 15.1.2005 by the Divisional Manager, HP State Forest Corporation, Rampur, District Shimla without complying the provisions of section 25-F & G of the Industrial Disputes Act, 1947 is legal and justified? If not, what relief of service benefits, amount of compensation, back wages and seniority the aggrieved workman is entitled to?"*

4. Respondent-Corporation by way of detailed written statement refuted the aforesaid claim of the petitioner on various grounds including maintainability. Respondent, while admitting that the petitioner was initially engaged as Field-man in Nankhari Unit of the Forest Corporation on daily wage basis on 18.7.1989 to perform watch and ward duty, stated that he was habitual absentee from duty and was to remain absent from duty. Respondent further claimed before the Tribunal below that services of the petitioner-workman were terminated due to willful absent from duty and he was also negligent in performing his duties. As per respondent, petitioner-workman remained willfully absent from duty continuously for a period of 5/6 months before termination of his services. Respondent specifically denied that petitioner-workman was in continuous service for a period of 240 days preceding twelve months period. In the aforesaid background, respondent sought dismissal of the statement of claim of the petitioner-workman filed before the Tribunal below.

5. The petitioner-workman by way of rejoinder reasserted his claim made in the statement of claim and denied the averments of written statement filed by respondent-Corporation.

6. On the pleadings of the parties learned Tribunal below has framed the following issues for determination:-

> "1. Whether the retrenchment of services of petitioner by the respondent w.e.f. 15.1.2015 without complying with the provisions of section 25F & G of the Industrial Disputes Act, 1947 is illegal and unjustified as alleged? ... ...OPP.
>
> 2. If issue no.1 is proved, to what relief of service benefits, amount of compensation, back wages and seniority, the petitioner is entitled to?... ...OPP.
>
> 3. Relief."

7. Learned Tribunal below on the basis of pleadings as well as evidence led on record by respective parties answered reference in negative and dismissed the claim of the petitioner-workman.

8. Mr.P.P. Chauhan, learned counsel representing the petitioner, vehemently argued that impugned award passed by learned Tribunal below is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence led on record as well as law on the point. While referring to the impugned award passed by Tribunal below, Mr.Chauhan forcefully contended that learned Tribunal below miserably failed to appreciate that services of the petitioner-workman were terminated without complying with the provisions of law contained in the Act and as such impugned award being against well established principle of law deserves to be quashed and set aside.

9. Mr.Chauhan strenuously argued that since absenteeism of the petitioner was made basis by the respondent to dispense with his service, it was incumbent upon the respondent to have conducted a domestic enquiry after following due procedure of law.

Mr.Chauhan further contended that absenteeism, if any, of the petitioner, at best could be termed to be misconduct on his part and disciplinary action, if any, could be taken by conducting domestic inquiry against him. Since no domestic inquiry was conducted before alleged termination of petitioner, action of respondent in terminating the services of petitioner-workman, which was further upheld by the impugned award, is required to be rectified in accordance with law.

10. While concluding his arguments, Mr.Chauhan further contended that since petitioner had completed more than 10 years of service with more than 240 days in each calendar year as on 1.9.1997, as such, it was incumbent upon the respondent to have granted work charge status to the petitioner-workman on completion of 10 years of service in terms of the directions issued by the Hon'ble Apex Court in ***Mool Raj Upadhyaya vs. State of H.P. and Others, 1994 Supp(2) SCC 316*** and in that eventuality, the services of the petitioner-workman could not have been dispensed with in such cursory manner by the respondent. In the aforesaid background, Mr.Chauhan, prayed that the petitioner-workman may be reinstated in service with consequential benefits after setting aside the impugned award having been passed by the learned Tribunal below.

11. Mr.P.P. Singh, learned counsel representing the respondent-Corporation, supported the impugned award. As per Mr.Singh, there is no illegality and infirmity in the impugned award passed by the learned Tribunal below and the same is based upon correct appreciation of evidence adduced on record by the respective parties. While referring to the impugned award, Mr.Singh argued that evidence led on record by respective parties has been dealt with in its right perspective and there is no scope of interference, whatsoever, of this Court, especially, while exercising writ jurisdiction. While refuting the aforesaid submissions having been made by learned counsel representing the petitioner-workman, Mr.Singh argued that points raised before this Court by Mr.Chauhan were never raised before the learned Tribunal below and as such present petition deserves to be dismissed on this ground only.

12. While concluding his arguments, Mr.Singh invited the attention of this Court to the terms of the reference made by appropriate Government to the learned Tribunal below to demonstrate that cogent and convincing evidence was led on record by the respondent-Corporation to prove its case within the ambit of question passed to the Tribunal and as such there is no force in the contention of learned counsel representing the petitioner-workman. In the aforesaid background, Mr.P.P. Singh, learned counsel representing the respondent-Corporation, prayed for dismissal of the writ petition.

13. During proceedings of the case, this Court had an occasion to peruse the pleadings as well as complete record of Tribunal below (annexed with the petition), perusal whereof clearly suggests that learned Tribunal below, while exploring the answer to specific term of reference sent to it by appropriate Government, dealt with each and every aspect of the matter and as such this Court sees no force in the contention put forth on behalf of the petitioner-workman that evidence adduced on record by respective parties have not been dealt with in its right perspective.

14. In nutshell, case of the petitioner-workman was that since he had completed 240 days in the preceding twelve months, his services could not be terminated in illegal manner by respondent-Corporation without resorting to provisions of Section 25-F of the Act, whereas respondent-Corporation claimed that the petitioner-workman left the job voluntarily and he had not completed continuous service of 240 days preceding his termination.

15. Petitioner-workman, while appearing as PW-1 before learned Tribunal below, stated that he was engaged as Field-man in the year 1989 on daily wage basis and he continued to work as such till the year 2003 for more than 240 days in each calendar year. He also stated that in the year 2003, he was transferred from Nankhari to Forest Division, Rampur in an illegal manner and was detailed for duty as conductor in the Truck. It has also come in his statement that since he was deputed for duties to places like, Nahan, Baddi, Nalagarh and Kumarhatti, he

requested Divisional Manager, Forest Corporation that it was not possible for him to travel with the Truck to distant places, accordingly his services were terminated on 15.1.2005 without complying with the provisions of Section 25-F of the Act. Though petitioner-workman claimed that he rendered continuous service of more than 240 days in each calendar year during the span of his fourteen years of service, but he was unable to prove on record aforesaid factum by leading cogent and convincing evidence in the shape of ocular or documentary evidence. In his cross-examination he admitted that he had worked for 224 days during the calendar year 2003 and for 29 days during the calendar year 2004. He also admitted that he had not worked w.e.f. 18.5.2004 to 31.12.2004. Perusal of Ex.PB i.e. mandays chart led in evidence by him also does not prove that he had completed 240 days during a period of twelve calendar months preceding the date of his termination. There is no illegality in the findings returned by Tribunal below that onus was upon workman to prove that he infact had completed 240 days in the preceding twelve months period.

16. Whereas, respondent examined RW-1 Shri Yogesh Parsad Gupta, Divisional Manager, Forest Corporation, who appeared before the Tribunal as RW-1 and deposed that petitioner-workman was not performing his duty properly and was habitual absentee. While placing reliance upon the documents, RW-1 stated that since he remained absent from duty from 1.5.2004, his explanation in writing was called by Assistant Manager and thereafter he joined duty on 19.5.2004, but failed to submit any reply. RW-1 further stated that petitioner-workman again remained absent from duty w.e.f. 27.5.2004, whereafter he was also asked to join his duties vide notice Ex.P-2 dated 16.6.2004, but in vain. Perusal of notices Ex.R-4 and Ex.PD clearly prove on record that repeatedly petitioner-workman was asked to join his duties but petitioner-workman failed to join, as a result of which his services came to be terminated on 15.1.2005. Cross-examination conducted on RW-1 nowhere suggests that the petitioner-workman was able to extract anything contrary to what he stated in his examination-in–chief, rather, this Court, after carefully perusing the record, has no hesitation to conclude that there is no illegality or infirmity in the findings returned by the learned Tribunal below that petitioner-workman was habitual absentee from duties and since he did not respond to the notices issued by Corporation to join his duties, his services were rightly terminated by the Corporation.

17. Similarly, this Court sees no illegality or infirmity in the findings returned by Tribunal below that there is no evidence on record to show that the petitioner-workman had actually completed 240 days in preceding 12 months period and as such there was no occasion for Forest Corporation to issue notice under Section 25-F of the Act. Since petitioner-workman had claimed that he had worked for more than 240 days in a calendar year, onus was upon him to prove the same by leading cogent and convincing evidence.

18. In the present case, as has been discussed above, no evidence was led on record to prove factum of his completion of 240 days in preceding 12 months, rather, respondent-Corporation, by placing on record ample evidence, proved to the hilt that despite repeated communications, petitioner-workman failed to join his duties as a result of which his services came to be terminated.

19. Consequently, this Court sees no illegality and infirmity in the impugned award passed by the Tribunal below, which appears to be based upon correct appreciation of evidence as well as law and hence calls for no interference of this Court.

20. Another contention of Mr.P.P. Chauhan, learned counsel representing the petitioner-workman, that since absenteeism of the petitioner was made basis by the respondent to dispense with his services, it was incumbent upon the respondent to have conducted a domestic enquiry before taking disciplinary action, deserves out right rejection. Perusal of pleadings as well as impugned award nowhere suggests that aforesaid point was ever raised before Tribunal and as such same cannot be allowed to be raised at this stage in writ proceedings, where legality of impugned award is under challenge. Moreover, Tribunal in reference petition was only bound to answer specific term of reference as referred to it by the appropriate Government for adjudication. "Term of reference" nowhere suggests that Tribunal

was required to decide whether services of the petitioner-workman could be terminated without conducting disciplinary proceedings, especially, when charge was of absenteeism.

21. This Court also sees no force in another arguments having been made by Mr.Chauhan that since petitioner-workman had completed more than 10 years of service with more than 240 days in each calendar year as on 1.9.1997, as such, it was incumbent upon the respondent to have granted work charge status to the petitioner on completion of 10 years of service in terms of the directions issued by the Hon'ble Apex Court in ***Mool Raj Upadhyaya's*** case *supra* because this was not the issue before learned Tribunal below, who, well within four corners of reference specifically referred to it, returned its findings.

22. This Court is conscious of the fact that it has very limited jurisdiction to re-appreciate the findings of fact returned by learned Tribunal below, while exercising its jurisdiction under Article 226 of the Constitution of India and it has very limited scope to re-appreciate the findings of fact. In this regard reliance is placed upon the judgment passed by the Hon'ble Apex Court in ***Bhuvnesh Kumar Dwivedi vs. M/s.Hindalco Industries Ltd. 2014 AIR SCW 3157,*** wherein the Court held as under:-

> *"16. ………The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. nA error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.*
>
> *17. The judgments mentioned above can be read with the judgment of this Court in Harjinder Singh's case (supra), the relevant paragraph of which reads as under:*
>
> > *21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and / or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare*

legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:

10.... The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State.

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

23. Learned counsel representing the petitioner was unable to point out any particular mistake, if any, committed by learned Tribunal below in admitting the evidence illegally or error in law, while dismissing the claim of petitioner-workman and as such, this Court sees no occasion to interfere in the findings of the learned Tribunal below which otherwise appear to be based on proper appreciation of evidence.

24. Consequently, in view of the detailed discussion made hereinabove, this Court sees no illegality and infirmity in the impugned award dated 17.1.2011 passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla and as such the same is up-held and present petition is dismissed being devoid of any merit.

25. All the interim orders are vacated. All miscellaneous applications are disposed of.

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

Sh. Shyam Lal & Others ....Petitioners

Versus

Shri Praveen Verma & Others ....Respondents-Contemnors

COPC No.430 of 2016
Judgment Reserved on: 02.03.2017
Date of decision: 08.03.2017

Contempt of Courts Act, 1971- Section 12- A consent order was passed by the Writ Court directing the respondents to convene a general house in the presence of Assistant Registrar of the Co-operative Societies after following due process of law- a contempt petition was filed pleading that the respondents have not obeyed the order passed by the Writ Court – held that the respondent had taken all possible steps for convening of general house – the petitioners

frustrated the managing committee meeting so that general house meeting could not be held – the respondents have not violated the order passed by writ court- Contempt petition dismissed.

(Para-7 to 15)

For the Petitioners: Mr.Ankush Dass Sood, Senior Advocate with Mr.Rakesh Kumar, Advocate.

For Respondent No.1: Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan & Mr.Romesh Verma, Additional Advocate Generals and Mr.J.K. Verma, Deputy Advocate General.

For Respondents No.2 to 8: Mr.Ashwani Pathak, Senior Advocate with Mr.Rajiv Rai, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant Contempt Petition preferred under Section 12 of the Contempt of Courts Act, 1971 read with Article 215 of the Constitution of India, petitioners have prayed for initiation of contempt proceedings against the respondents for willful non-compliance of the judgment dated 08.09.2016 passed by this Court in *CWP No.1958 of 2016, titled: Shyam Lal and Others vs. Addl.CS-cum-Secretary (Cooperation) to the Government of Himachal Pradesh and Others,* with further prayer to issue directions to the respondents to comply with the aforesaid judgment. Apart from above, petitioners have also prayed for restraining the respondents from convening a General House fixed on 8th October, 2016.

2. 'Key' facts, as emerged from the record are that the petitioners filed writ petition bearing CWP No.1958 of 2016 seeking therein following reliefs:-

"a) Quash, set aside and clarify the observation made in para 8,9,10,11 as detailed in the review petition filed by the petitioner in order dated 15.03.2016 passed by the respondent no.1 Annexure P-7 and also set aside the order dated 15.06.2016 Annexure P-13 in so far as it dismisses the review petition filed by the present petitioner pertaining to the case;

b) Direct respondent no.3 and 4 authorities to convene the meeting of the Managing Committee of the respondent no.5 Society as per rules 45 and 48 of the H.P. Co-Operative Societies Rules, 1971 for discussing the no confidence motion passed by the petitioners against the office bearers of the Society in terms of the operative part of the order dated 15.03.2016 passed by the respondent no.1 by ignoring the observation made in para 8,9,10,11.

c) Respondent no.6 to 12 may kindly be restrained from carrying out functions of the Managing Committee of the Non-applicant/respondent no.5 Society or in the alternative from taking any major or financial decision without associating the petitions and justice may be done;

d) The unilateral major or financial decisions taken by the minority respondents no.6 to 12 may be directed to be reviewed by the entire Managing Committee in the presence of the concerned Inspector of the co-operative Societies;

e) The books of the respondents no.5 Society may be directed to be audited by respondent authorities."

3. Writ Court, after considering the pleadings made available on record by the respective parties, passed consent order directing the respondents to convene a General House in

the presence of Assistant Registrar of the Cooperative Societies after following due procedure within a period of four weeks from the date of passing of the aforesaid judgment.

4. Shri Ankush Dass Sood, learned Senior counsel representing the petitioners, vehemently argued that the respondents willfully and intentionally disobeyed the aforesaid judgment and have made all out efforts to defeat the mandate issued by this Court and as such they are liable to be punished for Contempt of Court. Mr.Sood further contended that despite there being specific direction to the respondents to convene a General House in the presence of the Assistant Registrar of Cooperative Societies, no steps, whatsoever, have been taken till date by concerned person for convening General House, rather respondents in flagrant violation of directions issued by this Court convened meeting of Management to pass an agenda for discussion in the General House meeting, which was not the direction of the Court.

5. As per Mr.Sood, there was no occasion for the respondents to pass an agenda in issue for discussion about termination of membership of two members of Society i.e. S/Shri Shyam Lal and Lal Singh, who were allegedly terminated on 9.11.2015. Mr.Sood further contended that issue with regard to termination of the membership of the petitioners was subject matter of the Civil Writ Petition, wherein this Court, after hearing rival submissions of both the parties, had ordered for convening of General House meeting in the presence of Assistant Registrar of Cooperative Societies after following due procedure. Mr.Sood further contended that there was no occasion for the Assistant Registrar i.e. respondent No.1 to approve the agenda made available to him by the Management Committee and as such he is guilty of disobeying the directions contained in the judgment dated 8.9.2016, whereby General House was to be convened in his presence. Lastly, Mr.Sood contended that agenda, if any, was to be discussed in General House and by no stretch of imagination same could be approved by the Assistant Registrar of the Cooperative Societies.

6. Respondents, by way of separate replies, have submitted that they have highest regard for the orders passed by this Court and by no stretch of imagination they can think of disobeying or flouting the Court's directions. Respondents further averred that they have neither willfully nor deliberately disobeyed or flouted the orders passed by this Court but still, if any inconvenience caused to the Court on account of their actions or inactions, they tender unconditional apology for the same at the very outset.

7. Perusal of reply filed by respondent No.1 i.e. Assistant Registrar, clearly suggests that he had no prior intimation with regard to meeting of Managing Committee of Society, wherein as per provisions of Rule 50 (i) and (j) of the H.P. Co-operative Societies Rules, 1971, meeting was convened to discuss and for fixing the date, agenda and venue of the proposed General Body meeting of the Society. As per respondent No.1, on 15.9.2016, he, in terms of directions issued by Registrar, Co-operative Societies Himachal Pradesh, directed the Secretary/President of the Bilaspur J.P. Cement Industries Transport Society *(hereinafter referred to as the 'Society')* to immediately convene a General Body meeting by following due procedure for ensuring compliance of the judgment dated 8.9.2016 passed by this Court.

8. Perusal of documents placed on record in shape of Annexure R-1 certainly suggest that respondent No.1 called upon President/Secretary of the Society to decide about the date of General Body meeting of the Society in terms of judgment dated 8.9.2016. Similarly, reply having been filed by respondent No.1 also suggests that pursuant to request having been made by the petitioners, he issued a letter to respondent No.3, President/Secretary of Society, to inform him the date of holding Management Committee meeting so that Inspector is authorized to attend the said meeting.

9. After carefully perusing the reply filed by respondent No.1 and documents annexed therewith, this Court is convinced and satisfied that all possible steps, as required by him, were taken to ensure the convening of General House meeting. Otherwise also perusal of judgment dated 8.9.2016 nowhere suggests that action, if any, for convening the General House

meeting of the concerned Co-operative Society was required to be taken by respondent No.1, rather meeting, as referred above, was to be convened by the Society in the presence of Assistant Registrar of Co-operative Societies after following due procedure within a period as prescribed in the order. Hence, this Court sees no reason to initiate proceedings, if any, against respondent No.1 for non-compliance of judgment dated 8.9.2016.

10. Reply preferred on behalf of respondents No.2 to 8 also suggests that immediately after passing of judgment dated 8.9.2016, steps were taken by the Co-operative Society concerned for convening General House. As per respondents No.2 to 8, since Writ Court, while passing judgment dated 8.9.2016, had not fixed any agenda to be discussed in the General House, Society called the meeting of Managing Committee for deciding the agenda, but petitioners instead of participating in the meeting and proposing agenda in the Managing Committee made all out efforts to frustrate the Managing Committee meeting so that General House meeting as directed by this Court is not held. As per respondents No.2 to 8, petitioners No.1 and 2, who seized to be members of Managing Committee, were also present in the meeting of Managing Committee, wherein agenda for General House was being discussed, but they refused to sign the attendance register. After carefully examining the explanation having been rendered by respondents No.2 to 8, this Court sees no substantial force in the arguments having been advanced by learned Senior Counsel representing the petitioner, that no steps whatsoever, were taken by respondent-Society to ensure the compliance of judgment passed by this Court and efforts were made to defeat the mandate issued by this Court.

11. After bestowing our thoughtful consideration, this Court is of the view that respondents have not willfully disobeyed the judgment passed by this Court, rather they misinterpreted and misread the directions contained in the judgment dated 8.9.2016. Petitioners herein by way of Writ Petition bearing No.1958/2016 had sought directions to convene the meeting of Managing Committee of respondent No.5 Society in terms of Rules 45 and 48 of the H.P. Co-operative Societies Rules, 1971 for discussing the no confidence motion passed by the petitioners against the office bearers of the Society in terms of order dated 15.3.2016 passed by respondent No.1 ignoring the observations made in paras 8, 9, 10, and 11 of review petition.

12. Apart from above, petitioners No.1 & 2, who stood terminated from the membership of Society also laid challenge to their termination on the ground that decision, if any, with regard to termination of the member of Society could only be taken by the General House. Since issue in question in the writ petition was with regard to termination of members of Society by the Managing Committee of respondent-Society as well as discussion of no confidence motion by petitioners against all the office bearers of the Society, this Court deemed it fit to dispose of writ petition with the consent of parties to decide the aforesaid issue in the General House meeting to be conducted in the presence of Assistant Registrar of Cooperative Societies after following due procedure.

13. Though we see force in the aforesaid contention made by respondents No.2 to 8 that since there was no agenda fixed by this Court for the discussion of General House, meeting of Managing Committee was required to be convened for fixing the agenda in terms of Rules 50 (i) and (j) of H.P. Cooperative Societies Rules, 1971, whereby Society is under obligation to discuss and fix the agenda at first instance before fixing the date of General House meeting of the Society, but after carefully perusing the minutes of meeting of Managing Committee held on 25.9.2016 (Annexure C-2), we are in agreement with the submissions having been made by Shri Ankush Dass Sood, learned Senior Counsel, that there was no occasion for the Society to discuss issue with regard to termination of members of Society in the meeting of Management Committee because same was required to be discussed and decided in the general meeting of Society as directed by this Court vide judgment dated 8.9.2016.

14. Leaving everything aside, it clearly emerge from the pleadings available on record as well as submissions having been made on behalf of the counsel representing the parties that both the parties are keen to have the meeting of General House and as such this Court without

complicating the matter further deems it fit to dispose of the Contempt Petition with the direction to respondent No.1 i.e. Assistant Registrar, Cooperative Societies to ensure convening of meeting of General House strictly in terms of judgment dated 8.9.2016 passed by this Court within a period of 30 days from the date of passing of this order.

15. Needless to say that all the issues as raised in the CWP shall be discussed and decided in the General House meeting as agreed by both the parties at the time of passing of the judgment dated 8.9.2016 strictly following the procedure as laid in bye-laws of the Society. Respondents No.2 to 8 shall render all necessary assistance to respondent No.1 for smooth convening of General House. However, it is made clear that intimation with regard to date on which Assistant Registrar of Co-operative Society convenes General House shall be conveyed to all the members of Society by the respondent-Society by written communication. Shri Ankush Dass Sood, learned Senior counsel, undertakes that petitioner herein shall make themselves available in the General House meeting on the date to be fixed by the Assistant Registrar of Cooperative Societies.

16. Consequently, in view of the aforesaid discussion, we do not see any reason to interfere in this Contempt Petition and accordingly same is disposed of.

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

Girdhari Lal & Another ….Appellants-Plaintiffs
Versus
Amin Chand ….Respondent-Defendant

Regular Second Appeal No.616 of 2007
Judgment Reserved on: 06.03.2017
Date of decision: 16.03.2017

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that half share of the suit land was owned by K and remaining half share was owned by D- plaintiff was recorded as tenant without the payment of rent with the consent of the owners – original owner D died and his daughter 'C' gifted her 1/4th share in favour of the plaintiff – plaintiff remained in possession as tenant over the remaining share- defendant purchased half share and became co-owner- after the death of the plaintiff, his legal heirs succeeded to him- defendant is threatening to interfere with the suit land on the basis of revenue entries- suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that the original owner was survived by four co-sharers including the plaintiff- one co-sharer had gifted 1/4th share to the plaintiff- plaintiff became owner of half share- entries were made during settlement after proper verification – original plaintiff was not recorded as a tenant after 1958-59 and the name of the legal representatives to the extent of half share is wholly misconceived – no bilateral agreement was proved- Courts had dealt with evidence in a proper manner- appeal dismissed. (Para-10 to 29)

Cases referred:

Kaushalya Devi & Ors vs. Sito Devi and Others, 2014(2) Him.L.R. 768
Ashok Kumar vs. Satya Devi, 2013(2) Him.L.R. 1164
Sant Ram Nagina Ram vs. Daya Ram Nagina Ram and Others, AIR 1961 (Pb) 220.
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellants: Mr.Rajnish K.Lall, Advocate.
For the Respondent Mr.Pawan Gautam, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellants-plaintiffs against the judgment and decree dated 22.09.2007, passed by the learned District Judge, Kangra at Dharamshala, H.P., affirming the judgment and decree dated 07.06.2005, passed by learned Civil Judge(Senior Division), Dehra, District Kangra, H.P., whereby the suit filed by the appellants-plaintiffs has been dismissed.

2. Brief facts of the case, as emerged from the record, are that the appellants-plaintiffs *(herein after referred to as the `plaintiff'),* filed a suit for declaration to the effect that he be declared in exclusive possession of the land comprised in Khata No.29, Khatauni No.65, Khasra No.479, measuring 0-01-11 hectares, as per jamabandi for the year 1993-94, situated in Mohal Dohag, Mauza Gumber, Tehsil Dehra, District Kangra, *(hereinafter referred to as `suit land')* as co-sharer and he is entitled to remain in exclusive possession, the entries to the contrary be declared as null and void and not binding upon the plaintiff. Plaintiff also claimed a decree for permanent prohibitory injunction restraining the defendant from interfering in his exclusive possession over the suit land or from raising construction. Plaintiff also claimed a decree for mandatory injunction to remove the foundation from the suit land.

3. It is averred by the plaintiff in the plaint that ½ of land comprised in Khasra No.479, measuring 6 marlas, was owned by Kishanu and others and remaining ½ share was owned by Dilu, but total land of said Khasra No.479 was recorded in possession of original plaintiff, Sant Ram, as a tenant without payment of rent with the consent of aforesaid owners. It is further averred by the plaintiff that during the consolidation operation, the land comprised in Khasra No.479 (old Khasra No.255) was put in the share of Dilu and the same was recorded in the ownership of Dilu, but the possession of the same remained to be recorded in exclusive possession of original plaintiff Sant Ram. It is alleged by the plaintiff that on the death of Dilu, his sons and one daughter succeeded him in equal shares to the said land, but Sant Ram remained in possession of the same as a co-sharer to the extent of 1/4th share and as a tenant to the extent of 3/4th share. It is further alleged by the plaintiff that Smt.Chinti Devi daughter of Dilu gifted her 1/4th share in favour of Sant Ram, as a result of which Sant Ram became a co-sharer to the extent of ½ share over the said land comprised in Khasra No.255, but he remained in possession as a tenant over the remaining ½ share of the suit land. It is further averred that the suit land was a part of old Khasra No.255, which is recorded in possession of Sant Ram as a co-sharer. It is averred by the plaintiff that the defendant purchased ½ share of the suit land from Piar Chand son of Bhagat Ram and Jagdish, as a result of which the defendant became co-sharer with the plaintiff to the extent of ½ share in the suit land, but defendant never came in possession over any portion of the suit land. To the contrary, Sant Ram, original plaintiff, continued to be in exclusive possession over whole of the suit land as a co-sharer to the extent of ½ share and as a tenant to the extent of remaining ½ share. It is further claimed that on the death of original plaintiff Sant Ram, his sons and widow, who were substituted as legal representatives of Sant Ram, succeeded to the share of Sant Ram in the suit land as well as to his tenancy rights and, as such, they are entitled to remain in exclusive possession and the entries showing the suit land in joint possession of all the co-sharers are wrong, null and void and not binding upon the plaintiff. It is further alleged by the plaintiff that under the garb of said wrong entries, the defendant dug out and laid foundation of a shop in the suit land and in his absence collected construction material and completed the construction during the pendency of the suit. In the alternative, it is also claimed by the plaintiff that, if he fails to prove his exclusive possession over the suit land, even then a co-sharer has no right to raise any new construction till the suit land is partitioned by metes and bounds. In the aforesaid background the plaintiff filed a Civil Suit before the learned trial Court.

4. Defendant, by way of filing written statement, refuted the claim of the plaintiff on the ground of cause of action and estoppel. On merits, it is averred by the defendant that Dilu, father of the plaintiff Sant Ram, and others were owners in possession of the suit land. Dilu had three sons, namely, original plaintiff Sant Ram, Jagdish Chand and Bhagat Ram and one daughter Smt.Chinti Devi. It is alleged by the defendant that Smt.Chinti Devi gifted her 1/4th share in favour of plaintiff Sant Ram and, thus, he became a co-sharer in the suit land to the extent of ½ share. It is further alleged by the defendant that after the death of Bhagat Ram, his son Piar Chand succeeded to his share in the suit land and said Piar Chand sold his share to Chingo, who further sold the same to the defendant. Thus, the defendant became a co-sharer in the suit land to the extent of 1/4th share and Jagdish Chand remained a co-sharer to the extent of 1/4th share. It is further pleaded that there was one shop covering about two and half marlas of land, which was given by the plaintiff to the defendant on rent. It is alleged by the defendant that in the month of November, 1994, Sant Ram, plaintiff requested the defendant to vacate the shop and build his own shop in vacant portion of the suit land. Since defendant was owner to the extent of 1/4th share i.e. an area of one and half marlas and the vacant portion of the land was in possession of Jagdish Chand, an another co-sharer, the defendant approached Jagdish Chand, who sold his 1/4th share to the defendant on 09.01.1995 and handed over the possession of entire remaining portion of the suit land. In this way, the defendant became owner in possession of the suit land to the extent of ½ share. It is alleged by the defendant that the plaintiff was pressurizing him for vacation of his shop, hence, the defendant laid the foundation of a shop and a room behind it in the month of February, 1995 on persuasion of the plaintiff himself and in his presence he constructed the shop and, after construction of the same, vacated the shop of the plaintiff and handed over the possession of ½ portion of the shop on 07.07.1995 by raising separation wall. On the basis of said averments, defendant claimed that the original plaintiff Sant Ram never remained in exclusive possession of the suit land as a tenant. In the aforesaid background the defendant prayed for dismissal of the suit.

5. On the pleadings of the parties, the learned trial Court framed the following issues:-

> *"1. Whether the plaintiff is in exclusive possession of the suit land and the entries to the congtrary in the revenue record are wrong and incorrect, as alleged? OPP.*
>
> *2. Whether the plaintiff has no cause of action? OPD.*
>
> *3. Whether the plaintiff is estopped by his act and conduct? OPD.*
>
> *4. Whether the plaintiff is estopped by his act and conduct? OPD.*
>
> *5. Relief."*

6. Learned trial Court vide judgment and decree dated 07.06.2005 dismissed the suit of the plaintiffs.

7. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiffs was dismissed, appellants-plaintiffs filed an appeal under Section 96 of the Code of Civil Procedure *(for short `CPC')* read with Section 21 of the H.P. Courts Act assailing therein judgment and decree dated 07.06.2005 passed by learned Civil Judge(Senior Division), in the Court of learned District Judge, Kangra at Dharamshala, who, vide impugned judgment and decree dated 22.09.2007, dismissed the appeal preferred by the plaintiff by affirming the judgment and decree passed by the learned trial Court. In the aforesaid background, the present appellants-plaintiffs filed this Regular Second Appeal before this Court, details whereof have already been given above.

8. This second appeal was admitted on the following substantial question of law:

> *"(1) Whether the findings of the court below are perverse, based on misreading of oral and documentary evidence as also pleadings of the parties particularly the revenue records P12, P13 and P11 and the report of the Local Commissioner D1 to D3.*

> 2. *Whether on the material on record, the presumption of truth attached to the revenue records P12 P13 and P11 was rebtted more particularly in view of the provisions of Section 104 of the H.P. Tenancy and land Reforms Act and also the presumption of continuity of the tenancy had been rebutted.*
> 3. *Whether in the facts and circumstances of the case, the plaintiff was entitled to a decree for permanent and prohibitory injunction when the construction was sought to be carried out during the pendency of the case and the appellant could be denied the discretionary relief of injunction."*

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

10. This Court, with a view to explore answer to the substantial questions of law, as referred hereinabove, as well as to ascertain the genuineness and correctness of submissions/arguments having been advanced by learned counsel representing the parties, carefully perused the oral as well as documentary evidence led on record by the respective parties, perusal whereof clearly suggests that there is no force in the arguments having been made by Shri Rajnish K.Lall, learned counsel representing the appellants-plaintiffs, that Courts below, while dismissing the suit of the plaintiff, misread and mis-appreciated the evidence. This Court, after close scrutiny of evidence, is convinced and satisfied that both the Courts below have meticulously dealt with each and every aspect of the matter. Documentary evidence in the shape of Ex.P-1 to Ex.P-13 placed on record by the plaintiff would go to show that original plaintiff; namely; Sant Ram, was recorded in the suit land as non-occupancy tenant without payment of rent and he continued to be recorded as such in the suit land, as emerged from the entries reflected in copies of Jamabandies for the years 1958-59 and 1972-73 (Exts.P-12 & P-13). However, perusal of Misalhaquiat for the year 1976-77 (Ex.P-2) clearly suggests that settlement took place in the year 1976-77, wherein during settlement operation, Khasra No.255 was given new Khasra No.479, i.e. suit land, which came to be recorded in joint ownership and possession of Sant Ram i.e. original plaintiff and his brothers Jagdish Chand, Bhagat Ram and sister; namely; Smt.Chinti Devi in equal shares.

11. Mr.Lall vehemently argued that plaintiff was recorded as tenant over the suit land since the year 1954-55 till settlement i.e. year 1976-77 and as such he was entitled to be recorded thereafter in the same capacity and entry showing him not as a tenant in possession is wrong and incorrect. But aforesaid arguments of Shri Lall deserve outright rejection because if Jamabandies for the years 1954-55, 1958-59 (Ex.P-12 and Ex.P-11) are perused carefully, it clearly emerge that nature of land is shown to be an *Abadi deh* whereupon original plaintiff Sant Ram was recorded as non-occupancy tenant without payment of rent with the consent of the land owners. Similarly, perusal of pleadings adduced on record by the respective parties clearly suggests that there is no dispute that Dilu, who happened to be father of the original plaintiff Sant Ram, was actually inducted as tenant over the suit land. There is no other evidence led on record, be it ocular or documentary, by the plaintiff suggestive of the fact that plaintiff himself was ever inducted as a tenant over the suit land and as such this Court sees no force in the contention of Shri Lall that since plaintiff was shown as a non-occupancy tenant in the earlier entries i.e. prior to Jamabandi for the year 1993-94, he was entitled to be recorded as such during consolidation operation as well as in future also.

12. If pleadings available on record as well as testimonies of PW-1 Girdhari Lal and PW-4 Parmod Singh, who happened to be legal representatives of original plaintiff Sant Ram, are perused juxtaposing revenue record, Ex.P-1 to Ex.P-13, it clearly emerge that suit land was originally owned and possessed by Krishanu and Others to the extent of half share and Dilu to the extent of remaining half share. It is also undisputed between the parties that during consolidation operation, the suit land was partitioned and allotted to Dilu, who died leaving behind Sant Ram i.e. original plaintiff, Jagdish Chand, Bhagat Ram and Smt.Chinti Devi. There is no dispute that all aforesaid legal representatives of Dilu inherited the suit land to the extent of

1/4th share each. Smt.Chinti Devi gifted her 1/4th share to the original plaintiff Sant Ram, on the basis of which mutation No.379 came to be attested and sanctioned, as a result of which Sant Ram i.e. original plaintiff became owner to the extent of ½ share of the suit land. It is also admitted case of the parties that Jagdish Chand and Bhagat Ram remained owners to the extent of 1/4th share each. Bhagat Ram died leaving behind Piar Chand as his only legal heir, to whom his 1/4th share on the suit land was shifted. Similarly, this Court sees no rebuttal, if any, to the positive assertion of the defendant that Piar Chand son of Bhagat Ram sold his 1/4th share in the suit land in favour of Chingo, who further sold the same to the defendant herein. It is own case of the plaintiff, as projected in the plaint, that Jagdish Chand, who happened to be son of late Dilu, also sold his 1/4th share in the suit land to the defendant, as a result of which defendant herein became owner to the extent of ½ share in the suit land.

13. True, it is that original plaintiff Sant Ram stood recorded in possession of the suit land as non-occupancy tenant without payment of rent with the consent of land owners, as reflected in Jamabandi for the year 1954-55 (Ex.P-13) and he continued to be recorded as such till 1958-59 and thereafter in the Jamabandi for the year 1972-73. But, in settlement, which took place in the year 1976-77, old Khasra No.255 was given new Khasra number 479 and it came to be recorded in joint ownership and possession of Sant Ram i.e. original plaintiff and his brothers Jagdish Chand and Bhagat Ram in equal shares. Perusal of Ex.P-6 i.e. Jamabandi for the year 1993-94 suggests that Sant Ram and Jagdish Chand were recorded as co-owners of the other joint land but in exclusive possession of different Khasra numbers of the joint land as co-sharers. However, as per entries incorporated in the copy of Jamabandi for the year 1993-94 (Ex.P-1), the suit land stood recorded in joint ownership and possession of Sant Ram and after his death in the name of his legal representatives to the extent of ½ share and rest of ½ share of the suit land stood recorded in the ownership of defendant.

14. This Court sees no force in the contention of Mr.Lall that changes in the revenue entries were made without there being any basis. At first instance Settlement Authorities during settlement operation themselves verified the factual possession on the spot and on the basis of actual possession on the spot recorded the land in the joint ownership of co-owners, who were admittedly legal representatives of Dilu. Similarly, there is no dispute with regard to purchase of shares of Bhagat Ram and Jagdish Chand i.e. legal representatives of deceased Dilu, by the defendant, as a result of which he became co-owner to the extent of ½ share of suit land. There is no evidence on record suggestive of the fact that steps, if any, were ever taken by either legal representatives of plaintiff or by plaintiff himself, laying therein challenge to change made in the revenue entries in Misalhaquiat for the year 1976-77 (Ex.P-10), wherein joint ownership and possession of Jagdish Chand and Bhagat Ram, legal representatives of Dilu, were recorded in equal shares alongwith original plaintiff Sant Ram; meaning thereby entries as referred above attained finality.

15. As per own case of the plaintiff, Smt.Chinti Devi i.e. legal representative of Dilu gifted her share in favour of original plaintiff Sant Ram, as a result of which he became owner of the suit land to the extent of ½ share. Aforesaid factum of gift having been made in favour of plaintiff by Smt.Chinti Devi, clearly suggests that plaintiff was not aggrieved with the revenue entries made in the year 1976-77 after settlement operation and as such suit land continued to be in joint ownership and possession of parties. It was in the year 1993-94, when change in revenue entries was made, whereby name of defendant came to be recorded as joint owner in possession of the suit land alongwith the plaintiff. Careful perusal of Ex.P-6 clearly suggests that Jagdish Chand sold his share in favour of defendant and accordingly mutation was attested and sanctioned in his favour and as such there is no force in the arguments of Sh.Rajnish K. Lall that change in revenue entries, as reflected in Jambandi for the year 1993-94, is without any basis.

16. Similarly, this Court sees no document placed on record by the plaintiff suggestive of the fact that change, if any, in revenue entries was made by authorities concerned between year 1976-77 till 1993-94 and since there was no dispute between the plaintiff and other

legal representatives of Dilu i.e. Jagidsh Chand and Bhagat Ram and legal representatives of Bhagat Ram, entries made after settlement in the year 1976-77 continued till 1993-94. Since Jagdish Chand sold his share to plaintiff in the year 1993-94, his name came to be recorded as joint owner in possession of the suit land alongwith original plaintiff in the revenue record. Most importantly, nature of the suit land, as emerged from the record, is *Gair Mumkin Dukan* and as such perusal of documentary evidence, as discussed above, clearly establish on record that original plaintiff Sant Ram is not recorded as a tenant after the year 1958-59 and hence claim of his legal representatives that they are tenants qua the suit land to the extent of ½ share is wholly misconceived.

17. Perusal of depositions, having been made by PW-4 Promod Singh and PW-5 Babu Ram, is very material, who in their statements have categorically stated that they are aware of the settlement operation in the village, which took place in the year 1975-76. They also stated that possession of persons is recorded properly. Hence, this Court is of the view that since there is a long standing revenue entries showing original plaintiff Sant Ram as well as Jagdish Chand and Bhagat Ram as co-owners and in possession of ½ share each, it cannot be said that deceased plaintiff had been cultivating the suit land as *Gair Maurusi Tenant*. Needless to say that to prove the tenancy, there must be some agreement between the landlord and tenant, but in the instant case no agreement, if any, entered into between the deceased plaintiff and original owner of the land is available on record.

18. PW-4 Promod Singh son of deceased plaintiff though claimed the cultivating possession of his father over the suit land as a tenant without payment of any *galla, but* denied his relationship, if any, with landlord. But, as observed above, there must be certain terms and conditions to constitute tenancy. Hence learned Courts below rightly came to the conclusion that the deceased plaintiff never remained tenant over the suit land to the effect of ½ share after the year 1958-59. Similarly, there is no evidence that after 1958-59, deceased plaintiff remained tenant over the suit land to the extent of $3/4^{th}$ share as claimed in the plaint because admittedly there is no revenue record for intervening period between the year 1958-59 to the year 1975-76.

19. Shri Lall was unable to point out any material available on record suggestive of the fact that deceased plaintiff continued to remain in possession of the suit land as tenant till his death in the month of October, 1995, whereas, entries, as recorded in the revenue record, clearly proves on record that Jagdish Chand, who happened to be brother of deceased plaintiff continued to be in joint possession of the suit land alongwith other co-sharers including the deceased plaintiff and defendant. Similarly, Bhagat Ram was also in possession of the suit land as a co-owner alongwith the deceased plaintiff and other co-sharers. Hence, the learned Courts below rightly came to conclusion that there is no reason to discard long standing revenue entries right from the year 1972-73 till 1993-94. Moreover, in para-3 of the plaint, PW-1 Girdhari Lal son of deceased plaintiff has himself admitted the possession of the defendant over ½ share of the suit land. He also admitted the ownership of the defendant and stated that defendant constructed the shop over the suit land forcibly. PW-4 Promod Singh brother of PW-1 Girdhari Lal though deposed that defendant started interfering in the suit land in the month of July, 1995, whereas, PW-1 Girdhari Lal during his cross-examination has admitted that defendant laid foundation of the shop over the disputed portion of the suit land in the moth of February, 1995.

20. PW-1 Girdhari Lal though claimed that, during the pendency of the suit, defendant constructed the shop over a part of the suit land, but he in his cross-examination admitted that there was one *"Kharpel posh"* shop which was removed and slates were put in the said shop. PW-3 Dharam Chand in his cross-examination admitted that deceased was a tailor by profession and doing the tailoring work in the shop of the plaintiff. While claiming relief of injunction, PW-1 Girdhari Lal, PW-2 Jagat Ram and PW-3 Dharam Singh deposed before the Court that defendant raised construction on the other vacant portion of the land during the pendency of the suit, whereas PW-4 Promod Singh son of original plaintiff as well as PW-5 Babu Ram stated that over half share of the suit land there is a double storyed house of the plaintiff

and rest of the suit land was vacant on spot. Though plaintiff as well as witnesses adduced by him claimed that no shop of the defendant is in existence over the suit land, but it is not understood that why plaint was amended and relief of demolition of shop constructed by the defendant in the suit land was sought and prayed for. Even perusal of report of the Local Commissioner Ex.D-3 suggests that during his visit foundation of the shop was already there. As per report, one old shop was also in existence and other shop was being raised by the defendant.

21. Similarly, there is nothing in the plaint that defendant raised shop, if any, on any more valuable portion of the suit land, rather, documents available on record suggests that suit land is one filed. Plaintiff has nowhere proved on record that defendant or his predecessor-in-interest were enjoying the possession of the suit land, rather with own admission of plaintiff as made in the plaint as well as in his deposition before the Court, it appears that original plaintiff Sant Ram was in possession of old shop adjacent to which defendant proposed to raise construction. Similarly, there is no averment, if any, in the plaint made by the plaintiff that defendant had no right, title or interest on the suit land.

22. This Court also carefully perused the following case law pressed into service by Shri Lall in support of his contention:-

1. *Kaushalya Devi & Ors vs. Sito Devi and Others, 2014(2) Him.L.R. 768.*
2. *Ashok Kumar vs. Satya Devi, 2013(2) Him.L.R. 1164*
3. *Sant Ram Nagina Ram vs. Daya Ram Nagina Ram and Others, AIR 1961 (Pb) 220.*

23. There cannot be any quarrel with the proposition of law that whenever there is any conflict between the revenue entries, it is the later entry which must prevail. It is also settled law that presumption of truth is attached to the later entries, but the same is rebuttable one and it would stand rebutted by the fact that the alteration in the later entries was made un-authorisedly or mistakably, there being no material to justify the change of entries.

24. But, in the instant case, as has been discussed hereinabove, settlement took place in the year 1976-77 and during settlement operation Khasra No.255 was given new Khasra No.479 and suit land came to be recorded in joint ownership and possession of original plaintiff and his brothers Jagdish Chand and Bhagat Ram in equal shares and since then it continued to be in their joint ownership and possession till the year 1993-94, when Jagdish Chand and Bhagat Ram sold their respective shares to the extent of $1/4^{th}$ each to defendant, who lateron became owner to the extent of ½ share alongwith original plaintiff as reflected in the year Jamabandi for the year 1993-94. At the cost of repetition, it may be stated that entry as reflected in the Jamabandi for the year 1993-94 is not a stray entry without there being any basis, rather it clearly emerge from the Jamabandi for the year 1993-94 that mutation was attested and sanctioned in favour of defendant after sale of share of Jagdish Chand and Bhagat Ram in his favour. Hence, it cannot be accepted that change is reflected in the year 1993-94 was without any basis.

25. Similarly, it is well settled that till the land is partitioned amongst the cosharers, all the cosharers are entitled to use every inch of the land and they are owners in possession of entire land. But, in the instant case, there is nothing in the pleadings of the plaintiff that defendant has raised shop, if any, on the more valuable portion to the detriment of the plaintiff. Rather, as per own admission of the plaintiff, it clearly emerged that defendant proposed the construction on the land adjacent to shop of plaintiff which was already on the spot. Perusal of report filed by the Local Commissioner suggests that the suit land is one field and plaintiff is in possession of bigger share than that of defendant. Hence, this Court sees no application of aforesaid law cited by learned counsel for the appellants-plaintiffs in the instant case.

26. Interestingly, in the instant suit, plaintiff, while claiming himself to be in exclusive possession of the suit land as a co-sharer, prayed that entries, as reflected in Jambandi

for the year 1994-94 showing defendant as a co-owner to the extent of ½ share, be declared null and void, but nowhere laid any challenge to the entries, as reflected in Misalhaquiat for the year 1976-77 (Ex.P-2), wherein suit land came to be recorded in joint ownership and possession of original plaintiff Sant Ram and his brothers Jagdish Chand, Bhagat Ram and sister Chinti Devi in equal shares. Rather, as per own case of the plaintiff, Chinti Devi, legal representative of Dilu, gifted her share to him raising his share from 1/4th to ½ in the suit land. Since there was no dispute, if any, between original plaintiff Sant Ram and his brothers Jagdish Chand and Bhagat Ram and their legal representatives, entries, as reflected in Misalhaquiat for the year 1976-77 (Ex.P-2), continued till year 1993-94, when admittedly, name of defendant came to be recorded as co-owner in possession to the extent of ½ share on the basis of sale admittedly made by Jagdish Chand and Bhagat Ram of their respective shares to the defendant. Since plaintiff failed to lay any challenge to sale made by Jagdish Chand and Bhagat Ram, he cannot be allowed to say that entries, as reflected in Jamabandi for the year 1993-94, were abrupt and without any basis.

27. 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 appears to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264,** to case supra, wherein the Court has held as under:

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

28. Consequently, in view of detailed discussion made hereinabove, this Court is of the view that there is no illegality and infirmity in the judgment and decree passed by the Courts below, which are based upon proper appreciation of evidence, be it ocular or documentary, adduced on record. Similarly, this Court sees no reason to differ with the findings returned by the Court below that the plaintiff has miserably failed to prove on record by leading cogent and convincing evidence that he was inducted as tenant over the suit land by original owner.

29. No relief of permanent prohibitory injunction could be granted in favour of plaintiff in view of his own admission that defendant had laid foundation of shop in February, 1995 i.e. prior to institution of suit, with his consent, whereas, defendant, while filing written statement to the plaint, specifically admitted that he has already laid foundation in February, 1995 with the consent of plaintiff. Hence, all the substantial questions of law are answered accordingly.

30. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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

State of Himachal Pradesh .....Petitioner

Versus

Manohar Lal .....Respondent.

Cr. Appeal No. 452 of 2007
Decided on : 20/03/2017

Indian Penal Code, 1860- Section 279, 337, 338, 304-A and 201-Accused was driving a truck in a rash and negligent manner – the truck hit S, who sustained injuries below the abdomen – the accused was tried and acquitted by the Trial Court- held in appeal that the testimonies of the prosecution witnesses did not establish that accused had an opportunity to see the deceased and despite that he had hit the deceased– the author of the FIR was not examined- no blood stain was found on the tyre of the truck – the prosecution case became suspect due to all these infirmities – the Trial Court had properly appreciated the evidence- appeal dismissed.(Para- 9 to 14)

For the petitioner: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Ms. Shikha Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgement of acquittal recorded by the learned Additional Chief Judicial Magistrate, Kasauli, District Solan, H.P. whereby he pronounced an order of acquittal upon the accused qua the offences allegedly committed by him.

2. The brief facts of the case are that on 23.10.2001 at about 5.45 p.m on receipt of a telephonic message qua the accident, SI Brij Mohan Sharma, alongwith Constable Neter Singh had gone to ESI Hospital, Parwanoo. ASI Bheem Singh and constable Ram Lal met them in the bazaar at Parwanoo, who had at that time were on patrol duty. They both were also taken to ESI Hospital by S.I. Brij Mohan Sharma. There they came to know that Suneel Kumar had met with an accident near Truck Union, with truck No. HP-07-1112 due to which he had sustained injuries on his body below the abdomen. Suneel Kumar from ESI Hospital Parwanoo had been referred for further treatment to the Government Medical College and Hospital, Sector-32, Chandigarh. On preliminary enquiry conducted by SI Brij Mohan Sharma, alongwith other police officials, he came to know that a truck after loading material from Cosmo Factory was coming towards the Truck Union being driven by the accused Manohar Lal. When the truck reached near the Truck Union gate, Suneel Kumar at that time was going towards the bus stand. Accused Manohar Lal by driving the truck at high speed and in a negligent manner while trying to take the truck inside the gate, struck it against Suneel Kumar, who sustained injuries below the abdomen. The accident is said to have taken place due to the rash and negligent driving on the part of the accused. The accused had fled alongwith the truck from the spot. On the written report made by SI Brij Mohan Sharma, an F.I.R. under Sections 279, 337, 338 and 304-A and 201 of the Indian Penal Code was recorded in Police Station, Parwanoo and after completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused, challan was prepared and filed in the Court.

3. A notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 337, 304-A and 201 of the IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 5 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal

Procedure, was recorded in which he pleaded innocence and claimed false implication. He did not choose to 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.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. The learned counsel appearing for the respondent 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. As unraveled by site plan embodied in Ext.PW-5/A, the site whereat the truck driven by the accused/respondent, struck deceased Sunil Kumar, stands depicted therein to be point 'C' in sequel whereto, the body of the latter stood pulverized thereunder, whereupon as divulged by post mortem report held in Ext.PW-5/B, the deceased suffered on his person the injuries as stand delineated therein, whereupon he suffered his demise. The learned Deputy Advocate General has contended with much vigour and force qua with PW-1, an ocular witness to the occurrence, emphatically rendering a truthful account qua the occurrence wherewithin he ascribes penally inculpable negligence vis.a.vis the respondent, thereupon his testimony was sufficient for constraining the learned trial Court, to record findings of conviction upon the accused also he submits qua the mere factum of dis-concurrence if any, in the ocular account qua the occurrence rendered by PW-1 vis.a.vis. the injuries borne on post mortem report comprised in Ext.PW-5/B would not be amenable to any inference, conspicuously, even when the injuries reflected in post mortem report borne on Ext.PW-5/B do not hold synonymity with the testification of PW-1, qua hence the body of deceased Sunil Kumar standing not pulverized under the tyres of the offending vehicle driven by accused/respondent qua nor perse thereupon this Court standing constrained to revere the findings returned upon the accused/respondent.

10. The latter submission addressed before this Court by the learned Deputy Advocate General, though would hold tremendous vigour unless evidence stood adduced by the defence qua the fragility or strength of the ribcage of the victim/deceased whereover the offending truck driven by the accused drove upon also with vivid pronouncements occurring therein qua the fragility or strength of the ribcage of the victim/deceased whereover the offending truck driven by the accused, drove upon, thereupon its suffering or not hence suffering a complete fracture thereof, whereas absence of the aforesaid apposite evidence, does constrain this Court to conclude qua the visible non-alignment inter se the version qua the aforesaid factum testified by PW-1 vis.a.vis the minimal injuries in sequel thereto standing reflected in the post mortem report borne on Ext.PW-5/B, does contrarily constrain this Court to conclude qua it being construable to be unworthy of any relevance, for hence disimputing credence vis.a.vis the prosecution case.

11. PW-3 the other eye witness to the occurrence has in his cross-examination disclosed qua his not glimpsing the precise moment whereat the body of deceased Sunil Kumar stood driven upon/over by the offending truck, truck whereof stood thereat driven by the accused/respondent, thereupon his testification borne in his examination in chief wherein he attributes penal negligence qua the occurrence upon the accused, does obviously loose its vigour, its holding an account thereof, at a stage whereat he had not eye witnessed the trite factum of the

manner of the accused/respondent purportedly driving over/upon the body of deceased Sunil Kumar.

12. Dehors the above, the aforesaid ocular witnesses to the occurrence omitted, to, in their respective examinations in chief make any disclosure therein qua the factum probandum qua the accused/respondent despite his holding an opportunity to sight the arrival of the deceased before the truck driven by him, his yet proceeding to manoeuvre, it for its standing driven over the body of the deceased. The omission of the aforesaid disclosures in the examinations in chief of the aforesaid purported eye witnesses to the occurrence, fillips a derivative qua the relevant tenet, for establishing the charge against the accused, comprised in the prosecution proving qua the accused/respondent despite sighting the arrival of the accused before the truck driven by him, his hence abandoning adherence to the standards of due care and caution, deviation wherefrom standing constituted in his penal act of driving the offending truck upon the body of the deceased. Consequently, reticence qua the aforesaid facet(s) by both the ocular witnesses to the occurrence, coaxes an inference qua evidence qua the accused not adhering to the standards of due care and caution, being wholly amiss, whereupon this Court cannot proceed to sustain the charge.

13. Be that as it may, PW-4 has made a disclosure in his statement qua one Brij Mohan Sharma, on receiving a Rukka from one Ram Lal, in Rukka whereof details occur qua the manner of the occurrence, his thereupon proceeding to register an F.I.R. qua the occurrence. The aforesaid Rukka in sequel whereof the apposite F.I.R stood registered against the accused hence constituted the best evidence qua the manner of besides the genesis of the relevant occurrence. However, it came to be withheld besides obviously suppressed also both Ram Lal and Brij Mohan Sharma remained un-examined by the prosecution. The effect of withholding of 'Rukka' in sequel whereof one Brij Mohan Sharma registered the apposite F.I.R., whereas the endeavour of the prosecution to succor the charge, on anvil of purported eye witness thereto would achieve success, only on their names finding occurrence therewithin, contrarily with the 'Rukka' standing withheld nor Brij Mohan Sharma and Ram Lal standing examined constrains an inference qua both the purported ocular witnesses to the occurrence standing unnamed by Ram Lal in the 'Rukka', whereupon it is befitting to conclude qua the Investigating Officer contriving the factum of their presence at the relevant site of occurrence thereat thereupon their testimonies lose their credibility. The further effect of both Ram Lal, who purportedly prepared Rukka and of Brij Mohan Sharma who thereupon prepared the apposite F.I.R hence remaining unexamined is qua hence an inference standing aroused qua the prosecution hence smothering the true genesis of the occurrence which otherwise may stand unfolded by Ram Lal and Brij Mohan Sharma whereupon the emergence of a smothered besides invented version qua the occurrence warrants dis-imputation of credence thereto.

14. Be that as it may, the inevitable sequel of the body of deceased standing crushed under the tyres of the offending vehicle, vehicle whereof stood driven thereon by the accused, warranted the tyres of the offending truck to acquire blood stains, yet photographs unravelling the aforesaid fact remained unadduced whereupon also the aforesaid submission(s) apart from the hereinbefore ascribed reasons warrant, theirs standing discountenanced.

15. For the reasons which stand recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of 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 whereupon its judgement warrants no interference.

16. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Suchita Bhaik …….Petitioner.

Versus

Rajesh Kumar Bhaik …….Respondent.

FAO (HMA) No. 163 of 2009.
Decided on: 20th March, 2017

Hindu Marriage Act, 1955- Section 13- Wife filed a petition on the ground that her husband is a known patient of Schizophrenia and had treated her with cruelty – the husband pleaded that he was suffering from depression, which is curable – the petition was dismissed – aggrieved from the order, the present appeal has been preferred- held that wife has to prove that the disease with which the spouse is suffering is not curable and it is not possible to live with the ailing spouse – the Doctor was not examined to prove the nature of ailment – it was not proved that the disease was not curable – the respondent suffered first attack after 4½ years of marriage, which reveals that respondent was not suffering from the attacks regularly – the husband is prepared to live with the petitioner in a matrimonial home- the divorce petition was rightly dismissed- appeal dismissed.(Para-9 to 15)

Cases referred:

V.Bhagat versus D. Bhagat, (1994) 1 Supreme Court Cases, 337

K. Srinivas Rao versus D.A. Deepa, (2013) 5 Supreme Court Cases 226

For the appellant	Mr. Prashant Kumar Sharma, Advocate vice Mr. Manish Sharma, Advocate
For the Respondent	Mr. Satyen Vaidya, Senior Advocate with Mr. Varun Chauhan, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Appellant herein was the petitioner in a petition filed under Section 13 of the Hindu Marriage Act, 1955 for dissolution of her marriage with the respondent. Learned District Judge, Shimla, after holding full trial and affording the parties on both sides due opportunity of being heard, has dismissed the petition vide judgment and decree dated 31.12.2008, which is under challenge in this appeal.

2. The grounds on which the decree for dissolution of marriage was sought to be passed in a nut shell read as follows:

i) The respondent-husband is a known/ diagnosed patient of schizophrenia since 1988 and during the initial stay about three years of their marriage; he had been picking up quarrels and fights with her on trivials. On 11.3.2002 when the respondent came from the shop, which was opened by him in New Shimla having not in good mood started behaving with her in a awkward manner and when she offered food to him and indifferently such as that he wanted to kill someone. The incident was conveyed to his mother in the village and he was taken to IGMC by her with the help of neighbours in ambulance.

ii) On this occasions when her mother-in-law came to Shimla, she disclosed, for the first time, that the respondent was suffering with such decease since 1988.

iii) The respondent regularly got himself checked up in IGMC Shimla to Dr. Ravi and during such visit was used to stay outside.

iv) He suffered another attack of schizophrenia in the month of October 2002, due to which they had to close the shop and leave Shimla.

v) Later on, in July 2003, she got a job in DAV School Kumarsain. They started living there in rented accommodation. There the respondent allegedly beaten up one Balwant in the neighbourhood and also quarreled with landlord in the year 2005.

3. The respondent-husband has, however, denied the allegations of cruelty so levelled by the petitioner against him being wrong. However, according to him, it is also denied that he is a diagnosed patient of schizophrenia. It is admitted that he is suffering from depression since 1991, which is a disease completely curable. It is denied that this fact was concealed from the petitioner at the time of marriage and rather the marriage, which could be settled with the intervention of one Govind Shyam related to both families, the petitioner and her parents were duly apprised about the disease from which he was suffering.

4. Rejoinder was also filed. The contentions to the contrary in the reply were denied being wrong and the case set-up in the petition reiterated.

5. On such pleadings of the parties, the following issues were framed:

1. Whether the respondent has treated the petitioner with cruelty, as alleged? ..OPP
2. Whether the petition is not maintainable? ....OPR
3. Whether the petitioner is estopped from filing the petition by her own act and conduct? .....OPR
4. Whether the petitioner has no cause of action? .....OPR
5. Whether the petition is not according to H.M. Act?.....OPR
6. Whether this Court has no jurisdiction to try the petition? .....OPR
7. Relief.

6. Learned trial Court, on appreciation of the evidence available on record, has dismissed the petition vide judgment and decree under challenge before this Court in the present appeal.

7. The legality and validity of the impugned judgment and decree has been questioned on the grounds *inter alia* that the evidence qua the cruelty mental as well as physical committed by the respondent upon his wife, has not been appreciated in its right perspective. The allegations in the petition allegedly were not the wear and tear of normal married life and rather the true instances of cruelty he committed upon her. The Court below allegedly has erred in not taking view of the matter that the petitioner-wife came to know about the respondent suffering from schizophrenia after about 4½ years of her marriage with him. There is no appreciation of the specific instances of cruelty given by her in the petition. The wife allegedly cannot be compelled to remain in the company of the respondent when it is established that he being the patient of schizophrenia may take her life and the life of her son including causing bodily injuries to both of them. Therefore, she had made out a case for the grant of decree of divorce, which relief allegedly has been withheld from her on untenable grounds.

8. On hearing learned counsel representing the parties and also going through the evidence available on record, the only question which needs adjudication in the present lis is that though the appellant-petitioner has made out a case for dissolution of her marriage with the respondent on the ground of he is suffering from an incurable disease, however, learned trial Court on account of misappreciation, misconstruction and misreading of the facts of the case as well as the evidence available on record has wrongly dismissed the petition.

9. Before coming to the facts of case and also the evidence available on record, it is desirable to take note of the provisions contained under Section 13(1)(iii) of the Act, which reads as follows:

> "13. **Divorce:-** Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-
>
> (i) xxx xxx xxx
>
> (ia) xxx xxx xxx
>
> (ib) xxx xxx xxx
>
> (ii) xxx xxx xxx
>
> (iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
>
> Explanation – In this clause-
>
> (a) The expression "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia
>
> (b) The expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including sub-normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or
>
> xxx xxx xxx

10. A bare reading of the above provisions leave no manner of doubt that in order to succeed on such grounds the party seeking decree of divorce should plead and prove that the disease, with which the other spouse is suffering, is not curable or he/she is suffering from mental disorder either continuous or intermittently of such a nature that it is not possible to the party seeking the decree of divorce to live with the ailing spouse. The explanation 'a' and 'b' defines the 'mental disorder' and 'psychopathic disorder'.

11. True it is that the instances of cruelty detailed supra in this judgment and quoted in the petition by the petitioner have been pressed into service for seeking the decree of divorce. However, if coming to the proof thereof she is satisfied with her own testimony and also that of one Madan Singh Chauhan, PW-1, who has proved the record qua admission of the respondent in psychiatric department of the IGMC Shimla during the period 8.11.2003 to 11.11.2003. He has also proved the copy of discharge slip Ex.PW-1/A, however, it was not for PW-1 to have said something about the nature of the ailment from which the respondent was suffering. The onus to prove issue No.1 was on the petitioner. She failed to discharge the same because the testimony of PW-1 and discharge slip Ex.PW-1/A is not sufficient to discharge the onus upon her. Nothing has come on record qua the nature of the ailment with which the respondent was suffering in the statement of PW-1. Although in Ex.PW-1/A the primary disease, from which the respondent was suffering, finds mentioned, however, whether it was schizophrenia or depression, it remained unexplained. Learned Trial Judge, therefore, has not committed any illegality or irregularity while holding that for want of the expert opinion viz. the opinion given by the doctor concerned, it cannot be said that the respondent is suffering from schizophrenia or that while under the attack thereof used to be violent and thereby the petitioner-wife really apprehends danger not only to her own life but also to that of her minor son.

12. Interestingly enough the marriage was solemnized on 25.10.1997. No evidence has also come on record to show that the respondent is suffering from a disease, which is not curable. The first attack of the disease as per the allegations in the petition was suffered by the respondent on 11.3.2002 i.e. after about 4 ½ years of marriage, which itself reveals that he is not suffering from a disease nor suffering the attacks regularly. At the most and as per his own admission he is suffering from depression, however, there is nothing to believe that such disease is not curable. Above all the petitioner and respondent had lived as husband and wife in the company of each other till June 2005, which amply demonstrates that the respondent is not suffering from a disease of such a nature that it has become difficult for the petitioner to live in his company.

13. Interestingly enough, she did B.Ed. from Himachal Pradesh University and it is he who, as per her own evidence, used to attend to the business in the shop he had opened in New Shimla. The respondent as such is not suffering from any incurable disease and rather the story has been fabricated and engineered by the petitioner merely to get rid of him as admittedly he is suffering from a disease i.e. depression. The present as such is the case where the petitioner is backing out from her responsibilities and moral obligations towards her ailing husband, who at this juncture need her company.

14. It is not the petitioner's case that the respondent has turned her out from matrimonial home. No doubt, she claims that she apprehends danger to her life; however, for the reasons hereinabove the same is not correct. The respondent-husband is still prepared to live with her in the matrimonial home as stated by learned counsel at bar during the course of arguments. Being so, it is difficult to believe that the petitioner has made out a case for dissolution of her marriage with the respondent by a decree of divorce on the ground as discussed hereinabove. The legal principles settled by the apex Court in ***V.Bhagat*** versus ***D. Bhagat, (1994) 1 Supreme Court Cases, 337*** and ***K. Srinivas Rao*** versus ***D.A. Deepa, (2013) 5 Supreme Court Cases 226,*** are not attracted in this case being distinguishable on facts.

15. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. Consequently, the judgment and decree passed by the trial Court is affirmed. No order so as to costs.

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

Salig Ram ….Appellant-Plaintiff
Versus
Ved Parkash ….Respondent-Defendant

Regular Second Appeal No.388 of 2005
Date of decision: 21.03.2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit seeking permanent prohibitory injunction for restraining the defendant from interfering in the suit – it was pleaded that plaintiff had purchased 41/97th Share in the suit land –he had constructed a septic tank and two latrines over the land by spending Rs.30,000/- - the defendant has no right over the suit land but is interfering with the same- he demolished the septic tank and two latrine sheets – the defendant pleaded that construction was started without getting the suit land demarcated – the latrine and septic tank were constructed over the passage- the suit was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held in second appeal that plaintiff and defendant had purchased the share from the original vendor – plaintiff had not purchased any specific portion of the suit land- the plaintiff was found to be encroacher in the demarcation – plaintiff had purchased 4 biswas of land but was found in possession of 4.10 biswa of the land –

plaintiff was not present at the time of the incident and the testimony of his witness is not satisfactory – the Courts had dealt with the evidence properly- appeal dismissed.(Para-12 to 27)

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

For the Appellants: Mr.G.D. Verma, Senior Advocate with Mr.B.C. Verma, Advocate.
For the Respondent Mrs.Ritu Raj Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellant-plaintiff against the judgment and decree dated 28.4.2005, passed by the learned District Judge, Shimla, H.P., affirming the judgment and decree dated 27.3.2004, passed by learned Civil Judge(Junior Division), Shimla, H.P., whereby the suit filed by the appellant-plaintiff seeking the relief of prohibitory injunction and damages has been dismissed.

2. Brief facts of the case, as emerged from the record, are that the appellant-plaintiff *(herein after referred to as the 'plaintiff'),* filed a suit for permanent prohibitory injunction restraining the defendant from interfering in his suit land comprised in Khata No.41, Khatauni No.52, Khasra No.638/33/1, measuring 4.10 biswas, situated at Mauja Chakrail, Pargana Majhola, Tehsil and District Shimla *(hereinafter referred to as the 'suit land')* and also sought damages to the tune of Rs.40,000/- from the defendant. It is averred by the plaintiff that he had purchased 41/97th shares in the suit land from Prabhu Ram and Nazroo Devi vide sale deed dated 21.5.1994. It is further averred by the plaintiff that he occupied this land and had constructed a house, septic tank and two latrines over this land. It is further averred by the plaintiff that he has spent a sum of Rs.30,000/- on the construction of septic tank and two laterines. It is alleged by the plaintiff that the defendant has no right or interest, whatsoever, over the suit land, however, he has unlawfully and illegally destroyed the septic tank of the plaintiff on 5.3.2000 and also demolished latrine seats with a hammer, thereby causing wrongful loss to him to the tune of Rs.40,000/- in all. In the aforesaid background the plaintiff filed a Civil Suit before the learned trial Court.

3. Defendant, by way of filing written statement, refuted the claim of the plaintiff on the ground of maintainability, cause of action and estoppel. On merits, it is averred by the defendant that the plaintiff started raising construction over the land without getting it demarcated and in this process had covered more area of land under his construction than was purchased by him. It is further averred by the defendant that the plaintiff constructed septic tank and latrines on a portion of land, which is being used as common passage by the owners and vendees. It has further been averred by the defendant that the plaintiff constructed latrines and septic tank on this common passage, which is in the shape of stair-case and has blocked it. Defendant, while denying all other allegations regarding demolition of latrines and septic tank and of plaintiff suffering loss to the tune of Rs.40,000/-, prayed for the dismissal of the suit.

4. On the pleadings of the parties, the learned trial Court framed the following issues:-

"1. Whether the plaintiff is entitled to relief of permanent prohibitory injunction as prayed? OPP

2. Whether the plaintiff is entitled to relief of damages as prayed? OPP.

3. Whether the suit is not maintainable? OPD

4. Whether the plaintiff has no cause of action? OPD.

5. *Whether the plaintiff is estopped from filing the suit? OPD*
6. *Relief".*

5. Learned trial Court vide judgment and decree dated 27.03.2004 dismissed the suit of the plaintiff for relief of permanent prohibitory injunction restraining the defendant from interfering in the suit land and also for damages to the extent of Rs.40,000/-.

6. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiff was dismissed, appellant-plaintiff filed an appeal under Section 96 of the Code of Civil Procedure *(for short `CPC')* in the Court of learned District Judge, Shimla, who, vide impugned judgment and decree dated 28.04.2005, dismissed the appeal preferred by the plaintiff by affirming the judgment and decree passed by the learned trial Court. In the aforesaid background, the present appellant-plaintiff filed this Regular Second Appeal before this Court, details whereof have already been given above.

7. This second appeal was admitted on the following substantial question of law:

"(1) Whether approach on the part of both the courts below in considering the subject matter of dispute has been erroneous and illegal and instead of considering the claim of plaintiff for grant of decree for permanent prohibitory injunction, the claim was taken for removal of encroachment over the suit land?

2. Whether the appellant is entitled for recovery of suit amount on account of damages as caused by the defendant to the septic tank and latrines of the plaintiff and in this regards the claims stands proved by damage report Ex.PW-4/A prepared by Sh.H,.S. Bisht a retired Executive Engineer?

3. Whether Ex.Dx alleged compromise set up by the respondent is irrelevant for the purpose of determination of the dispute because this document is not relating to the dispute in the present suit?

4. Whether tatima Ex.PW-1/B report of expert Ex.PW-4/A and Ex.DX have been misread and misconstrued?

5. Whether the courts below were required to appoint a Local Commissioner in order to ascertain the location and dismantling of the septic tank?"

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

9. Mr.G.D. Verma, learned Senior Counsel representing the appellant-plaintiff, vehemently argued that approach of both the Courts below, while considering the dispute at hand, has been erroneous and illegal, as a result of which, erroneous/contrary findings have come on record to the detriment of plaintiff, who successfully proved on record, by leading cogent and convincing evidence, that defendant is interfering in the exclusive ownership and possession of the plaintiff. As per Mr.Verma, it was none of the case of the plaintiff that defendant encroached upon the land of the plaintiff, rather, plaintiff filed Civil Suit for injunction restraining the defendant from interfering in the ownership and possession of the plaintiff. With a view to substantiate his aforesaid argument, Mr.Verma, invited the attention of this Court to the evidence led on record by respective parties, be it ocular or documentary, to demonstrate that Courts below not only misread and misinterpreted the real point of controversy, but failed to appreciate the evidence in its right perspective.

10. On the other hand, Mrs.Ritu Raj Sharma, learned counsel appearing for the respondent-defendant, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have meticulously dealt with each and every aspect of the matter. She also urged that scope of interference by this Court is very limited, especially when two Courts have recorded concurrent

findings on the facts as well as law. In this regard, to substantiate her aforesaid plea, she placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

<u>Substantial Question No.1</u>:

11. This Court, with a view to ascertain the genuineness and correctness of the aforesaid submissions having been made by Mr.Verma vis-à-vis substantial question of law No.1, carefully perused the pleadings as well as evidence adduced on record by the respective parties, perusal whereof nowhere suggests that learned Courts below misread and mis-appreciated the material on record. Rather, close scrutiny of the impugned judgments passed by both the Courts below suggests that both the Courts below have carefully dealt with each and every aspect of the matter and by no stretch of imagination it can be said that the Courts below, while deciding the case at hand, mis-directed themselves. Admittedly, plaintiff filed suit for permanent prohibitory injunction restraining the defendant from interfering in any manner with the ownership and possession of the plaintiff over the suit land, as described hereinabove, and also for recovery of an amount of Rs.40,000/- on account of damages.

12. In order to succeed, onus was on plaintiff to prove on record by leading cogent and convincing evidence that he had constructed septic tank and latrines on the suit land comprising in Khasra No.638/33/1, measuring 4.10 biswas and the same was demolished by the defendant without any justification. It is admitted case of the plaintiff that he as well as defendant purchased shares, as described above, out of land of Khasra Nos.637/33 and 638/33 from original vendors Prabhu Ram and Nazaroo Devi. Though plaintiff claimed that land purchased by him is comprised of Khasra No.638/33/1, measuring 4 biswas and 10 biswansis, but admittedly, there is nothing on record suggestive of the fact that he had purchased specific portion of joint land from the previous owners.

13. Similarly, there is no evidence, be it ocular or documentary, available on record suggestive of the fact that land was partitioned between joint owners. Hence, plaintiff cannot be allowed to state that he is exclusive owner in possession of the suit land. Similarly, in view of aforesaid, plaintiff cannot be allowed to contend that any portion of his land is encroached by the defendant unless specific portion of the land was identified or demarcated on the spot. Plaintiff by placing on record Tatima Ex.PW-1/B made an attempt to prove that he purchased land bearing Khasra No.638/33/1, on which he constructed a house, septic tank and two latrines and, as such, defendant had no right, whatsoever, to interfere in the same. But perusal of Ex.PW-2/B, i.e. demarcation report submitted by the Assistant Collector, clearly suggests that plaintiff himself was found to have encroached upon common passage used by the parties. Aforesaid report, having been given by Assistant Collector, nowhere suggests that land of plaintiff was encroached by the defendant, as alleged by the plaintiff. Similarly, there is no evidence available on record suggestive of the fact that plaintiff being dis-satisfied with the aforesaid demarcation, having been carried out by Assistant Collector, ever laid any challenge to the same, meaning thereby that the same was accepted by the plaintiff without any demur. It may also be noticed that Tatima Ex.PW-1/B was prepared by Patwari Dalip Singh, who, while appearing as PW-1, stated that he had prepared Tatima Ex.PW-1/B on the spot on 10.3.2000 i.e. just five days after the alleged incident, but it nowhere suggests that any septic tank or latrines constructed over the land in Khasra No.638/33/1 were found in demolished condition. Aforesaid PW-1 Dalip Singh Patwari also admitted that plaintiff was found to be in possession of 4 biswas and 10 biswansis of land, whereas, as per plaintiff, he had only purchased 4 biswas of land. PW-2 Ludermani Kanungo, who had conducted demarcation of land of the plaintiff on 20.4.2001, nowhere stated that some septic tank was found demolished on the spot.

14. Similarly, there is no Tatima annexed with the report Ex.PW-2/B reflecting exact possession of the plaintiff over the join land. Rather, report, as referred above, clearly suggests that the plaintiff has purchased only 4 biswas of land, whereas he was found to be in possession of land measuring 4.10 biswas of land. Similarly, this Court also carefully perused demarcation

report Ex.DW-1/A obtained by the plaintiff in Civil Suit having been filed by him against one Devi Ram, which also suggests that plaintiff himself encroached upon the land left for the path for constructing septic tank etc. Since no cogent or convincing evidence was led on record by the plaintiff suggestive of the fact that he is/was exclusive owner in possession of the land over which septic tank and latrines were constructed by him, Courts below rightly held him not entitled to the relief of prohibitory injunction.

15. Careful perusal of impugned judgments passed by both the Courts below nowhere suggests that Courts below misdirected themselves while adjudicating the subject matter of the dispute and erroneously and illegally considering the case of the plaintiff for removal of the encroachment of the suit land instead of grant of decree for permanent prohibitory injunction. Substantial question of law is answered accordingly.

Substantial Question No.2:

16. Mr.Verma, while making submissions, as referred above, also strenuously argued that Courts below miserably failed to appreciate overwhelming evidence adduced on record by the plaintiff that damage to the septic tank as well as latrine seats was caused by the defendant and as such he was entitled to be compensated. Mr.Verma, with a view to substantiate his aforesaid arguments, invited the attention of this Court to the damage report Ex.PW-4/A, prepared by Shri H.S. Bisht, a retired Executive Engineer. However, aforesaid arguments having been made by Shri Verma also appear to be without any merit because admittedly this Curt was unable to lay its hand to any evidence, be it ocular or documentary, suggestive of the fact that defendant damaged or dismantled septic tank and latrines of the plaintiff constructed on the common passage. Plaintiff himself stated before the Courts below that at the time of incident he was not present on the spot. It has come in his statement that septic tank and latrines were damaged by the defendant on 5.3.2000 in the presence of his wife, but strangely she was not brought to the witness box to prove aforesaid factum. Since plaintiff was not present on the spot, as admitted by him, no reliance, if any, could be placed upon his version without there being any corroboration from person, who was actually present on the site.

17. PW-3 Plaintiff Salig Ram though claimed in his statement that septic tank and latrines were demolished by the defendant causing loss to him to the tune of Rs.40,000/-, but careful perusal of admission having been made by him in his cross-examination as well as photographs mark A-1 to A-7 clearly suggests that plaintiff had constructed part of his septic tank beneath the stairs which admittedly are not over the land of the plaintiff nor he has constructed the same. Rather, these stairs were got prepared by previous owners as common passage.

18. Statement of PW-4 H.S. Bisht, retired Executive Engineer, who prepared damage report Ex.PW-4/A, suggests that plaintiff had constructed part of his septic tank beneath the stairs. Moreover, perusal of Ex.PW-4/A also suggests that Shri H.S. Bisht visited the spot at the behest of plaintiff namely, Shri Salig Ram, who requested him to inspect his house and prepare estimate on the basis of present market value qua the damage caused by defendant Ved Parkash to septic tank and two WC seats of his house. Report, as referred above, clearly suggests that version put forth on behalf of Salig Ram plaintiff was incorporated in the report, wherein he stated that defendant namely Ved Parkash damaged septic tank and two WC seats of his house.

19. This Court, after carefully perusing the aforesaid report, has no hesitation to conclude that same was procured by the plaintiff on 16.3.2000 solely with a view to claim damages from the defendant. But, as has been observed above, there is no direct evidence adduced on record by the plaintiff suggestive of the fact that defendant caused damage to septic tank as well as two WC seats and as such no help/benefit, if any, could be taken by the plaintiff on the basis of report furnished by PW-4 H.S.Bisht, who admittedly prepared report on the basis of version put forth by the plaintiff himself after visiting site on 11.3.2000 i.e. after one week of the alleged incident. Hence, this Court sees no illegality and infirmity in the findings returned by

the Courts below qua the claim of damages of the plaintiff, which was based upon the damage report Ex.PW-4/A prepared by Mr.H.S. Bisht. Hence, substantial question of law is answered accordingly.

Substantial Questions No.3 & 4:

20. Mr.Verma, while inviting the attention of this Court to Ex.DX, strenuously argued that Courts below placed undue reliance upon the compromise deed dated 21.10.2001, wherein he allegedly compromised the matter with defendant subsequent to aforesaid incident. As per Mr.Verma, bare perusal of compromise deed would reveal that nothing with regard to septic tank or latrines were agreed upon between the parties, rather, it pertains to boundary dispute between the parties and parties had agreed to withdraw the respective cases pertaining to boundaries. Careful perusal of compromise i.e. Ex.DX clearly suggests that plaintiff entered into a compromise with Shri Devi Ram as well as defendant, wherein parties agreed to withdraw their cases against each other. Parties also agreed that there shall be a vacant space of 3 feet between the two houses, meaning thereby that the parties agreed not to raise any kind of construction on the land measuring 3 feet existing between the house of plaintiff as well as defendant.

21. True, it is that compromise deed, as referred above, nowhere suggests that there is mention, if any, with regard to septic tank and two latrines but, if compromise is read in its entirety, especially the background in which it came into existence, it can be safely concluded that after institution of present lis by the plaintiff against the defendant as well as another suit having been filed by Shri Devi Ram against the plaintiff, parties agreed to resolve the matter amicably. Plaintiff himself in his cross-examination admitted that earlier suit was instituted by him against his neighbour Devi Ram, wherein he had obtained demarcation report Ex.DW-1/A, perusal whereof suggests that plaintiff was found to have encroached upon the land left for path by constructing septic tank etc.

22. This Court, after specifically seeing the background of compromise, sees no force much less substantial in the arguments having been made by Shri Verma, learned Senior Counsel representing the appellant, that compromise Ex.DX has no relevance for the purpose of determination of dispute between the parties and as such sees no illegality and infirmity in the findings returned by the Courts on the basis of document Ex.DX. Similarly, this Court sees no merit in the contention of Shri Verma that Courts below misread and mis-construed Tatima Ex.PW-1/B and report of expert Ex.PW-4/A, effect of which has already been dealt with by this Court while answering aforesaid substantial questions of law. Hence, both the aforesaid substantial questions of law are answered accordingly.

Substantial question No.5:

23. While exploring answer to substantial question of law No.5, this Court could lay its hand to relevant portion of ground-(xi) of the appeal, which is reproduced hereinbelow:-

> *"(xi)… … … … … …As a matter of fact, there was no dispute about the identity and boundaries of the respective plots of the parties. The fact of the matter is that since Respondent caused damage to the properties of the plaintiff as detailed in the suit, therefore, claim has been set up for recovery of amount of damages and also a prayer was made that the Respondent should be restrained from committing acts of interference and damages."*

24. It is own case of the plaintiff that there was no dispute about the identity and boundaries of the respective plots of the parties, rather case of the plaintiff is/was that since respondent caused damage to the property of the plaintiff, he is entitled for the recovery of amount of damages, as claimed in the plaint by the plaintiff. Moreover, plaintiff, with a view to prove his claim, placed on record demarcation report conducted on spot by Assistant Collector i.e. Ex.PW-2/B, wherein no land of plaintiff was found under the encroachment of the defendant. Rather, plaintiff's own witness Patwari Dalip Singh admitted that the plaintiff was in possession of 4.10 biswas of land, whereas, as per own case of plaintiff, he has purchased only 4 biswas of land, meaning thereby that he himself covered more area of land under construction than was

actually purchased by him. Similarly, this Court finds that apart from above, there was another demarcation report Ex.DW-1/A available on record suggestive of the fact that the plaintiff himself encroached upon the land left for the path for constructing septic tank etc. Hence, in view of above, this Court is not in agreement with the contention of Shri G.D. Verma, learned Senior Counsel representing the plaintiff, that the Courts below ought to have appointed Local Commissioner in order to ascertain the location and dismantling of the septic tank. Since there was no boundary dispute, if any, between the parties, as admitted by the plaintiff, there was no occasion for the Courts below to appoint Local Commissioner, more particularly when two demarcation reports in the shape of Ex.PW-4/A and Ex.DW-1/A were available on record suggestive of the fact that the plaintiff himself encroached upon the land left for path by constructing septic tank and latrines etc. It may also be observed that there is no evidence available on record that the plaintiff, being aggrieved, if any, with the aforesaid demarcation report, ever laid any challenge to the same in appropriate proceedings under law. Hence, substantial question is answered accordingly.

25. 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 and Others vs. Ranganath and Others,*** **(2015)4 SCC 264,** to case supra, wherein the Court has held as under:

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

26. In the instant case, learned Senior Counsel representing the appellant-plaintiff was unable to point out any perversity, which could persuade this Court to interfere in the concurrent findings of fact and law recorded by the Courts below.

27. Consequently, in view of detailed discussion made hereinabove, this Court is of the view that there is no illegality and infirmity in the judgment and decree passed by the Courts below, which are based upon proper appreciation of evidence, be it ocular or documentary, adduced on record. Hence, the present appeal fails and is dismissed accordingly. There shall be no order as to costs.

28. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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

Gian Chand (since deceased) through his legal heirs .....Appellants/Plaintiffs.
Versus
Janki Devi & others .....Respondents/defendants.

RSA No. 351 of 2006.
Reserved on: 10th March, 2017.
Decided on : 24th March, 2017.

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit pleading that he is owner in possession of the suit land and defendant is interfering with the same without any right to do so- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that Courts had relied upon the report of the Local Commissioner, who had found no encroachment on the suit land – however, the demarcation was not conducted in accordance with law – appeal allowed and suit of the plaintiff decreed. (Para-7 to 12)

For the Appellants: Mr. K.D. Sood, Senior Advocate with Mr. Ankit Aggarwal, Advocate.
For the Respondents: Mr. Parneet Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the appellants/plaintiffs against the concurrently recorded verdicts of the learned Courts below, whereby, they dismissed the suit of the plaintiff wherein he claimed relief of permanent prohibitory injunction restraining the defendants from interfering in his possession over the suit land as also for demarcation and in alternative for possession.

2. Briefly stated the facts of the case are that the original plaintiff Gian Chand had filed a suit against the defendant for permanent prohibitory injunction restraining the defendants from interfering in the land comprised in Khata No.44, Khatauni No. 44 min, khasra Nos. 3, 80, 82, kita 3, measuring 3 kanals 15 marlas situated in Tiko Kharoh, Tappa Matti Morian, Tehsil and District Hamirpur, H.P. and also for demarcation of the same. It is averred that the plaintiff is owner in possession of the suit land and the defendants have no concern with it. It was alleged that the defendant being head strong and quarrelsome person, started interference over the suit land without any right, title or interest and also threatened to dispossess the plaintiff from the suit land. Hence the suit.

3. The defendants contested the suit and filed written statement wherein they have pleaded that the land of the defendants adjoining to the suit land and it stands already demarcated by the revenue authorities and parties were found in possession of their respective land as per the demarcation report. It is further pleaded that the defendants neither raised any construction nor interfered with the suit land. It is further pleaded that in case the defendants were found to be in possession of any part of the suit land, in that case, the defendants had become the owner of the same by way of adverse possession.

4. 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 to the relief of injunction, as prayed for? OPP.
2. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court DISMISSED the suit of the plaintiffs/appellants herein. In an appeal, preferred

therefrom by the plaintiffs/appellants herein before the learned First Appellate Court, the first Appellate Court also dismissed the appeal and affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellants herein have instituted the instant Regular Second Appeal before this Court assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 21.11.2006 this Court, admitted the appeal instituted by the plaintiffs/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the report of the Local Commissioner, appointed vide order dated 10.03.1995 is beyond the scope of reference made to him and it ought not to have been relied upon for deciding the matter?

Substantial question of Law No.1.

7. Both the learned Courts below had declined the apposite relief to the plaintiff by placing reliance upon the report of the Local Commissioner embodied in Ex. LX, whereto copy of aks musabi embodied in Ex. L-1 stood appended. Both the learned Courts below had imputed implicit reliance to the report of the Local Commissioner, also they dispelled the vigour of the objections purveyed thereto by the plaintiff. The impugned verdicts recorded by both the learned Courts below apparently spur from theirs grossly mis-appraising, the import of the apposite pleadings constituted in the plaint besides in the written statement. Short shrift, by both the learned Courts below to the apposite averments constituted in the plaint by the plaintiff, qua his holding possessory title qua the suit land besides visible gross overlooking(s) by both the learned Courts below vis-a-vis the written statement furnished thereto by the defendants, wherein they acquiesce qua both the litigating parties in consonance with a previous demarcation, hence holding possession qua tracts of land(s) demarcated thereunder, has palpably engendered erroneous findings standing returned, on the apposite issue.

8. The import of the acquiescence of the defendants in their written statement furnished to the plaint qua the contentious boundaries standing previously demarcated by the Revenue Agency concerned, in sequel, whereto each holding possession of tracts of land, is qua theirs bespeaking with candour qua the plaintiff not encroaching upon the land of the defendants abutting his land also the effect of the aforesaid acquiescence is qua the defendants not holding any grievance qua the plaintiff nor theirs espousing qua encroachment, if any, carried by the plaintiff upon theirs land, standing ordered by the Court for its apt determination by a Local Commissioner. Moreover, the defendants omitted, for succoring their espousal even if veiledly ventilated in their written statement qua theirs holding only portion of the suit land in pursuance to a previous demarcation carried by the Revenue Authorities concerned to adduce evidence in consonance thereto, comprised in their placing on record the report of the demarcating officer concerned. Omission of the defendants to place on record the report of the demarcating officer prepared by the latter previous to the report of the demarcating officer, hereat comprised in Ex.LX nor their concerting to seek appointment of a Local Commissioner for re-demarcating the suit land, is a stark display qua the defendants acquiescing qua the plaintiff not encroaching upon any portion of their land abutting the land of the plaintiff also thereupon an inference stands engendered qua theirs accepting the claim of the plaintiff.

9. In the backdrop of the aforesaid pleadings constituted respectively in the plaint besides in the written statement, the effect of the report of the Local Commissioner embodied in Ex. LX whereon implicit reliance stand placed upon by the learned Courts below stands enjoined to be tested besides the effect of the learned trial Court recording an order on 10.03.1995, for appointment of a Local Commissioner for visiting the relevant site, for determining qua whether the defendants carrying out encroachment(s) upon the land of the plaintiff whereas the demarcating Officer concerned in transgression thereto preparing his report embodied in Ex.LX making unfoldments therein qua the plaintiff encroaching upon the land of the defendants, legality of transgression whereof also stands enjoined to be tested.

10. The reference made to the Local Commissioner under the apposite orders recorded on 10.03.1995, was to determine qua the defendants encroaching upon the land of the plaintiff, thereupon, he stood enjoined to revere the mandate held therewithin. However, the Local Commissioner proceeded to irrevere the scope of the apposite reference, comprised in his unfolding in his report qua the plaintiff encroaching upon the land of the defendant whereupon, hence, with the Local Commissioner, travelling beyond the scope of the reference, stains his report with a vice of his holding leanings towards the defendants, evident display whereof stands unearthed in his report Ex. Lx wherein he proposed action against both the plaintiff besides his counsel, for their refusal to append their signagtures on their statements wherewithin they purveyed their objections qua the demarcation conducted by him. The evident bias of the Local Commissioner concerned also benumbs the efficacy of his report embodied in Ex. LX. The objections purveyed by the deceased plaintiff before the learned trial Court whereon he assailed the report of the Local Commissioner comprised in Ex. LX, make loud echoings qua the demarcating officer not holding the demarcation of the suit land in consonance with the apposite rules and regulations. The aforesaid objections warranted determination under a speaking order standing pronounced thereon. However, both the learned Courts below proceeded to impute implicit reliance or credibility to the report of the Local Commissioner comprised in Ex. LX, despite his proceeding to demarcate the suit land in gross detraction of the scope of the apposite reference whereon he was directed to ascertain the encroachment made by the defendants upon the suit land. Also the belittling by both the learned Courts below of the aforesaid acquiescence (s) of the defendants qua the plaintiff not encroaching upon their land assumes significance comprised in its conveying qua both the learned Courts below despite the defendants not hence instituting any counterclaim to the apposite plaint of the plaintiffs, theirs proceedings to impute leverage to the report of the local Commissioner, imputation of sanctity whereof tantamounts to their leveraging an unespoused claim of the defendant also theirs discreetly pronouncing a decree qua them despite its standing never claimed whereupon a gross injustice has ensued to the plaintiff besides travesty to the pleadings has occurred.

11. 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 not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court has excluded germane and apposite material from consideration. Accordingly, the substantial question of law is answered in favour of the plaintiffs/appellants and against the defendants/respondents.

12. In view of above discussion, the present Regular Second Appeal is allowed and the judgements and decrees rendered by both the learned Courts below are set aside. Consequently, the suit of the plaintiff is decreed and the defendants are restrained from interfering in th suit land comprised in Khata No.44, min, Khataoni NO.44 min, Khasra No.3, 80, 82 measuring 3 kanals 15 marlas situated in Tika Kharoh, Tappa Matti Morian, Tehsil and District Hamirpur, H.P., in any manner whatsoever through themselves or through their authorized agents, servants and family members etc. Decree sheet be drawn accordingly. All pending applications also stand disposed of. No order as to costs.

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

Sanjay Kumar ….Petitioner.

Versus

Sumna Kumari & others ….Respondents.

Civil Revision No. 113 of 2014.
Date of Decision: 24th March, 2017.

Hindu Adoption and Maintenance Act, 1956- Section 18 and 23- Trial Court granted interim maintenance of Rs.1,000/- per month to each of the plaintiffs/applicants- aggrieved from the order, the present petition was filed- held thatTrial Court had relied upon the pleadings to grant interim relief- although issues have been framed, parties were not called upon to produce the evidence – the reliance placed upon the pleadings is improper as in case of dismissal of main suit, recovery proceedings would have to be initiated – petition allowed- order of the Trial Court set aside. (Para-3 and 4)

For the Petitioner: Mr. Amandeep Sharma, Advocate.
For the Respondents : Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The Instant petition stands directed against the impugned order recorded by the learned trial Court, on 21.05.2014, upon an application standing preferred therebefore under Sections 18, 23 of Hindu Adoption and Maintenance Act, whereby, he granted relief of interim maintenance quantified in a sum of Rs.1000/- per mensem qua plaintiff/applicant No.1 besides also quantified interim maintenance of Rs.1000/- per mensem qua plaintiff No.2/applicant No.2.

2. A perusal of the plaint constituted before the learned trial Court underscores qua in the plaintiffs/applicants espousing therein, the apposite relief, theirs drawing leverage from the provisions engrafted in Section 18 of the Hindu Adoption and Maintenance Act.

3. Per se, the plaint constituted against the defendant in the apposite civil suit, holds an apparent synonimity vis-a-vis the statutory provisions whereunder the applicants/plaintiffs, anvilled their apposite application qua award of interim maintenance vis-a-vis them. The statutory provisions whereunder, both the plaint as also the apposite application stood constituted also whereupon, the impugned rendition stood recorded by the learned trial Court, do not hold any mandate qua the learned trial Court holding any jurisdiction to grant any sum of money, as interim maintenance qua the plaintiffs/applicants, thereupon, it was unbefitting for the learned trial Court, to proceed to accord the relief of interim maintenance upon an application constituted therebefore under statutory provisions holding alikeness with the statutory provisions whereunder the plaintiffs instituted a suit against the defendant. The underlying object of the legislature, in omitting to, engraft in the relevant statutory provisions, any apt provision for grant of interim maintenance, appears to stand engendered by the Civil Court standing thereupon forestalled to render a decision upon the plaint, ultimate decision whereon, may, with the defendant adducing evidence of vigorous sinew, be adversarial vis-a-vis the plaintiff, whereupon, the plaintiffs would prematurely besides at an inchoate stage hence stand unjustly enriched also would lead to the obviable fate of the defendant(s) standing driven to seek refund of amount(s) awarded to the plaintiff(s) as interim maintenance, besides any decision upon an application for interim maintenance may also present a *fait accompli* to the Civil Court significantly when on completion of trial of the suit, it proceeds to render an adjudication thereupon.

4. Dehors the above, a perusal of the impugned order recorded by the learned trial Court unveils qua the imminent reason prevailing upon it, standing anchored upon the pleadings respectively constituted in the plaint besides in the written statement, each by the plaintiffs and the defendant, also it stands gauged from the relevant record qua the learned trial Court proceeding to impute validation to the pleadings in the plaint despite the apposite issue(s) thereupon standing struck subsequent to its proceeding to record the impugned order, thereupon in the learned trial Court proceeding to analyze the worth of the contentious respective pleadings of the respective contestants also its imputing sanctity to the pleadings constituted in the plaint, whereas, it dispelling the sanctity of the pleadings constituted in the written

statement, despite no evidence standing adduced therebefore thereon, at the relevant stage, by either of the contesting parties, is a per se deprecatory exercise resorted to, by the learned trial Court. Even otherwise, with the application aforesaid, for the reasons aforestated being misconstituted therebefore also with the relief asked therein being analogous to the relief claimed by the plaintiff in the main suit, thereupon, also the impugned order stands ingrained with an inherent vice, emanating from the learned trial Court committing a gross illegality and impropriety comprised in its untenably deciding the claim in the suit, without asking for adduction of relevant evidence thereupon by the defendant, evidence whereof may ultimately constrain it to dismiss the suit, thereupon, the plaintiff would stand untenably/inchoately enriched also the defendant would be driven to launch obviable restitutory recovery proceedings for the recovery of the amount awarded as interim maintenance besides thereupon the aforesaid underlying object of the legislature in not clothing the Civil Court with jurisdiction to grant any ad interim maintenance amount would suffer frustration. Consequently, the instant petition is allowed and the impugned order is quashed and set aside. The learned trial Court is directed to conclude the trial of the suit within one year from today. However, it is made clear that any observations made hereinabove shall have no bearings on the merits of the case. Records be sent back forthwith. All pending applications also stand disposed of.

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

Fanki Ram …..Appellant.

Versus

State of H.P. …..Respondent.

Cr. Appeal No. 163 of 2007.
Date of Decision: 27th March, 2017.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 450 grams charas – the accused was tried and convicted by the Trial Court- held in appeal that the testimonies of prosecution witnesses are credible and confidence inspiring – independent witnesses have not supported the prosecution version- however, they admitted their signatures on the seizure memos and are estopped from denying the contents of the same – samples were connected to the contraband recovered – option was given to the accused to get his premises searched by Executive Magistrate or Gazetted Officer – however, the accused consented for search by the police- the prosecution case was proved and the accused was rightly convicted- appeal dismissed.(Para-9 to 13)

For the Appellant:	Mr. Yashveer Singh Rathore, Advocate.
For the Respondent:	Mr. R.S. Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed against the judgment rendered on 07.05.2007 by the learned Sessions Judge, Solan, H.P. in Sessions trial No.2-S/7 of 2007, whereby, the learned trial Court convicted the accused/appellant herein for his committing an offence punishable under Section 20-B of the Narcotic Drugs and Psychotropic Substances Act (hereinafter referred to as NDPS Act) and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs.10,000 and in default of payment of fine amount to further undergo rigorous imprisonment for a period of six months.

2. The facts relevant to decide the instant case are that on 4.9.2006, ASI Deva Nand along with other police officials of the C.I.A. staff had left Solan at about 2.30 p.m. and had gone to Kunihar on routine checking and detection of crime. When they reached at Kunihar bus stand, a secret information was received by ASI Deva Nand that Fanki Ram son Shri Balak Ram, resident of Village Jabal Jhamrot, Post Office, Koti, Tehsil Kasauli, keeps and sells charas in his house and if his house is checked charas in large quantity can be recovered. Finding the information reliable ASI Deva Nand recorded the reasons of belief and sent it to S.P. Solan through C. Ajay Kumar, which were received by S.P. Solan on the same day at 5.30 p.m.. Thereafter they proceeded towards the house of the accused and on the way two independent witnesses Pritam Singh, Up Pardhan and Om Parkash were associated and police party reached the house of accused where he was found present in his court yard. No person was present with him at that time. He was apprised of the reasons for search. Asi Deva Nand told him about the information and had asked him if he wanted his personal search to be effected before a Magistrate or a Gazetted Officer but he agreed to be searched by the police. His search was then effected by the police party after giving their personal search to the accused but nothing incriminating was found on his personal search and thereafter the search of the house was effected and during the search of the house, a plastic container on which word “mint” was written was found under the bed box which was kept in the main gallery. The container was taken out and opened. It was found containing charas in the forms of wicks. It was tested by smell by ASI Deva Nand and found it giving smell of charas and identification memo was prepared in this regard in the presence of both the witnesses. The weighing scale and weights were procured from the shop of one Sant Ram and the charas was weighed in presence of the witnesses and on weighment, it was found 450 grams. Two samples of 25 grams each were drawn and then were put into two separate empty cigarettes packets and sealed in cloth parcels separately and the remaining charas was also sealed in separate cloth parcel with same seal “K”. ASI Deva Nand also took sample impressions of the seal used, filled NCRB forms in triplicate and the case property was taken into possession in presence of the witnesses through recover memo. Consequently, an FIR was registered in the concerned police station. Thereafter, the Investigating Officer concerned completed the codel formalities.

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

4. The accused stood charged by the learned trial Court for his committing offence punishable under Section 20-B of the NDPS Act. In proof of the prosecution case, the prosecution examined 11 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court 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, recorded findings of conviction against the accused/appellant herein.

6. The appellant/convict stands aggrieved by the judgment of conviction recorded against him by the learned trial Court. The learned counsel appearing for the appellant/convict 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 warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the learned trial Court standing based on a mature and balanced appreciation by it of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The testimonies of the official witnesses are bereft of any vice of any inter se contradictions in their respective depositions qua the prosecution version comprised in their respective examinations-in-chief vis-a-vis their respective testimonies embodied in their respective cross-examinations. Also when their testimonies are shorn off any vice of any intra se contradictions vis-a-vis their respective depositions on oath, hence, constrains this Court to conclude qua their respective testimonies being both credible as well as inspiring.

10. Furthermore, even if, PW-1 one Om Prakash and PW-6 one Pritam Singh, both independent witnesses to the apposite proceedings which stood initiated and concluded at the relevant site, reneged from their respective previous statements recorded in writing, nonetheless the factum of theirs respectively reneging from their previous statements recorded in writing would not undermine the efficacy of the prosecution case qua its propagation qua recovery of contraband standing effectuated from the conscious and exclusive possession of the accused in the manner as enunciated in the apposite FIR borne on Ex. PW8/A. The reason for this Court omitting to belittle their creditworthiness rests upon the fact of both PW-1 and PW-6 admitting their signatures borne on memos Ex.PW1/A, Ex.PW1/B, Ex.PW1/C, Ex.PW1/D, Ex.PW1/E, Ex. PW1/F, and Ex.PW1/G. Both also admit their signatures occurring on bulk parcel, Ex. P-2. The effect of both PW-2 and PW-6 respectively admitting their signatures borne on Ex.PA, Ex.PB and Ex.PC besides respectively borne on sample parcel as well as bulk parcel, comprised respectively in Ex.P-1 and P2, is qua their depositions manifestative of theirs repelling besides ousting their previous statements recorded in writing, holding no worth, given the embodiment of the apt legal principle in Sections 91 and 92 of the Indian Evidence Act, qua theirs hence standing estopped to digress from the contents of the afore referred exhibits, preeminently when their respective signatures occurring thereon, stand admitted by both besides with a mandate standing foisted in the afore referred provisions of the Indian Evidence Act qua with proof emanating qua signatures of both existing thereon hence ex facie ipso facto constituting conclusive evidence in proof of the recitals recorded in the apposite memos, whereupon, this Court stands constrained to conclude qua dehors theirs reneging from their previous statements recorded in writing, yet for reasons aforesaid the recitals recorded therein standing rendered to stand conclusively proved by the prosecution. In sequel, with the depositions of the official witnesses acquiring corroborative vigour from hence the conclusively proven recitals of the apposite exhibits whereon both PW-1 and PW-6 admit theirs carrying their signatures, besides with the principle engrafted in Sections 91 and 92 of the Indian Evidence Act against the receipt of oral evidence contrary to the signatured recitals occurring in any document preponderantly when signatures of both PW-1 and PW-6 stand undenied by them, rendered them hence incapacitated to depose at variance or in digression to the recitals occurring in the apposite memos. Consequently, the effect of theirs reneging from their previous statements recorded in writing would not preclude this Court to undermine the efficacy of proof adduced by the prosecution qua the apposite recitals depicted in the apposite memos. In aftermath, this Court concludes with aplomb qua the prosecution succeeding in proving the factum of the genesis of the occurrence embodied in the apposite FIR borne on Ex.PW8/A.

11. Be that as it may, the prosecution was also under a solemn legal obligation to firmly connect the contraband as stood recovered from the purported exclusive and conscious possession of the accused at the site of occurrence under memo Ex.PW1/D with the sample parcel thereof as stood sent for analysis to the FSL concerned, whereon the latter on receiving the apposite sample(s) recorded its affirmative opinion, qua its contents, opinion whereof stands borne on Ex.PW7/D also the prosecution was enjoined to connect the opinion manifested in Ex.PW7/D vis-a-vis the sample parcels at the stage contemporaneous to their production in Court. Firm connectivity inter se, the case property recovered from the purported exclusive and conscious possession of the accused at the site of occurrence vis-a-vis the opinion recorded by the FSL concerned comprised in Ex.PW7/D stood comprised in the apposite road certificate

comprised in Ex.PW8/C, connectivity whereof for reasons ascribed hereinafter, hence, stands proven.

12. The investigating officer, had obtained reliable and credible information with visible upsurgings therein qua the accused/respondent holding in his premises some item of contraband. In sequel thereto, the Investigating Officer concerned formed a raiding party, whereupon, he proceeded to arrive at the house of the accused/convict. The Investigating Officer prepared consent memo comprised in Ex.PW1/A holding echoings therein qua the accused/convict holding a statutory right qua his premises standing searched by a Executive Magistrate or a Gazetted Officer also the recitals borne therein holding echoings qua in the event of the accused waiving his statutory right for his premises standing searched by a Executive Magistrate or a Gazetted Officer, thereupon, the accused communicating his consent to the Investigating Officer qua his premises standing searched by him in the presence of the relevant witnesses, whereupon, as unfolded therein the accused communicated his apposite consent qua his premises standing searched by the Investigating Officer, in sequel whereto, the relevant search of the premises stood conducted by the Investigating Officer leading to effectuation of recovery therefrom of 'charas' under the apposite recovery memo borne on Ex.PW1/D. The consent memo holding the aforesaid unfoldments stands signatured by the relevant witnesses thereto. Ex.PW1/D holds the signatures of the witnesses to the relevant recitals occurring therein predominantly qua the one displaying effectuation of recovery of charas weighing 450 grams by the Investigating Officer also his at the relevant site of its recovery preparing two sample parcels of 25 grams each besides his enclosing in a separate parcel the remaining bulk holding a weight of 400 grams. Also he proceeded to as unraveled by the apposite NCB form comprised in Ex.PW7/B, emboss thereon three seal impression(s) of english alphabet 'K', whereafter the afore referred exhibit unfolds qua the SHO resealing it with seal 'A'. Prior to the aforesaid effectuation of recovery of charas in the manner delineated in recovery memo Ex.PW1/D, the Investigating Officer concerned under memo Ex.PW1/B and Ex.PW1/C respectively permitted the accused/convict to hold personal search of the members of the raiding party in the presence of witnesses thereto also the Investigating Officer had under memo Ex.PW1/C held a *jama talashi* of the accused/convict.

13. Be that as it may, the relevant case property stood dispatched under road certificate borne on Ex.PW8/C to the FSL concerned, whereupon, the FSL concerned in its opinion comprised in Ex.PW7/D concluded qua the contents of the relevant parcel(s) sent to it for analysis, holding therewithin ingredients of charas also their exists intra se congruity inter se seal impression(s) borne on the relevant parcels, Ex. P-1 and P-2 vis-a-vis the seal impressions recited in the NCB form to stand embossed thereon, at the time contemporaneous to the Investigating Officer concerned effectuating recovery of charas. The description of seal impression(s) as stood embossed thereon at the earliest stage as unraveled in the apposite NCB form comprised in Ex.PW7/B, holds synonimity vis-a-vis the description of the seal impression(s) borne on the relevant parcels of charas, seal impression whereof depicted in specimen of seal impression(s) drawn on cloths Ex.PW11/A and Ex.PW7/A, ultimately, the report of the FSL concerned comprised in Ex.PW7/D , makes a disclosure qua the imperative congruity qua the description of seal impressions embossed on the relevant case property/parcels received at the laboratory concerned holding synonimity with the seal impression(s) reflected to be borne thereon prior thereto in recovery memo(s) comprised in Ex.PW1/D, NCB form comprised in Ex.PW7/B as also, on the road certificate, wherefrom it is befitting to conclude qua the prosecution succeeding in establishing the factum probandum of intra se connectivity qua the description(s) of seal impressions occurring on the relevant parcels at the stage whereat they stood received in the laboratory concerned. However, the aforesaid connectivity would not per se enhance any conclusion qua thereupon, the prosecution succeeding in establishing qua the relevant parcel, whereupon the FSL concerned recorded an opinion qua the contents held therewithin holding ingredients of charas holding connectivity with the one which stood recovered under the apposite recovery memo, unless at the material stage, qua the relevant case property standing produced before the learned trial Court, also, displaying an evident apt connectivity qua the relevant prima

dona factum. A thorough perusal of the testimony of PW-2, wheretowhom the case property stood shown by the learned PP unravels qua his making a marked explicit enunciation therein qua parcels Ex.P-1 and P-2 holding analogity with the relevant memo comprised in Ex.PW1/D, whereunder the recovery of the relevant item of contraband stood effectuated, thereupon the prosecution has succeeded in proving on all fronts its case to the fullest.

14. The learned counsel appearing for the accused/convict has contended with vigour qua the testimony of IO qua his receiving a secret information qua the accused holding charas in his premises standing contradicted by PW-2 and PW-3, whereupon, he concerts to draw leverage. However, the aforesaid contradictions would not unsettle the entire genesis of the prosecution case, anvilled upon the relevant connectivity for the reasons aforesaid standing unflichingly proven at all the relevant stages commencing from the storage of the case property in the malkhana concerned, its dispatch under the apposite R.C. to the FSL concerned also its retrieval from the latter place upto the police station concerned and ultimately at the stage of its production in Court, whereupon, reiteratedly, the charge against the accused stands proved..

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

16. Consequently, there is no merit in the instant appeal which is accordingly dismissed. The judgment impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

Balia & Others ….Appellants-Defendants

Versus

Ganga Ram ….Respondent-Plaintiff

Regular Second Appeal No.54 of 2007.
Date of decision:28.03.2017

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he alongwith his brother is in settled possession of the suit land, which was given to them by S- defendant No.1 is stated to have purchased part of the suit land from S but the same is paper transaction – possession was not delivered to the purchaser – the defendants started interfering in the suit land – hence, the suit was filed – the suit was dismissed by the Trial Court – an appeal was filed, which was allowed- held in second appeal thatS had filed a civil suit against the plaintiff and his brother in which plaintiff and his brother were held to be in possession of the suit land - the sale deed was executed before the final judgment was delivered in the suit – S had no authority to execute the sale deed – the Appellate Court had rightly held that the plaintiff was in possession and was entitled to protect his possession – appeal dismissed.(Para-16 to 29)

Case referred:

Maria Margarida Sequeira Fernandes and Others vs. Erasmo Jack De Sequeira (Dead) through LRs., (2012)5 SCC 370

For the Appellants: Mr.Neeraj Gupta, Advocate.
For Respondent: Mr.J.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 02.11.2006, passed by learned District Judge, Shimla in Civil Appeal No.50-S/13 of 2006, reversing the judgment and decree dated 03.05.2006 passed by learned Civil Judge(Senior Division), Theog, District Shimla, H.P., whereby suit for permanent prohibitory injunction having been filed by the plaintiff-respondent *(hereinafter referred to as the `plaintiff')* was dismissed, however, it was ordered that the plaintiff and his brother be not evicted therefrom except in due course of law.

2. Briefly stated facts, as emerged from the record, are that plaintiff filed a suit for permanent prohibitory injunction praying therein to restrain the appellants-defendants *(hereinafter referred to as `defendants')* from dispossessing him as well as raising any construction upon the land comprised in Khasra No.52, measuring 0-07-60 hectares, situated in Chak Sainj, Pargana Jais, Tehsil Theog, District Shimla, H.P. *(hereinafter referred to as the `suit land').* It is alleged by the plaintiff that he alongwith his brother Budhi Ram is in settled possession of the suit land for the last 22 years, which was given to them in family arrangement by their mother; namely; Smt.Shobni. Plaintiff further claimed that land in question was given to them by Smt.Shobni since she was being maintained by them. Plaintiff further stated that Smt.Shobni had filed a Civil Suit bearing RBT No.54-1 of 2004/2003 for injunction against him as well as his brother, which was dismissed by Civil Judge (Junior Division), Chopal Camp at Theog on 14.10.2004. As per plaintiff, he alongwith his brother was found to be in possession of the suit land in the aforesaid Civil Suit having been filed by Smt.Shobni. Plaintiff further averred that defendant No.1 is alleged to have purchased a part of the suit land from Smt.Shobni and mutation was also attested on 16.09.2004 vide mutation No.98, but, said sale was a paper transaction as no possession was ever handed over to defendant No.1 because plaintiff and his brother were in settled possession of the suit land. Plaintiff further claimed that since defendant No.1 through defendants No.2 and 3 started interfering in the suit land, he was compelled to file suit, as described hereinabove, seeking therein relief of permanent prohibitory as well as mandatory injunction.

3. Defendants, by way of detailed written statement, refuted the aforesaid claim having been put forth by the plaintiff and stated that plaintiff as well as his brother had no right, title or interest over the suit land and they are also not in possession of the suit land. Defendants further averred that Smt.Shobni was owner of the suit land and she had sold the entire land to different persons including defendant No.1, who had also purchased suit land vide registered sale deed dated 25.08.2004 for a consideration of Rs.15,000/-. Defendants further claimed that on the basis of aforesaid sale deed, mutation was attested in favour of defendant No.1 and he was also given possession. In nutshell, defendant No.1 claimed himself to be bonafide purchaser for consideration. Defendants further averred that construction was started in the month of April, 2005 and thereafter pillars were constructed and huge material was collected by defendant No.1 for raising construction and at no point of time objection, if any, was raised to the construction by the plaintiff and as such he has every right to raise construction over the suit land. Accordingly, he prayed for dismissal of the suit.

4. Learned trial Court on the basis of pleadings of the parties framed the following issues:-

"1. Whether plaintiff is entitled for relief of permanent injunction? OPP.

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

3. Whether defendant No.1 is bonafide purchaser for consideration? OPD."

5. Subsequently, learned trial Court, on the basis of pleadings as well as evidence adduced on record by respective parties, dismissed the suit of the plaintiff, however, ordered that the plaintiff as well as his brother be not evicted from the suit land except in accordance with law.

6. Plaintiff Ganga Ram, being aggrieved and dis-satisfied with the dismissal of his suit, preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned District Judge, Shimla, which came to be registered as Civil Appeal No.50-S/13 of 2006. Learned District Judge accepted the appeal having been filed by the plaintiff and held him entitled to relief of permanent injunction restraining the defendants from interfering in possession of the plaintiff over the suit land till they are lawfully evicted.

7. In the aforesaid background, defendants approached this Court in the instant proceedings praying therein for setting aside the judgment and decree passed by the learned first appellate Court.

8. This Court admitted the instant appeal on the following substantial questions of law:-

> *"1. When the Defendant-Appellant acquired title to the suit property from rightful title holder through registered sale deed, which document recited the delivery of possession of the land sold, was the lower appellate court justified in granting the relief of injunction to the plaintiff, who had not legal right over the property, especially when the plaintiff himself was deriving the right of possession from the same owner?*
>
> *2. Was not it necessary for the plaintiff to challenge the sale deed in favour of defendant in the suit for prohibitory and mandatory injunction when the title was lawfully vested in defendant? Have not the entries in revenue record lost their presumption of truth on account of recital in the deed of sale, disentitling the plaintiff to seek injunction against the true owner, especially when there was no cogent evidence justifying the claim of the plaintiff to be in settled possession?*
>
> *3. When the plaintiff has not arrayed his brother namely Shri Budhi Ram as party to the suit have not the courts below acted in erroneous and perverse manner recorded findings in favour of plaintiff and his brother to be in possession by wrongly placing reliance on the entries in the revenue record, which were not proved to be recorded in accordance with law and also relying on Ex.P-1 which had no effect of the controversy in question?"*

9. Mr.Neeraj Gupta, learned counsel appearing for the appellants-defendants, vehemently argued that impugned judgment and decree passed by learned first appellate Court are highly unjust, illegal, arbitrary, against law and facts and as such are liable to be set aside. While referring to the aforesaid impugned judgment having been passed by learned first appellate Court, Mr.Gupta contended that learned lower appellate Court committed grave illegality and irregularity while reversing the well reasoned findings of the learned trial Court, whereby suit having been filed by the plaintiff-respondent was dismissed in toto. Mr.Gupta, further contended that entries existing in the revenue record were assailed by the defendants-appellants because same were without any basis.

10. Mr.Gupta further stated that findings of learned lower appellate Court below that the suit land was in possession of the plaintiff-respondent are apparently erroneous and perverse, rather, contrary to the recital made in the sale deed as well as in the mutation entered and attested in favour of defendant No.1. Mr.Gupta contended that title of the property vested in defendant No.1 by virtue of sale deed and as such suit filed by the plaintiff-respondent without there being any challenge to sale made by Smt.Shobni was not competent and as such same was rightly dismissed by learned trial Court below.

11. While concluding his arguments, Mr.Gupta, strenuously argued that bare perusal of pleadings as well as evidence, be it ocular or documentary available on record, suggests that both the Courts below misread and misconstrued the same and wrongly arrived at conclusion that possession of disputed property denoted by Khasra No.52/2/3, admittedly, purchased by defendant No.1 is also with the plaintiff. Mr.Gupta further contended that learned trial Court rightly refused injunction to the plaintiff-respondent because he was not having any

title to the suit property, but Court below wrongly placed reliance upon the judgment and decree Ex.P-1, while concluding that plaintiff-respondent is in possession of the suit land. Mr.Gupta, contended that since defendant successfully proved by way of documentary evidence on record that he is in possession of the suit land, there was no occasion for Courts below to have recorded arbitrary, illegal, erroneous and perverse findings that the plaintiff and his brother Budhi Ram are in possession of the suit land. In the aforesaid background, Mr.Gupta prayed for dismissal of the suit.

12. Mr.J.S. Chandel, learned counsel appearing for the respondent-plaintiff, while supporting the impugned judgment and decree passed by learned first appellate Court, vehemently argued that there is no illegality and infirmity in the same, rather, the same is based upon correct appreciation of evidence adduced on record by the respective parties. With a view to refute aforesaid contentions having been made by Mr.Neeraj Gupta, learned counsel representing the appellants, Mr.Chandel made this Court to travel through findings returned by the learned trial Court, wherein learned trial Court, while dismissing the suit of the plaintiff, has categorically held that plaintiff and his brother are in possession of the suit land.

13. Mr.Chandel further contended that it is an admitted fact that decision of Civil Suit RBT No.54-1/2004/2003 came to be passed on 14.10.2004, whereas sale deed Ex.DA was executed in favour of defendant No.1 on 25.08.2004. He further contended that in the aforesaid litigation, plaintiff and his brother were found to be in possession of the suit land. Accordingly, learned trial Court, though dismissed the suit of the plaintiff, but categorically observed that it was bounden duty of defendant No.1 to prove as to when and how Smt.Shobni came in possession and delivered possession to him on execution of sale deed Ex.DA.

14. Mr.Chandel further invited the attention of this Court to Ex.P-1, copy of *Misalhaquiat* for the year 1998-99, to demonstrate that name of plaintiff and his brother appeared in column of possession and there is no documentary evidence led on record by the defendants suggestive of the fact that the aforesaid entry, validly showing the plaintiff to be owner in possession of the suit land, was ever rectified or changed in accordance with law at the behest of defendants. Mr.Chandel further contended that though there is a mention of delivery of possession by Mrs.Shobni in favour of vendee in the sale deed Ex.DA, but mere recital in the sale deed was not sufficient to prove the possession on the spot because plaintiff by placing on record Ex.P-2 successfully proved on record that possession of the suit land was with him prior to sale made by Mrs.Shobni in favour of defendants. Mr.Chandel, while referring to the impugned judgment passed by learned first appellate Court, forcefully contended that since plaintiff successfully proved on record his possession over the suit land, learned trial Court ought to have granted decree for permanent prohibitory injunction against the defendants.

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

16. During proceedings of the case, this Court had an occasion to peruse the pleadings, evidence on record as well as submissions having been made by the learned counsel representing the parties, perusal whereof clearly suggests that Smt.Shobni had appointed DW-2 Sh.Het Ram as her Power of Attorney, who allegedly sold the suit land vide sale deed Ex.DA in favour of defendants. But perusal of copy of judgment Ex.P-2 clearly suggests that Smt.Shobni had filed Civil Suit bearing RBT No.54-1 of 2004/2003 against the plaintiff as well as his brother, claiming herself to be exclusive owner in possession of the land denoted by Khata No.108, Khatauni Nos. 142 and 143, Khasra Nos.52 (subject matter of instant suit) 56, 81, 158, 159, 160, 191, 607, 609 and 165, Kitta 10, measuring 1-35-13 hectares, situated in Chak Sainhj, Tehsil Theog, District Shimla, which came to be dismissed on 14.10.2004. In the aforesaid suit, she claimed herself to be exclusive owner in possession of the suit land for the last 20 years.

17. Most importantly, in the suit, as referred hereinabove, Smt.Shobni also stated that during settlement operation defendants *(present plaintiff and his brother Budhi Ram)* changed the entry in the column of possession without the consent and permission of the plaintiff because she never parted with legal possession at any time nor gave suit land to the defendants

exclusively for cultivation. Civil Court, while hearing Civil Suit bearing RBT No.54-1 of 2004/2003, framed following issues on the basis of pleadings of the parties:-

"1. Whether the plaintiff is the owner in possession of the suit land? OPP.

2. Whether the defendants are interfering with the suit land without any right, title or interest? OPP.

3. Relief."

18. However, fact remains that aforesaid issues were decided against Smt.Shobni (plaintiff therein) and she was not held to be owner in possession of the suit land, which is also the subject matter of the present case. In the aforesaid suit, defendants therein (plaintiff and his brother herein) were held to be in possession of the suit land. It is also undisputed that sale deed Ex.DA, allegedly made in favour of defendants at the behest of Smt. Shobni, was executed on 25.8.2004 i.e. before final judgment in Civil Suit RBT No.54-1 of 2004/2003. This Court sees substantial force in the arguments having been made by Shri J.S. Chandel, learned counsel representing the respondent-plaintiff, that once vide judgment dated 14.10.2004, Ex.P-2, plaintiff and his brother were held to be in possession of the suit land, how possession, if any, qua the suit land, could be delivered to defendants as recited in sale deed Ex.DA.

19. Needless to say that it was incumbent upon defendant No.1 to prove on record by leading cogent and convincing evidence that at the time of execution of sale deed dated 25.8.2004, Smt.Shobni was owner in possession of the suit land and she had delivered the same to him at the time of execution of sale deed Ex.DA. Though defendant No.1, with a view to prove his possession over the suit land, examined DW-1 Balia and DW-2 Het Ram, but, careful perusal of their statements made before the Court nowhere suggests that defendant was able to prove on record that at the time of execution of sale deed dated 25.8.2004 Smt.Shobni was owner in possession of the suit land. There is no evidence led on record by defendants to establish that at the time of execution of sale deed Ex.DA, Smt.Shobni was lawful owner of the land and as such recital made in the sale deed that defendant was put to possession is of no consequence. DW-1 Balia simply stated that defendant purchased land from Smt.Shobni and he had seen the revenue record that he purchased the land, but he further stated that possession was that of Het Ram, which is contrary to record. Similarly, Het Ram, DW-2 son of Smt.Shobni and brother of plaintiff also stated that he had sold suit land vide sale deed Ex.DA to defendant No.1. He also admitted that suit was earlier filed for injunction against Budhi Ram and his brother and same was dismissed. Most importantly, aforesaid witness stated that when he sold the land, he did not see the possession, as recorded in revenue record. True it is that DW-3 Budhi Ram and DW-4 Rama Nand, marginal witnesses, proved sale deed Ex.DA and similarly there is a reference of delivery of possession in favour of the vendor, but recital in sale deed may not be sufficient to prove actual possession over the land.

20. Mere recital in the sale deed that possession was delivered at the time of execution of sale deed was not sufficient to conclude that vendor was in possession of the suit land at the time of executing sale deed, especially, in view of specific findings returned by learned trial Court in Civil Suit No.RBT 54-1 of 2004/2003, whereby, admittedly, plaintiff there (Smt.Shobni Devi) was not held to be owner in possession vide judgment dated 14.10.2004. To the contrary, defendants therein (plaintiff herein and his brother) were held to be in possession of the suit land and as such it is not understood how learned trial Court on the basis of sale deed Ex.DA dated 25.8.2004 could conclude that defendant was put into possession pursuant to aforesaid sale deed.

21. At the cost of repetition, it may be observed that though by way of placing reliance on sale deed Ex.DA defendant No.1 made an attempt to prove on record that he acquired title of the property from Smt.Shobni, but as has been discussed above, there is no evidence led on record by defendant suggestive of the fact that at the time of execution of sale deed dated 25.8.2004 Smt.Shobni had authority to execute sale deed being lawful owner of the property. Apart from above, there is no evidence, as has been discussed above, suggestive of the fact that

pursuant to sale deed Ex.DA defendant No.1 put into possession by Smt.Shobni because admittedly at the time of execution of the aforesaid sale deed, Civil Suit RBT No.54-1 of 2004/2003 was pending before the Court having been filed by Smt.Shobni, wherein admittedly she was not held to be owner in possession of the suit land vide judgment dated 14.10.2004.

22. True, it is that ordinarily no injunction can be granted against true owner, but in the instant case defendant admittedly failed to prove on record that he became true owner pursuant to sale deed Ex.DA dated 25.08.2004 because, as per own case of defendant, he purchased suit land from Smt.Shobni Devi vide aforesaid sale deed, who failed to prove her title before the competent Court of law in Civil Suit RBT No.54-1 of 2004/2003. Once the title of original vendor; namely; Smt.Shobni was under clout in aforesaid Civil Suit, there was no occasion for her to make sale of the suit land in favour of defendant No.1 and moreover she was not held to be owner in possession of the suit land in those proceedings. Hence, this Court sees substantial force in the arguments of Shri J.S. Chandel, learned counsel appearing for the respondent, that once Smt.Shobni was not held to be owner in possession of the land how defendant No.1 can claim to have title qua the suit land on the basis of sale deed Ex.DA.

23. Similarly, this Court sees no force in the contention of Shri Neeraj Gupta that while seeking relief for prohibitory and mandatory injunction against defendant qua the suit land, it was incumbent upon the plaintiff to lay challenge to the sale deed made in favour of defendant because it is none of the case of the plaintiffs that they are owners in possession of the suit land, rather their simplicitor case is that they are in possession over the suit land for so many years and they cannot be evicted forcibly, save and except, in accordance with law.

24. Moreover, there is nothing in pleadings or in evidence led on record by plaintiff, suggestive of the fact that plaintiff disputed the title of the defendant over the suit property. Plaintiff, while setting up a case before the trial Court, stated that defendant alleged to have purchased part of the suit land from Smt.Shobni and to that effect mutation has been attested vide mutation No.98 dated 20.8.2004, but, such transaction is merely paper transaction because no possession was ever transferred and since then the same is with the plaintiff and his brother. Undoubtedly, there is recital in the sale deed with regard to delivery of possession of the suit land, but, as has been observed above, same could not be termed sufficient for holding that defendant was in actual physical possession of the suit land. Ex.P-1, copy of Jamabandi for the year 1998-99, clearly suggests that names of plaintiff and his brother are recorded in column of possession and as such entry could not be changed merely on the basis of sale deed Ex.DA, rather, defendants ought to have filed appropriate proceedings in appropriate Court of law seeking possession of the suit land on the basis of sale deed Ex.DA.

25. True it is, that plaintiff has not arrayed his brother, namely, Budhi Ram, as party in the suit but perusal of Ex.P-1 clearly proves on record that name of Budhi Ram is also recorded alongwith his brother, who happens to be plaintiff in the present case, in the column of possession. Similarly, perusal of Ex.P-2 i.e. judgment dated 14.10.2004 passed by Civil Court in suit having been filed by Smt.Shobni also proves on record that Shri Buidhi Ram was in possession of the suit land alongwith his brother i.e. plaintiff and as such this Court sees no illegality and infirmity in the findings of Courts below, whereby Shri Budhi Ram has also been held to be in possession of the suit land along with his brother; namely; Ganga Ram.

26. Leaving everything aside, it also emerge from the judgment passed by learned trial Court in instant suit having been filed by the plaintiff that the learned Court below while declining the decree of permanent prohibitory injunction in favour of plaintiff held him to be in possession of the suit land. But, interestingly no challenge, whatsoever, was ever laid to the aforesaid findings recorded by the learned trial Court by the defendants, rather, aforesaid judgment dated 03.05.2006 passed by trial Court was accepted by the defendant without any demur and as such findings with regard to possession of the plaintiff over the suit land attained finality. Substantial questions are answered accordingly.

27. After carefully examining the pleadings as well as record, this Court has no hesitation to conclude that learned first appellate Court appreciated the evidence in its right perspective and has rightly come to the conclusion that once plaintiff has successfully proved on record that he is in possession of the suit land, relief of injunction ought to have been granted against the defendant, especially, when defendant who claimed himself to be true owner, failed to prove on record that at the time of execution of sale deed Ex.DA, original vendor; namely; Smt.Shobni Devi was the owner in possession of the suit land. Otherwise also it is well settled that nobody ought to be condemned unheard and a person in settled possession will not be dispossessed except by due process of law.

28. In this regard reliance is placed upon ***Maria Margarida Sequeira Fernandes and Others vs. Erasmo Jack De Sequeira (Dead) through LRs., (2012)5 SCC 370,*** wherein the Hon'ble Apex Court has held as under:-

> *"61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.*
>
> *62. Possession is an incidence of ownership and can be transferred by the owner of an immovable property to another such as in a mortgage or lease. A licensee holds possession on behalf of the owner.*
>
> *63. Possession is important when there are no title documents and other relevant records before the Court, but, once the documents and records of title come before the Court, it is the title which has to be looked at first and due weightage be given to it. Possession cannot be considered in vacuum.*
>
> *64. There is a presumption that possession of a person, other than the owner, if at all it is to be called possession, is permissive on behalf of the title-holder. Further, possession of the past is one thing, and the right to remain or continue in future is another thing. It is the latter which is usually more in controversy than the former, and it is the latter which has seen much abuse and misuse before the Courts.*
>
> *65. A suit can be filed by the title holder for recovery of possession or it can be one for ejectment of an ex-lessee or for mandatory injunction requiring a person to remove himself or it can be a suit under Section 6 of the Specific Relief Act to recover possession.*
>
> *Due process of Law*
>
> *79. Due process of law means that nobody ought to be condemned unheard. The due process of law means a person in settled possession will not be dispossessed except by due process of law. Due process means an opportunity to the defendant to file pleadings including written statement and documents before the Court of law. It does not mean the whole trial. Due process of law is satisfied the moment rights of the parties are adjudicated upon by a competent Court."*

29. Exposition of law, as referred hereinabove, suggests that due process of law is satisfied the moment rights of the parties are adjudicated by a competent Court. It further suggests that ejectment from settled possession can only be ordered by recourse to a Court of law and person in settled possession cannot be ejected without a Court of law having adjudicated upon his rights qua the true owner. But, in the instant case, where the plaintiff, who had filed suit for prohibitory injunction, though was denied decree of injunction by trial Court below but was held to be in possession of suit land. Court below, while holding plaintiff to be in possession of suit land, further directed that he be evicted in accordance with law. Aforesaid findings qua possession as well as directions with regard to eviction in accordance with law were never challenged by the appellants-defendants in any of the proceedings. Hence, this Court sees no illegality and infirmity in the findings of learned Court below.

30. In view of the detailed discussion made hereinabove, this appeal fails and is dismissed accordingly. The judgment passed by the learned first appellate Court below is upheld

and that of the learned trial Court is quashed and set aside. There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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

Ashok Kumar ....Petitioner.

Versus

Social Mutual Benefits Company Ltd. ....Respondent.

Civil Revision No. 123 of 2010.
Decided on: 29th March, 2017

Code of Civil Procedure, 1908- Order 21 Rule 37- Petitioner/judgment debtor was ordered to be detained in civil imprisonment for a period of two months- aggrieved from the order, the present revision petition has been filed – held that the judgment debtor can be ordered to be detained in civil imprisonment on service of show cause notice to him and after giving an opportunity of being heard- judgment debtor pleaded that he is a man of no means and is not in a position to satisfy the decree – there is no evidence that judgment debtor had disposed of his property after institution of the suit or had neglected to pay the decretal amount intentionally and deliberately – merely because judgment debtor does not have any movable and immovable property is not sufficient to detain him – order set aside. (Para- 7 to 12)

For the petitioners : Mr. Vishal Bindra, Advocate.
For the Respondent : Mr. Karan Singh, Advocate

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Challenge herein is to the order Annexure P-2, passed in an application registered as CMA No. 209/6 of 2010 filed in Execution Petition No.22/10 of 2009/08 by learned Civil Judge (Senior Division) Court No.1, Paonta Sahib whereby the application has been allowed and the petitioner, hereinafter referred to as the judgment debtor has been ordered to be detained in civil imprisonment for two months.

2. The legality and validity of the impugned order has been questioned in this petition on several grounds, however, mainly that the same is contrary to the provisions contained under Order 21 Rule 37 and also Section 51 of the Code of Civil Procedure.

3. Mr. Vishal Bindra, Advocate learned counsel representing the petitioner has urged that no doubt the order qua detention of the judgment debtor, if he fails to satisfy the decree, can always be passed under Order 21 Rule 37 of the Code of Civil Procedure, however, such power is controlled by the proviso to Section 51 of the Code of Civil Procedure and on finding that the petitioner despite having sufficient movable or immovable property and even was a man of means, failed to satisfy the decree.

4. Mr. Karan Singh Advocate, learned counsel representing the respondent, hereinafter referred to as the decree holder submits that in view of the own admission of the judgment debtor in reply to the application that by way of his earning he is arranging for his both ends meet and also the expenses required for his medical treatment itself demonstrates that he has source of income and as such could have discharged his liability under the decree sought to be executed. Also that prayer for adjournment of the execution petition for payment of the decretal amount can be taken to arrive at a conclusion that he was in a position to satisfy the

decree, however, to the reasons best known to him failed to do so. It has, therefore, been urged that learned trial Court has rightly ordered his detention in Civil Imprisonment.

5. Before coming to the claims and counter claims as aforesaid, it is desirable to take note of the provisions contained under Order 21 Rule 37 of the Cove of Civil Procedure, which read as follows:

> **"37**. **Discretionary power to permit judgment-debtor to show cause against detention in prison**.- (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment debtor who is liable to be arrested in pursuance of the application, the Court shall, instead of issuing a warrant for his arrest, issue a notice calling upon on him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison:
>
> Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.
>
> (2) Where appearance is not made in obedience to the notice, the Court shall, if the decree holder so requires, issue a warrant for the arrest of the judgment debtor."

6. The other provision relevant in the present controversy finds mentioned in Section 51 of the Code of Civil Procedure, the same also reads as follows:

> **"51. Powers of Court to enforce execution.-** Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree holder, order execution of the decree—

(a) by delivery of any property specifically decreed;

(b) by attachment and sale or by sale without attachment of any property;

(c) by arrest and detention in prison for such period not exceeding the period specified in section 58, where arrest and detention is permissible under that section;

(d) by appointing a receiver; or

(e) in such other manner as the nature of the relief granted may require:

> Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—
>
> (a) that the judgment debtor, with the object or effect of obstructing or delaying the execution of the decree,—
>
> (i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or
>
> (ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or
>
> (b) that the judgment debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or
>
> (c) that the decree is for a sum for which the judgment debtor was bound in a fiduciary capacity to account.
>
> Explanation : In the calculation of the means of the judgment debtor for the purposes of clause (b), there shall be left out of account any property which, by

> or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree."

7. In terms of the provisions contained under Order 21 Rule 37 CPC supra the judgment debtor can be ordered to be detained in civil imprisonment in connection with the execution of decree on service of show cause notice to him and also affording him opportunity of being heard, if in the given facts and circumstances it is deemed fit and proper to do so. In a case of money decree, in terms of the proviso to Section 51 CPC, the detention of judgment debtor during execution proceedings can be ordered if the Court is satisfied that the judgment debtor with a view to obstruct or delay the execution of the decree is likely to abscond or leave the local limits of the jurisdiction of the Court or had concealed and removed any part of his property after institution of the suit or committed other act of bad faith in relation to his property or irrespective of having means to pay the decretal amount or substantial part thereof, he refused or neglected to pay the same.

8. Now coming to the case in hand, the application filed with a prayer to detain the judgment debtor in civil imprisonment in relation to the execution of the decree is consisting of one para, which reads as follows:-

> " That the JD No.1 is delaying the payments since then at one or the other pretext and is not making the payments of decretal amount and it has become very difficult to realize the decretal amount as he does not possess movable and immovable property because the DH has made tireless affords to get the details of his property but all in vain, hence this application. An affidavit is attached."

9. In reply thereto the stand of the judgment debtor is that he is a man having no means nor any movable or immovable property hence on account of his poor financial condition not in a position to satisfy the decree. The reply to this application has weighed heavily with learned trial Court while arriving at a conclusion that the judgment debtor as per his own admission has no movable or immovable property, hence in its opinion he deliberately and intentionally failed to satisfy the decree. Learned Trial Judge has also noticed from the record that the stand of the judgment debtor right from the very beginning is that he had not raised loan from the decree holder nor executed any document hence not liable to pay the suit amount. The defence of the defendant in the written statement as such has also been used against him while passing the impugned order. As a matter of fact, what was the defence of the defendant in the written statement should have not been taken into consideration during the execution proceedings and the application as such was required to be decided in view of the pleadings and also the provisions contained under order 21 Rule 37 and Section 51 of the Code of Civil Procedure. When according to Decree Holder itself the judgment debtor does not possess movable and immovable property, it is not possible to realize the decretal amount from him. Therefore, the present is not a case where the judgment debtor either disposed of his property after institution of the suit or neglected to pay the decretal amount intentionally and deliberately.

10. As a matter of fact in order to seek the detention of the judgment debtor in imprisonment, the plaintiff was required to plead and prove its case in terms of the provisions contained under Order 21 Rule 37 read with Section 51 CPC. Merely that the judgment debtor does not have any movable and immovable property he could have not been ordered to be detained in imprisonment.

11. True it is that on behalf of the judgment debtor time was sought for payment of decretal amount on the very first day i.e. 29.9.2009 and in reply to the application, his defence was that he anyhow or other is earning his livelihood and arranging the expense required for his medical treatment by way of working as labourer. However, on the basis thereof also it cannot be said that he is a man of means or that he has neglected to pay the decretal amount intentionally and deliberately.

12. In view of the above, the impugned order is not legally and factually sustainable and the same as such is quashed and set aside. The decree holder, however, is at liberty to take

appropriate steps including filing of an application for detention of the judgment debtor in civil imprisonment to ensure that the decree is satisfied, however, in the light of the observations hereinabove and in accordance with law. The petition is accordingly allowed and stands disposed of.

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

Dharam Chand .....Petitioner.
Versus
State of H.P ....Respondent.

Cr. Revision No. 139 of 2010
Decided on : 29.3.2017

Indian Penal Code, 1860- Section 326 and 506- Complainant and accused are residing in the same building – the room of the accused is above the room of the complainant - complainant noticed that water was dripping from the room of the accused , which was falling on her bed – the complainant went to the room of the accused to complain about this fact- the accused started abusing her – her husband came on the spot – the accused took out a knife and stabbed the husband of the complainant – the accused was tried and convicted for the commission of the offence punishable under Section 326 of IPC – an appeal was preferred, which was dismissed – held in revision that medical evidence proved the injuries – the statement of accused was not recorded prior to recovery and the recovery is not admissible – there are contradictions in the statements of PW-2 and PW-6- report of the FSL did not say that the blood found on the knife belonged to the accused – the possibility of sustaining injury by falling upon nails cannot be ruled out – the Courts had wrongly convicted the accused – appeal allowed – judgments of the Courts set aside- accused acquitted of the offences charged. (Para-9 to 18)

For the Petitioner: Mr. Atul Jhingan, Advocate.
For the Respondent: Mr. R.K Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant revision petition stands directed against the impugned judgment of 28.4.2010 rendered by the learned Additional Sessions Judge, FTC, Kullu in Criminal Appeal No. 07/2010, whereby he affirmed the judgment of 20.1.2010 rendered by the learned Judicial Magistrate, 1st Class, Manali, District Kullu, H.P. in Criminal Case No. 48-1/09: 46-II/09 whereupon the petitioner herein (hereinafter referred to as "accused") stood convicted besides sentenced for his committing an offence punishable under Section 326 of IPC.

2. Brief facts of the case are that on 5.11.2008 at 8 a.m. complainant Pawna Devi, her husband Chunni Lal and nephew Kuldeep were present in the room of the house. In the upper story of the room of the house of the complainant, her brother-in-law (Jeth)/accused also resides alongwith his family. On the draining of water from the upper story of the room in which the accused alongwith his family resides, the complainant went upside and informed the accused with regard to the falling of water on her bed. On this accused started abusing her. The complainant came out to the verandah of the house. The husband of the complainant also arrived there. Accused in presence of Kuldip hit Chunni Lal with knife in his stomach and also threatened him to do away with his life and fled away. The injured thereafter was shifted to Mission Hospital, Manali for medical treatment. On the same day at 8.30 a.m. the complainant

reported the matter to the police of Police Station, Manali through telephone. Rapat No. 15(a) was registered. After completing all codal formalities and on conclusion of the investigation into the offence by the investigating Officer, allegedly committed by the accused challan was prepared and filed in the Court

3. The accused stood charged by the learned trial Court for his committing offence punishable under Sections 326 and 506 IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 9 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded wherein he pleaded innocence and claimed false implication. In defence he did not choose to lead any evidence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal qua the accused for his committing an offence punishable under Section 506 of I.P.C however it returned findings of conviction qua the accused for his committing an offence punishable under Section 326 of IPC.

6. The learned counsel appearing for the accused has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court, findings whereof stood affirmed by the learned Appellate Court, standing not based on a proper appreciation of evidence on record rather theirs standing sequelled by gross mis-appreciation of the relevant material on record by both the Courts below. Hence he contends qua the concurrently recorded findings of conviction warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of acquittal.

7. The learned Deputy Advocate General, has with considerable force and vigor contended qua the findings of conviction concurrently recorded by both the learned Courts below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference rather meriting vindication.

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

9. In the alleged occurrence, wherein the prosecution ascribes a penal ascription qua the accused committing an offence punishable under Section 326 of I.P.C, the victim sustained injuries borne on Ex. PW-1/A proven by PW-1.

10. With PW-1 (Dr. Philip Alexander) making underscorings in his testification qua the injuries embodied in Ex. PW-1/A being sequel-able by user of a shape edged weapon also with proven efficacious recovery of knife (Ex.P-1) under memo Ex.PW-2/B, ultimately with the injured/victim and the complainant both with intra-se corroboration testifying in consonance with the recitals borne in the apposite FIR, thereupon the verdict(s) concurrently recorded upon the accused are not amenable to a conclusion qua theirs warranting any reversal.

11. Be that, as it may, the prosecution was enjoined to prove the factum of the injuries borne on Ex.PW-1/A standing, as deposed with utmost unison by both PWs 4 (Chunni Lal) and 6 (Smt. Pawna Devi), caused by user by the accused, of knife (Ex.P-1), upon the abdomen of the victim, recovery whereof stood effectuated under memo Ex.PW-2/B besides also the prosecution was enjoined to prove qua the aforesaid recovery memo qua the purported weapon of offence holding the paramount statutory virtue of admissibility besides relevancy. In determining the aforesaid facet, the Investigating Officer concerned stood enjoined with a dire legal necessity, to, prior to his effectuating recovery of weapon of offence, his during the course of holding the accused to custodial interrogation, his recording the disclosure statement of the accused, holding unfoldments therein qua the place of its concealment or hiding by him, necessity whereof stands cornered within the domain of Section 27 of the Indian Evidence Act, 1872, provisions whereof stand extracted hereinafter also therein it stands propounded qua thereupon an admissible besides a relevant custodial confessional statement of accused assuredly making its emergence, in sequel whereto the subsequent recovery of the weapon of

offence, at the instance of the accused would hold immense evidentiary clout, contrarily when without preceding thereto, the apposite statutorily warranted custodial confessional disclosure statement of the accused remains unrecorded, thereupon any bald recovery of any weapon of offence at the instance of the accused by the investigating Officer would be hence wholly naked nor would it be construable to be an admissible besides a relevant piece of incriminatory evidence vis-à-vis the accused, significantly when the mandate of law warrants effectuation of the relevant recovery at the instance of the accused not under a composite recovery memo rather warrants recording prior thereto an admissible custodial disclosure statement of the accused. In other words, the recording of a disclosure statement of the accused by the Investigating officer prior his effectuating any "recovery" at the instance of the accused, is preemptory, its embodying the custodial confessional statement of the accused, omission to record whereof renders inconsequential besides inadmissible any recovery under a naked bald recovery memo.

> "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 proven."

12. Hereat, tritely with the Investigating Officer concerned prior to his effectuating recovery of weapon of offence, not recording the apt custodial admissible disclosure statement of the accused renders the indispensable canon held within the domain of Section 27 of the Indian Evidence Act qua the accused prior to his facilitating the Investigating Officer to effectuate recovery of the purported weapon of offence, his making an admissible relevant custodial confessional statement, remains wholly un-satiated hence rendering recovery, if any, at the instance of the accused, of the purported weapon of offence, to hold no probative vigor nor also it can be concluded qua the prosecution thereupon proving qua "knife" with purported user whereof injuries stood sustained by the victim standing used thereon by the accused.

13. Also complainant(PW-6) and Kuldeep (PW-2) in their previous statements recorded in writing make echoings qua the effectuation of the relevant recovery of weapon of offence standing begotten by the Investigating Officer at the instance of the accused from a jungle, thereupon their testifications in variance thereto stand ingrained with a vice of theirs perse being in rife contradiction with the recitals borne in the apposite recovery memo, hence theirs constituting embellishments therefrom, whereupon the purported efficacious recovery of the alleged weapon of offence under an apposite memo, looses its apposite tenacity.

14. Injured PW-4 (Chunni Lal) in his testification recorded before the learned trial Court thereat omitted to, with utmost categoricality, identify the relevant weapon of offence (Ex.P-1) when it thereat stood shown to him in Court qua its comprising the weapon of offence with user whereof, the accused inflicted injuries on his person, whereupon a firm conclusion spurs qua hence the testifications of ocular witnesses to the occurrence wherein they with specificity assign an incriminatory role to the accused qua his with user of knife stabbing the victim, in sequel whereto he gained injuries on his person, thereupon loosing in their entirety their respective evidentiary sinew also it appears qua hence theirs inventing a false ascription vis-à-vis the accused qua his, with purported user of weapon of offence thereupon stabbing the victim.

15. The injuries borne in Ex.PW-1/A are in stark contradiction(s) with the ocular version(s) qua the occurrence testified with intra-se harmony by both PW-4 besides by PW-6 wherein they ascribe qua the accused, a penal ascription qua his while purportedly wielding "knife", his delivering its singular blow on the abdomen of PW-4, whereas the injuries enunciated in Ex.PW-1/A unfold qua the victim apart from his receiving stab injuries, his body also holding injuries reflected in Sr. No. 2 to 5 in Ex.PW-1/A, whereupon also the testifications of ocular witnesses to the occurrence loose their respective creditworthiness rendering open a conclusion qua the complainant in collusion with the victim rearing a false case against the accused moreso when the other ocular witness to the occurrence has not lent any succor to the charge.

16. The FSL concerned to which the knife as well as the clothes of the victim stood dispatched for eliciting an opinion therefrom qua the blood stains existing therein belonging to the victim also omitted to pronounce in its apposite opinion borne on Ex. PX (report of FSL) qua the purported stains of blood held in T-shirt also in knife, belonging to the victim, in sequel thereto it appears qua the prosecution contriving the factum qua the accused stabbing the victim on his stomach with a "knife" in sequel, whereto the "knife" gathered blood stains thereon also its contriving the factum qua the T-Shirt of the accused also during the course of the occurrence, standing stained with blood.

17. Apparently the relevant site of occurrence is the "verandah" of the upper storey of the house apparently in close proximity whereof exists a "staircase", as unveiled in the testification of the complainant embodied in her cross-examination wherewithin she also echoes qua nails standing embedded thereon, thereupon the effect of existence thereon of "nails" when stands coagulated with the aforesaid dis-concurrence inter-se the ocular version qua the occurrence vis-à-vis the pronouncements made in Ex.PW-1/A besides also with PW-1 during the course of his standing subjected to cross-examination, his making a communication therein qua the injuries borne on Ex.PW-1/A being sequel-able by the victim falling upon nails, hence boosts an inference qua the injuries borne on Ex.PW-1/A being a sequel to the victim falling on "nails" embedded in the staircase.

18. In view of above discussion, the petition is allowed and the impugned judgment is quashed and set aside. The accused is acquitted of the offence charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Bail bonds, if any, furnished by the accused are discharged. Records be sent down forthwith.

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

Smt. Manju Sharma ... Petitioner

Versus

State of Himachal Pradesh and others ... Respondents

CWP No. 870 of 2011
Reserved on: 24.03.2017
Date of decision: 29.03.2017

Constitution of India, 1950- Article 226- Petitioner worked as Balwari teacher in Balwari Centre, Bathmana- respondent No.3 sanctioned an Anganwadi Centre – applications were invited from the eligible candidates- petitioner submitted her candidature but the respondent No.3 refused to entertain her application- respondent No.6 was appointed by way of transfer- notification was issued to fill up the post, which had fallen vacant due to the transfer- she filed an appeal, which was rejected as time barred- a further appeal was filed, which was also dismissed as time barred- aggrieved from the orders, present writ petition has been filed- held that clause 4 of the terms and conditions reads that under the ICDS programme there is no provision of transfer of Anganwadi Workers/ Helpers as these are honorary workers- it has been stated that in case of marriage of Anganwadi workers or helpers, if any vacancy exists, she would be transferred or adjusted in that Anganwadi Centre - only a female who is resident of the Village/Ward, where Anganwadi Centre is located or who belongs to feeder area is eligible for appointment- adjustment of respondent No.6 by way of transfer is arbitrary and colourable exercise of power- once the discretionary power had been exercised by adjustment, it was not incumbent to adjust her again- application for second adjustment is contrary to guidelines – petition allowed- direction issued to initiate the process to fill up the post of Anganwadi worker.

(Para-7 to 20)

For the petitioner:	Ms. Anu Tuli Azta, Advocate.
For the respondents:	Mr. V.S. Chauhan, Additional Advocate General with Mr. Vikram Thakur and Ms. Parul Negi, Deputy Advocate Generals, for respondents No. 1 to 5 and 7.
	Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate, for respondent No. 6
	Mr. Suresh Kumar Sharma, Director, Directorate of Women and Child Development, present in person.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral):

By way of this writ petition, the petitioner has prayed for the following reliefs:-

"1. the impugned orders/notification dated 5-11-2006, 10-6-2008 and 9-7-2010 may kindly be quashed and set aside.

2. the respondents no. 1 to 5 be directed to entertain and consider the application of the petitioner for the post of AWW at village Bathmana on the basis of old guidelines of Anganwadi workers and helpers prevailing at the time of first eligibility of the petitioner and fresh post be advertised against the vacancy of AWW at AWC, Bathmana inviting applications from all the eligible candidates of village Bathmana on the criteria of old rules under the ICDS Scheme so that the rights of all others who did not approach the court may also be not affected adversely.

3. the respondents be directed to produce the entire record of the case in the Honorable High Court.

4. the respondent no. 6 Smt. Geeta devi be directed to join back at AWC, Jabri in the facts and circumstances of the case.

5. any other relief which this learned court deems fit and proper in the facts of the case may also be granted in favour of the petitioner and the petition may kindly be accepted alongwith costs.

2. Case of the petitioner is that she is a resident of village Bathmana, Tehsil and District Shimla. She is matriculate and has worked as Balwari teacher in Balwari Centre, Bathmana from 01.05.2005 to 25.02.2006. Respondent No. 3 sanctioned an Anganwadi Centre in village Bathmana vide notification dated 25.10.2006 and applications were accordingly invited from the eligible candidates for filling up the said post. As per the petitioner, as she was eligible to apply for the said post of Anganwadi Worker at Anganwadi Centre, Bathmana, she submitted her candidature complete in all respects. However, respondent No. 3 refused to entertain her application and verbally informed that the said post was likely to be filled by way of transfer. It is further the case of the petitioner that with an ulterior motive to give unreasonable benefit to respondent No. 6, respondent No. 3 issued another notification dated 05.11.2006 vide which respondent No. 6 was appointed by way of transfer as Anganwadi Worker at Anganwadi Centre, Bathmana, thus, denying the petitioner and other similarly situated persons opportunity of being appointed to the said post. Further, as per the petitioner, vide notification dated 05.11.2006 addressed to Pradhan, Gram Panchyat, Jabri, the Pradhan was called upon to invite applications for filling up the post of Anganwari Worker at Anganwari Centre, Jabri, which had thereafter fallen vacant on account of respondent No. 6 having been transferred from Jabri to Bathmana, which act of the respondents according to the petitioner was arbitrary and discriminatory. As per the petitioner, she filed Original Application No. 3384/2006 before learned H.P. Administrative Tribunal but the same was dismissed for want of jurisdiction of the Tribunal. It is further the case of the petitioner that she thereafter preferred an appeal under Section 12 of the ICDS Scheme before learned Deputy Commissioner,

Shimla. However, the said appeal was rejected by the authority concerned as being time barred. Thereafter, she filed an appeal before learned Divisional Commissioner, Shimla, which was also dismissed on 09.07.2010 on the ground that the authorities were not having any power to condone any delay in filing appeals in Anganwadi matters. It is further the case of the petitioner that respondent No. 6 was earlier also transferred from Anganwadi Centre Bhawana in village Ghanatti to Anganwadi Centre, Jabri, in the year 2001 on account of her marriage and since then respondent No. 6 was working at Jabri till she was arbitrarily transferred to Anganwadi Centre, Bathmana from Jabri vide impugned communication dated 05.11.2006 again on the ground of marriage. As per petitioner, distance between Bathmana and Jabri is just 2 KMs.

3. On above pleadings, the petitioner has filed the present petition challenging the impugned act of respondents of filling up the vacancy of Anganwadi Worker at Anganwadi Centre, Bathmana by transferring respondent No. 6 to the said place from Anganwadi Centre, Jabri.

4. Respondent State has filed reply to the petition, whereas respondent No. 6 has adopted the reply filed by the State. Respondent State vide its reply has justified its act on the ground that the adjustment of respondent No. 6 at Bathmana from Jabri is not an arbitrary act or an act of colourable exercise of powers but she was adjusted from Jabri to Bathmana, where a new Anganwadi Centre stood sanctioned in the year 2006-07 on account of her marriage and the said adjustment was made by the respondents in exercise of powers which are in consonance with the provisions contained in Para-4 of the Terms and Conditions of Services Part-II of guidelines notified by the State on 29.05.2006. On this reasoning, the respondent State has justified its act. Private resident has supported this stand of the State.

5. On 28.12.2016, this Court had directed respondent No. 2 to file his personal affidavit within a period of ten days as to whether Anganwadi Worker can be adjusted at more than one place in lieu of marriage or not as per the guidelines.

6. In the affidavit which has been filed by respondent No. 2, pursuant to the directions issued by this Court on 28.12.2016, the following stand has been taken:-

> "The Guidelines/Scheme as notified on 29-05-2006, and which is applicable in the present case, do not restrict the number of times which the Anganwadi Workers may be transferred to the concerned Anganwadi Centre on ground of marriage provided matrimonial home of the Anganwadi Worker is the feeding village of the Anganwadi Centre where the Anganwadi Worker is transferred."

7. Therefore, in this background, now the moot issue which has to be adjudicated upon by this Court is whether clause (4) of the guidelines for the engagement of Anganwadi Workers/Helpers under the ICDS scheme confers upon the respondents power to adjust by way of transfer an Anganwari Worker on her request more than once?

8. Before proceeding further, it is relevant to take note of Clause (4) of the Terms and Conditions of Services of the guidelines, which is reproduced herein below:-

> "**4. Transfer/Adjustment of the Anganwadi Workers/Helpers**
>
> a) Under ICDS programme there is no provision of transfer of Anganwadi Workers/ Helpers as these are honorary workers. However, in the case of marriage of an Anganwadi Worker or Helper, if at the place of her marriage, vacancy of an Anganwadi Workers or Helper exists she would be transferred or adjusted in that Anganwadi Centre.
>
> b) Request for adjustment/transfer can be made to the Child Development Project Officer on plain papers with certificate of marriage.
>
> c) Child Development Project Officer will be the competent authority to order transfer/ adjustments of Anganwadi Workers/Helpers within the project and

> outside project but within the District, the District Programme Officer will be the competent authority to do so. Outside district transfers/adjustments will be done with the approval of Director on the recommendation of the Distt. Programme officers of the both distts."

9. A perusal of Clause (4) of the Terms and Conditions of Services of the guidelines supra, demonstrates that this clause envisages that under the ICDS programme there is no provision of transfer of Anganwadi Workers/ Helpers as these are honorary workers. However, it is mentioned therein that in case of marriage of an Anganwadi Workers or Helpers, if at the place of her marriage, vacancy of an Anganwadi Workers or Helpers exists she would be transferred or adjusted in that Anganwadi Centre.

10. Before proceeding further, it is necessary to take note of the fact that as per the eligibility criteria laid down in the Guidelines supra, only such female candidates are eligible to apply for the post of Anganwadi Worker or Helper who either are resident of the village/ward where Anganwadi Centre is located or belong to the feedings villages/wards of the Anganwadi area. Meaning thereby that no female candidate who is not resident of the village/ward where Anganwadi Centre is located or does not belong to the feeding village/ward of the Anganwadi area, is eligible to be considered for engagement as Anganwadi Workers/ Helpers. Because engagement of Worker/Helper is contingent upon the person so engaged being resident of the village/ward concerned or feeding villages/wards of the Anganwadi area, for this reason in its wisdom it has been provided in the policy by the State that under the ICDS programme there is no provision of transfer of Anganwadi Workers/Helpers. The only exception is that in case of marriage of an Anganwadi Worker or Helper, if at the place of her marriage, vacancy of an Anganwadi Workers or Helpers exists, they would be adjusted or transferred in that Anganwadi Centre.

11. When we come to the facts of the present case, it is obvious that respondent No. 6 was initially engaged as per the said guidelines as Anganwadi Worker at Anganwadi Centre, Bhawana in village Ghanatti. Thereafter, on account of her marriage, in exercise of the powers conferred upon the authority under Clause (4) of the guidelines supra, respondent No. 6 was transferred to Anganwadi Centre, Jabri in the year 2001. When a separate Anganwadi Centre stood sanctioned in the year 2006-07 at Bathmana, respondent No.6 again applied for her adjustment in this Anganwadi Centre and the same was considered and exceeded to by the State.

12. The respondents have justified their act of adjusting respondent No. 6 twice on account of her marriage firstly at Anganwadi Centre, Jabri and thereafter at Anganwadi Centre, Bhatmana, on the ground that initially she was adjusted at Anganwadi Centre, Jabri, on account of her marriage as village Bathmana was feeding village of Anganwari Centre, Jabri and thereafter, she was adjusted at Bathmana itself as a new Anganwadi Centre was sanctioned for the said place itself in the year 2006-07.

13. In my considered view, this act of the respondent authority of adjusting respondent No. 6 by invoking Clause (4) of the guidelines from Jabri to Bathmana is both arbitrary as well as an act of colourable exercise of powers. No doubt, Cause (4) confers upon the authority power to adjustment of the Anganwadi Workers on account of her marriage but this clause does not confer arbitrary powers on the authority to invoke the said clause more than once or again and again in order to adjust/accommodate Anganwadi Worker on account of her marital status. Once the discretionary power of adjustment stood exercised by transferring respondent No. 6 from Bhawana in village Ghanatti to Jabri as per clause (4) on account of marriage of respondent No. 6, it was not open to the respondent authority to have had readjusted her at_Bathmana on the pretext that the said adjustment was also as per clause (4) as a new Anganwadi Centre stood open at Bathmana itself. This issue can be looked into from another aspect also, if Bathmana was the place where in fact respondent No. 6 had the right to be adjusted on account of her marriage as per clause (4) of the policy then the only conclusion which can be drawn is this that her initial adjustment at Jabri by the respondent by invoking clause(4) of the guidelines supra, was wrong and not inconformity with the clause of the

guidelines. However, without further dwelling on this aspect of the matter, in my considered view, the second adjustment of respondent No. 6 from Jabri to Bathmana is not sustainable in the eyes of law as when the authority had once exercised the discretionary power for adjusting of respondent No. 6 on account of her marriage from Bhawana to Jabri it was not open to invoke Clause (4) again and re-adjust respondent No. 6 from Jabri to another Centre as has been done in the present case. In fact if this is permitted, then it will defeat the very purpose for which this concession was given to a married lady and it will confer unfettered power upon the authority concerned.

14. Accordingly, the impugned act of the respondent authority of transferring/ adjusting respondent No. 6 from Anganwadi Centre, Bathmana, is held to be an arbitrary act and an act of colourable exercise of power.

15. During the course of arguments, it was urged by learned counsel for the respondents that this Court need not to go into the merits of the case as the petitioner had the right to file appeal if she was aggrieved by the policy of respondent No. 6 and she failed to avail this remedy within the period of limitation. In my considered view, this contention of the respondents also deserves to be rejected. This is for the reason that the appeals which are envisaged in the guidelines are on account of party being aggrieved by the engagement of Anganwadi Worker after a process for engagement of such Anganwadi Worker has been initiated by the authority and pursuant to the said process, an engagement has been made. Therefore, right to file an appeal is conferred upon an aggrieved party who is dissatisfied with the engagement of a person engaged as Anganwadi Worker. In my considered view, in the present case, the petitioner in fact was misguided to file appeal both before the Deputy Commissioner as well as Divisional Commissioner under the provisions of the guidelines. This is for the reason that the grievance of the petitioner was not qua engagement of an Anganwadi Worker appointed pursuant to a process undertaken in this regard by the authorities concerned, but her grievance was that a process initiated for engagement of Anganwadi Worker at Bathmana was throttled on account of arbitrary act of the respondent authority i.e. of filling up the vacancy in issue by wrongly transferring respondent No.6 from Anganwadi Centre, Jabri to Anganwadi Centre Bathmana. Therefore, as there is no merit in the contention of the respondents, the same is accordingly rejected.

16. Another objection of the respondent authority is that as the petitioner had not applied for the post, therefore, she had no locus to file and maintain this petition. This objection also has no merit and same thus deserves to be rejected. It is not the case of the respondents that pursuant to the advertisement issued for the engagement of Anganwadi Worker at Anganwadi Centre, Bathmana, the petitioner was not fulfilling the criteria which was contemplated in the guidelines in force at the relevant time. Besides, in the present case, applications were invited for engagement of Anganwadi Worker at Anganwadi Centre, Bathmana, vide communication dated 25.10.2006 as per which applications could be submitted by 15.11.2006. It is a matter of record that before 15.11.2006 vide impugned communication dated 05.11.2006 (Annexure P-3) the communication vide which applications were invited for Anganwadi Centre, Bathmana, was withdrawn on the ground that respondent No. 6 stood adjusted at the said Centre and the applications were thereafter invited for Anganwadi Centre, Jabri. Meaning thereby that the petitioner was having her right to have had applied for the said Centre upto 15.11.2006 but the communication inviting applications stood rescind before the last date by which the applications were to be received. In this view of the matter, the contention of the respondents that the petitioner does not has a locus to file and maintain the petition, also stands rejected.

17. During the course of hearing on 24.03.2017, Director, Directorate of Women and Child Development, had made a statement in the Court that as vacancy of Anganwadi Worker at Anganwadi Centre, Jabri, was still available, the Department had no difficulty in re-appointing the private respondent at the said place and Mr. Sanjeev Bhushan, learned Senior Counsel appearing for respondent No. 6, had on instructions submitted that private respondent was not

averse to be reverted back to Anganwadi Centre, Jabri but then the respondent authority must ensure that she should not be disturbed from Jabri on account of the pressure of the villagers.

18. Be that as it may, in view of the fact that this Court has come to the conclusion that the act of adjustment of respondent No. 6 from Jabri to Bathmana was an act of arbitrary exercise of power by the respondent authority, communication dated 05.11.2006 (Annexure P-3) vide which earlier communication dated 25.10.2006 was rescinded, is quashed and set aside and the adjustment of respondent No. 6 from Jabri to Bathmana is held to be bad. Respondent No. 6 shall rejoin her duties at Anganwadi Centre, Jabri forthwith and respondent authority shall ensure that respondent No. 6 is permitted to perform her duties in accordance with law at Anganwadi Centre, Jabri.

19. Writ is accordingly allowed. Communication dated 05.11.2006 (Annexure P-3) is quashed and set aside. Orders dated 10.06.2008 (Annexure P-6) and 09.07.2010 (Annexure P-7) are also quashed and set aside having been passed by authorities without jurisdiction. Respondents No. 2 and 3 are directed to forthwith commence the process to fill up the post of Anganwadi Worker in Anganwadi Centre, Bathmana, under the ICDS Project in Mashobra Development Block, District Shimla. It is further directed that the process to fill up the said post shall be initiated by respondents No. 2 and 3 as per the guidelines for the engagement of Anganwadi Workers on honorary basis under the ICDS Scheme run by Social Justice and Empowerment Department as were in force at the time when communication dated 25.10.2006 (Annexure P-1) was issued, by inviting applications from eligible candidates. Keeping in view the fact that the impugned communication was issued on 05.11.2006 rescinding communication dated 25.10.2006 vide which applications were invited for engagement as Anganwadi Worker in Anganwadi Centre, Bathmana. This direction is being passed to do substantive justice to the petitioner because the process which was initiated on 25.10.2006 was rescinded vide communication dated 05.11.2006 and thereafter, guidelines for engagement for Anganwadi Workers have undergone changes. It is further clarified that in case no person is found eligible to be offered the said post under the process so initiated under the old guidelines then the respondents shall be at liberty to fill up the said post by inviting afresh applications as per the existing guidelines.

20. Writ petition is disposed of in the above terms with cost assessed at Rs.5,000/-, which shall be paid to the petitioner by the respondent State with liberty to the State to recover the same from the erring officer(s)/ official(s). Miscellaneous Applications pending, if any, also stand disposed of.

****

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

Mr. Parma Nand .....Petitioner/JD.
Versus
Kasturi Lal & others .....Respondents.

Civil Revision No. 91 of 2016.
Reserved on: 16th March, 2017.
Date of Decision: 29th March, 2017.

Code of Civil Procedure, 1908- Order 21 Rule 30- An execution for recovery of money was filed- the notice was served upon the daughter of J.D.- however, the process server did not record that J.D. could not be found at the residence within a reasonable time – hence, the service was not proper- however, the ex-parte order was not sought to be set aside by the J.D. - further, the property was ordered to be sold and the notice required under Order 21 Rule 66 (2) was not

served – however, the compliance of Order 21 Rule 54(1A) was made- hence, no prejudice was caused to the J.D. – petition dismissed. (Para- 2 to 6)

Case referred:
Desh Bandu Gupta versus N.L. Anand and Rajinder Singh, (1994)1 SCC 131

For the Petitioner: Mr. Nishant Kumar, Advocate.
For Respondents No.1 to 3 : Mr. K.D. Sood, Senior Advocate with Mr. Mukul Sood and Sanjeev Sood, Advocates.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner herein suffered a conclusive binding decree for recovery of money, decree whereof stood rendered by the learned Sub Judge 1st Class, Dehra, District Kangra, H.P., in Civil Suit/RBT No. 27/99/91, verdict whereof stood pronounced on 27.12.2000. On rendition of the aforesaid conclusive decree, the plaintiffs/decree holders instituted an application under Order 21, Rule 30 of the Code of Civil Procedure before the learned Executing Court wherein they sought realization of the decretal amount from the Jds, in the manner hereinafter extracted:-

> "(1) That in C.S. titled Kasturi vs. Hari Chand and others C.S. No. RBT 27/99/91 the Hon'ble Court S.J.I. Dehra on 27.12.2000 have passed the order decree against the respondents to the tune of Rs.3020/- being LRS of late Sh. Santu to the extent their shares inherited from late Sh. Santu.
>
> (2) That the respondents have not paid the amount recoverable by applicant despite the decree and order passed by the Hon'ble Court.
>
> (3) That JD's No.1 to 3 have inherited share of khilwatta, who have succeeded to Late Sh. Santu to the extent of ¼ share. Respondent No.(4) ABCD have inherited the share of late Sh. Gian Chand, who have succeeded to late Sh. Santu to the extent of ¼ share. Respondent No.4 also have succeeded to late Sh. Santu to the extent of ¼ shares. Respondent No.5 also have succeeded to late Sh. Santu to the extent of ¼ shares. Similarly respondent NO.6 have succeeded to late Smt. JOK to late Santu to the extent of ¼ shares.
>
> 4. That as per share respondents No.1 to 3 had to pay Rs.755/- in equal share, respondent No.4 ABCD had to pay Rs.755 in equal share. Respondent 5 to the extent of Rs.755/- and respondent No.6 to the extent of Rs.755/- to the applicant.
>
> 5. That respondents have inherited the other land of late Sh. Santu which is comprised khata 104, khatauni 174, khasra Nos. 97,99, 136, measuring 0-03-45 hectares and in khata No. 106, khatoni No.176, khasra N.98, 106, 107 area 0-09-58 hectares situated in Mohal Katoi Mauza Chakath, Tehsil Dehra, District Kangra, H.P. entered, (H.P.) entered jamabandi 1999-2000.
>
> 6. That no appeal against the order and decree is pending or has been filed as per knowledge of the applicant.
>
> (7)……………………………………………"

2. Notice upon execution petition No. 19 of 2003 stood ordered by the learned Executing Court to be issued upon the JDs. The process server concerned, concerted to personally serve JD Parmanand through ordinary mode. The endorsement made by the process server concerned on the reverse of the apposite summons, discloses qua on his visiting the abode of Parmanand, on 5.9.2003 also his concerting to locate him thereat, whereas his apposite concert(s) proving abortive, thereupon, his delivering a copy of the summons(es) to his daughter

Vijeta Kumari, also he echoes therein qua the latter willingly accepting them. He also makes a disclosure in the apposite summons qua Vijeta Kumari, the daughter of Parmanand residing along with the latter. JD Parmanand despite standing served through his daughter Vijeta Kumari omitted to on the relevant date, record his presence before the learned executing Court, whereupon the latter proceeded to order qua his being proceeded against ex-parte.

3. The execution petition, in the absence of JD Pramanand recording his presence therebefore progressed uptil the stage of the decree holder(s) on 15.2.2005 under an application constituted therebefore under Order 21, Rule 64 of the CPC, motioning it, for sale of the attached property/assets of the Jds, whereon, the learned Executing Court proceeded to record an order for issuance of notice(s) under Order 21, Rule 54 (1-A) of the CPC upon the JDs for hence the terms of sale standing settled, It on 24.3.2005 imputed credence to the sworn affidavit furnished before it by the process server concerned holding, echoings qua his effectuating service of notice(s) aforesaid upon JD Nos. 1,2, 3, 4(d) and 5, whereupon the learned Executing Court, on JD Parmanand besides other JDs omitting to on the date aforesaid record their respective appearance(s) therebefore hence recorded a direction qua theirs standing proceeded against ex-parte. Both the orders of the learned Executing Court respectively recorded on 27.01.2004 and on 24.03.2005 wherein it directed qua JD Parmanand standing proceeded against ex-parte, stood not concerted by him to be set aside nor obviously he thereafter proceeded to participate in the apposite execution petition.

4. The initial effectuation of service of summons by the process server concerned upon JD Parmanand through his daughter Vijeta Kumari, effectuation whereof occurred prior to the order recorded on 24.03.2005 by the learned Executing Court does attract qua him an apposite prohibition engrafted under Order 5, Rule 15 of the CPC, significantly, against the assay process server concerned concerting to serve a copy of summons upon his daughter Vijeta Kumari, importantly, when for reasons ascribed hereinafter the mandate held therewithin stood evidently infringed, at the stage contemporaneous qua the initial effectuation of service upon JD Parmanand through his daughter whereupon the aforesaid manner of JD Parmanand standing served suffers from a vice of invalidity also the order(s) pronounced by the learned Executing Court qua his for want of his appearance therebefore, his being hence proceeded against ex-parte, concomitantly stand stained with jurisdictional fallibility. Provisions of Order 4, Rule 15 stand extracted hereinafter:-

> **"15. Where service may be on an adult member of defendant's family**.- Where in any suit the defendant is absent from his residence at the time when the service of summons is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and he has no cogent empowered to accept service of summons on his behalf service may be made on any adult member of the family, whether male or female, who is residing with him.

The aforesaid provisions hold a palpable mandate upon the process server concerned, to prior to his proceeding to effectuate a copy of the relevant summons upon any adult member residing along with the addressee, his making echoings in his report qua prior thereto, his concerted efforts in discovering the (a) addressee at his homestead/abode, not bearing any fruition; (b) there being no likelihood qua his being found at his abode within a reasonable time. However, the aforesaid echoings do not find occurrence in the relevant summons, whereupon, the tendering of a copy thereof besides acceptance thereof by Vijeta Kumari, the daughter of JD Parmanand hence would not tantamount to any valid effectuation of service upon him.

5. Be that as it may, the effect, if any, of an invalid effectuation of service upon JD Parmanand on 5.9.2003, in sequel, whereto the learned Executing Court proceeded to on 17.01.2004 record an order qua his being proceeded against ex-parte is reinteratedly qua the order aforesaid hence also acquiring a vice of nullity. Nonetheless vices aforestated staining the aforesaid order would stand subsumed, on evident upsurgings occurring in the relevant record, in portrayal qua prior to the learned Executing Court proceeding to order for issuance of

proclamation of sale of the attached assets of the JDS, through a public auction, it revering the mandate of Order 21, Rule 66 of the CPC, provisions whereof stand extracted herein after:-

> "**Rule 66. Proclamation of sales by public auction.-** (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause proclamation of the intended sale to be made in the language of such Court.
>
> (2) Such proclamation shall be drawn up after notice to the decree holder and the judgment debtor and shall state the time and place of sale and specify as fairly and accurately as possible-
>
> (a) the property to be sold [or, where a part of the property would be sufficient to satisfy the decree, such part];
>
> (b) the revenue assessed upon the estate or part of the state, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government.
>
> (c) any incumbrance to which the property is liable;
>
> (d) the amount for the recovery of which the sale is ordered; and
>
> (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property;
>
> [Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under rule 54, it shall not be necessary to give notice under this rule to the judgment debtor unless the Court otherwise directs;
>
> Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties.]
>
> (3) Ever application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.
>
> (4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto."

Sub-rule (2) to Rule 66 of Order 21of the CPC, casts a peremptory legal obligation upon the Executing Court, to, preceding its drawing a proclamation of sale of the assets/immovable property of the JD(s), wherefrom the decretal amount is intended to be satisfied, its ordering for issuance of notice upon the JDs concerned, notice whereof indicating therewithin the time and place of sale, of the attached assets of the JD, through a public auction, besides its ensuring qua the apposite notice(s) standing validly served upon the JDs. On anvil of the aforesaid mandate embodied in the afore extracted relevant provisions of the CPC, judgment debtor Parmanand in his application constituted under the provisions of Order 21, Rule 89 of the CPC, before the learned executing Court had thereupon, vigorously canvassed qua prior to the learned Executing Court drawing up the apposite proclamation of sale, of his attached assets, through a public auction, its irrevering the mandate of sub-rule (2) to Rule 66 of Order 21 of the CPC, comprised in its, in digression therefrom neither ordering for issuance of notice of sale, of his assets, through a public auction nor obviously his standing served, consequently, he contended qua a visible infraction of the peremptory mandate of sub-rule (2) to Rule 66 of Order 2, bolstering his espousal qua the relief canvassed in his application hence being affordable to him. He also places reliance upon a decision of the Hon'ble Apex Court in ***Desh Bandu Gupta versus N.L. Anand***

and Rajinder Singh, reported in (1994)1 SCC 131, the relevant paragraphs NO.9 and 10 whereof are extracted hereinafter:-

> “[9] However, there is considerable force in the contention of the appellant that the procedure prescribed under Order 21 Rule 66 was flagrantly violated by the Executing court. We have already noted the order of the court to conduct the sale. For judging its legality and validity, it would be desirable to have a bird's eye view of the procedure for sale of immovable property in execution. On an application for execution filed under Order 21 Rule 5 the court shall ascertain the compliance of the prerequisites contemplated under Rule 17 and on finding the application in order, it should be admitted and so to make an order, thereon to issue notice under Rule 22, subject to the conditions specified therein. If a notice was served on the judgment-debtor as enjoined under Order 5 but he did not appear or had not shown cause to the satisfaction of the court, under Rule 23 the court "shall order the decree to be executed". If an objection is raised to the execution of the decree, by operation of sub-rule (2) thereof, "the court shall consider such objections and make such order as it thinks fit". Thereafter in the case of a decree for execution against immovable property an attachment under Rule 54 should be made by an order prohibiting the judgment-debtor from transferring or creating encumbrances on the property. Under Rule 64 the court may order sale of the said property. Under Rule 66 (2 proclamation of sale by public auction shall be drawn up in the language of the court and it should be done after notice to the decree-holder and the judgment-debtor and should state "the time and place of sale" and "specify as fairly and accurately as possible" the details specified in clauses (a) to (d) of sub-rule (2) thereof. The Civil Rules of Practice in Part L in the Ch. 12 framed by the High court of Delhi 'sale of Property and Delivery to the Purchaser' Rule 2 provides that whenever a court makes an order for the sale of any attached property under Order 21, Rule 64, it shall fix a convenient date not being distant more than 15 days, for ascertaining the particulars specified in Order 21 Rule 66 (2) and settling the proclamation of sale. Notice of the date so fixed shall be given to the parties or their pleaders. In Rule 4 captioned 'settlement of Proclamation of Sale, Estimate of Value' it is stated that on the day so fixed, the court shall, after perusing the documents, if any, and the report referred to in the preceding paragraph, after examining the decree-holder and judgment-debtor, if present, and after making such further enquiry as it may consider necessary, settle the proclamation of sale specifying as clearly and accurately as possible the matters required by Order 21 Rule 66 (2) of the Code. The specifications have been enumerated in the rule itself. The proclamation for sale is an important part of the proceedings and the details should be ascertained and noted with care. This will remove the basis for many a belated objections to the sale at a later date. It is not necessary to give at proclamation of sale the estimate of the value of the property. The proclamation when settled shall be signed by the Judge and got published in the manner prescribed by Rule 67. The court should authorise its officers to conduct the sale. Under Rule 68 the sale should be conducted at "the place and time" specified or the time may be modified with the consent in writing of the judgment-debtor. The proclamation should include the estimate, if any, given by either judgment-debtor or decree-holder or both the parties. Service of notice on judgment-debtor under Order 21 Rule 66 (2), unless waived by appearance or remained ex parte, is a fundamental step in the procedure of the court in execution. Judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verified as accurately and fairly as possible so that the intending bidders are not misled or to prevent them from offering inadequate price or to enable them to make a decision in offering adequate price. In Gajadhar Prasad v. Babu Bhakta Ratari this court, after noticing the conflict of judicial opinion among the High courts, held that a review of

the authorities as well as the amendments to Rule 66 (2) (c) make it abundantly clear that the court, when staling the estimated value of the property to be sold, must not accept merely the ipse dixit of one side. It is certainly not necessary for it to state its own estimate. If this was required, it may, to be fair, necessitate insertion of something like a summary of a judicially considered order, giving its grounds, in the sale proclamation, which may confuse bidders. It may also be quite misleading if the court's estimate is erroneous. Moreover, Rule 66 (2) (e) requires the court to state only nature of the property so that the purchaser should be left to judge the value for himself. But, the essential facts which have a bearing on the very material question of value of the property and which could assist the purchaser in forming his own opinion must be stated, i. e. the value of the property, that is, after all, the whole object of Order 21, Rule 66 (2) (e) , Civil Procedure Code. The court has only to decide what are all these material particulars in each case. We think that this is an obligation imposed by Rule 66 (2) (c). In discharging it, the court should normally state the valuation given by both the decree-holder as well as the judgment-debtor where they both have valued the property, and it does not appear fantastic. It may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised, which could reasonably and usefully be stated succinctly in a sale proclamation has to be determined on the facts of each particular case. Inflexible rules are not desirable on such a question. It could also be angulated from an The proclamation should include the estimate, if any, given by either judgment-debtor or decree-holder or both the parties. Service of notice on judgment-debtor under Order 21 Rule 66 (2), unless waived by appearance or remained ex parte, is a fundamental step in the procedure of the court in execution. Judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verified as accurately and fairly as possible so that the intending bidders are not misled or to prevent them from offering inadequate price or to enable them to make a decision in offering adequate price. In Gajadhar Prasad v. Babu Bhakta Ratari this court, after noticing the conflict of judicial opinion among the High courts, held that a review of the authorities as well as the amendments to Rule 66 (2 (c) make it abundantly clear that the court, when staling the estimated value of the property to be sold, must not accept merely the ipse dixit of one side. It is certainly not necessary for it to state its own estimate. If this was required, it may, to be fair, necessitate insertion of something like a summary of a judicially considered order, giving its grounds, in the sale proclamation, which may confuse bidders. It may also be quite misleading if the court's estimate is erroneous. Moreover, Rule 66 (2) (e) requires the court to state only nature of the property so that the purchaser should be left to judge the value for himself. But, the essential facts which have a bearing on the very material question of value of the property and which could assist the purchaser in forming his own opinion must be stated, i. e. the value of the property, that is, after all, the whole object of Order 21, Rule 66 (2) (e) , Civil Procedure Code. The court has only to decide what are all these material particulars in each case. We think that this is an obligation imposed by Rule 66 (2) (c). In discharging it, the court should normally state the valuation given by both the decree-holder as well as the judgment-debtor where they both have valued the property, and it does not appear fantastic. It may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised, which could reasonably and usefully be stated succinctly in a sale proclamation has to be determined on the facts of each particular case. Inflexible rules are not desirable on such a question. It could also be angulated from another perspective. Sub-rule (1) of Rule 66 enjoins the court that the details enumerated in sub-rule (2) shall be specified as fairly and accurately as possible. The duty to comply with it arises only after service of the

notice on the judgment-debtor unless he voluntarily appears and is given opportunity in the settlement of the value of the property. The absence of notice causes irremediable injury to the judgment-debtor. Equally publication of the proclamation of sale under Rule 67 and specifying the date and place of sale of the property under Rule 66 (2) are intended that the prospective bidders would know the value so as to make up their mind to offer the price and to attend at sale of the property and to secure competitive bidders and fair price to the property sold. Absence of notice to the judgment-debtor disables him to offer his estimate of the value who better knows its value and to publicise on his part, canvassing and bringing the intending bidders at the time of sale. Absence of notice prevents him to do the above and also disables him to know fraud committed in the publication and conduct of sale or other material irregularities in the conduct of sale. It would be broached from yet another angle. The compulsory sale of immovable property under Order 21 divests right, title and interest of the judgment-debtor and confers those rights, in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgment-debtor or the decree-holder. A sale made, therefore, without notice to the judgment-debtor is a nullity since it divests the judgment-debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutory that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality, exaggeration may at time be possible. In Rajagopala Ayyar v. Ramachandra Ayyar the full bench held that a sale without notice under Order 21 Rule 22 is a nullity and is void and that it has not got to be set aside. If an application to set aside such a void sale is made it would fall under Section 47.

[10] Above discussion indicates a discernible rule that service of notice on the judgment-debtor is a fundamental part of the procedure touching upon the jurisdiction of the Execution court to take further steps to sell his immovable property. Therefore, notice under Order 21 Rule 66 (2), unless proviso is applied (if not already issued under Order 21 Rule 22, and service is mandatory. It is made manifest by Order 21 rule 54 (1-A) brought on statute by 1976 Amendment Act with peremptory language that before settling the terms of the proclamation the judgment-debtor shall be served with a notice before settling the terms of the proclamation of sale. The omission thereof renders the further action and the sale in pursuance thereof void unless the judgment-debtor appears without notice and thereby waives the service of notice."

Evidently, the relevant records omit to make any underscorings qua the learned Executing Court, prior to its ordering for issuance of proclamation of sale, of the attached assets/immovable property of the JDs through a public auction, its ordering for issuance of notice(s) under sub-rule (2) to Rule 66 of Order 21 of the CPC upon the JDS nor obviously it ensured qua the apposite notice(s) standing served upon JD Parmanand. Significantly, hence, an apparent infraction of the mandate of sub-rule (2) to Rule 66 of Order 21 of the CPC has visibly occurred. However, no benefit can stand derived therefrom by JD Permanand, negation of relief qua him on anvill aforesaid stands encapsulated in the evident factum qua though the aforesaid mandate encapsulated under sub-rule (2) to Rule 66 of Order 21 of the CPC standing visibly infringed by the learned Executing Court yet his not adducing the enjoined evidence, in display qua upon the apposite application constituted under Order 21, Rule 54 of the CPC by the decree holder before the learned Executing Court, the latter neither ordering for issuance of notice(s) upon them nor ensuring qua theirs standing served. In the event of, on an incisive perusal of the record, forthright evidence emanating, holding revelations qua upon an application standing constituted under Order 21, Rule 64 of the CPC by the decree holders before the executing Court, the latter

ordering qua issuance of summons(es) upon the JDs also obviously, its ensuring qua theirs standing personally validly served, thereupon the proviso engrafted in sub rule (2) of Rule to Rule 66 of Order 21 of the CPC would hold command besides clout also would dilute the effect of infringement(s), if any, made by the learned Executing Court vis-a-vis the mandate of sub rule (2) of Rule 66 to Order 21 of the CPC, significantly when the apposite proviso, to sub rule (2) to Rule 66 of Order 21 of the CPC, holds vivid echoings qua where the learned Executing Court has proceeded to within the ambit of Order 21, Rule 54 (1-A) of the CPC, hence order for issuance of notice(s) upon the Jds, thereupon no subsisting statutory obligation standing cast upon the learned Executing Court, to also obey the mandate of sub rule (2) of Rule 66 of Order 21 of the CPC unless it records a direction for compliance therewithin yet standing warranted. Provisions of Order 21, Rule 54 stand extracted hereinafter:

> "**54 attachment of immovable property.-** (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such charge.
>
> [(1A) The order shall also require judgment debtor to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale.]
>
> (2) The order shall be proclaimed at some place on or adjacent of such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate [and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.]"

Reiteratedly, thereupon, it stands not enjoined to within the domain of sub rule (2) of Rule 66 to Order 21 of the CPC hence order for issuance of notice(s) upon the JDS concerned. For making the relevant unearthings from the record which exists hereat, an allusion to the trite factum of the learned executing Court recording an order on 15.02.2015 for issuance of notice(s) upon JDS concerned, for hence eliciting their participation before it for settling the terms of proclamation of sale, of the relevant attached property, through a public auction, brings-forth an apt conclusion from this Court qua the learned Executing Court hence begetting compliance with the mandate of sub rule (1A) to Rule 54 of Order 21 of the CPC, whereupon, it stood relieved of the statutory obligation of revering the mandate of sub rule (2) to Rule 66 of Order 21 of the CPC. Conspicuously, also when in pursuance to the learned Executing Court, hence, begetting compliance with sub rule (1A) to Rule 54 of Order 21 of the CPC, the process server concerned making endorsement(s) on the reverse of the apposite notices qua JD Parmanand standing personally served, factum whereof attains vigorous evidentiary worth arising from the factum of Parmanand endorsing his signature(s) on the reverse of the apposite notice(s), also with JD Parmanand not disputing the authenticity of his signatures existing on the reverse of notice served upon him under sub rule (1A) to Rule 54 of Order 21 of the CPC, thereupon, with JD Parmanand hence standing personally served within the ambit of the proviso of sub rule (2) to Rule 66 of Order 21 of the CPC also with the aforesaid proviso operating as an exception to the peremptory mandate constituted in sub rule (2) of Rule 66 of Order 66 of the CPC besides obviously thereupon, infraction, if any, by the learned Executing Court of the mandate of the aforesaid substantive provisions, would not stain the sale by public auction of the attached assets of the JDs , whereupon, even if the learned Executing Court hence prior to its ultimately drawing up the apposite proclamation of sale of the attached property(ies) of the JDS, omitted to under the aforesaid provisions order for issuance of notice(s) upon the JDS, yet its impugned order does not , hence, for reasons aforestated fall within the domain of judicial fallibility. Even though, the coinage "unless the Court otherwise directs" occurring at the end of the relevant proviso, does confer power upon the learned Executing Court to undermine the vigour of the mandate of the apposite proviso also hence give a discretion to it, to yet, comply with the mandate of sub rule (2)

of Rule 66 to Order 21 of the CPC, nonetheless the petitioner has been unable to espouse with efficacy qua the relevant material laid therebefore making relevant bespeakings, for entailing the learned Executing Court to proceed to comply with the mandate of sub rule (2) to Rule 66 of Order 21 of the CPC, material whereof pronouncing upon the likelihood of fraud or irregularity occurring at the sale by public auction of the assets of JD, thereupon, on anvill thereof also the petition cannot succeed.

6. For the foregoing reasons, there is no merit in the instant petition, consequently, the instant petition stands dismissed and the orders impugned hereat are affirmed and maintained. All pending applications also stand disposed of.

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

Shri Umesh Chand Thakur & others ..Appellants.
Versus
Land Acquisition Collector and others .....Respondents.

RFA No. 345 of 2008.
Reserved on: 28th February, 2017.
Date of Decision: 29th March, 2017.

Land Acquisition Act, 1894- Section 30- The land was acquired and a reference was made under Section 30 – Reference Court declared respondent No.3 to be the person entitled for compensation on the basis of entries in the jamabandi and missal hakiat – held in appeal that a reference was made under Section 28-A of the Act – petition under Section 30 was not forwarded to the reference Court – hence reference court had no jurisdiction to adjudicate the entitlement of respondent No.3 – it was wrongly held that respondent No.3 was gairmaurusi over the acquired land – appeal allowed and the award of the reference Court modified. (Para-3 to 6)

For the Appellants: Mr. Bhupender Gupta, Senior Advocate with Mr. Ajeet Jaswal, Advocate.
For Respondents No.1 & 2: Mr. Vivek Singh Attri, Dy. A.G.
For Respondent No.3: Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Under the impugned award, pronounced by the learned Reference Court in Petition No. 58-S/4 of 2007/94, it, proceeded to order qua respondent No.3, namely, Chattar Singh alone holding the entitlement qua compensation amount assessed thereunder. The aggrieved appellants hence for assailing the award pronounced by the learned Reference Court, have instituted the instant appeal herebefore.

2. The paramount reason which prevailed upon the learned reference Court, to declare respondent No.3 to hold the sole entitlement qua the determination of compensation amount pronounced under the impugned award, rested upon the factum of reflections occurring in the jamabandi apposite to the suit land pertaining to the year 1980-81 comprised in Ex. RX also upon the entires embodied in Ex.AW1/C, copy of missal hakiyat qua the suit land pertaining to the year 1985-86, reflections whereof unfold qua one Devi Ram (the petitioner in land reference petition No. 58-S/4 of 2007/94 whereupon the impugned rendition stood pronounced) standing in the apposite column of ownership pronounced to be its owner whereas respondent

No.3, Chattar Singh, standing therein reflected to hold a tenancy under the aforesaid Devi Ram to the extent of 135 share in the undevided holdings. Moreover, in coagulation with the aforestated reflections borne on the aforesaid exhibits, the learned Reference Court also imputed credence to an admission held in the statement of one Suresh comprised in Ex. R-2, holding echoings qua his father inducting respondent No.3, Chattar Singh, as a "gair maurusi" upon the suit land, whereupon, it recorded a conclusive finding qua respondent No.3 holding the status of a "gair maurusi" upon the acquired land, whereupon it stood constrained to render a further finding qua the aforesaid status of respondent No.3 upon the suit land clothing him with automatic statutory bestowment of proprietary rights thereon, significantly, at the time apposite to the issuance of the apposite notification under Section 4 of the Land Acquisition Act, whereby, the respondent concerned initiated proceedings for bringing the relevant land, under acquisition, thereupon, foisting a leverage in him to, to the ouster of the appellants herein, claim the entire amount of compensation determined under the impugned rendition.

3. The sinew of the aforesaid reasoning, has to be tested not in isolation rather stands enjoined to be tested by making an allusion to the recitals unraveled in Ex. RW2/B, exhibit whereof constitutes an application preferred by respondent No.3, Chattar Singh, under Section 28-A of the Land Acquisition Act, 1984 before the Land Acquisition Collector, whereunder he claimed the benefit of the award recorded on 27.05.1994, by the Reference Court, in land reference petition No. 2NS/4 of 1990/89. Though, the patwari in the office of the Collector concerned, whose statement stands embodied in Ex. R-3, has been unable to forthrightly testify therein qua the aforesaid petition constituted by respondent No.3 under Section 28-A of the Land Acquisition Act, standing transmitted by the Collector concerned to the learned Reference Court, for enabling the latter to pronounce an adjudication thereupon, whereas, in Ex.RW2/B a recital occurs qua the respondents therein holding no objection qua the amount claimed by respondent No.3, Chattar Singh, in the latter's petition constituted under Section 28-A of the Land Acquisition Act, 1894 standing disbursed in his favour. It also holds echoings qua the respondents in Ex.RW2/A standing directed by the Collector to make the deposit of Rs.81,925/-. However, no apposite record exists hereat manifesting qua the amount assessed under Ex.RW2/B qua respondent No.3 standing released in his favour, yet therefrom, it is not apt to conclude qua his not receiving its benefit, especially, when no apposite record making the aforesaid bespeakings exists hereat. Nonetheless, articulations occur in Ex. R-3 constituting the statement of the patwari concerned, qua on 4.10.1985, respondent No.3 under protest receiving the amount of compensation determined under the apposite Award No. 9/83 of 12.6.1983, as pronounced by the Collector concerned, also therein echoings occur qua his prior thereto prefering a petition under Sections 30 and 31 of the Land Acquisition Act before the Collector concerned. However, he continues to depose qua the aforesaid petitions preferred by Chartar Singh standing ordered to be filed, wherefrom, it is befitting to conclude qua the aforesaid petitions preferred by respondent Chattar Singh never standing transmitted to the learned Reference Court for enabling the latter to pronounce an adjudication thereupon. However, the effect of the aforesaid omission, of the Collector concerned or of respondent No.3 to ensure the further apt transmission of his apposite petition aforesaid preferred prior to his receiving the amount of compensation determined under the award No.9 of 1983 would stand dwelt upon hereinafter. At this stage, it is deemed fit, to thereupon construct, an inference qua respondent No.3 Chattar Singh acquiescing to the payment of compensation determined in his favour by the Collector concerned, under the apposite award No.9 of 1983 also his acquiescing to the relevant pronouncement made under Ex.RW2/B, whereupon, he stood estopped, to, in land reference petition No. 58-S/4 of 2007/94, whereupon the impugned rendition stood pronounced, to hence contest qua his solitarily to the complete ouster of the landowners, standing entitled to receive the entire compensation amount determined thereunder. Furthermore, with respondent No.3 herein, not ensuring the transmission, by the Collector concerned of his petitions aforesaid constituted under Section 30 and 31 of the Act, onwards to the learned Reference Court, whereupon, hence with his contest raised therein standing terminated, thereupon, also the learned Reference Court held no jurisdiction to, when it stood seized only of a composite petition constituted therebefore by the landowners, wherein they sought enhancement of compensation

besides canvassed qua the award of compensation amount vis-a-vis respondent No.3 Chattar Singh standing set aside, significantly when the composite petition aforesaid alone warranted pronouncement of an adjudication thereon, to pronounce a verdict qua respondent No.3 more so when for the aforestated reasons he stood estopped to re-agitate a terminated claim.

4. Even though, Chattar Singh stood impleaded as respondent No.3 in reference petition No. 58-S/4 of 2007/94, whereupon he stood entitled to contest the claim canvassed therein by the landowners, thereupon, the learned Reference Court though held jurisdictional capacity to reject his prayers urged thereunder, nonetheless, it did not hold any jurisdictional vigour, to oust the landowner from his/their entitlement, to receive compensation amount adjudged in his/their favour by the authority concerned. Ensuingly, also the according of relief qua the entire compensation amount, adjudged upon the apposite land reference petition aforesaid constituted therebefore by the landowners, hence standing disbursed exclusively qua respondent No.3, Chattar Singh, whereas, the latter had omitted to ensure the onward apt transmission, of his petition preferred before the quarter concerned under Section 30 and 31 of the Act, though, it stood preferred prior to his receiving compensation under protest on 4.10.1985, in sequel to pronouncement of award No. 9 of 1983, whereupon he stood estopped to seek any ouster of the landowner(s) from theirs seeking enhancement of compensation amount from the learned Reference Court upon his/their land Reference Petition No. 58-S/4 of 2007/94. The effect of the aforesaid estopple, is qua its baulking not only respondent No.3 Chattar Singh from exclusively claiming the adjudicated compensation amount besides his also standing forestalled to preempt the landowners from receiving the compensation amount awarded under the impugned award also its foisting an embargo upon the learned Reference Court against its totally excluding the landowner(s) from receiving the compensation amount determined by it under the impugned rendition pronounced upon their petition. Consequently, the findings of the learned reference Court qua the aforesaid factum probandum suffers from an inherent jurisdictional vice.

5. Be that as it may, it appears that the learned Reference Court had depended upon the aforesaid exhibits besides upon the apposite acquiescence(s) occurring in the statement of Suesh, comprised in Ex. R-2 to hence hold qua respondent No.3, Chattar Singh holding the status of “gair maurusi” upon the entire land of the landowners. The aforesaid inference stands erected upon a wholly fallacious besides misfounded appreciation of the aforesaid exhibits, especially, when therewithin echoings occur qua respondent No.3 Chattar Singh standing recorded as “gair maurusi” upon 135th share of the landowner(s), wherefrom it is befitting to conclude qua only upon the afore referred share, respondent No.3, Chattar Singh holding rights as a “gair maurusi” under the landowner(s), unless evidence stood adduced holding stark postures qua the earmarked share in exhibits aforesaid constituting the entire share of one Devi Ram in the relevant undivided holdings, brought to acquisition. However, the aforesaid evidence is amiss. In aftermath, it was judicially insagacious for the learned Reference Court to, hence, conclude qua vis-a-vis the entire tract of joint holdings of the landowner(s), respondent No.3 Chattar Singh holding status of a “gair maurusi” nor it was apt for it to conclude qua his alone to the exclusion of the landowner(s) holding entitlement qua the entire compensation amount determined under the impugned award. Likewise, the oral admission occurring in the cross-examination of Suresh embodied in Ex.R-2 qua Devi Ram inducting, respondent No.3 as a “gair maurusi”, is not amenable to a construction qua its affording any leverage to respondent No.3 to espouse qua vis-a-vis the entire share of Devi Ram in the undivided holding, his standing inducted as a tenant thereon by him, obviously when the aforesaid trite precise evidence in respect thereto stood enjoined to be adduced by respondent No.3, whereas, he omitted to adduce it. Contrarily, his abandoning to pursue his petition under Sections 30 and 31 of the Act also his accepting the mandate of Ex.RW2/B ensures the ensual of a clinching conclusion qua his hence portraying his acquiescence qua vis-a-vis only a part of the share of one Devi Ram in the relevant undivided holding, his holding the status of a “gair maurusi” under him, whereupon also he stands estopped to canvass qua the entire amount of compensation determined qua the acquired

land(s), hence, standing disbursed in its entirety in his favour and to the complete ouster of other landowner(s).

6. For the foregoing reasons, the impugned award is modified to the extent, it has declared respondent No.3 to stand entitled to the entire amount of compensation determined under the impugned award. However, the disbursement of amount of compensation, if any, earlier made vis-a-vis Chattar Singh (respondent No.3), under the relevant pronouncement(s) do not warrant any direction qua his standing dis-entitled to their benefit(s). The benefit of the impugned rendition shall also accrue to the appellants besides to respondent No.3 in the manner as concluded/drawn in the previous rendition(s), rendered with respect to the acquired land(s). Accordingly, the instant appeal stands disposed of. All other pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

National Insurance Company Ltd. … Appellant.
Versus
Vidya Devi & another … Respondents

FAO (WCA) No. 330 of 2010
Date of Decision : March 30, 2017

Workmen Compensation Act, 1923- Section 4- H was employed by B – he died as a result of accident during the course of employment- the Commissioner awarded compensation of Rs.4,50,000/- along with interest @ 12 % per annum – solatium was awarded @ 30% - held in appeal that Insurance Company is liable to pay the compensation even if the driving licence is not valid- the Act does not provide for the grant of solatium @ 30% but only provides for the payment of penalty and interest – appeal allowed – the award passed by Commissioner modified.
(Para- 2 to 10)

Cases referred:

Oriental Insurance Company vs. Bhagat Singh, 2012 (2) Him. L. R. 969
Ved Prakash Garg vs. Premi Devi & others, (1997) 8 SCC 1

For the appellant : Mr. Jagdish Thakur, Advocate, for the appellant.
For the respondent : Mr. Vijay Chaudhary, Advocate, for respondent No. 1.
Mr. Vikrant Chandel, Advocate, vice Mr. Dinesh Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Sanjay Karol, J. (Oral)

The appeal stands admitted on the following substantial questions of law:

"1. Whether the Insurance Company is liable to pay the compensation, if the driver is not having valid and effective driving license?

2. Whether the ld. Commissioner below is justified in awarding 30% solatium on the award amount under the provisions of Workmen Compensation Act, 1923?

3. Whether the Insurance Company is liable to pay penal interest under the provisions of workmen Compensation Act?

4. Whether the ld. Commissioner below has erred in interpreting Section 4-A(3)(a)(i) of the Workmen Compensation Act?"

2. Insofar as question No. (1) is concerned, the issue is no longer *res integra* in view of law laid down by the apex Court in *Kulwant Singh & others vs. Oriental Insurance Company Ltd.,* (2015) 2 SCC 186, wherein it is held as under:

> "6. The learned counsel for the appellants submitted that the High Court erred in holding that licence for driving light motor vehicle disentitled the driver to drive 'light goods vehicle'. Reliance has been placed on the Judgments of this Court in *S. Iyyapan vs. United India Insurance Company Limited and another*, (2013) 7 SCC 62 and *National Insurance Company Ltd. vs. Annappa Irappa Nesaria alias Nesearagi and others*, (2008) 3 SCC 464. Thus, there was no breach of policy entitling the Insurance Company to recovery rights against the owner. The learned counsel for the Insurance Company supported the view taken by the High Court.
>
> (7) We have considered the rival submissions and perused the judgments relied upon.
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> (8) We find the judgments relied upon cover the issue in favour of the appellants. In *Annappa Irappa Nesaria (supra)*, this Court referred to the provisions of Sections 2(21) and (23) of the Motor Vehicles Act, 1988, which are definitions of 'light motor vehicle' and 'medium goods vehicle' respectively and the rules prescribing the forms for the licence, i.e. Rule 14 and Form No.4. It was concluded:
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>> "20. From what has been noticed hereinbefore, it is evident that "transport vehicle" has now been substituted for "medium goods vehicle" and "heavy goods vehicle". The light motor vehicle continued, at the relevant point of time to cover both "light passenger carriage vehicle" and "light goods carriage vehicle". A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."
>
> (9) In *S. Iyyapan (supra)*, the question was whether the driver who had a licence to drive 'light motor vehicle' could drive 'light motor vehicle' used as a commercial vehicle, without obtaining endorsement to drive a commercial vehicle. It was held that in such a case, the Insurance Company could not disown its liability. It was observed :
>
>> "18. In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive the commercial vehicle. The impugned judgment [Civil Misc. Appeal No.1016 of 2002, order dated 31.10.2008 (Mad)] is, therefore, liable to be set aside."
>
> (10) No contrary view has been brought to our notice.
>
> (11) Accordingly, we are of the view that there was no breach of any condition of insurance policy, in the present case, entitling the Insurance Company to recovery rights.
>
> (12) Accordingly, we allow these appeals, set aside the impugned order of the High Court and restore that of the Tribunal. There will be no order as to costs."

3. Insofar as question No. (4) is concerned, this issue also stands settled in view of law laid down by a Coordinate Bench of this Court in *Oriental Insurance Company vs. Bhagat Singh,* 2012 (2) Him. L. R. 969. Wages have been correctly accounted for while determining the amount of compensation payable to the workman.

4. It is not in dispute that Hem Chand who was employed by Bhagat Ram, died during the course of his employment. He died as a result of an accident on 10.11.2006. It is not in dispute that at the time of his death, Hem Chand was of 19 years of age. It is also not in dispute that claimant Vidya Devi is mother of the deceased and that she is entitled to the claim. Salary payable to the deceased is also not in dispute.

5. In terms of the impugned Award, claim petition stands allowed to the following effect:

> "The amount of compensation is due to the petitioner but not the whole amount as prayed for by the petitioner. The workman compensation Act WC Act lays down the method to calculate the compensation amount. The age of the deceased at the time of the death was 19 years as per record available which is Ex. AW2/A. Further respondent No. 1 has admitted in his w/reply and statement on oath that the deceased was getting 4000/- pm. Therefore on the application of factor formula given in schedule i.e. half of the wages (subject to the maximum of Rs. 2000/-) is multiplied by the relevant factor which is 225.22 at the age of 19 years, the amount of compensation comes to Rs. 4,50,000/- which amount will be payable to the petitioner from the date of accident till the final payment of compensation as assessed supra. The assessed amount alongwith interest @ 12% per annum from the date of accident. I further do consider here, the loss of future aspects of parents as the deceased was the only son and earner in old age and coming to this non pecuniary damage. It would be appropriate to console the poor harijan parents who lost their 19 years unmarried son forever. They lost their future aspects of hereditary growth thereby deprived of from last Hindu rituals (rites) even there will be none to perform/lit fire to their pyre at the time of death. This permanent pain, sufferings and unbearable mental agony through out their life cannot be compensated in terms of money but by little relief. I find this case fit to award solatium @30% on awarded amount of Rs. 4,50,000/- The aforesaid amount of Rs. 7,69,500/- shall be deposited by respondent No. 2 within 30 days from the date of this order failing which 18% penal interest over and above on Prime Landing Rate @ 12% above as penalty shall be paid till the final date of deposit. The file be consigned to G.R.R.Arki after due completion."

6. It is a settled principle of law that claimants are entitled for compensation only in terms of the Workmen's Compensation Act, 1923 (hereinafter referred to as the 'Act'). The 'Act' does not provide for grant of "solatium @30%", on the awarded amount, which stands awarded by the Commissioner, Workman Compensation, in terms of the impugned award.

7. Compensation, due and payable to the workman/claimant is payable under Section 4(1)(a) which provides as under:

> "4. Amount of compensation. – (1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-
>
> > (a) Where death results from the injury an amount equal to fifty per cent of the monthly wages of the deceased workman multiplied bythe relevant factor; or an amount of eighty thousand rupees, whichever is more;" …

8. Additionally claimant would have been entitled for interest and penalty in terms of Section 4-A of the Act, which in the instant case is not the position. As such, substantial question of law No. (2) is answered accordingly.

9. Insofar as substantial question of law No. (3) is concerned, again one has to only peruse the provisions of Section 4-A of the Act which does not provide for payment of penal interest. The authority is empowered to award interest, simple in nature @12% per annum, only where the employer is in default in paying the amount of compensation due, under the Act, which would be one month from the date it fell due. The apex Court in *Ved Prakash Garg vs. Premi Devi & others,* (1997) 8 SCC 1, has clarified what is the meaning of expression "date it fell due" to mean, one month after the date of incident/accident. As such the question is answered accordingly.

10. Under these circumstances, the impugned Award dated 30.4.2010 passed by Commissioner, Under Workman's Compensation Act, Arki in Case No. 9 of 2007, titled as *Vidya Devi vs. Bhagat Ram & another,* is modified to the following effect:

> Claimant shall be entitled to compensation of Rs. 4,50,000/- alongwith interest @12% from 11.12.2006 that is one month after the date of accident which took place on 10.11.2006 up to 28.8.2010, the date of deposit, which comes to Rs. 2,00,466/-. As such total compensation payable comes to Rs. 6,50,466/- instead of Rs. 7,69,500/-.

Appeal stands disposed of accordingly, as also pending application(s), if any.

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

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

Versus

Bhim Singh ....Respondent.

Cr. Appeal No. 145 of 2009.
Date of Decision: 30th March, 2017.

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a bus – he took it to the wrong side and the bus fell down – the complainant sustained injuries – the accused was tried and acquitted by the Trial Court- held in appeal that according to mechanical expert the steering and braking system of the vehicle had suffered break down– he was not cross-examined at all- hence, the defence version is probable – Trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 11)

For the Appellant: Mr. R.K. Sharma, Deputy Advocate General.
For the Respondent: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of Himachal Pradesh against the judgment rendered on 16.10.2008 by the learned Sub Divisional Judicial Magistrate, Chachiot at Gohar, District Mandi, H.P. in Police Challan No. 76-I/2001 (2000), whereby, he acquitted the accused for his allegedly committing offences punishable under Sections 279, 337 and 338 of the IPC.

2. The facts relevant to decide the instant case are that complainant Nargis Thakur, Hindi Teacher at Senior Secondary School Thunag recorded her statement before the Police to the effect that today on 28.9.1999 at about 3.35 P.M., she was travelling in a HRTC bus which was

going from Janjehli to Sundernagar and was sitting on seat No.3. There were about 35 passengers in the bus. AT about 4.00 p.m., when the bus passed through Kandhi mod then about 70 ft. ahead, the driver of the bus bearing No. HP-31-1509 due to his rashness and negligence took the bus to the wrong side and the bus tumbled down 50 ft. below the road. She came out from the window of the bus. She stated that she along with other passengers of the bus received injuries in the alleged accident. The accident stated to have taken place due to the rash and negligent driving of the bus by its driver. On the aforesaid statement of the complainant, FIR was registered in the police station concerned. Thereafter, the Investigating Officer concerned completed the codel formalities.

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

4. The accused stood charged by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 of the IPC. In proof of the prosecution case, the prosecution examined 23 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court in which the accused claimed innocence and pleaded false implication in the case.

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

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded in favour of the accused/respondent by the learned trial Court. The learned Deputy Advocate General for the State has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the accused/respondent herein has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned trial Court standing based on a mature and balanced appreciation by him of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The penal act of the accused/respondent stands comprised in his purportedly negligently driving his vehicle/bus bearing No. HP-31-1509, constituted by his driving it at an excessive and brazen pace, whereupon, it rolled down at Kandi Mod into a depth of 50 feet below the road. The prosecution witnesses unanimously deposed qua in sequel to the negligent manner of driving of the bus by the accused/respondent, thereupon, it rolling into a depth of 50 feet below the road, also they in tandem depose qua the passengers occupying the bus driven by the accused/respondent sustaining injuries on their person(s), factum whereof stands borne on the apposite MLCs embodied in Ex. PW19/A to Ex.PW19/K and Ex.PA to Ex.PV. All the prosecution witnesses are the occupants of the bus driven by the accused/respondent, each in their respective testifications, testify with unanimity bereft of any vice of any intra se contradictions qua the accused/respondent driving the aforesaid bus, at an excessive speed, whereupon, hence, swerved it astray from the road, whereafter it tumbled into a depth of 50 feet from the edge of the road whereon it stood plied.

10. Be that as it may, their consistently deposed version qua the charge, whereto the accused stood tried, would constrain an inference of the accused/respondent while driving the

aforesaid HRTC bus bearing No. HP-31-1509, his driving it negligently at a brazen pace, sequel whereto, being qua its rolling down into a depth of 50 feet from the edge of the road whereon it stood plied. However, before imputing tenacious credence to the testifications of the ocular witnesses qua the relevant incident, an allusion to the strength of the espousal made by the accused in his defence qua the tumbling of the bus from the edge of the road whereon it stood plied, into a depth of 50 feet therefrom, emanating from eruption of sudden mechanical defect therein, on anvil whereof, he obviously seeks to exculpate his incriminatory role embodied in the relevant charge, besides as a necessary corollary thereto also warrants an advertence to the report of the mechanical expert borne on Ex.PW21/A holding disclosures therein qua sequels of the the Mechanical Expert carrying its inspection, on the day subsequent to the ill-fated mishap involving the vehicle driven by the accused/respondent. The mechanical report Ex.PW21/A, which stands proven by PW-21, pronounces therein qua on his holding the inspection of the relevant vehicle, his detecting its steering system suffering a break down also he vioces therein qua the tyre rod also the leaf spring also standing noticed by him stand dismantled, whereupon, he stood incapacitated to hold inspection of the steering wheel of the relevant vehicle. Furthermore, he has also voiced in Ex.PW21/A qua his inability to ascertain the efficacy of the braking system of the vehicle, inability whereof arose from the brake pipe suffering a breakdown. However, in his report, he has not with firmness voiced the aforesaid defects noticed by him to be occurring in the relevant vehicle on his holding its inspection either erupting prior to the occurrence or subsequent to the occurrence of the accident. However, when PW-9, PW-11 and PW-14, all ocular witnesses to the occurrence in their respective testifications occurring in their relevant cross-examination(s) make vivid articulations qua at the time contemporaneous to the bus driven by the accused swerving away from its appropriate path, whereupon, it tumbled upto a depth of 50 feet from the edge of the road, whereon, it stood plied, theirs hearing a sound of some breakage occurring in the relevant vehicle. The aforesaid testimonies of PWs aforesaid stood not concerted to be shred of their efficacy by the learned APP concerned comprised in his seeking the permission of the learned trial Magistrate to either cross-examine them or to re-examine them qua the fact aforesaid, whereupon, the effect of the aforesaid pronouncements made by the aforesaid PWs is qua theirs being credible besides their apposite effect stands when construed in coalescence with PW-21 omitting to with firmness voice in Ex.PW21/A qua the relevant defects noticed by him to be occurring in the vehicle concerned occurring thereon either prior to the accident or subsequent thereto, whereupon, hence with lack of conclusivity of imputation by him qua the relevant defects noticed by him in the relevant vehicle hence occurring therewithinn prior to or subsequent to the accident, is qua hence an inference standing engendered qua the espousal of the accused qua his inability to keep the vehicle on the appropriate side of the road standing sequelled by the failure or of break down of its steering wheel besides break down of its braking system, whereupon, obviously the speed at which it stood driven being hence volitionally uncontrollable did not hence render him penally inculpable.

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

12. Consequently, there is no merit in the instant appeal which is accordingly dismissed. The judgment impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

State of H.P. ……Appellant.

Versus

Madan Lal & ors. ……Respondents.

Cr. Appeal No. 49 of 2014.

Decided on: 30.3.2017.

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased S was married to accused M – the accused treated her with cruelty – she consumed poison and committed suicide – the accused was tried and acquitted by the Trial Court- held in appeal that parties were married for 9 years – according to prosecution cruelty started after 5-6 months of the marriage- the cause of cruelty was not given – the deceased was asked to return to her matrimonial home, which shows that that the situation was not grave otherwise Panchayat would not have asked her to return to her matrimonial home – the children of the deceased were not associated to prove the cruelty – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-6 to 17)

For the appellant	Mr. D.S.Nainta and Mr. Virender Verma, Addl. AGs.
For the respondents	Appeal stands abated against respondent No. 1.
	Mr. Gaurav Gautam, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

The respondents (hereinafter referred to as the accused persons), one of them i.e. respondent No. 1 Madan Lal has expired during the pendency of the appeal in this Court, have been acquitted of the charge under Sections 498-A and 306 read with Section 34 IPC by learned Sessions Judge, Kangra, Sessions Division at Dharamshala vide impugned judgment dated 30.3.2013, passed in sessions Case No. 67-K/VII/2010/08.

2. This appeal has been filed with a prayer to quash the impugned judgment and after recording the findings of conviction against the accused persons to convict them for the commission of the offence they allegedly committed.

3. The charges against all the accused persons were that they all started treating deceased Sweety Bala, wife of accused Madan Lal (since dead) with cruelty, mental as well as physical, after 5-6 years of her marriage. As a result thereof, she consumed *'phosphide'*, a poisonous substance at 8:00 AM on 18.10.2007, at the place of her in-laws i.e. village Baidi, Tehsil Kangra under the jurisdiction of Police Station Kangra, H.P. Therefore, all the co-accused in furtherance of their common intention have allegedly tortured the deceased and abetted the commission of suicide by her.

4. The prosecution, in order to prove charges so framed against the accused persons, has examined 16 witnesses in all. However, the material prosecution witnesses are the mother of the deceased PW-1 Radha Rani, her brother PW-4 Sanjeev Kumar, Uncle PW-5 Pawan Kumar, PW-7 Ghandharv Singh and maternal Uncle PW-10 Des Raj. Learned trial Court, on appreciation of the evidence as has come on record by way of their testimony and also by that of the official witnesses, has arrived at a conclusion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. They all have therefore been acquitted of the charges which were framed against each of them.

5. The grouse of the appellant-State herein is that learned trial Judge has brushed aside the cogent and reliable evidence produced by the prosecution without assigning any reason. The findings of acquittal as recorded, therefore, are stated to be not legally and factually sustainable. On hearing learned Addl. Advocate General at length and also going through the entire evidence as well as taking into consideration the arguments addressed on behalf of the appearing accused-respondents No. 2 & 3, the questions which have engaged our attention and need adjudication are that the findings of acquittal recorded by learned trial Court are not in consonance vis-à-vis oral as well as documentary evidence produced by the prosecution during the course of trial.

6. Interestingly enough, the deceased was married to accused Madan Lal nine years ago of her suicidal death. As per the first version which find recorded in the statement Ext. PW-1/A of Smt. Radha Rani, the mother of the deceased, accused started torturing her daughter immediately after 5-6 months of her marriage. The cause as to why she was being tortured or being turned out from the matrimonial home, however, is missing in Ext. PW-1/A and also in the statement of the material prosecution witnesses, named hereinabove. As per their version, it is deceased Madan Lal, the husband of deceased Sweety Bala who had apprised on 18.10.2007 around 2:00 PM over telephone that Sweety Bala had consumed poison and that PW-1 Radha Rani should reach in Dharamshala hospital at once. PW-1 Radha Rani tells us in her examination-in-chief that her statement Ext. PW-1/A was recorded by the police, however, at what stage, the same is silent. Now, if coming to her cross-examination, she tells us about recording of her statements by the police twice i.e. first at the time when her deceased daughter was admitted for treatment in the hospital and secondly in the mortuary when her post mortem was being conducted. We could lay our hands only on her statement i.e. Ext. PW-1/A recorded under Section 154 Cr.P.C. i.e. after the death of Sweety Bala. Where is her first statement which as per her version was recorded at the time when the deceased was admitted in hospital, the record is silent, meaning thereby that the allegations leveled by the complainant party against the accused persons are not proved beyond all reasonable doubt. The possibility of the present case foisted against the accused persons under some political pressure cannot be ruled out because admittedly, Chaudhary Ashok Kumar, Advocate, nephew of Sh. Chander Kumar, Former Member of Parliament and Cabinet Minister of Himachal Pradesh was related to complainant party, being son-in-law (Chacha Sasur) of PW-1 Radha Rani. Though, it is denied that the case against the accused was engineered and manipulated under political pressure, however, when specific instances of cruelty thereof remained unexplained, therefore, in view of the recent trend of implicating the in-laws of a married women having committed suicide, the false implication of the accused persons cannot be ruled out.

7. The Panchayat was there in the village of the complainant party. The Pradhan/Up-Pradhan of the Gram Panchayat was none else but PW-10 Des Raj, maternal Uncle of the deceased. As per the own admission of PW-1 Radha Rani, Police Post Gaggal was at a distance of 3 kms. from her house. As admitted by all the material prosecution witnesses, they never reported the matter qua the alleged torturing and harassment of the deceased in the matrimonial home either to the Gram Panchayat or to the police. They rather had been consoling the deceased as and when she comes to them with a complaint of her maltreatment and torturing against accused and make her to understand to return to the matrimonial home. Had the degree of alleged cruelty been to such an extent that the deceased decided to put an end of her life by committing suicide, the complainant party instead of pacifying or consoling the deceased or persuading her to return to the matrimonial home was expected to have reported the matter either to the Panchayat, police or have filed complaint in the Court of law against her in-laws. As a matter of fact, while in the witness-box, they had no explanation to offer to justify their conduct in not reporting the matter to the authorities that the accused started treating the deceased with cruelty.

8. It is significant to note that two issues were born to the deceased out of her wed-lock with accused Madan Lal (since dead). As per the testimony of PW-1 Radha Rani, the complainant and PW-4 Sanjeev Kumar, the daughter of the deceased was studying in 7th

standard whereas son in 4th standard. This fact was not disclosed to the Investigating Agency as has come in the statement of complainant PW-1 Radha Rani while in the witness-box. The Investigating Agency has also not made any effort to associate the daughter and son of the deceased during the course of investigation. As a matter of fact, a child studying in 7th standard is mature enough and can be said to be a material witness in a case of this nature having witnessed the harassment and torturing of his/her mother at the hands of his/her father or any relative(s) of father. Therefore, the daughter of deceased would have deposed something tangible to lend support to the prosecution case had there been any ill-treatment or harassment of her mother at the hands of accused Madan Lal or her grand parents, accused Munshi Ram and Geeta Devi. Since she has not been associated during the course of investigation, therefore, an adverse inference has to be drawn against the prosecution. Above all, the only independent witness PW-7 Ghandharv Singh examined by the prosecution has not supported its case and rather he has turned hostile. His testimony, therefore, belies the prosecution case that the accused persons started treating the deceased with cruelty after 5-6 months of her marriage and that this fact was disclosed by the deceased herself to this witness. The rest of the prosecution case that the accused used to turn out the deceased from the matrimonial home and that he tried to settle the matter between the complainant party and the accused on several occasions is without any result having also been denied being wrong. According to him, the accused never compelled the deceased to commit suicide. There is nothing to disbelieve the testimony of PW-7 Ghandharv Singh because he is Rajput by caste whereas accused belongs to Ghirth community. It has come in his examination-in-chief that accused was his relative, however, clarified in his cross-examination that he was not related with them in any manner, whatsoever, and rather he had friendly relations with the parents of the deceased. He had settled the marriage of the deceased with accused Madan Lal in the capacity of a mediator, however, neither party approached him for getting the dispute, if any, amongst them to be sorted out by him.

9. Therefore, the evidence discussed hereinabove is not suggestive of that the deceased was being tortured by the accused persons and the degree thereof was to such an extent that the deceased deemed it appropriate to put an end to her life and that too when she was mother of two minor children.

10. A bare reading of Section 498-A reveals that subjecting the wife to cruelty by her husband or his relative with a view to coerce her or any person related to her to meet with their unlawful demand for any property or valuable security or any willful conduct of the husband of such woman or his 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 is *sine qua non* to constitute the commission of offence punishable under Section 498A IPC. We are drawing support in this regard from the judgment dated 12.8.2016 of a Division Bench of this Court rendered in Cr. Appeal No. 800 of 2008 titled ***State of H.P. vs. Rajinder Singh and others***.

11. If coming to the offence punishable under Section 306 of the Indian Penal Code, the prosecution is required to plead and prove beyond all reasonable doubt that some person has committed suicide and he/she did so after being instigated by the accused. 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 of 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.

12. It is thus crystal clear that in order to infer the commission of an offence punishable under Section 306 IPC, the prosecution is required to plead and prove that one person has instigated another person to commit suicide and as a result of such instigation, such another person had committed suicide. It is only in that event the person causing the instigation is liable to be punished for the commission of an offence punishable under Section 306 IPC.

13. Interestingly enough, even for the arguments sake if it is believed that in the case in hand, the deceased was being treated with cruelty by the accused persons, it is not the case of the prosecution that her torturing and mal-treatment was for the demand of dowry or any valuable security by her husband accused Madan Lal or his parents accused Munshi Ram and Geeta Devi. There is not even a whisper in this regard in the evidence relied upon by the prosecution. It cannot also be believed by any stretch of imagination that she was being tortured by her in-laws.

14. In view of the contradictions, inconsistencies and improvements, as noticed hereinabove, the allegations of cruelty as has come on record in the statements of PW-1 Radha Rani, PW-4 Sanjeev Kumar, PW-5 Pawan Kumar, PW-7 Gandharv Singh and PW-10 Desh Raj are nothing else but merely an after thought and leveled with an idea to implicate the accused persons in this case falsely.

15. We, therefore, are not in agreement with learned Addl. Advocate General representing the State i.e. appellant herein that it is on account of maltreatment of the deceased at the hands of the accused persons, they abetted the commission of suicide by her within the meaning of Section 306 of the Indian Penal Code.

16. The remaining prosecution witnesses PW-2 Const. Vijay Kumar, PW-3 Dr. Vivek Sood, PW-6 Shiv Kumar, PW-8 HHC Kuldeep Singh, PW-9 HHC Ajeet Singh, PW-11 HC Vijay Singh, PW-12 HC Gopal Sain, PW-13 HC Rahul Rishi, PW-14 ASI Nirmal Dass, PW-15 Insp. Ranjit Singh and PW-16 Dr. Ashok Kumar are formal, as they remained associated during the investigation of the case in one way or the other. Their evidence at the most could have been used as link evidence had the prosecution otherwise been able to bring guilt home to the accused by way of producing cogent and reliable evidence.

17. 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 and 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.

18. In view of what has been said hereinabove, the appeal fails and the same is accordingly dismissed. The personal bonds furnished by the accused persons shall stand cancelled and the sureties discharged.

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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

Bimla Devi. ....Respondent

Criminal Appeal No. 38 of 2014

Reserved on: 24.3.2017

Date of Decision: 31.3.2017

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to the son of the respondent – respondent used to taunt the deceased for not delivering a male child and for not giving gifts- respondent used to quarrel with the deceased on insignificant issues- the deceased

got burnt – the accused was tried and acquitted by the Trial Court –aggrieved from the order, the present appeal has been filed – held that witnesses except PW-16 turned hostile – there are discrepancies in the testimony of PW-16 – the deceased had also made contradictory statements in the dying declaration due to which the dying declaration cannot be relied upon – an inference can be drawn that the deceased may have put herself on fire on account of daily quarrel but a suspicion cannot take the place of proof – the abetment or cruelty has not been established – the prosecution had failed to prove its case beyond reasonable doubt and the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para- 8 to 35)

Cases referred:

Raja and others Vs. State of Karnataka (2016) 10 SCC 506
Umakant and another Vs. State of Chhattisgarh (2014) 7 SCC 405
Samadhan Dhudaka Koli vs. State of Maharashtra (2008) 16 SCC 705,
Bhadragiri Venkata Ravi Vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2013) 14 SCC 145
Gurcharan Singh Vs. State of Punjab (2017) 1 SCC 433

For the Appellant: Mr.M.A. Khan and Mr. Virender Verma, Additional Advocate Generals.
For the respondent: Mr. Virender Singh Rathour, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

State has assailed acquittal of respondent vide judgment dated 25.7.2013 passed in Sessions Trial No. 72-J/VII-2010/2009 by Sessions Judge, Kangra at Dharamshala in case FIR No. 136 of 2008 under Sections 498-A and 306 IPC registered in Police Station Indora.

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

3. On 18.6.2008 at about 11.30 A.M. a telephonic message was received in Police Post Fatehpur, calling police for action, as a lady having burn injuries was brought for treatment in CHC, Fatehpur. On reducing the said information into writing as report No. 7, dated 18.6.2008, PW-2 ASI Mohinder Singh along with Head Constable Rajesh Kumar departed for CHC Fatehpur, on whose application Ex. PW-2/B, Medical Officer opined that injured was fit to give statement whereupon statement of injured Ex. PW-2/D was recorded in presence of PW-11 Janak Raj Pradhan Gram Panchayat, Up-Pradhan Karnail Singh and Medical Officer duly attested by Medical Officer wherein injured (deceased Asha Devi) stated that she caught fire accidently when she was lighting kerosene stove and on crying her mother-in-law who was outside with cattle, came and extinguished fire and in the incident there was no negligence or fault of any body. The said statement was also reproduced in rapat No. 9, dated 18.6.2008 Ex. PW-2/E in Police Post, Fatehpur by PW-2 ASI Mohinder Singh. On finding that case pertained to jurisdiction of Police Station Indora, at about 1:00 P.M., telephonic information was sent to Police Station Indora through Head Constable Rajesh Kumar on behalf of Incharge of Police Post Fatehpur for taking action in the matter with further information that statement of injured has been recorded whereupon, from Police Station Indora, PW-9 H.C. Anubhav Krishan was sent to CHC Fatehpur where he found that injured had been taken to Pathankot for treatment. From Pathankot deceased was shifted to Dr. Rajendra Prasad Government Medical College (RPGMC), Tanda. On 19.6.2008, PW-9 H.C. Anubhav Krishan, on receiving telephonic information about return of father of injured (deceased), who was accompanying her in hospitals, to his village, went to parental village of deceased, where he found that PW-15 ASI Geeta Parkash had already arrived there who recorded statement Ex. PW-10/A of PW-12 Subash Singh, father of deceased under Section 154 Cr.P.C.

4. In his statement Ex. PW-10/A recorded under Section 154 Cr.P.C, PW-12 stated that his daughter Asha Devi (deceased), married to son of respondent, whenever came to meet him, had been telling him that respondent used to taunt her for not delivering to male child and for not giving gifts by her parents to them and also used to quarrel on insignificant issues whereupon he used to propose his daughter to advise respondent, but his daughter always refrained him from doing so because of some pressure. Thereupon he asked his son-in-law to advise his mother not to harass deceased. He further stated that on 18.6.2008 on receiving information about burning of his daughter, he reached hospital, where on asking, his daughter did not tell anything and he took her to a private hospital at Pathankot, wherefrom she was referred to Chandigarh/Ludhiana whereupon he brought his daughter in the same vehicle to RPGMC Tanda for treatment. Thereafter he stated that he believed that his daughter burn herself by pouring kerosene oil upon her on 18.6.2008 because of harassment by respondent. The aforesaid statement was sent to Police Station Indora as rucka, in pursuance to which FIR Ex. PW-10/B was recorded by PW-10, Inspector Shakti Parsad.

5. On the basis of FIR Ex. PW-10/B, investigation was started, statements of witnesses were recorded, burnt cloths alngwith bottle of kerosene oil and match box were taken into possession vide seizure memo Ex. PW-11/A and were sent to chemical examination to forensic lab and on 22.6.2008 at about 11:35 A.M. another statement Ex. PW-15/G of deceased Asha Devi was recorded by PW-15 Geeta Prakash in Medical College, Tanda in presence of her mother PW-3 Kamla Devi and one Baldev Singh and Medical Officer made endorsement Ex. PW-17/A on it, certifying making of the statement in his presence. PW-17 Dr. Sanjay Sood was examined to prove the signatures of Dr. Kuldeep Singh (deceased) in endorsement Ex. PW-17/A made on the statement of deceased Asha Devi Ex. PW-15/G. In this statement, deceased alleged that on 18.6.2008 respondent Bimla Devi, her mother-in-law, started quarreling on issue of cattle and poultry and thereafter she started taunting for not giving birth to male child and teasing by uttering hopeless words and she did not stop despite requests of deceased whereupon deceased felt angry and poured kerosene oil upon herself and put herself on fire by lighting matchstick and on feeling pain she ran out of the room and started crying and her mother-in-law also cried for help and tried to extinguish fire of her clothes. She fell down on the ground and respondent threw water upon her. Thereafter villagers took her to hospital and she had put on fire herself because of harassment by Bimla Devi. She further stated that she did not want to say anything about statement given in CHC Fatehpur.

6. On 25.6.2008, Asha Devi succumbed to her injuries at about 6:15 P.M. Her post mortem was conducted by PW-14 Dr. Atul Gupta on 26.6.2008, who issued her post mortem report Ex. PW-14/C with opinion that she died due to asphyxia and septic shock due to antimortem burns approximately 70%. In chemical examination report, traces of kerosene oil were detected in burnt clothes with skin of deceased and match box. On completion of investigation, prima facie findings complicity of respondent, challan was put in the Court against her and she was charged under Sections 498-A and 306 IPC.

7. Prosecution has examination 17 witnesses to prove its case. After recording statement of respondent under Section 313 Cr.P.C., she had chosen not to lead any evidence in defence. On conclusion of trial, respondent stands acquitted.

8. Receiving burn injuries on 18.6.2008 by deceased at her in-laws house and her death on 25.6.2008 succumbing to her injuries is not disputed. Respondent Bimla Devi had also received burn injuries, for which she was also treated in CHC Fatehpur and remained admitted in the hospital from 20.6.2008 to 29.6.2008 is also an admitted fact as prosecution examined PW-1 Dr.Randhir Thakur, who medically examined and treated her, to prove her MLC Ex. PW-1/B and discharge card Ex. PW-1/C. In cross-examination, he admitted injuries mentioned in MLC Ex. PW-1/B were possible, if person tried to extinguish fire of other person and probable time of receiving these injuries might be morning and day time of 18.6.2008.

9. The moot question to be decided in this appeal is that whether prosecution has established beyond reasonable doubt that deceased Asha Devi had burn herself by putting kerosene oil upon her, because of harassment subjected to her by respondent.

10. PW-6 Shiv Kumar photographed the dead body of deceased. PW-7 H.C. Santokh Singh had received message from Police Post Fatehpur and recorded report on the basis of said message. PW-8 H.C. Sushil Kumar, being Malkhana incharge, had received articles taken in possession during investigation and sent them for chemical examination. PW-9 H.C. Anubhav Krishan had visited the parental village of deceased and hospital in pursuance to information received PW-10 Inspector Shakti Parsad had registered FIR after receiving statement Ex. PW-10/A made by PW-12. PW-14 Dr.Atul Gupta conducted post mortem of dead body of deceased. PW-17 Dr.Sanjay Sood identified signatures of Dr.Kuldeep Singh (deceased) on statement of deceased Ex. PW-15/G. PW-4 Surinder Kumar had taken deceased Asha Devi to CHC, Fatehpur in his Jeep. PW-5 Hoshiar Singh on hearing cries of deceased went to the house of her in-laws and found deceased in burnt condition and helped to take her to CHC Fatehpur. All these witnesses are not aware about the cause of incident.

11. Prosecution has examined PW-3 Smt. Kamla Devi, PW-12 Subash (parents of deceased), PW-13 Tilak Raj and PW-16 Ram Pal (paternal and maternal uncles of deceased) and PW-11 Sh. Janak Raj, Pradhan of Gram Panchayat to prove that deceased has committed suicide as a result of harassment faced by her in the hands of respondent.

12. Except PW-16, all these witnesses were declared hostile for resiling their earlier statements recorded by police under Section 161 Cr.P.C. PW-16 also, though in examination-in-chief stated that mother-in-law of deceased i.e. respodnent Bimla Devi maltreated and tortured the deceased, resulting into commission of suicide by deceased. But in cross-examination, he admitted that deceased in her statement recorded by police in CHC Fatehpur, stated that she had caught fire accidently. He further stated that deceased never complained to him or his family members about any maltreatment or any instance of torture by respondent. He had shown his ignorance about relations between respondent and deceased. He also expressed his ignorance about the fact that respondent remained admitted in the hospital for nine days for her treatment, due to burn injuries sustained by her. The version of this witness is self-contradictory.

13. Conviction can be based on statements of hostile witness as statement of hostile witness is not to be brushed aside in toto and Court can consider evidence of hostile witness to corroborate other evidence on record. It is also clearly well settled that mere fact that a witness is declared hostile does not make him unreliable witness so as to exclude his evidence from consideration altogether but the said evidence remains admissible in the trial and there is no legal bar to base conviction or acquittal upon testimony of hostile witness if corroborated by other reliable evidence. Hon'ble Supreme Court in case ***Raja and others Vs. State of Karnataka (2016) 10 SCC 506*** has held as under:-

> "32. *That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."*

14. In the light of aforesaid settled position, we have to examine statements of hostile witnesses PW-3, PW-11, PW-12 and PW-13.

15. PW-3 Smt. Kamla Devi in her cross-examination by learned Public Prosecutor also desisted from supporting case of prosecution and has denied to have made statement portion A to A recorded under Section 161 Cr.P.C. Though she admitted that her son-in-law used to keep

her daughter nicely and only respondent maltreated and tortured her, but she further stated that she could not say that due to torture of respondent, her daughter committed suicide. She admitted that they had good relation with respondent and she want to save old lady from punishment for daughters of deceased and her son-in-law and for that reason she was not deposing against her as per police case. In cross-examination by defence counsel, she denied that her daughter never complained to her that respondent had been torturing and maltreating her for not giving birth to a male child, but so far as cause of burning of deceased is concerned, she categorically stated that she could not say that deceased had stated to police that she had caught fire accidently. At the same time, she also remained silent about the incident, by not saying that deceased had committed suicide because of maltreatment of respondent. What can be gathered from her entire statement is that respondent was taunting deceased for not delivering male child. About cause of burning this witness is not sure.

16. PW-12 Subash is father of deceased and on the basis of his statement Ex. PW-10/A recorded under Section 154 Cr.P.C. case was registered against the respondent, has also not lent support to the prosecution case. He was declared hostile and was subjected to cross-examination by learned Public Prosecutor. He denied the entire case of prosecution and also statement Ex.PW-10/A, except his signatures on the same. He stated that he was an illiterate person and was not conversant with Hindi language and he could not say what was written by police in Ex. PW-10/A. He admitted that he did not want to pursue the present case against the respondent. He stated that Ex. PW-10/A was not read over to him and nor he himself read it. He also expressed his ignorance about recording of statement of deceased in CHC, Fatehpur, wherein she stated that she had caught fire accidently. However, he admitted that deceased never made any complaint regarding maltreatment or any kind of mental torture to him against respondent and it was told by him to the police at the time of recording his statement that he did not know anything about the case. Despite lengthy cross-examination by learned Public Prosecutor, nothing favourable could be extracted in favor of prosecution.

17. PW-13 Tilak Raj, uncle of deceased, was also declared hostile for not supporting the prosecution case. In cross-examination by learned Public Prosecutor, he admitted that deceased Asha Devi used to visit his parental house and tell him that respondent harassed and maltreated her. He also stated that because of that harassment and maltreatment, she set herself on fire. In cross-examination by defence counsel, he stated that he was not present at the time of incident on the spot and he could not say how and why deceased sustained burn injuries. He admitted that on 18.6.2008 in CHC Fatehpur, statement of deceased was recorded by PW-2 ASI Mohinder Singh in presence of PW-11 Janak Raj and Karnail Singh Pradhan and Up-Pradhan of Gram Panchyat, wherein she stated that she had caught fire accidently when she was trying to pump oil in kerosene stove. He further stated that deceased was living very nicely prior to death with respondent Bimla Devi and deceased was not having any dispute of any nature with respondent or her husband and in his presence respondent never tortured deceased for giving birth to daughters. However, he denied suggestion that deceased had never complained to him against respondent for being maltreated by her for not giving birth to son. This witness also indicates harassment of deceased by respondent for not delivering male child.

18. PW-11 Janak Raj Pradhan Gram Panchyat, went to CHC Fatehpur on coming to know about burn injuries received by deceased along with Up-Pradhan Karnail Singh. He stated that in his presence and also that of Medical Officer, deceased made a statement to police stating therein that at about 9:00 A.M. she caught fire accidently when she was trying to pump oil in kerosene store. He was also declared hostile for resiling his earlier statement recorded under Section 161 Cr.P.C. and was subject to cross-examination by learned Public Prosecutor. He admitted recording of his statement, but stated that he did not remember whether small girl child named Shibu was present on spot and he denied that small girl child Shibu told in his presence that her mother poured kerosene oil and set her on fire. He denied to have made such statement to the police. A suggestion was put to him by prosecution itself that respondent had tried to extinguish fire on the person of deceased and during that process, respondent had also sustained burn injuries on her person, which he admitted. In cross-examination by defence counsel, he

again admitted making of statement by deceased, recorded by ASI PW-2 Mohinder Singh, in his presence and that of Karnail Singh, stating therein that she caught fire accidently and the said fact was also told by him to police at the time of recording his statement. Small girl child namely Shibu was never examined despite being claimed to be eye witness in cross-examination of PW-11 by learned Public Prosecutor. Prosecution did not explain why the said Shibu was not brought before the Court. Prosecution must also be fair to the accused. Fairness on the part of investigating agency in investigation as well as trial is a human right of an accused. The State cannot suppress vital evidence from the Court only because the same would support the case of accused. (See *Samadhan Dhudaka Koli Vs. State of Maharashtra (2008) 16 SCC 705*).

19. PW-15 recorded statement Ex. PW-15/G made by deceased in RPGMC, Tanda in presence of her mother PW-3 Kamla Devi and one Baldev Singh which was endorsed by Dr. Kuldeep Singh (now deceased). Signatures of Dr. Kuldeep Singh were proved by PW-17 Dr.Sanjeev Sood. However, PW-17 is not witness to statement. PW-3 Kamla, mother of deceased is silent about this statement. Interestingly the statement was not put to her even during cross-examination by learned Public Prosecutor. Another witness to this statement PW Baldev Singh was not examined.

20. In statement Ex. PW-15/G, deceased had accused respondent for abetting her to commit suicide by maltreating and taunting her. However there is another statement Ex. PW-2/D made by deceased to PW-2 Mohinder Singh, which is also on record, wherein she had attributed the incident of her burning to an accident. Therefore, there are two inconsistent statements of deceased on record. The circumstances and timing of these statements are so proximate to the death of deceased and to each other that both of these statements can be considered to be her dying declaration. The statement of deceased cannot be discarded only on the ground that there is more than one dying declaration. Conviction can also be based upon only on dying declaration of deceased in case the said dying declaration is trustworthy, credible and confidence inspiring. However, when there is material variance and inconsistency in two statements of deceased, definitely either of those statements cannot be made basis for convicting accused.

21. In case ***Umakant and another Vs. State of Chhattisgarh (2014) 7 SCC 405***, Hon'ble Apex Court has held as under:-

> *"22. The legal position about the admissibility of a dying declaration is settled by this Court in several judgments. This Court in Atbir v. Government of NCT of Delhi - 2010 (9) SCC 1, taking into consideration the earlier judgments of this Court in Paniben v. State of Gujarat - 1992 (2) SCC 474 and another judgment of this Court in Panneerselvam v. State of Tamilnadu 2008 (17) SCC 190 has given certain guidelines while considering a dying declaration:*
>
> *"(i) Dying declaration can be the sole basis of conviction if it inspires full confidence of the Court.*
>
> *(ii) The Court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.*
>
> *(iii) Where the Court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.*
>
> *(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborative. The rule requiring corroboration is merely a rule of prudence.*
>
> *(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.*
>
> *(vi) A dying declaration which suffers from infirmities, such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.*

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(iv) When the eye-witness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny the Court is satisfied that it is free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it basis of conviction, even if there is no corroboration."

22. Law on multiple dying declarations is well settlement. In ***Samadhan Dhudaka Koli vs. State of Maharashtra (2008) 16 SCC 705***, Hon'ble Apex Court has held as under:-

"18. Consistency in the dying declaration, therefore, is a very relevant factor. Such a relevant factor cannot be ignored. When a contradictory and inconsistent stand is taken by the deceased herself in different dying declarations, they should not be accepted on their face value. IN any event, a rule of prudence, corroboration must be sought from other evidence brought on record. …."

23. However, after considering plethora of judgments, Hon'ble Supreme Court in case ***Bhadragiri Venkata Ravi Vs. Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2013) 14 SCC 145*** has held as under:-

"22. It is a settled legal proposition that in case there are apparent discrepancies in two dying declarations, it would be unsafe to convict the accused. In such a fact-situation, the accused gets the benefit of doubt. (Vide: Sanjay v. State of Maharashtra, (2007) 9 SCC 148; and Heeralal v. State of Madhya Pradesh, (2009) 12 SCC 671).

23. In case of plural/multiple dying declarations, the court has to scrutinise the evidence cautiously and must find out whether there is consistency particularly in material particulars therein. In case there are inter-se discrepancies in the depositions of the witnesses given in support of one of the dying declarations, it would not be safe to rely upon the same. In fact it is not the plurality of the dying declarations but the reliability thereof that adds weigh to the prosecution case. If the dying declaration is found to be voluntary, reliable and made in a fit mental condition, it can be relied upon without any corroboration. But the statements should be consistent throughout.

24. In case of inconsistencies, the court has to examine the nature of the same, i.e. whether they are material or not and while scrutinising the contents of various dying declarations, the court has to examine the same in the light of the various surrounding facts and circumstances. In case of dying declaration, as the accused does not have right to cross-examine the maker and not able to elicit the truth as happens in the case of other witnesses, it would not be safe to rely if the dying declaration does not inspire full confidence of the court about its correctness, as it may be result of tutoring, prompting or product of imagination. The court has to be satisfied that the maker was in a fit state of mind and had a clear opportunity to observe and identify the assailant (s). (Vide: Smt. Kamla v. State of Punjab, AIR 1993 SC 374; Kishan Lal v. State of Rajasthan, AIR 1999 SC 3062; Lella Srinivasa Rao v. State of A.P., AIR 2004 SC 1720; Amol Singh v. State of Madhya Pradesh, (2008) 5 SCC 468; State of Andhra Pradesh v. P. Khaja Hussain, (2009) 15 SCC 120; and Sharda v. State of Rajasthan, AIR 2010 SC 408)."

24. Discrepancy in two statements Ex. PW-2/D and Ex. PW-15/G made by deceased is not trivial in nature, but both the statements are in contrast to each other and such contradictory statements renders the version of deceased unreliable. In case first statement Ex. PW-2/D is not considered to be dying declaration and only statement Ex. PW-15/G is considered

to be dying declaration, then also it is admitted case of prosecution that deceased had made statement Ex. PW-2/D recorded by Pw-2 Mohinder Singh and said fact stands also admitted by deceased in her statement Ex. PW-15/D, wherein she stated that she had no explanation about statement Ex. PW-2/D made by her in CHC Fathepur. Though PW-2 Mohinder Singh has tried to improve by stating that it appeared at that time that deceased was trying to save her mother-in-law and deceased seemed to be under some pressure, but his version does not find corroboration from his subsequent conduct. After going back to Police Post Fathepur he entered daily diary report Ex. PW-2/E and reproduced entire statement of deceased along with his comments in the said report. Perusal of contents of report Ex. PW-2/E reveals that he had no where recorded his observation that it was noticed by him that deceased was under pressure and was trying to save her mother-in-law. After finding the case fallen in jurisdiction of Police Station Indora, information was sent to the said Police Station and it was conveyed in the information that statement of injured had been recorded. Again there was no reference of observation of PW-2 about saving of her mother-in-law by deceased under some pressure or otherwise. Therefore, improvement made by PW-2 Mohinder Singh is also of no help to the prosecution.

25. There are contradictory statements of deceased as well as relatives of deceased from parental side. Scrutiny of evidence on record, at the most can lead an inference that deceased may have put herself on fire on account of day to day quarrels with respondent and such inference can lead to conclusion only that cause of committing suicide by deceased may have been maltreatment by respondent. But suspicion however strong may not take place of conclusive proof. It is settled law that in absence of conclusive proof, conviction cannot be based merely on suspicion. There are self contradictory statements of prosecution witnesses and two divergent statements of deceased but for unexplained reasons, which leads to only conclusion that it cannot be said beyond all reasonable doubt that deceased had committed suicide on account of maltreatment and harassment by respondent. It is another aspect of the case that whether such taunting will amount a sufficient reason driving deceased to take drastic step to end her life by committing suicide. However, statements of deceased and prosecution witnesses are not sufficient to prove beyond reasonable doubt that deceased committed suicide due to taunting by respondent for not giving birth to a male child or otherwise respondent abetted deceased to commit suicide.

26. Section 107 of Indian Penal Code defines abetment which reads as under:-

> *"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."*

27. Legislature has also inserted Section 113-A in the Evidence Act, 1872 permitting Court to have presumption as to abetment of suicide by a married women by her husband or any his relative if suicide is committed within seven years of marriage and her husband or his relative had subjected her to cruelty. Cruelty in this Section has same meaning as expressed in Section 498-A IPC.

28. Section 498-A IPC reads as under:-

> *"498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be pun-ished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.—For the purpose of this section, "cruelty" means—*

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing 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."

29. For raising presumption under Section 113-A of the Evidence Act cruelty on the part of in-laws is sine qua non. In absence of cruelty as defined in Section 498-A IPC there cannot be any presumption of abatement of suicide.

30. In ***Gurcharan Singh Vs. State of Punjab (2017) 1 SCC 433,*** Hon'ble Supreme Court has held as under:-

"26. Though for the purposes of the case in hand, the first limb of the explanation is otherwise germane, proof of the willful conduct actuating the woman to commit suicide or to cause grave injury or danger to life, limb or health, whether mental of physical, is the sine qua non for entering a finding of cruelty against the person charged.

27. The pith and purport of Section 306 IPC has since been enunciated by this Court in Randhir Singh vs. State of Punjab (2004)13 SCC 129, and the relevant excerpts therefrom are set out hereunder. (SCC p. 134, paras 12-13)

"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. Vs. Orilal Jaiswal (1994) 1 SCC 73, 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."

28. Significantly, this Court underlined by referring to its earlier pronouncement in Orilal Jaiswal (supra) that courts have to be extremely careful in assessing the facts and circumstances of each case to ascertain as to whether cruelty had been meted out to the victim and that the same had induced the person to end his/her life by committing suicide, with the caveat that if the victim committing suicide appears to be hypersensitive to ordinary petulance, discord and differences in domestic life, quite common to the society to which he or she belonged and such factors were not expected to induce a similarly circumstanced individual to resort to such step, the accused charged with abetment could not be held guilty. The above view was reiterated in Amalendu Pal @ Jhantu vs. State of West Bengal (2010) 1 SCC 707.

29. That the intention of the legislature is that in order to convict a person under Section 306 IPC, there has to be a clear mens rea to commit an offence and that

there ought to be an active or direct act leading the deceased to commit suicide, being left with no option, had been propounded by this Court in S.S. Chheena vs. Vijay Kumar Mahajan (2010) 12 SCC 190.

30. In Pinakin Mahipatray Rawal vs. State of Gujarat (2013) 10 SCC 48, this Court, with reference to Section 113A of the Indian Evidence Act, 1872, while observing that the criminal law amendment bringing forth this provision was necessitated to meet the social challenge of saving the married woman from being ill-treated or forcing to commit suicide by the husband or his relatives demanding dowry, it was underlined that the burden of proving the preconditions permitting the presumption as ingrained therein, squarely and singularly lay on the prosecution. That the prosecution as well has to establish beyond reasonable doubt that the deceased had committed suicide on being abetted by the person charged under Section 306 IPC, was emphasised."

31. In present case unnatural death of deceased has taken place within seven years of marriage and even if it is considered to be suicide, then also it is not a case of harassment for dowry but for alleged cruelty as explained in explanation (a) in Section 498-A IPC. For evidence on record, it cannot be said with certainty that there was willful conduct of respondent causing grave injury or danger to life, limb or health (mental or physical) of the deceased.

32. There is no other allegation against respondent, except that she was cursing deceased for not giving birth to male child and even the incident quoted in statement Ex. PW-15/G is considered to be true, quarrel within family on insignificant day to day matters cannot be treated sufficient for driving deceased to take a decision for committing suicide. It is stated in Ex. PW-15/G by deceased that she put kerosene upon her out of anger as respondent did not pay heed to her requests to keep mum. For committing suicide by deceased in heat of anger of spur of moment, respondent cannot be held guilty for abetting deceased to commit suicide. There is nothing on record establishing that respondent either instigated or intentionally aided deceased to commit suicide or engaged with someone else in a conspiracy so as driving deceased to commit suicide. Ingredients necessary for abetting as defined in Section 107 IPC are missing in present case. On the contrary it has come on record in statements, Ex. PW-2/D as well as Ex. PW-15/G, that respondent tried to save deceased and in this process she herself also suffered burn injuries and remained admitted in hospital for 9 days.

33. In view of aforesaid discussion, prosecution has failed to establish beyond reasonable doubt that respondent is responsible for driving deceased to commit suicide on account of her maltreatment and harassment. There is no trustworthy, cogent and reliable evidence to prove the said allegation. The evidence on record does not inspire confidence to accept version of prosecution story and therefore, the view taken by trial Court is a plausible one, which cannot be termed to be perverse and the trial Court has appreciated the evidence correctly and completely.

34. Respondent has advantage of being acquitted by the trial Court which strengthens presumption of her innocence. Onus to rebut such presumption heavily lies upon prosecution, to which prosecution has miserably failed. After considering arguments of respective counsel for the parties and minutely examining the testimonies of witnesses and other documentary evidence placed on record, we are of the considered view that no case for interference is made out.

35 Thus, present appeal, devoid of any merit, is dismissed and also pending applications, if any. Bail bonds, if any, furnished by or on behalf of respondent are discharged. Records of the Court below be immediately sent back.

****

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

State of Himachal Pradesh. ....Appellant

Versus

Mahesh Verma. ....Respondent

Criminal Appeal No. 215 of 2011
Reserved on: 24.3.2017
Date of Decision: 31.3.2017

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.5 kg. charas – the accused was tried and acquitted by the Trial Court- held in appeal thatthere are cuttings and over writings in record, which have not been properly explained – the witnesses had not given the detail of material particulars – PW-5 supported the prosecution version – the defence version was probablized by defence witnesses- the prosecution evidence creates doubts about the fairness of investigation – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 21)

Cases referred:

Raja and others Vs. State of Karnataka (2016) 10 SCC 506

P. Satyanarayana Murthy Vs. District Inspector of Police State of Andhra Pradesh and another (2015) 10 SCC 152

Jose alias Pappachan Vs. Sub-Inspector of Police, Koyilandy and another (2016) 10 SCC 519

For the Appellant: Mr.D.S. Nainta and Mr.Virender Verma, Additional Advocate Generals.
For the respondent: Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Judgment dated 30.3.2011 passed by learned Special Judge, Fast Track Court Kullu in Sessions Trial No. 27 of 2009 in case FIR No. 114 of 2008 registered in Police Station, Banjar under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985, acquitting respondent, has been assailed by State of Himachal Pradesh by way of present appeal.

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

3. Prosecution case is that on 6.10.2008, police party headed by PW-9 ASI Man Singh consisting of PW-6 Constable Puran Chand, PW-7 Constable Ramesh Kumar was on patrolling in Taxi No. HP-01K-1491 being driven by PW-5 Sunder Singh from Banjar to Sai Ropa side. On the way near village Dogri Ropa, on noticing respondent coming from Gushaini side with backpack on his right shoulder, police party questioned him, who on inquiry disclosed his name as Maheshwar son of Kehar Singh, R/o Khadragi. PW-9 ASI Maan Singh suspected possession of some contraband and therefore, associated PW-5 Sunder Singh and PW-6 constable Puran Chand, as witnesses and then gave his personal search vide memo Ex. PW-5/A to respondent in presence of these witnesses, nothing except uniform worn by him was found in his possession. Thereafter on searching backpack of respondent, charas in the form of stick, ball and pancake was found inside a polythene bag, which on weighing was found to be 1 Kg 500 grams. Two samples weighing 20 grams each were extracted and those samples and remaining charas, left in polythene bag, were sealed in different pieces of cloth with six seal impressions of

seal 'D' on each parcel. Parcel of remaining charas was kept in the same bag from which it was recovered and bag was also sealed in a cloth in similar manner. Sample seal was taken separately on separate piece of cloth, NCB form Ex. PW-9/A was prepared in triplicate and after use seal was handed over to PW-5 Sunder Singh. Seizure memo Ex.PW-5/C was prepared, which was signed by witnesses and copy of the same was supplied to respondent after obtaining his signatures on memo. Rucka Ex. PW-9/B was prepared and sent to Police Station Banjar through PW-6 Constable Puran Chand, who came back on the spot after registration of FIR Ex. PW-4/A in pursuance to rucka. Statements of witnesses were recorded and site plan Ex. PW-9/C was prepared and respondent was interrogated and arrested at 5:30 P.M. and arrest memo Ex. PW-5/D was prepared accordingly and intimation of his arrest was given to his brother, as desired by him and memo of personal search Ex. PW-9/E was also prepared after personal search. Thereafter case property was produced before PW-4 SHO SI Lal Singh in Police Station, who re-sealed it with seal impression "H" and handed over the same to PW-1 MHC Uttam Chand. Special report was prepared and copy of same Ex. PW-2/A was delivered to Additional Superintendent of Police, Kullu through PW-8 Constable Laxman Dass on 7.10.2008 at about 4:00 P.M. On 9.10.2008, sample parcels were sent to State Forensic Science Laboratory (FSL), Junga by PW-1 MHC Uttam Singh through PW-7 Constable Ramesh Kumar vide Road Certificate No. 78/08 along with NCB-1 form, seal impression H, seal impression D, copy of FIR and copy of seizure memo which were delivered by PW-7 in State Forensic Science Laboratory, Junga on 13.10.2008, as there were holidays on 10.10.2008, 11.10.2008 and 12.10.2008. Receipt issued by FSL, Junga was deposited by him with PW-1 MHC Uttam Chand.

4. It is further case of prosecution that on 18.12.2009 PW-10 HHC Sobha Ram took parcel of contraband from District Malkhana to State FSL, Junga vide RC No. 8/09 (Ex. PW-10/A) and deposited the case property on the same date in State FSL, Junga and handed over the receipt thereof to MHC on his return.

5. As per prosecution, on verification from Gram Panchyat Chehni, name of respondent was found to be Mahesh Verma @ Happy and since accused deliberately disclosed wrong name, commission of offence under Section 419 IPC was also added against him. Photographs of the spot Ex. PW-7/A to Ex. PW-7/E, snapped by PW-7 Constable Ramesh Kumar were also developed. On completion of investigation, file was handed over to PW-4 SI/SHO Lal Singh. PW-4 after receiving chemical examination report Ex. PW-4/C from FSL Junga, indicating therein that recovered contraband was charas, prepared challan and presented it before the Court.

6. Prosecution has examined ten witnesses to prove its case. After his examination under Section 313 Cr.P.C., respondent also examined DW-1 Rajesh Kumar (conductor of HRTC Bus) in his support. Recovery of charas from bag on 6.10.2008 is not disputed, except that recovered charas was 3 Kgs and not 1.5 Kgms, as indicated in the challan and that bag containing charas did not belong to respondent. Further, recovery of said contraband from respondent has been disputed and it is defence of respondent from very beginning, put to every relevant witness, that on 6.10.2008 respondent was travelling in HRTC bus No. HP-34A-1285 plying on Bathar-Banjar route, on the last seat on driver side and the said bus was intercepted by police party near Amni and one unclaimed bag, lying inside the bus near rear door, was found whereafter police party proclaimed that they had information that bag belonged to a person wearing blue jean pant and respondent for wearing blue jean pant, was apprehended by police in the pretext of the said secret information and was deboarded from bus and bag was also taken out by the police. After covering a distance of about three kilometers, at Dogri Ropa, taxi was stopped and parked on the side of road in jungal and respondent was taken out of taxi along with bag and photographs were snapped after handing over bag to him. On searching bag charas in form of stick, ball and pancake like was found in two polythene bags and on weighing the said charas was found to be, 3 Kgs (1.5 Kgms in each packet) and respondent was framed in present case, though for recovery of 1.5 Kgrms charas from his conscious possession.

7. As per chemical examination report Ex. PW-4/C, recovered contraband was found extract of cannabis and sample of charas. Respondent also disputed safe transportation of samples as well as remaining bulk of seized contraband to State FSL. Samples as well as remaining bulk of contraband were deposited with MHC Uttam Chand, Incharge of Malkhana Police Station, Banjar. There is no evidence on record that remaining bulk of contraband was shifted to District Malkhana, Kullu. Two parcels of samples were sent by PW-1 MHC Uttam Chand through PW-7 Constable Ramesh Kumar to FSL, Junga, but remaining charas was stated to have been sent to State FSL, Junga through PW-10 HHC Sobha Ram on 18.12.2009 after receiving one parcel from District Malkhana Kullu. How and when remaining contraband was shifted from Police Station Banjar to District Malkhana, Kullu is not clear from the evidence on record and there is no documentary or oral evidence, proved on record, indicating the said shifting. Therefore, link evidence connecting the remaining charas in present case with parcel taken by PW-10 on 18.12.2009 to State FSL, Junga from District Malkhana is missing.

8. Samples of contraband were handed over to PW-7 by PW-1 on 9.10.2008 who deposited these parcels in State FSL on 13.10.2008, stating that there were holidays on 10th, 11th and 12th October, 2008. How and when he travelled from Banjar to State Forensic Science Laboratory Junga, where he stayed during these three holidays and how and where he kept parcels of sample during his journey and stay during intervening period from 9.10.2008 to 13.10.2008 is not clear. There are also cuttings and overwriting in record, vide which sample parcels were stated to be transported from Police Station Banjar to State Forensic Science Laboratory, Junga. PW-1 admitted that it was correct that in Road Certificate Ex. PW-1/B figure 78 had been overwritten and the same was without initials. He also admitted that in original Road Certificate, date is visible as 8.10.2008, which was changed to 9.10.2008 on the front as well as back of the said Road Certificate. He also admitted that it was correct that figure 8.10.2008 against column of date was altered to 9.10.2008 in the carbon copy of Road Certificate. He also admitted that in NCB form, date of issuance of Road Certificate 78/08 was mentioned as 8.10.2008 whereas Road Certificate in prosecution evidence was claimed to be issued on 9.10.2008. Though, he explained that it was a clerical mistake, but for the reasons that date 8.10.2008 was changed to 9.10.2008 more than three places in Road Certificate, it cannot be said that it was a clerical mistake, rather it appears that concerned officer forgot to tamer/or manipulate date mentioned on NCB form. Also date of Road Certificate written on NCB Form as 8.10.2008 was attributed to clerical mistake, however, no reason was assigned in the evidence placed on record for firstly writing date on Road Certificate as 8.10.2008 and later on changing the same as 9.10.2008. All these discrepancies cast doubt on fair investigation and lead to an inference that scope of manipulation in investigating the matter cannot be ruled out and truth is something else contrary to prosecution story as portrayed.

9. PW-6 Constable Puran Chand, PW-7 Constable Ramesh Kumar and PW-9 ASI Maan Singh in their examination in chief re-iterated the prosecution case. In cross-examination, all of them denied that police party engaged taxi of PW-5 Sunder Singh for apprehending a person coming in HRTC bus and HRTC bus HP-34A-1285 coming from Gushani to Banjar was stopped by police party and on finding unclaimed bag near rear door of bus, respondent was framed in the case for wearing blue jean pant for information with them that one person wearing blue jean pant was coming with contraband in the said bus. PW-7 described dates, time and other minute details in his examination-in-chief, but in cross-examination stated that he did not remember that where vehicle was stopped, how many parcels were stitched and also that the instrument used in weighing contraband was a traditional or electronic. He further stated that first of all photographs were taken and thereafter other proceedings were conducted. Perusal of photographs Ex. PW-7/B, PW-7/C and Ex. PW-7/E clearly indicates that these photographs were taken after opening bag and keeping its articles on the road. Meaning thereby that prosecution story of giving personal search by PW-9 to respondent and preparation of memo in respect thereof is not true. In special report Ex. PW-2/A as well as rucka Ex. PW-9/B, there was no mention that PW-9 Investigating Officer had given his personal search to respondent, much less preparation of memo Ex. PW-5/A.

10. In photograph Ex. PW-7/B, two polythene bags all clearly visible. However, prosecution witnesses claimed that there was only one polythene bag and in Court also only one poly bag was produced. PW-6 also stated that no parcels were stitched on the spot. Whereas, case of prosecution is that samples parcels and parcel of remaining bulk were stitched and sealed on the spot. PW-6 Constable Ramesh Kumar is an official witness, therefore, his statement casting doubt about prosecution story is material, particularly when only independent witness PW-5 Sunder Singh has also not supported the prosecution case.

11. PW-5 Sunder Singh who was admittedly with police party, not only desisted from lending support to prosecution case, but also admitted the defence version propounded by respondent since very beginning of the trial and re-iterated in statement under Section 313 Cr.P.C which was also fortified by examining DW-1 Rajesh Kumar, Conductor of HRTC Bus HP-34A-1285, who was on duty on 6.10.2008 in the said bus coming from Bathar to Banjar wherefrom respondent was claimed to be de-boarded and detained. PW-5 was declared hostile and was subjected to cross-examination by learned Public Prosecutor. He admitted suggestion of learned Public Prosecutor that when bag was opened and checked, charas in the shape of stick, ball and pancake was found and he also admitted photographs mark C-1 to C-5 (Ex. PW-7/A to Ex. PW-7/E) taken on the spot. However, he denied that weight of charas was found to be 1.5 Kgm and volunteered that it was more than that. But contrary to prosecution story, in examination-in-chief as well as in cross-examination by defence, he stated that his taxi was engaged by police for checking bus on the basis of information received by police that one person was coming in the said bus along with contraband. He also admitted and corroborated the version of respondent propounded in his defence. Therefore, defence plea of false implication cannot be legally discarded.

12. It is also clearly well settled that mere fact that a witness is declared hostile does not make him unreliable witness so as to exclude his evidence from consideration altogether the evidence remains admissible in the trial and there is no legal bar to base conviction or acquittal upon testimony of hostile witness if corroborated by other reliable evidence. Hon'ble Supreme Court in case ***Raja and others Vs. State of Karnataka (2016) 10 SCC 506*** has held as under:-

> "32. *That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."*

13. From very beginning, respondent had set up a clear, distinct and definite defence with certainty by mentioning registration number of bus, its route and name of conductor on duty in the said bus plying on Bathar-Banjar route on 6.10.2008. Respondent also placed on record certificate Ex. DW-1/A issued by HRTC authorities, which was not disputed by prosecution, certifying that on 6.10.2008 bus No. H.P.-34A-1285 was operating on Bathar-Banjar route with driver Sh.Leela Vilas-II and Conductor DW-1 Rajesh Kumar. DW-1 corroborated story put forth by respondent in his defence and in his cross-examination, nothing material for doubting his veracity could be brought on record.

14. PW-5 Sunder Singh is a prosecution witness who not only denied the prosecution version but also deposed a story different to the said version but similar to defence propounded by respondent in cross-examination of prosecution witnesses and narrated by DW-1 Rajesh Kumar and also strengthened by documentary evidence Ex. DW-1/A a certificate issued by HRTC authorities.

15. From evidence on record, possibility of second view has clearly been established by respondent and on the other hand prosecution has failed to prove its case beyond reasonable doubt by leading cogent, reliable, convincing and confidence inspiring evidence. Presumption of innocence is a recognized human right and it is well settled that benefit of doubt belongs to accused and therefore, whenever possibility of two views arises from evidence on record, the view beneficial to accused is to be preferred by the Court. Hon'ble Apex Court in ***P. Satyanarayana Murthy Vs. District Inspector of Police State of Andhra Pradesh and another (2015) 10 SCC 152*** has held as under:-

> *"26. In reiteration of the golden principle which runs through the web of administration of justice in criminal cases, this Court in criminal cases, this Court in Sujit Biswas V. State of Assam (2013) 12 SCC 406 had held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of "may be" true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture. It was held, that the court must ensure that miscarriage of justice is avoided and if in the facts and circumstances, two views are plausible, then the benefit of doubt must be given to the accused."*

16. In its recent decision, Hon'ble Apex Court in case ***Jose alias Pappachan Vs. Sub-Inspector of Police, Koyilandy and another (2016) 10 SCC 519*** has held as under:-

> *"56. It is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of may be true but has to essentially elevate it to the grade of must be true. In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted."*

17. Scrutiny of evidence does not inspire confidence in favour of prosecution, rather creates doubt about fairness of investigation. Version of respondent propounded in defence story also appears to be plausible and according to settled law out of two possible views, view favorable to accused will have precedence. Therefore, respondent is entitled for benefit of doubt.

18. Illicit drug trafficking is menace having disastrous effect not only to particular individual, but also on family as well as society at large. Keeping in view dangerous effect of drug abuse at National and International level, the Narcotic Drugs and Psychotropic Substances Act, 1985 has been enacted with stringent provision having deterrent punishment against an offender. The offence committed under the Act is serious and heinous in nature. Therefore, presumption of culpable mental state has also been provided under Section 35 of the Act, which provides that for an offence under this Act, which requires a culpable mental state of accused, the Court shall presume the existence of such mental state. Section 54 of the Act also provides presumption regarding commission of offence by accused under this Act for possession of any material which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, of which he fails to account satisfactorily. However, the said presumptions are rebuttable on proving contrary by the accused. Presumption of Sections 35 and 54 of the Act will come into play only when prosecution establishes conscious and physical possession of contraband by the accused, beyond

all reasonable doubt, which is sine qua non for recording finding of conviction against the accused.

19. In present case, prosecution has failed to prove recovery of contraband from conscious and physical possession of respondent by leading cogent, reliable, convincing and confidence inspiring evidence. Therefore, provisions of Sections 35 and 54 of the Act are not attracted in present case.

20. Respondent has advantage of being acquitted by the trial Court which strengthens presumption of his innocence. Onus to rebut such presumption heavily lies upon prosecution, to which prosecution has miserably failed. After considering arguments of respective counsel for the parties and minutely examining the testimonies of the witnesses and other documentary evidence placed on record, we are of the considered view that no case for interference is made out.

21. Thus, present appeal, devoid of any merit, is dismissed and also pending applications, if any. Bail bonds, if any, furnished by or on behalf of the respondent are discharged. Records of the Court below be immediately sent back.

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

Smt. Veena Devi … Petitioner
Versus
State of Himachal Pradesh and others … Respondents

CWP No. 8439 of 2014
Reserved on: 30.03.2017
Date of decision: 31.03.2017

Himachal Pradesh Panchayati Raj Act, 1994- Section 163- Petitioner was elected as ward panch- election was challenged before authorized officer by filing an election petition- petitioner was held to be disqualified to hold the post- an appeal was filed, which was dismissed- aggrieved from the order, present writ petition has been filed- held that election petition filed before the prescribed authority was beyond the period of limitation as election petition can be filed within thirty days only- authorized officer erred in entertaining the petition after the period of limitation- writ petition allowed and the order of disqualification of the petitioner set aside subject to payment of cost of Rs.10,000/-. (Para- 13 to 25)

For the petitioner: Mr. Dushyant Dadwal, Advocate.
For the respondents: Mr. V.S. Chauhan, Additional Advocate General with Ms. Parul Negi, Deputy Advocate General, for respondents No. 1 to 3.
Mr. Ajay Sharma, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral):

By way of this writ petition, petitioner has challenged the order passed by Sub Divisional Officer (Civil), Dehra, exercising the powers of authorized officer under Section 161 of the Himachal Pradesh Panchayati Raj Act, 1994, in an Election Petition No. 42/EP/2011 dated 16.02.2012, vide which the said authorized officer while accepting the election petition filed by respondent No. 4 under Section 163 of the Himachal Pradesh Panchayati Raj Act, 1994, set aside the election of the present petitioner as Ward Panch, Ward No. 7, Gram Panchayat Bhadal,

Development Block Pragpur, District Kangra, by holding that her husband was an encroacher of Government land and also the order passed in appeal by learned appellate authority i.e. Deputy Commissioner, Kangra at Dharamshala in Case No. 9/2012 dated 21.10.2013 vide which learned appellate authority dismissed the appeal so filed by the present petitioner against the order of learned authorized officer dated 16.02.2012.

2. Before proceeding further, it is clarified that though the election which is subject matter of the writ petition pertains to the year 2010 and the term of the said election is over and thereafter fresh elections to elect various Ward Panchs of different Gram Panchayats in the State of Himachal Pradesh have taken place, the necessity of deciding this case on merit is that the ground on which the present petitioner was held to be disqualified continuous to be a stigma, as far as petitioner is concerned, to contest Gram Panchayat elections etc.

3. Brief facts necessary for adjudication of the present case as can be carved out from the pleadings of the parties are that the present petitioner was elected as Ward Panch, Ward No. 7, Gram Panchayat Bhadal, Tehsil Dehra, District Kangra, in the Panchayat elections which were held in the month of December, 2010. Her election as such was challenged under Section 163 of the Himachal Pradesh Panchayati Raj Act, 1994, by respondent No. 4 before learned authorized officer by filing an election petition which was instituted on 08.06.2011. Primary ground of assailing the elections of the petitioner was that her husband had encroached upon the Government land which rendered the petitioner disqualified to contest the elections.

4. In her reply filed to the election petition, the petition inter alia took an objection with regard to the maintainability of the election petition on the ground that the same was time barred. There was a specific preliminary objection taken in this regard.

5. Learned authorized officer vide order dated 16.02.2012 held that the husband of the petitioner was an encroacher upon the Government land and on these basis, it held that the petitioner was disqualified to contest the Panchayat elections and learned authorized officer on this account declared the election of the present petitioner as Ward Panch, Ward No. 7, Gram Panchayat Bhadal, as void.

6. A perusal of the order demonstrates that the issue of limitation was not dealt with by learned authorized officer in the said order.

7. Feeling aggrieved, the present petitioner filed a statutory appeal under Section 181 of the Himachal Pradesh Panchayati Raj Act, 1994, wherein also a ground was taken that the order passed by the authorized officer was not sustainable as learned authorized officer had not appreciated that the election petition filed before it was time barred and the election petition in fact was liable to be dismissed on this account alone.

8. Learned appellate authority vide order dated 21.10.2013 while dismissing the appeal so filed by the present petitioner and upholding the order of learned authorized officer held as under on the point of limitation:-

> "On the point of limitation raised by the counsel of appellant I feel this point should have been raised before the lower court during trial. From the case file there is no proof that this point was raised at the lower court. Hence this can be looked at this stage."

9. Said orders passed by learned authorized officer as well as learned appellate authority respectively are under challenge in the present writ petition.

10. Mr. Dushyant Dadwal, learned counsel for the petitioner, has argued that the order passed by learned authorized officer as well as the order passed by learned appellate authority are *non est* and liable to be set aside on this account alone that both learned authorities below erred in not appreciating that as the election petition was filed beyond the limitation as is prescribed under the statutory provisions of the Himachal Pradesh Panchayati Raj Act, 1994, the same could not have been adjudicated upon by learned authorized officer on merit

at all as the said authority was not having any power in law to entertain and adjudicate upon the election petition which was time barred. Mr. Dushyant Dadwal has further argued that the order passed by learned appellate authority was not sustainable in law at all as while dealing with the issue of limitation it erred in not appreciating that the issue of limitation is a legal issue and it can be looked at any stage and further learned appellate authority did not appreciate that in fact the point of limitation was duly taken up in the reply which was filed to the election petition by the present petitioner as well as in the grounds of appeal. On these basis, it has been urged by Mr. Dushyant Dadwal that the orders passed by both the authorities below were liable to be quashed and set aside.

11. Learned counsel for the respondents have justified the impugned orders on the ground that when the husband of the petitioner was an encroacher, she in fact was not eligible to contest the election and her election, therefore, was rightly set aside by both the authorities below and further the petition in fact has become infructuous with the efflux of time.

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

13. As far as the factum of the petition having become infructuous with the efflux of time is concerned, I have already mentioned above that the petition is being adjudicated on merit in view of the fact that the stigma of the petitioner being disqualified for contesting Panchayati Raj elections is writ large as there are findings returned against her by the statutory authority in an election petition under the Himachal Pradesh Panchayati Raj Act, 1994, to this effect and the said findings stood affirmed in the appeal by the appellate authority.

14. It has not been disputed during the course of arguments by the respondents that the petitioner in fact was elected to Gram Panchayat elections which took place in December, 2010 itself. It has also not been disputed by learned counsel for the respondents that the election petition which was filed by respondent No. 4 before the prescribed authority were beyond the period of limitation as is prescribed under Section 163 of the Himachal Pradesh Panchayati Raj Act.

15. Chapter-XI of the Himachal Pradesh Panchayati Raj Act, 1994, deals with the disputes relating to election. Section 163 of the Act contemplates that any elector of a Panchayat may, on furnishing the prescribed security in the prescribed manner, present **within 30 days of the publication of the result**, on one or more of the grounds specified in sub-section (1) of section 175, to the authorized officer an election petition in writing against the election of any person under this Act. Section 165 of the Act contemplates that if an election petition is not furnished in the prescribed manner, or the petition is not presented within the period specified in section 163, the authorized officer shall dismiss the petition provided that the petition shall not be dismissed without giving the petitioner an opportunity of being heard.

16. There is no corresponding provision in the Act whereby learned authorized officer has been conferred the power to condone delay in filing the election petition beyond the period of limitation prescribed in Section 163 of the Act.

17. Himachal Pradesh Panchayati Raj Act is a Special Act and right to appeal is a statutory right. In the absence of any enabling provision being there in the Himachal Pradesh Panchayati Raj Act, conferring upon the authorized officer authority to entertain and adjudicate an election petition beyond the period of limitation prescribed in Section 163 of the same, no election petition can be entertained and adjudicated on merit in case the same is not presented within 30 days of the publication of the result. A co-ordinate Bench of this Court in ***CMPMO No. 27 of 2007*** titled ***Deepender Rohal Vs. Suresh Thakur and others***, decided on 14.12.2007 has held:-

> "The provisions of Section 165 of the Act cast a mandatory duty on the Authorized Officer to dismiss the petition if the election petition is not furnished

in the prescribed manner or the petition is not presented within the period specified under section 163."

18. Admittedly, the elections were held in December, 2010, whereas the petition was presented before respondent No. 3 on 08.06.2011. Though it is not clear from the pleadings as to when did the publication of the result took place, however, it was stated at Bar by learned Additional Advocate General that the publication also took place in December, 2010, as all the elected members were given oath in the month of January, 2011. Besides this, it is not even the case of the private respondent that the election petition was in fact filed by him within 30 days of the publication of the result.

19. In these circumstances, in my considered view, respondent No. 3 erred in entertaining and adjudicating upon the said election petition on merit when admittedly the said election petition was not filed within the statutory period as is envisaged in Section 163 of the Act, and when a specific stand was taken in the reply so filed to the election petition by the present petitioner that the petition was time barred. Even otherwise, issue of limitation being a legal issue, it was incumbent upon the said authority to have had applied its mind as to whether the election petition before it was within limitation or not.

20. Similarly, learned appellate authority while dealing with the point of limitation raised by the counsel of appellant held that the same should have been raised before the lower court during trial and erred in not appreciating that it was the duty of learned appellate forum also to have had adjudicated on the point as to whether the election petition which was decided by respondent No. 3 on merit was in fact filed before the said authority within limitation or not. Learned appellate authority could not have had shirked its responsibility by simply stating that this issue should have been raised before the lower court during trial. This Court deprecates this kind of approach in deciding the matters by quasi judicial authorities.

21. The quasi judicial authorities have to keep in mind while performing their duties as quasi judicial officers that they are deciding rights of the parties and the rights of the parties have to be decided within the parameters of law and legal issues if raised cannot be brushed aside in the manner in which the same has been done by both the authorities in the present case in general and by the appellate authority in particular.

22. Accordingly, in view of the discussion held above, this petition is allowed and impugned order dated 16.02.2012 passed by respondent No. 3 in Election Petition No. 42/EP/2011 and impugned order dated 21.10.2013 passed by respondent No. 2 in Case No. 9/2012 are accordingly quashed and set aside and the findings returned against the petitioner in the impugned orders are held *non est.*

23. It is further clarified that as the term of the office for which the petitioner was elected is since over and fresh elections have also taken place in the Gram Panchayat concerned, this judgment shall not confer any right upon the petitioner to occupy any office on the strength of her having been elected as Ward Panch, Ward No. 7, Gram Panchayat Bhadal, Tehsil Dehra, District Kangra, H.P.

24. It is further clarified that the findings returned by the prescribed authority to the effect that the petitioner was disqualified, are being set aside, as the election petition was not maintainable, having been filed beyond the prescribed period of limitation and this Court has not returned any findings on merit as far as the issue of disqualification of the petitioner is concerned and this issue is left open.

25. Petition accordingly stands disposed of in above terms with cost assessed at Rs.10,000/-. Miscellaneous Applications pending, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Amit Jha ....Petitioner.
versus
State of Himachal Pradesh ....Respondent.

CRMPM No.309 of 2017
Date of Decision: April 1, 2017

Code of Criminal Procedure, 1973- Section 439- Accused has been charged for the commission of offences punishable under Sections 364-A, 420 and 342 read with Section 120-B of I.P.C and Section 66 (d) of I.T. Act, 2000- an FIR was registered on the basis of complaint made by A stating that he was made to travel to Delhi on the pretext of taking him abroad but he was taken to Bagdogra and forced to part with a sum of Rs.22 lakhs- he was kept in confinement and was physically assaulted- petitioner seeks bail on the ground that witnesses examined by the prosecution do not establish the charged offences and he is in custody for more than one year, he is permanent resident of Himachal Pradesh and is a student having bright future- held that the grant or refusal of bail lies in the discretion of the Court- the primary purposes of bail are to relieve the accused in imprisonment, to relieve the State of the burden of keeping him pending trial and to keep the accused constructively in the custody of the Court- accused has wrongly stated that he is permanent resident of Himachal Pradesh- he is actual resident of Orissa – petitioner was traced and brought back from his native place after the lapse of two years- there is nothing on record to establish that petitioner has got roots in the society-hence, he is not entitled to the concession of the bail- petition dismissed. (Para-8 to 13)

Cases referred:
Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 40
Vinod Bhandari v. State of Madhya Pradesh, (2015) 11 SCC 502

For the petitioner : Mr. Rajesh Mandhotra, Advocate.
For the Respondent : Mr. R.S. Verma and Mr. M.L. Chauhan, Additional Advocates, General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

In relation to FIR No.41/2015, dated 2.3.2015, registered at Police Station, Dehra, District Kangra, Himachal Pradesh, accused-petitioner stands charged for having committed offences, punishable under Sections 364A, 420, 342, read with Section 120B of the Indian Penal Code, and Section 66-D of the IT Act, 2000. Such FIR came to be registered on the basis of complaint made by Arvind Singh that on the pretext of getting employment in a foreign country, present petitioner Amit Jha alongwith his co-accused Tarsem Singh, made him travel to Delhi, from where he was taken to Bagdogra and forced to part with a sum of `22 lakhs. Not only he stood duped, as the promises turned out to be false, but at Bagdogra, kept in confinement and physically assaulted.

2. Accused-petitioner seeks bail on the grounds – (a) witnesses so far examined by the prosecution do not establish the charged offences; (b) has been in custody for more than a year; (c) stands falsely implicated; (d) investigation is complete and nothing else is required to be recovered; (e) he is a permanent resident of Himachal Pradesh, and that (f) is a student and has a bright career. In support, learned counsel for the petitioner seeks reliance upon the following observations made by the apex Court in *Sanjay Chandra v. Central Bureau of Investigation,* (2012) 1 SCC 40:

> "21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.
>
> 22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, 'necessity' is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances."
>
> "25. The provisions of Cr.P.C. confer discretionary jurisdiction on Criminal Courts to grant bail to accused pending trial or in appeal against convictions; since the jurisdiction is discretionary, it has to be exercised with great care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. In our view, the reasoning adopted by the learned District Judge, which is affirmed by the High Court, in our opinion, is a denial of the whole basis of our system of law and normal rule of bail system. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty. If such power is recognized, then it may lead to chaotic situation and would jeopardize the personal liberty of an individual."

3. Significantly, in *Sanjay Chandra (supra),* the Court in Paras-39 & 40 itself has clarified that "<u>the grant or refusal to grant bail lies within the discretion of the Court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each</u> particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused. The primary purposes of bail in a criminal case are to relieve the accused of imprisonment, to relieve the State of the burden of keeping him, pending the trial, and at the same time, to keep the accused constructively in the custody of the Court, <u>whether before or after conviction, to assure that he will submit to the jurisdiction of the Court and be in attendance thereon whenever his presence is required</u>." (Emphasis supplied)

4. It further clarified that while granting bail, both, seriousness of the charge and severity of punishment, has to be kept in mind.

5. Further having gone through the said Report, one only finds the following factors, to have weighed with the Court in allowing the application for grant of bail – (a) the extent of sentence of imprisonment, which the accused, if found guilty could have been asked to undergo, (b) possibility of the accused remaining in detention for a period more than the one for which they could have been convicted, (c) large number of accused persons, (d) possibility of procrastinated trial, more so on account of voluminous record, and (e) the investigation being complete.

6. One finds the principle of law, in a case of grant of bail pertaining to non-bailable offence, to be reiterated by the apex Court in a more recent judgment rendered in *Vinod Bhandari v. State of Madhya Pradesh,* (2015) 11 SCC 502, which can be crystallized thus – (a) lawful detention is not violative of Article 21 of Constitution of India, (b) detention is preventive and not punitive, (c) at a pre-conviction stage, there is presumption of innocence, (d) the object of keeping a person in custody is to ensure availability for facing trial and receive sentence, if any, which

may be passed eventually, (e) seriousness of the allegations or availability of material in support thereof, (f) delay in commencement and conclusion of trial, (g) if trial is not likely to be concluded within a reasonable time, then accused is not to be kept in custody for indefinite period, (h) failure on the part of prosecution to prima facie establish the case, (i) even where prosecution has been able to prima facie establish its case, for reasons to be recorded, Court can still grant bail, (j) rejection of an application would not preclude the accused from filing a subsequent application for grant of bail. But however, circumstances prevalent are required to be examined, (k) danger of the accused absconding or fleeing away, after release on bail, (l) character, behavior, means, position and standing of the accused, (m) likelihood of the offence being repeated, (n) reasonable apprehension of the witnesses being tampered with, and, amongst others, (o) danger of justice being thwarted by grant of bail.

7. Record reveals that in the last five months, prosecution has examined 16 witnesses and the next date for examination of the remaining witnesses is fixed for 5.4.2017. In the month of December, 2016, similar application came to be filed, which was withdrawn with liberty to file before the trial Court. Vide order dated 17.2.2017, so annexed with the instant application, such bail application stands rejected.

8. Having perused the record, Court is of the considered view that the instant bail application only merits rejects.

9. Now, in the instant case, it is no doubt true that investigation is complete and most of the prosecution witnesses stand examined. To the credit of learned counsel for the petitioner, one finds statements of witnesses to have been placed on record. Bare perusal of record does not reveal that "ex-facie", no case is made out against the accused. One cannot forget that allegedly, complainant parted with valuable security of huge amount, and that too, on the pretext of being given employment in a foreign country. Allegedly, he was taken to Bagdogra and kept in confinement. He was forced to call his family, asking them to transfer the money. He was beaten up. Nature of allegations is quite severe and serious. The petitioner has wrongly mentioned that he is a permanent resident of Himachal Pradesh (Para-7 of the application). In fact, as is evident from the memo of his earlier bail petition, he is actually a resident of State of Orissa. How and in what manner conspiracy was hatched by the accused persons is a matter of trial.

10. According to Mr. R.S. Verma, learned Additional Advocate General, a bigger racket is being run in the State, which needs to be further investigated. Well, all this is for the trial Court to examine, but however, keeping in view the aforesaid principles of law laid down by the apex Court, this Court certainly does not find the petitioner to have made out a case for grant of bail. To the credit of the trial Court, witnesses are being examined, virtually on day-to-day basis. Maximum sentence, which can be imposed, is imprisonment for life. There is nothing on record to establish that petitioner has got roots in the society, either in this State or in his home State. Well, record does not reveal such fact. It is not that the allegations are vague and unfounded. Co-accused has got roots in a foreign country, i.e. Nepal, and according to the prosecution there is every likelihood of the accused fleeing away from the jurisdiction of this Court, which fact stands amplified on record. Though the case came to be registered in the year 2014, but only with great effort, petitioner was traced and brought back from his native place in Orissa, that too after a period of almost two years.

11. In any event, trial is likely to finish in near future and as such his further detention, preventive in nature, is only warranted, in the interest of justice and by no means can be said to be impinging upon his personal liberty, for his detention is purely in accordance with the procedure established by law and in public interest. Allegations are extremely serious.

12. Hence, for all the aforesaid reasons, present application is dismissed.

13. 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.

Application stands disposed of, so also pending application, if any.

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

Durga Dass Sharma ....Petitioner

Versus

State of H.P. & Others ....Respondents

CWP No.11054 of 2011
Date of decision: 01.04.2017

Constitution of India, 1950- Article 226- The father of the petitioner was having a shop-cum-residence, which was acquired for the construction of Bhakra Dam Project – compensation of Rs.556/- was paid to him and he fell in the definition of oustee – the petitioner claimed that he was entitled for allotment of plot in new Bilaspur Township but no plot was allotted to him - hence, he filed the writ petition- held that no document was placed on record to show that the petitioner had raised the issue from 1979 till 30th August, 2011, the date of filing of writ petition – the petition is hopelessly barred by time – the relief cannot be granted to a person who does not approach the Court within time- petition dismissed.(Para-6 to 14)

Cases referred:

B.S. Bajwa and another vs.State of Punjab and others, (1998)2 SCC 523
Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, 2014 AIR SCW 6519

For the Petitioner:	Mr.Arvind Sharma, Advocate.
For Respondents No. 1 & 2:	Mr.P.M. Negi, Additional Advocate General with Mr.Ramesh Thakur, Deputy Advocate General.
For Respondent No.3:	None.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of instant petition filed under Article 226 of the Constitution of India, petitioner has prayed for following main reliefs:-

(i) Writ Of Mandamus may be issued directing the respondent no.2 to Allot a plot to the petitioner as per Rules for The Allotment of Plots in The New Bilaspur Township as petitioner belongs to the family of oustee as defined under Rules for The Allotment of Plots in The New Bilaspur Township.

(ii) That the respondent be directed to produce the complete record of oustee before this Hon'ble Court with details of plots allotted till date to similar situated persons.

(iii) That the respondents may be directed to implement the rule for the allotment of plots in NEW Bilaspur Town".

2. In the present petition, petitioner has claimed that his father; namely late Shri Sant Ram was permanent resident of Bilaspur Town and he was having a shop-cum-residence, which was subsequently acquired by the Authorities for the construction of Bhakra Dam Project.

It is admitted case of the petitioner that at the time of acquisition of property of his late father, compensation amounting to Rs.556/- was given to him in the year 1979 as he fell in the definition of oustees as defined under the Rules for Allotment of Plots in the New Bilaspur Township.

3. Learned counsel representing the petitioner, while placing reliance on Annexure P-1, i.e. a list of oustees prepared by respondents-State, contended that father of the petitioner was having 4/62 share in the property acquired by respondents i.e. Khatauni No.319/421 and as such he was also entitled for allotment of plot in New Bilaspur Township as per Rules for Allotment of Plots. Learned counsel further contended that since shop-cum-residence was acquired for the purpose of construction of Bhakra Dam Project, the Authorities concerned, ought to have granted plot in favour of the petitioner in New BIlaspur Township, in addition to compensation already received by him.

4. Learned counsel, while inviting the attention of this Court to Annexures P-2 and P-3, stated that father of the petitioner had applied for residential plot on the prescribed application strictly in terms of Rules for Allotment of Plots in the New Bilaspur Township, but since no action, whatsoever, was taken on the aforesaid request for Allotment of plot having been made by the father of the petitioner, he was compelled to approach this Court by way of instant petition, seeking therein reliefs as reproduced above.

5. Mr.Ramesh Thakur, learned Deputy Advocate General, while inviting the attention of this Court to the reply filed by respondents No.1 and 2, vehemently argued that present petition is not maintainable on account of inordinate and unexplained delay. Mr.Thakur contended that it clearly emerge from the record as well as documents annexed alongwith the petition that petitioner has approached this Court after 54 years and as such present petition deserves to be dismissed on the ground of delay itself. Mr.Thakur further contended that bare perusal of award statement i.e. Annexure P-1 annexed with the petition clearly suggests that shop-cum-residence of petitioner's father was not acquired for construction of the Bhakra Dam Project, rather only land of the petitioner was acquired for the construction of Bhakra Dam Project and accordingly as per Rule 2 of Rules for Allotment of Plots in New Bilaspur Township, father of the petitioner was held not eligible for allotment of plot. Mr.Thakur further contended that since it is an admitted case of the petitioner that due compensation of Rs.556/- was received by late father of the petitioner on account of acquisition of their land, present petition deserves to be dismissed with exemplary costs.

6. During proceedings of this case, this Court had an occasion to peruse various documents annexed with the pleadings by the respective parties, perusal whereof clearly suggests that vide award statement (Annexure P-1) compensation of Rs.556/- was paid to father of the petitioner in the year 1979. Similarly, Annexure P-2 suggests that father of the petitioner vide application dated 30th July, 1979 had made an application for allotment of plot in New Bilaspur Township being Bhakra Dam oustee. However, perusal of Annexure P-4 i.e. communication dated 21.4.1994 clearly suggests that aforesaid request for allotment of plot in lieu of acquisition of land-cum-shop for construction of Bhakra Dam Project was rejected by the Collector, Bilaspur by stating that since name of applicant i.e. father of the petitioner is/was not included in the list of 256 oustees prepared by *Bhakra Dam Oustees Advisory Committee,* prayer for allotment of plot could not be considered.

7. This Court was unable to lay its hand to communication, if any, made by the petitioner and proforma respondent or their late father after issuance of letter dated 21.4.1994 till date, whereby his case was rejected by the Authorities for allotment of plot in New Bilaspur Township. Moreover, perusal of communication dated 21.4.21994 (Annexure P-4) itself suggests that list of 256 oustees was prepared in the meeting of *Bhakra Dam Oustees Advisory Committee* held on 13.7.1983, meaning thereby that prayer for allotment of plot in New Bilaspur Township was made after 11 years i.e. on 17.3.1994 by the petitioner, after the preparation of list of oustees by the aforesaid Committee. Otherwise also last communication, as per petitioner, was sent by the Authorities concerned on 21.4.1994 (Annexure P-4), but even then there is no communication

available on record suggestive of the fact that the petitioner raised issue in terms of original application filed by their father in the year 1979 till the filing of present petition i.e. 30th August, 2011.

8. After carefully examining the documents on record, this Court sees substantial force in the arguments of Shri Ramesh Thakur, learned Deputy Advocate General, that there is inordinate delay of 54 years in maintaining the present petition. First of all, there is no explanation worth the name in the petition for not pursuing the application made by father of the petitioner in 1979 till 21.4.1994 when Authority concerned informed that case of the petitioner could not be considered for allotment of plot in view of non-inclusion of name of their father in the list of oustees prepared by the Committee. There is no document on record to infer that even after 21.4.1994 petitioner took any steps to get the matter revived on the basis of original application filed by his father on 1.8.1979 and as such this Court has no hesitation to conclude that present petition is hopelessly time barred and accordingly deserves to be dismissed on this ground.

9. In the instant case, the petitioner has invoked the jurisdiction of writ Court in the year 2011 claiming residential plot on the basis of application made by his father on Ist August 1979, which claim of the petitioner is hopelessly time barred.

10. Reliance is placed on ***B.S. Bajwa and another vs.State of Punjab and others, (1998)2 SCC 523***, wherein the Hon'ble Apex Court has held as under:-

> *"7. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the single Judge and, therefore, the Judgments of the single Judge and the Division Bench have both to be set aside. The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of laches because the grievance made by B. S. Bajwa and B. D. Kapoor only in 1984, which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystallised which ought not to have been re-opened after the lapse of such a long period. At every stage the others were promoted before B. S. Bajwa and B. D. Kapoor and this position was known to B. S. Bajwa and B. D. Kapoor right from the beginning as found by the Division Bench itself. It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."*

11. The Hon'ble Apex Court in case titled as State of ***Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, 2014 AIR SCW 6519,*** held that relief cannot be extended to the persons who have approached the Court after long delay, that too, who are fence-sitters. It is apt to reproduce para 24 of the judgment herein:

> *"24. Viewed from this angle, in the present case, we find that the selection process took place in the year 1986. Appointment orders were issued in the year 1987, but were also cancelled vide orders dated June 22, 1987. The respondents before us did not challenge these cancellation orders till the year 1996, i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be pertinent to highlight that these respondents have not joined the service nor working like the employees who succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only there was unexplained delay and laches in filing the*

> *claim petition after period of 9 years, it would be totally unjust to direct the appointment to give them the appointment as of today, i.e. after a period of 27 years when most of these respondents would be almost 50 years of age or above."*

12. Even Division Bench of this Court, while placing reliance upon the aforesaid judgments passed by Hon'ble Apex Court, has held in ***LPA No.604 of 2011, titled Karan Singh Pathania vs. State of H.P. and Others*** that *"fencer cannot be held entitled to any relief"*.

13. This Court, after carefully examining the material available on record as well as law referred hereinabove, has no hesitation to conclude that the present petition is not maintainable at all, being solely time barred. Moreover, there is no explanation worth the name in the writ petition with regard to undue delay caused in maintaining this petition. Apart from above, as emerged from the record, present petition involves disputed question of fact because respondents have specifically disputed the factum of acquisition of shop alongwith land at the time of construction of Bhakra Dam Project and as such, same cannot be decided in the present proceedings under Article 226/227 of the Constitution of India.

14. Consequently, in view of detailed discussion made hereinabove, this petition is dismissed being devoid of any merit. However, the petitioner is at liberty to approach the appropriate Authority/Forum for redressal of his grievance. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Kamal Kishore ….Petitioner
Versus
State of H.P. & Others ….Respondents

CWP No.11020 of 2011
Date of decision: 01.04.2017

Constitution of India, 1950- Article 226- Petitioner was selected as a drawing master by PTA – respondent No.5 filed a complaint before Inquiry Committee stating that merit was ignored at the time of selection – the Inquiry Committee concluded that the proper procedure was not adopted by the PTA and held the appointment of the petitioner to be bad- an appeal was filed before Deputy Commissioner, which was dismissed- a writ petition was filed and the matter was remitted to the Inquiry Committee who concluded that petitioner had secured 8th position while the complainant had secured 6th position – the appointment was not proper – aggrieved from the report, present writ petition was filed – held that the appointment of the petitioner is not in accordance with the direction issued by the Government – the Inquiry Committee had rightly concluded that petitioner was not the most meritorious person- writ petition dismissed.
(Para-8 to 12)

For the Petitioner: Mr.Shyam Singh Chauhan, Advocate.
For Respondents No. 1 to 3: Mr.P.M. Negi, Additional Advocate General with Mr.Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Petitioner herein, being aggrieved with the order dated 30.08.2011 (Annexure P-4) passed by Enquiry Committee, whereby his appointment/selection as Drawing Master in

Government Middle School, Dhuma Devi, made by Parents Teacher Association *(for short 'PTA')* on 5.10.2007 was not held to be valid, approached this Court by way of instant petition filed under Article 226 of the Constitution of India seeking therein the following relief(s):-

"(i) That the order dated 30.8.2011, passed by enquiry committee may kindly be quashed with all consequential benefits while issuing the writ of Certiorari.

(ii) That the petitioner may kindly be allowed to work as PTA teacher as per grant in aid rules while issuing the writ in the nature of mandamus and any other order which may deem fit be passed in the interest of justice".

2. Briefly stated facts, as emerged from the record, are that in September, 2007 petitioner was selected by the concerned PTA as Drawing Master at Government Middle School, Dhuma *Devi,* Tehsil Sadar, District Mandi, H.P. *(for short GMS, Dhuma Devi).* However, respondent No.5; namely; Smt.Nirmala Devi, being aggrieved with the selection of petitioner, preferred a complaint before the Enquiry Committee stating therein that merit was ignored at the time of selection by PTA of the School. On the aforesaid complaint having been filed by respondent No.5, enquiry was conducted by the Committee constituted for the disposal of such complaints vide Notification No.EDN-A(Kha)7-3/2006, dated 19th April, 2008, issued by the Secretary (Higher Education) to the Government of Himachal Pradesh. Enquiry Committee conducted inquiry at GMS, Dhuma Devi on 17.9.2008 strictly in terms of the instructions/guidelines issued by Government vide Notification dated 27th May, 2008. Committee, after careful perusal of the record made available by Headmaster of concerned school, came to the conclusion that proper procedure to select the candidate for the post of Drawing Master was not adopted by the PTA and as such alleged appointment of petitioner namely Kamal Kishore, as a Drawing Master in GMS, Dhuma Devi, made by PTA is not in accordance with law and instructions contained in Para-11 of the guidelines of the Notification No.EDN-A(Kha)7-3/2006, dated 27th May, 2008. Petitioner, being aggrieved with the aforesaid findings of Enquiry Committee, preferred an appeal before Deputy Commissioner, Mandi, District Mandi under PTA Rules, which was dismissed.

3. Since petitioner was not satisfied with the rejection of his appeal by the Deputy Commissioner, preferred ***CWP bearing No.1047 of 2009, titled: Kamal Kishore vs. State of H.P. and Others*** before this Court, which came to be decided by Division Bench of this Court vide its judgment dated 18th March, 2010. It would be relevant to reproduce here-in-below the following relevant portion of the judgment:-

> *"The issue raised in these Writ Petitions pertains to the selection and appointment of teachers by the Parents Teacher Association. Learned counsel appearing on both sides point that the Director Higher Education, Himachal Pradesh has issued a communication dated 24th September, 2009, and the cases require fresh consideration in the light of the said communication. The relevant portion of the communication of the Director, Higher Education, Himachal Pradesh reads as follows:-*
>
> > *"Refer to letter No.EDN-kha(7)3706-1, dated 3.9.2009 from the Principal Secretary (Education) to the Govt.of Himachal Pradesh addressed to this directorate and copy endorsed to you and others vide which the government has asked to move an application immediate before the chairman of the concerned enquiry committee in view of the decision of CWP No.525/2009 titled as Ravinder Singh vs. State and CWP No.2632/2009 titled as Koyal Kumar vs. State wherein the Hon'ble High Court of Himachal Pradesh while setting aside the orders of the committee has directed that Committee after giving adequate opportunity of hearing to the petitioner as well as the other respondents can look into the matter and decide whether the appointment of the petitioner was valid or not. The committee while deciding the issue will keep into consideration the observation of the Hon'ble High Court made in CWPs. The copy of the judgment/orders passed by the Hon'ble High Court*

CWP No.2632/2009 titled as Koyal Kumar vs. State is also being sent to all the Deputy Directors.

Therefore, you are directed to comply with the directions of the Government and take action in the matter accordingly."

In view of the above clarification issued by the Director of Higher Education, Himachal Pradesh, the impugned orders are liable to be set aside. Ordered accordingly. However, we make it clear that it will be open to the Enquiry Committee to consider the matters afresh in the light of the instruction referred to above. The needful, if required, shall be done within a period of four months from the date of the production of a copy of this judgment by either side. It is also made clear that in the cases of those teachers who are working in the schools, in case they have not been paid their due wages, the same shall be paid and the State shall ensure that the required grant-in-aid is given to the Schools, as per the Rules forthwith.

The writ petitions are disposed of, so also the pending applications,if any."

4. Subsequent to passing of aforesaid judgment by Division Bench of this Court, matter was inquired into afresh by the Enquiry Committee in the light of observations made by the Division Bench of this Court in the judgment referred hereinabove. Enquiry Committee, while considering the matter afresh, fixed following criteria to assess the merit of nine candidates, who had appeared in the interview for the post of Drawing Master held on 5.10.2007:-

Matric	*10 marks*
Plus two	*10 marks*
BA/Graduation	*10 marks*
Diploma	*10 marks*
Total	***40 marks***

5. Enquiry Committee, applying the aforesaid criteria, prepared comparative merit list, wherein name of petitioner Kamal Kishore figured at Sr.No.8. Enquiry Committee, while passing order dated 30th August, 2011 in terms of aforesaid judgment passed by Division Bench of this Court, specifically concluded that petitioner; namely; Kamal Kishore, has secured 8th position and as such he was not most meritorious candidate for the aforesaid post. Enquiry Committee further concluded that even complainant Smt.Nirmala Devi, who secured 6th position of the merit list, is also not meritorious candidate for the above post. Committee, on the basis of material available on record, concluded that merit was ignored in the selection by the then PTA Committee of the GMS, Dhuma Devi, Tehsil Sadar, Mandi, District Mandi, H.P. accordingly, appointment/ selection of petitioner Kamal Kishore as Drawing Master in GMS Dhuma Devi made by the PTA of the said school on 05.10.2007 was not valid.

6. Mr.Shyam Chauhan, learned counsel representing the petitioner, while referring to impugned order dated 30th August, 2011 (Annexure P-4) strenuously argued that the same is not sustainable in the eye of law as the same is in complete violation of judgment passed by the Division Bench of this Court and as such same deserves to be quashed and set aside. Mr.Chauhan further contended that the petitioner was appointed to the post of Drawing Master, pursuant to interview held on 05.10.2007, whereas new guidelines/criteria, as have been followed by the Committee while passing order dated 30.08.2011, came into force on 27th May, 2008 and as such could not be made applicable in the case of present petitioner. Mr.Chauhan further invited the attention of this Court to the judgment passed by Division Bench of this Court in ***CWP No.525 of 2009, titled : Ravinder Singh vs. State of H.P. and Others, decided on 4.8.2009,*** to demonstrate that criteria laid down in the Notification dated 27.05.2008 could not have been applied retrospectively in the case of the present petitioner.

7. Mr.Ramesh Thakur, learned Deputy Advocate General, while refuting the aforesaid contention of the learned counsel representing the petitioner, specifically invited the

attention of this Court to the judgment dated 18th March, 2010, passed by Division Bench of this Court in ***CWP No.1047 of 2009*** *supra,* to demonstrate that liberty was reserved to Enquiry Committee to consider the matter afresh in the light of instructions contained in communication dated 24th September, 2009 issued by Director, Higher Education to the Government of Himachal Pradesh. Mr.Thakur further contended that bare perusal of criteria fixed by the Enquiry Committee, while considering the matter afresh in the light of judgment passed by this Court, suggests that no injustice was caused to any candidate who had appeared for the interview held on 5.10.2007, rather case of each and every candidate was considered on the basis of uniform criteria.

8. During proceedings of the case, this Court had an occasion to peruse the judgment dated 18th March, 2010 (Annexure P-3), as reproduced hereinabove, perusal whereof clearly suggests that issue with regard to selection and appointment of various teachers by PTA came to be decided by the Division Bench of this Court, wherein learned counsel representing the parties invited the attention of Division Bench to the communication dated 24th September, 2009 issued by Director Higher Education, Himachal Pradesh to demonstrate that certain matters require afresh consideration in the light of aforesaid communication. Perusal of judgment, referred hereinabove, clearly suggests that learned counsel representing the petitioner in that case also consented for fresh consideration of his case in the light of aforesaid communication and as such, at this stage, it does not lie in the mouth of learned counsel for the petitioner to contend that instructions contained in communication dated 24.09.2009 could not be made applicable in the case of petitioner by the Enquiry Committee, while deciding his case afresh. Communication dated 24.09.2009 clearly suggests that Principal Secretary (Education) to the Government of Himachal Pradesh, taking note of judgment passed by Division Bench of this Court in ***CWP No.525 of 2009, titled: Ravinder Singh vs. State of H.P. and CWP No.2632 of 2009, titled Koyal Kumar vs. State*** directed the concerned Authority to look into the matter afresh and decide whether the appointment of the petitioner was valid or not. Vide aforesaid communication, Enquiry Committee was advised to take into consideration the observations of the Hon'ble High Court made in the aforesaid CWPs while deciding the issue.

9. Apart from above, perusal of judgment dated 18th March, 2010 passed by Division Bench of this Court in CWP No.1047 of 2009 clearly suggests that liberty was reserved to the Enquiry Committee to consider the matter afresh in the light of instructions contained in communication dated 24th September, 2009. Perusal of impugned order dated 30.8.2011 (Annexure P-4) clearly suggests that Enquiry Committee, passed impugned order after considering the judgments passed by the Division Bench of this Court in ***CWP No.1047 of 2009, CWP No.525 of 2009*** and ***CWP No.2632 of 2009,*** *supra*.

10. Careful perusal of judgment passed by Division Bench of this Court in *CWP No.525 of 2009* clearly suggests that though Division Bench had held that criteria laid down by Notification dated 27.5.2008 could not have applied retrospectively but also observed that this Court has consistently held that all appointments by the PTA should be made on objective basis and merit should not be ignored.

11. This Court, after carefully examining the aforesaid order made by Enquiry Committee (Annexure P-4), sees no reason to agree with the arguments having been advanced by learned counsel for the petitioner that same is not in accordance with various directions issued by Division Bench of this Court in the cases, as referred above. Rather, close scrutiny of order dated 30.7.2011 clearly suggests that Enquiry Committee solely with a view to arrive at a concrete conclusion that merit has been ignored or not, evolved uniform criteria, which otherwise appears to be fair and just. It is admitted case of the parties that on 5.7.2007, when the interview for the post of Drawing Master held in GMS Dhuma Devi, nine candidates including the petitioner and respondent No.4 appeared. Enquiry Committee, while assessing the matter afresh, considered the cases of all those nine candidates, who originally appeared in the interview on 5.7.2007 and assessed their merit as per criteria fixed by it. Since, name of the petitioner

appeared at Sr.No.8 on the basis of fresh assessment carried out by Enquiry Committee, his appointment to the post of Drawing Master was rightly held not to be valid.

12. Consequently, in view of detailed discussion made hereinabove, this Court sees no illegality and infirmity in the order dated 30.8.2011 passed by the Enquiry Committee, pursuant to judgment dated 18th March, 2010 passed by Division Bench of this Court in CWP No.1047 of 2009 and as such same is upheld. This petition is dismissed. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Naresh Sharma. .... Petitioner/defendant
Versus
Shiv Ram Sharma .... Respondent/plaintiff.

Civil Revision No.159 of 2015 and
Civil Revision No. 107 of 2016
Date of decision: 01/04/2017

Code of Civil Procedure, 1908- Order 6 Rule 17- Order 8 Rule 6A- A civil suit for recovery of arrears of rent along with interest and also the use and occupation charges was filed – separate applications for pleading a counter-claim and amendment of written statement were filed by the tenant – the applications were dismissed by the Trial Court- aggrieved from the order, present revision has been filed – held that earlier an order of eviction was passed against the tenant on the ground of arrears of rent- he had not filed any counter-claim and had not taken any plea resisting the petition- the order of eviction was successfully executed- the tenant is estopped from raising any counter-claim– further the application for amendment could have been filed after the commencement of trial on establishing sufficient cause for not seeking the amendment earlier - the documents sought to be filed with the counter-claim were also available earlier- the counter-claim is also barred by the provision of Order 2 Rule 2 of C.P.C. – petition dismissed. (Para-2 to 7)

For the petitioner: Mr. S.C.Sharma, Advocate.
For the respondent: Mr. B.C.Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral):

These petitions arise from an order pronounced in CMP No. 29-6 of 2015, comprising an application constituted by the defendant, before the learned trial Court, under the provisions of Order 6 Rule 17 CPC and from an order pronounced in CMA No. 30-6 of 2015, comprising an application constituted before the learned trial Court under the provisions of Order 8 Rule 6A CPC. Though both the applications aforesaid stood dismissed by separate order(s) pronounced thereupon by the learned trial Court, yet when facts besides attendant material are common to both thereupon the validity of the orders recorded upon both can stand adjudicated upon, under a common verdict.

2. The impugned order recorded by the learned Civil Judge (Sr. Division), Theog, Himachal Pradesh upon CMA No. 29-6 of 2015, application whereof, comprises an application constituted before the learned trial Court by the defendant by his invoking the provisions of Order 6 Rule 17 read with Section 151 CPC whereupon he concerted to with the leave of the Court add apposite pleadings in his written statement, for succoring his propagation qua his counter claim embodied in CMA No.30-6 of 2015. Before proceeding to dwell upon the efficacy of the

pronouncements impugned hereat, it is imperative to allude to the factum of the suit constituted by the plaintiff before the learned trial Court echoing therein a relief qua a decree of damages, in a sum of Rs. 5,53,312/- comprising both the arrears of rent alongwith interest also the use and occupation charges qua the demised premises, hence standing pronounced upon the defendant. Qua the demised premises, a binding conclusive decree of eviction, of the defendant therefrom, arising from the plaintiff petitioner therein successfully establishing in his apposite rent petition constituted before the learned Rent Controller qua the defendant/petitioner herein falling into arrears of rent vis.a.vis the demised premises stood hence pronounced by the learned Rent Controller. The decree of eviction of the aggrieved defendant/petitioner herein from the demised premise, has come to be satisfactorily executed, comprised in the aggrieved defendant handing over vacant possession of the demised premises, to the plaintiff. The aggrieved defendant petitioner herein during the course of the apposite petition for his eviction from the demised premises, eviction whereof stood anchored upon his falling into arrears of rent, omitted to make any espousal therein qua the amount of arrears of rent claimed from him qua the demised premises, arrears whereof he evidently failed to liquidate qua the landlord, being ordered to be adjusted from the damages encumbered upon him arising from his standing constrained to sell machinery worth Rs.4,34,759/-, sale whereof stood engendered by the plaintiff reneging from his promises, whereas the aforesaid stage comprised the apposite stage for resisting the petition for his eviction from the demised premises anchored upon the statutory ground(s) of his falling into arrears of rent, concomitantly his omission aforesaid to on the aforesaid anchorage hence resist his eviction from the demised premises on the ground of his falling into arrears of rent, thereupon visibly constitutes estoppel against the aggrieved defendant, to with utmost procrastination subsequent to his instituting a written statement to the suit of the plaintiff, hence belatedly seek through the applications constituted before the learned trial Court, its leave for incorporation in the apposite written statement qua apposite amendments, holding communications/pleadings therein qua thereupon his rearing a counter claim against the amounts claimed in the suit instituted by the plaintiff, amounts whereof comprised the arrears of rent, for thereupon his non-suiting the plaintiff, conspicuously when the decree of his eviction from the demised premises stands satisfactorily executed whereupon also he stands forestalled to rear qua the plaintiff any counter claim qua the amounts aforesaid qua the plaintiff. Moreover, no issue on the aforesaid factum stood struck by the learned trial Court. Dehors the aforesaid non-availment earlier by the aggrieved defendant of his remedy to seek adjustment of amount(s) on anchorage aforestated vis.a.vis the quantum of arrears of rent claimed against him by the plaintiff qua the demised premises, he could well have at the earliest also instituted a separate suit holding therewithin the aforesaid relief whereupon he may have constrained the Rent Controller, to not proceed to pronounce any adjudication upon the apposite petition for his eviction, petition whereof stood anchored upon, his falling into arrears of rent in respect thereto, till an adjudication stood pronounced upon his suit for damages instituted against the plaintiff. Significantly, he did not even avail the aforesaid remedy rather permitted the learned Rent Controller to make a pronouncement qua his eviction from the demised premises also he has handed over its vacant possession to the plaintiff respondent herein whereupon with his willfully waiving and abandoning all the available grounds for hence his resisting the apposite petition for his eviction from the demised premises renders his resistance, nowat, to the apposite suit of the plaintiff for arrears of rent besides his monetary claim for use and occupation charges qua the demised premises being hence prima facie construable to be contrived or invented, inference whereof stands supported by the factum of his subsequent to the institution of his written statement to the plaint, his belatedly through an application instituted under the provisions of Order 8 Rule 6A CPC besides constituted before the learned trial Court concerting incorporation therein of his counter claim, incorporation whereof therein also for reasons hereinafter referred, warrants its standing discountenanced.

3. Be that as it may, the generation of the principle of estoppel whereupon the aggrieved defendant stands thwarted to belatedly espouse a counter claim against the suit of the plaintiff upsurges from the factum of the aggrieved defendant, through an application constituted under the provisions of Order 6 Rule 17 CPC, provisions whereof stands extracted hereinafter,

seeking its apposite leave qua its propagation in his written statement wherefrom the workability of the aforesaid provisions of law stands concomitantly aroused:-

> **"17. Amendment of Pleadings.-** the Court may at any stage at 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."

The afore extracted provisions of CPC therewithin holding a mandate qua his holding a leverage to with the leave of the Court incorporate propagations for succoring his counter claim, comprised in a sum of Rs.5,53,312/- vis.a.vis. the plaintiff whereupon an allusion is enjoined to be made to the relevant material holding bespeakings qua the aggrieved defendant begetting compliance with its mandate. The trite principle embodied in the provisions engrafted in Order 6 Rule 17 CPC, is though it not prohibiting any party to a lis to at any stage seek appropriate amendment(s) qua his pleadings nonetheless any apposite motion thereunder of any party to the lis, stands enjoined to withstand the test of the rule embodied in proviso thereof, comprised in the factum of the party concerned to the lis establishing the factum of his despite exercising due diligence his yet standing constrained to not earlier rear the apposite factual matrix in his apposite pleadings whereupon satiation thereof standing begotten would constrain this Court to allow even the belatedly made concert of the aggrieved defendant. Bearing in mind the aforesaid principle of law held in Order 6 Rule 17 CPC, it is necessary to allude to the relevant pleadings constituted in the application at hand qua theirs thereupon falling within the ambit or within the domain of the aforesaid provisions. A perusal of the apposite applications, unveil qua the aggrieved defendant petitioner herein not making any underscorings therein qua the cause(s) of action in consonance with the facts concerted to be with the leave of the Court incorporated in his pleadings being earlier unknown to him, unawareness whereof arising from his despite exercising due diligence his yet remaining unacquainted with them, contrarily averments stand constituted in the apposite application(s), averments whereof hold unveilings qua the disability of the aggrieved defendant to earlier incorporate apposite pleadings in his earlier instituted written statement, pleadings whereof nowat stand concerted to be added, ensuing from his omission to collect the documents apposite to his rearing a counter claim in his previous written statement, wherefrom a concomitant deduction stems qua hence despite the aggrieved defendant evidently holding knowledge qua the facts relevant to his rearing an apposite counter claim in his written statement filed earlier to the apposite application constituted under Order 6 Rule 17 CPC, his yet omitting to at the earliest rear a counter claim in his earliest instituted written statement to the plaint whereupon visibly his relevant omission(s) in respect thereto are construable to be both deliberate and intentional. Obviously thereupon the subtle nuance besides the import of the apposite proviso to Order 6 Rule 17 CPC whereupon the aggrieved defendant though stood enjoined to firmly establish qua despite exercise of due diligence, his at a stage earlier to the apposite application(s) standing instituted not thereat holding their knowledge whereupon he would hold the empowerment to constrain the Court concerned, to permit him to incorporate the relevant pleadings in his written statement, has hence visibly remained unsatiated, thereupon with the mandate of the proviso to the provisions of Order 6 Rule 17 CPC begetting non satiation, concomitantly renders his belated apposite endeavour to suffer rejection.

4. Be that as it may, even when the documents relevant to the defendant rearing an apposite counter claim in his written statement instituted prior to his instituting before the learned trial Court an application under Order 6 Rule 17 CPC alongwith a counter claim constituted under the provisions of Order 8 Rule 6A CPC, were thereat unavailable with him yet the aforesaid non-availability thereat of the relevant documents, with the defendant, cannot be construed to be absolutely forestalling his rearing a counter claim in his written statement, written statement whereof stood instituted before the learned trial Court prior to his instituting therebefore the aforesaid CMAs, significantly when dehors their non availability thereat, he yet

wielded the statutory leverage to depict them in the apposite list of documents relied upon him. However, he omitted to avail the aforesaid statutory leverage. Consequently, it appears qua his through the aforesaid applications hence belatedly concerting to seek leave of the Court to propagate his counter claim to the suit of the plaintiff being construable to be both pretextual besides flimsy.

5. Furthermore, the salient principle(s) embodied under the provisions of Order 2 Rule 2 CPC warrant also their application to the concert of the defendant, to nowat rear a counter claim, significantly when it constitutes 'the suit' of the defendant whereupon its clout holds its fullest sway qua even a counter claim, conspicuously when the facts apposite to the, nowat, concert of the defendant, remained alive earlier thereto also stood known to the defendant whereupon the omission of the defendant to incorporate in his earlier instituted written statement, any espousal apposite to his nowat propagated counter claim also spurs an inference qua his intentionally abandoning or relinquishing all claim(s) with respect thereto hence nowat rendering him disempowered to subsequently institute a 'suit' in respect thereof. Even though the provisions incorporated in Order 6 Rule 17 CPC operate as an exception qua the principle of law held within the ambit of Order 2 Rule 2 CPC provisions whereof stand extracted hereinafter

> **2. Suit to include the whole claim.-** (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.
>
> Explanation: For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

yet with this Court for reasons aforestated excluding qua the factual matrix prevailing hereat, the sway of the mandate of the proviso qua the provisions held in Order 6 Rule 17 CPC thereupon with the workability of the exception to the principle engrafted in the provisions of Order 2 Rule 2 CPC hence standing rendered ousted, thereupon the vigour besides play of the mandate of provisions of Order 2 Rule 2 CPC surfaces with invincible force thereupon with the defendant visibly not in his earlier instituted written statement rearing any counterclaim vis.a.vis the relief reared in the plaint by the plaintiff, hence enjoins this Court to firmly erect an inference qua his intentionally relinquishing his counter claim qua the suit of the plaintiff whereupon he stands statutorily dis-entitled to subsequently raise it.

6. Moreover, the provisions of Order 8 Rule 6A of the CPC foist therewithin a statutory right upon the aggrieved defendant to assert a counter claim to the claim reared by the plaintiff in his apposite plaint, provisions whereof stands extracted hereinafter:

> **"6A. Counter claim by defendant.-** (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of to suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not:
>
> Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court.

> (2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.
>
> (3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the court.
>
> (4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaints."

whereupon the defendant stood enjoined to with respect to cause(s) of action accruing to him either before or after filing of the suit but prior to expiry of time qua his delivering his defence or prior to the time for the aforesaid purpose standing granted to him, his standing enjoined to in addition to the plea raised therebefore, also rear a plea of counter claim for thereupon his resisting the claim of the plaintiff. Nowat, with the apposite cause(s) of action accruing vis.a.vis. the aggrieved defendant at the time when a petition for eviction stood instituted before the learned Rent Controller, petition whereof stood squarely anchored upon his falling into arrears of rent with respect thereto also when thereat the aggrieved defendant omitted to make the afore-referred appropriate concerts/motions for thereupon his holding the apposite leverage to oust the endeavour of the respondent to seek his eviction from the demised premises, on score of his falling into arrears of rent also renders open an ensuing corollary qua his abandoning the aforesaid plea whereupon he reiteratedly now stands estopped, to, with the leave of the Court seek its incorporation in his written statement

7. The counsel for the petitioner has placed reliance upon a judgement of the Hon'ble Apex Court rendered in Civil Appeal No. 2308-2309 of 2016 titled Vijay Prakash Jarath vs. Tej Prakash Jarath, hence to canvass qua with the Hon'ble Apex Court therein permitting the aggrieved defendant therein, to even after striking of issues, institute a counter claim, on anvil of the Hon'ble Apex Court therein concluding qua no apparent loss or prejudice standing caused to the defendant therein, whereupon this Court also permit the aggrieved defendant to likewise introduce pleadings in his written statement apposite to his propagation(s) qua his counter claim. However, a close reading of the verdict placed before this Court by the learned counsel for the petitioner does not disclose qua the Hon'ble Apex Court standing seized with an application under Order 6 Rule 17 CPC nor obviously the Hon'ble Apex Court pronounced thereupon qua the visible statutory imperativeness of the aggrieved defendant establishing qua his apposite application constituted under the provisions of Order 6 Rule 17 CPC begetting satiation of the principles held in its proviso whereas with this Court concluding qua the aggrieved defendant petitioner herein visibly not satiating the principles held in the proviso to the provisions of Order 6 Rule 17 CPC, whereupon the benefit of the verdict of the Hon'ble Apex Court relied upon by the learned counsel for the petitioner may not accrue to the defendant also when the Hon'ble Apex Court has confined the benefits of its verdict only on its concluding qua in the factual matrix existing therebefore qua thereupon no serious or irreparable loss accruing upon the aggrieved defendant therein, whereas with the factual matrix prevailing hereat being starkly contra distinct therewith, significantly when the counter claim hereat of the defendant if allowed, it would encumber the plaintiff with immense financial loss comprised in his standing forestalled to recover arrears of rent qua the demised premises wherefrom the aggrieved defendant has suffered a decree of eviction also the plaintiff would stand thwarted to claim the relevant use and occupation charges. Predominantly also with the aggrieved defendant herein for all the reasons aforestated intentionally abandoning all the aforesaid pleas whereupon he hence stands estopped by the principle engrafted in Order 2 Rule 2 of the CPC to hence nowat belatedly raise the plea(s) of counter claim(s). In aftermath the benefit of the verdict of the Hon'ble Apex Court cannot stand bestowed upon the aggrieved defendant. Consequently, there is no merit in the petition(s) which are accordingly dismissed so also the pending applications. Impugned orders are maintained and affirmed. The parties are directed to appear before the learned trial Court on 8.5.2017.

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

Neelam Sharma ….Petitioner
Versus
Baba Balak Nath Temple Trust & Others ….Respondents

CWP No.11017 of 2011
Date of decision:01.04.2017

Constitution of India, 1950- Article 226- Petitioner was appointed as Lecturer – she applied for extraordinary leave for three years and did not turn up to join her services after 15.3.1999 – she claimed the arrears on account of revision of pay till the date of service –held that no representation was made by the petitioner seeking revision of her pay- no explanation was given for the delay on the part of the petitioner – writ petition dismissed.(Para-8 to 15)

Cases referred:
B.S. Bajwa and another vs.State of Punjab and others, (1998)2 SCC 523
Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, 2014 AIR SCW 6519

For the Petitioner: Mr.J.R. Sharma vice Mr.Bhuvnesh Sharma, 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.

Petitioner, being aggrieved with the denial of revised pay scale of Rs.8000-13500/- w.e.f. 01.01.1996, invoked extra ordinary jurisdiction of this Court by way of filing instant petition seeking therein following main relief:

> *"(i) That the Respondents may very kindly be directed to grant the revised pay scale of Rs.8000/- to 13500/- to the Petitioner w.e.f. 01/01/1996 to 15/03/1999 and refix her pay accordingly with all consequential benefits and the arrears accrued there under may very kindly be ordered to be paid with interest, as allowed by this Hon'ble Court vide judgment dated 31/10/2008 in C.W.P. No.274/2008 titled as "Karan Singh Rana & Ors. v. State of H.P. & Ors."*

2. Facts, as emerged from the record, are that the petitioner was appointed as Lecturer in English in Baba Balak Nath Degree College, Chakmoh *(hereinafter referred to as 'College')* by Baba Balak Nath Temple Trust, Deotsidh *(hereinafter referred to as 'Temple Trust')* vide appointment letter dated 10.10.1995 in the pay scale of Rs.2200-4000 + usual allowances (Annexure P-1). Petitioner continued to serve aforesaid College till 15.03.1999, whereafter she applied for extraordinary leave for three years on his selection in the Education Department of Himachal Pradesh as Lecturer in English. It also emerge from the record that petitioner left the job from the aforesaid College w.e.f. 15.03.1999 and thereafter never turned up to join her services in the said College. In nutshell, grievance of the petitioner is that since pay scale of Lecturer was revised from Rs.2200-4000 to Rs.8000-13500 w.e.f. 01.01.1996, she was also entitled for same since she had rendered her services in the College till 15.03.1999.

3. Learned counsel representing the petitioner stated that since, despite repeated communications, respondents-College failed to release benefits of revised pay scale in favour of the petitioner, she was compelled to file instant petition seeking therein relief(s) as referred hereinabove. He also invited the attention of this Court to the judgment dated 31.10.2008, passed by Division Bench of this Court in ***CWP No.274 of 2008, titled: Dr.Karan Singh Rana & Others vs. State of H.P.,*** whereby directions were issued to respondents College/Trust to

release the revised pay scales to the Lecturers working in the College. Learned counsel further stated that since there is no dispute with regard to rendering of services by the petitioner in the respondents-College till 15.03.1999, respondents ought to have granted her benefit of revised pay scale w.e.f. 01.01.1996 to 15.03.1999.

4. Mr.K.D. Sood, learned Senior Counsel duly assisted by Mr.Sanjeev Sood, Advocate, appearing for the respondents, vehemently opposed aforesaid submissions having been made by learned counsel representing the petitioner as well as application of Division Bench judgment *supra* and stated that it will not help to the petitioner because she was not a party in that case, moreover, facts of the case are totally different.

5. Apart from above, Mr.Sood, strenuously argued that the present petition is highly time barred and cannot be entertained, at this belated stage. Mr.Sood, while inviting the attention of this Court to the writ petition filed by the present petitioner, stated that it is an admitted case of the petitioner that she never joined the College after 15.03.1999, whereas she raised demand for release of revised pay scale for the first time by way of instant petition in 2011 i.e. after 12 years. Mr.Sood further stated that there is no document made available on the record by the petitioner suggestive of the fact that in 12 years i.e. from 1999 to 2011, representation, if any, qua the release of revised pay scale was ever made to the respondents and as such present petition deserves to be dismissed on the ground of limitation.

6. Mr.Sood also invited the attention of this Court to the judgment passed by Division Bench of this Court in ***LPA No.604 of 2011, titled Karan Singh Pathania vs. State of H.P. and Others,*** whereby another Lecturer in English; namely Karan Singh had filed an appeal against order/judgment passed by learned Single Judge in ***CWP bearing No.8025 of 2010***, ***titled: Karan Singh Pathania vs. State of H.P.*** whereby his claim for release of revised pay scale was rejected. In the aforesaid background, Mr.Sood prayed that the present petition may be dismissed on the ground of limitation.

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

8. There is no dispute with regard to appointment of petitioner as a Lecturer in the respondents-College. Similarly, there is no dispute with regard to services having been rendered by petitioner in the respondents-College in the capacity of Lecturer w.e.f. 10.10.1995 till 15.03.1999, whereafter she herself applied for extraordinary leave for three years. Though pleadings available on record suggests that the pay scale of Lecturer was revised by the respondents from Rs.2200-4000 w.e.f. 01.01.1996, but this Court was unable to lay its hand to any of the documents made available on record by the petitioner suggestive of the fact that representation, if any, was ever made by her after revision of pay scale, praying therein for release of the same in her favour. Though, perusal of judgment dated 31.10.2008 passed by the Division Bench of this Court in *CWP No.274 of 2001 supra*, suggests that direction was issued to respondents to issue revised pay scale w.e.f. 01.01.1996 to the Lecturers working in the College, but definitely petitioner was not party to that case.

9. Moreover, judgment passed by learned Single Judge of this Court in *CWP No.8025 of 2010*, referred hereinabove, which was further upheld in *LPA No.604 of 2011 supra,* clearly suggests that similarly situate persons as the petitioner had approached this Court for release of revised pay scale after considerable delay and accordingly their prayer was rejected by this Court on account of inordinate delay itself. In the instant case learned counsel representing the petitioner was unable to render explanation, if any, qua the extra ordinary delay caused by the petitioner seeking revised pay scale and as such this Court sees substantial force in the arguments having been made by Mr. Sood that acceptance of prayer having been made by the petitioner at this stage may open pandora's box, otherwise also Division Bench of this Court while upholding the judgment dated 27.08.2011 passed by learned Single Judge in aforementioned *CWP No.8025 of 2011,* has specifically held that fencer cannot be held entitled to any relief.

10. In the instant case also, there is no explanation with regard to delay on the part of petitioner, but, relief has been prayed on the strength of judgment rendered by this Court in *CWP No.274 of 2001 supra,* which itself suggests that the petitioner failed to take recourse to appropriate remedy within reasonable time for release of revised pay scale and as such she can be termed as fencer and cannot be held entitled to any relief.

11. Reliance is placed on ***B.S. Bajwa and another vs.State of Punjab and others, (1998)2 SCC 523***, wherein the Hon'ble Apex Court has held as under:-

> *"7. Having heard both sides we are satisfied that the writ petition was wrongly entertained and allowed by the single Judge and, therefore, the Judgments of the single Judge and the Division Bench have both to be set aside. The undisputed facts appearing from the record are alone sufficient to dismiss the writ petition on the ground of laches because the grievance made by B. S. Bajwa and B. D. Kapoor only in 1984, which was long after they had entered the department in 1971-72. During this entire period of more than a decade they were all along treated as junior to the other aforesaid persons and the rights inter se had crystallised which ought not to have been re-opened after the lapse of such a long period. At every stage the others were promoted before B. S. Bajwa and B. D. Kapoor and this position was known to B. S. Bajwa and B. D. Kapoor right from the beginning as found by the Division Bench itself. It is well settled that in service matters the question of seniority should not be re-opened in such situations after the lapse of a reasonable period because that results in disturbing the settled position which is not justifiable. There was inordinate delay in the present case for making such a grievance. This alone was sufficient to decline interference under Article 226 and to reject the writ petition."*

12. The Hon'ble Apex Court in case titled as State of ***Uttar Pradesh and others vs. Arvind Kumar Srivastava and others, 2014 AIR SCW 6519,*** held that relief cannot be extended to the persons who have approached the Court after long delay, that too, who are fence-sitters. It is apt to reproduce para 24 of the judgment herein:

> *"24. Viewed from this angle, in the present case, we find that the selection process took place in the year 1986. Appointment orders were issued in the year 1987, but were also cancelled vide orders dated June 22, 1987. The respondents before us did not challenge these cancellation orders till the year 1996, i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be pertinent to highlight that these respondents have not joined the service nor working like the employees who succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only there was unexplained delay and laches in filing the claim petition after period of 9 years, it would be totally unjust to direct the appointment to give them the appointment as of today, i.e. after a period of 27 years when most of these respondents would be almost 50 years of age or above."*

13. Even Division Bench of this Court, while placing reliance upon the aforesaid judgments passed by Hon'ble Apex Court, has held in *LPA No.604/2011 supra* that *"fencer cannot be held entitled to any relief"*.

14. In view of judgment rendered hereinabove by the Division Bench of this Court, this Court sees no force in the prayer of the petitioner that respondents ought to have released benefits of revised pay scale to her in the light of judgment rendered by this Court in *CWP No.274 of 2001 supra*, especially, when there is no explanation available on record for inordinate delay caused by the petitioner in maintaining the present petition.

15. Consequently, in view of discussion made hereinabove, this petition is dismissed being devoid of any merits. However, petitioner is at liberty to approach respondents for redressal of her grievances. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Pradeep Chand Sharma and others …Appellants/Plaintiffs.
Versus
Budhi Devi and others …Respondents/Defendants.

R.S.A. No. 565 of 2012
Judgment reserved on: 29.3.2017
Date of decision: 1st April, 2017.

Indian Partition Act, 19- Section 4- Plaintiff filed a civil suit seeking partition of the property pleading that the property is jointly owned by large number of co-sharers and it is difficult to enjoy the same- the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that when a partition is sought, the entire joint property owned by the co-owners must be brought into hotchpot for division amongst the co-sharers –however, partial partition is permissible in certain circumstances provided that no prejudice is caused to the other side – the Appellate Court had made a general observation that the suit was bad for partial partition and no prejudice was pointed out –appeal allowed – judgment of the Appellate Court set aside and that of the Trial Court restored. (Para- 15 to 38)

Cases referred:

Bahadur vs. Bratiya and others, 2016 AIR (HP) 58
Kiran Singh versus Chaman Paswan AIR 1954 SC 340

For the Appellants	Mr. Bhupender Gupta, Senior Advocate, with Ms. Rinki Kashmiri, Advocate.
For the Respondents	Mr. G.R. Palsra, Advocate, for respondents No. 1, 4 and 5. Mr. Debinder Ghosh, Advocate, for respondent No.8.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This regular second appeal is directed against the judgment and decree passed by learned District Judge, Kullu on 3.7.2012 whereby he reversed the judgment and decree passed by learned Civil Judge (Senior Division), Kullu dated 6.12.2011.

2. The parties are ad idem that the facts of the case have been correctly set out in the impugned judgment passed by learned lower Appellate Court and, therefore, the same are extracted from the said judgment.

3. Brief facts necessary for disposal of the present appeal are that the plaintiff filed suit pleading that following property (hereinafter to be called suit property) is jointly owned and possessed by the parties:

(A) *A two storeyed CGI sheet roofed building with attic bearing municipal No. 371 situated at Nehru Chowk, Manali comprised in Khasra No. 711, 712 measuring 0-4-0 Bigha contained in Khatoni No. 773 of Khata No. 536*

incorporated in jamabandi for the year 1992-93 of Phati Nasogi, Kothi Manali, Tehsil and District Kullu.

(B) A four storeyed CGI shet roofed building with attic situated at Nehru Chowk Manali, Tehsil and District Kullu, comprised in Khasra No. 713 measuring 0-5-0 bigha contained in Khatoni No. 972 of Khata No. 535 incorporated in jamabandi for the year 1992-93 of Phati Nasogi, Kothi Manali, Tehsil and District Kullu.

(C) A single storeyed CGI roofed building comprised in Khasra No. 702 measuring 2-11-0 bigha contained in Khatoni No. 974 of Khata No. 537 incorporated in jamabandi for the year 1992-93 of Phati Nasoi, Kothi Manali, Tehsil and District Kullu,

(D) A single storeyed CGI roofed building comprised in Khasra No. 702, situated at Nehru Chowk Manali measuring 2-11-0 bigha contained in Khatoni No. 537 of Khata No. 974 incorporated in jamabandi for the year 1992-93 of Phati Nasogi, Kothi Manali, Tehsil and District Kullu.

(E) *A three storeyed RCC building situated at Dana Bazaar Manali comprised in Khasra No. 750 measuring 0-1-0 bigha contained in Khatoni No. 829 of Khata No. 427 incorporated in jamabandi for the year 1992-93 of Phati Nasogi, Kothi Manali, Tehsil and District Kullu.*

4. It was pleaded that the suit property was previously owned and possessed jointly by Moti Lal, plaintiff No.1, Shadi Lal, Maya Das, Shiv Singh, Totu Ram, Sher Singh (defendant No.4), Sham Lal, Hira, Hari Khushal, Milap Satish, Dharmi and Surjan defendant No.2 and all these persons are successors of interest of Budh Ram. It was pleaded that after death of Maya Das his estate was inherited by his daughter Hri and Lila, plaintiffs No. 3 and 4 and after death of Shiv Chand, his estate was inherited by plaintiffs No. 5 to 14, after death of Totu Ram, his estate was inherited by Kishan Chand, defendant No.3 and after death of Surat Ram, his estate was inherited by Sher Singh, defendant No.4. It was further pleaded that the suit property is joint and unpartitioned and is presently owned by large number of share holders. The suit property is situated at Manali and fetching handsome rental income but due to large number of share holders it is highly inconvenient to divide income amongst all the co-sharers and prayed that the suit property be partitioned as per shares of the parties.

5. The defendants filed written statements. Defendants No. 1 to 3 i.e. Hira, Surjan and Kishan Chand resisted and contested the suit and took couple of preliminary objections. It was pleaded that the plaintiffs are estopped by their own act and conduct to file the present suit and suit is not properly valued for the purpose of court fee and jurisdiction and also challenged the locus standi of the plaintiffs. It was pleaded that the shares of the persons have not been properly defined. These defendants pleaded that after death of Surat Ram, his share has been inherited by Shiv Chand, Sher Singh and remaining ten real brothers of Surat Ram jointly. They also pleaded that the suit property mentioned in Part E was jointly owned and possessed by the co-sharers mentioned in para No.7 of the plaint and share of Shiv Das was inherited by Jawahar Lal, plaintiff No.15.

6. Defendant No.4 Sher Singh in his written statement took couple of preliminary objections qua limitation, maintainability, estoppel by act and conduct, locus standi and suit not properly valued for the purpose of court fee and jurisdiction. It was pleaded that the value of the suit property is more than one crore ruppes, hence the suit was beyond pecuniary jurisdiction of the trial Court. It was pleaded that the suit was bad for partial partition since other property situated in village Yang Kothi Ranika, District Lahaul Spiti, Akhara Bazar, Kullu, Phati Dhalpur, village 18 Miles Phati Bran, Kothi Baragarh of the parties have not been included in the suit. It was pleaded that the suit was bad for non-joinder of necessary parties since son of defendant No.4 Anil Kumar registered owner of Hotel Woodline Annexe has not been impleaded as party. Defendant No.4 also pleaded that since the plaintiffs are not in possession of the suit property,

hence the suit was not maintainable. Moreover, defendant No.4 claimed absolute ownership and possession over the suit land. It was denied that the suit land was jointly owned and possessed by the parties. It was pleaded that the parties are agriculturist and governed by custom of Kullu Sub Division Riwaj-e-Zamindara, according to which female heirs, in presence of male heirs are not entitled to inherit anything and in case of death of holder of the property without any male heir and the female heir will acquire limited rights and in case of a widow, will acquire right till remarriage or death and in case of daughters they will acquire right till majority or married. It was pleaded that plaintiff No.3 has already married and after her marriage her rights have been automatically reverted to the reversioners male heirs. Defendant No.4 further pleaded that he was younger son out of 15 sons of Budh Ram and after 1950 had settled at Manali. The suit land was purchased by him from various persons from his own funds. He had purchased the property in the joint name of his brothers and no consideration was paid by the rest of the brothers. He also developed the suit land at his own expenses. The building expenses of the hotel were approved in the name of defendant No.4 and electricity and water etc. were also sanctioned in favour of defendant No.4 which prove that the suit property was exclusively owned and possessed by him. Defendant No.4 claimed that the property mentioned in Headnote B was not residential house and it was Hotel building which was registered in the name of defendant No.4. The building plan was proved in the name of defendant No.4 and his son and fee of Rs.1,25,000/- was charged by Nagar Panchayat Manali for sanction of plan. The defendant also claimed ownership by way of adverse possession over the suit property and was pleaded that since his possession was open, continuous and hostile to the other persons, hence he has become owner of the suit property by way of adverse possession. He denied that other parties had any right over the suit property.

7. Defendants No. 5 to 7 pleaded that the plaintiffs were estopped from their act and conduct from filing the suit, the suit was not properly valued and the plaintiffs had no locus standi to file the suit. They admitted that the suit property was jointly owned and possessed by the parties and pleaded that share of Surat Ram after his death was inherited by his brother Shiv Chand, Sher Singh and remaining ten brothers of Surat Ram jointly.

8. In replication, the plaintiffs reasserted their case and controverted the pleadings made by the defendants.

9. The learned trial Court framed the issues on 24.9.2010 and 26.6.2011:

1. Whether the suit property is joint, if so, its effect? OPP
2. If issue No.1 is proved in affirmative, whether the plaintiffs re-entitled to decree of possession of their shares, in the suit property by getting their share partitioned by metes and bounds as prayed? OPP
3. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD-4.
4. Whether the suit is time barred? OPD-4.
5. Whether the plaintiffs are estopped by their acts and conduct from filing the present suit? OPD-4.
6. Whether the suit property stood partitioned in family partition on 18.6.1988 as claimed, if so, its effect? OPD-4.
7. Whether the site plan filed with the plaint is not correct and not according to factual position on the spot? OPD-4.
8. Whether the suit is collusive with defendants No. 1 to 3 and 5 to 7 as alleged? OPD-4.

8A. Whether the suit of the plaintiff is not maintainable? OPD

8B. Whether the parties are governed by the agricultural custom of Kullu Sub Division known as Rewas-Jamindara? OPD

8C. Whether the present suit has been filed for partial. If yes, its effect? OPD

9. Relief.

10. After recording the evidence and evaluating the same, the learned trial Court decreed the suit of the plaintiffs by passing a preliminary decree for partition of the suit property.

11. Aggrieved and dissatisfied with the judgment and decree passed by the learned trial Court, legal representatives of defendant No.4, who died during the pendency of the case before the learned trial Court filed an appeal before the learned first Appellate Court, who allowed the same vide judgment and decree dated 3.7.2012.

12. Aggrieved by the judgment and decree dated 3.7.2012 passed by learned first Appellate Court, the plaintiffs/appellants have filed the instant appeal before this Court.

13. This Court vide its order dated 29.10.2012 admitted the appeal on the following substantial questions of law:

> *"1. When admittedly the proceedings for partition of agricultural land situated in District Lahaul and Spiti were pending before the competent revenue authorities, has not Lower Appellate Court taken erroneous view of facts and rendered erroneous and perverse finding that the suit is not maintainable being for partial partition, ignoring the fact that property in dispute was situated in District Kullu and mainly was hotel and constructed portions alongwith land appurtenant thereto.*
>
> *2. Whether lower Appellate Court has recorded erroneous and perverse findings that the suit pertaining to Khasra No. 702, which is assessed to ladn revenue is not maintainable in the Civil Court and application for partition ought to have been made before the revenue courts, ignoring the fact that such land was appurtenant to the structures for which suit for partition was filed.*
>
> *3. Whether the lower appellate Court has misunderstood the correct legal position regarding the applicability of custom to the parties to the suit and has recorded wrong findings that the suit was not competent as the shares of the parties have not been properly defined? Has not the lower Appellate Court acted in arbitrary, mechanical, erroneous and perverse manner in reversing the preliminary decree passed by trial Court by not defining thee shares of the parties and also failing to notice that Ms. Bimla and Ms. Ram Devi were alive and were parties before the trial Court as well as lower Appellate Court?*

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

Substantial questions of law No. 1 and 2:

15. Since both these substantial questions of law are intrinsically inter-linked and inter-connected the same are being decided by a common reasoning.

16. It is more than settled that normally when a partition is sought through the intervention of the Court the general rule is that the entire joint property owned by the co-owners, whether as joint tenants or tenants-in-common, must be brought into hotchpot for division by the Court.

17. It is equally a well established rule of law that the plaint in a suit for partition must embrace only such property in which the plaintiff has community of interest and unity of possession. Where a purchaser acquires an interest in the coparcenary property, the transfer really effects a severance of joint status in respect of the property transferred and he becomes a tenant-in-common in respect of such property with his vendor, but he does not become a coparcener.

18. Even as a rule of Hindu Law, if the property is not joint family property and the parties are not coparceners but only co-owners or tenants-in-common the rule is not so rigid and partial partition may be allowed if there is not much inconvenience to the other sharers.

19. In addition to that, the partial partition is prohibited for a good reason as the partition has the effect of breaking up a joint Hindu family. If such a family is disrupted, it stands to reason that the family should break up completely and the whole family property should be divided.

20. However, even suits praying for partial partition have also been recognized under some of the following circumstances, namely:

(i) where different portions of family property are situated in different districts, separate suits for partition for lands of each district may be brought;

(ii) it may be allowed when portion of joint property at the time of the suit for partition is incapable of partition;

(iii) where the property left out from its very nature impartible;

(iv) where the property is held jointly with strangers who cannot be joined as parties to a general suit for partition the same may be left out; or

(v) where the co-owners by mutual agreement decide to make partition of the joint family property leaving some portion in common.(Refer: ***Harey Harey Singha Chowdhury vs. Hari Chaitanya Singha Chowdhury 40 CWN 1237; Mansharam vs. Ganesh 17 CWN 521; Panchanan Mallick vs. Shiv Chandra ILR 14 Cal 805; Balaram vs. Ramchandra ILR 22 Bom 922; Abdul Karim vs. Badruddin ILR 28 Mad 216).***

Therefore, it is not in all events that partial partition is impermissible.

21. The purpose and object for insisting in a suit for partition that the entire joint property owned by the co-owners whether as joint tenants or tenants-in-common, must be brought into hotchpot in division is to ensure that much inconvenience is not caused to the opposite parties who are also co-heirs, because such suits lead to multiplicity of litigation and consequent harassment, inconvenience and endless litigation.

22. The rule against partial partition is only one of equity and convenience. Therefore, it is better to limit the rule in its application to properties over which the parties have community of interest and unity of possession. If partial partition can be had without inconvenience to the other sharers and if it will not stand in the way of equities being adjusted, it is not necessary to insist that all properties will have to be scheduled. 23. Thus, what can be taken to be settled is that there is no legal inhibition if there are justifying features in allowing a suit for partial partition. However, normally a distinction has to be made between partition of joint family property (joint tenants) and partition among tenants-in-common. The reason for the distinction is that in the former case, unlike in the latter case, there is unity of title, interest and possession over each and every item of property and hence the normal rule is that partition should be of entire properties of the joint family. In the case of partition between co-parceners (in respect of joint family properties) the entire property must be thrown into hotchpot except for certain well recognized exceptions.

24. On the other hand in the matter of partition of property held by tenants-in-common principle regarding partial partition may apply depending on the facts and circumstances of the case. Therefore, the rule regarding partial partition as it applies to the case of joint family properties cannot as such be applied in the case of partition of co-ownership properties in the possession of tenants-in-common.

25. Adverting to the facts, it would be noticed that the learned first Appellate Court by general and sweeping observations held that the suit was for partial partition as would be evident from para 29 of the judgment, which reads thus:

> *"29. The first and foremost question before this Court is "whether the partial partition is permissible in law and plaintiff had not included all the property jointly owned and possessed by the parties in the present suit?". The defendants had specifically pleaded that the plaintiffs have not included all the joint properties in*

the present suit, hence, the suit for partial partition was not maintainable. Issue No.8C was framed qua this plea. The plaintiff when appeared as PW-1 admitted that the parties were having joint and un-partitioned properties at Lahaul Spiti, Akhara Bazaar Kullu and Village Ruaru. Admittedly, these properties have not been included in the present suit. Hence, the suit for partial partition was not maintainable."

26. I really fail to understand as to how the learned first Appellate Court arrived at such a conclusion as it was incumbent upon it to have first clearly spelt out in detail the properties which according to it had been left out, so as to not only enable the parties but also this Court to arrive at a conclusion as to which of the properties had been left out and the same obviously could not have been left to guess work.

Property at Lahaul and Spiti:

27. It has already come on record and even otherwise not disputed by the respondents that the proceedings for partition of agricultural land situated at Lahaul and Spiti was already pending before the competent revenue authorities at the time of filing of the suit and this otherwise is the conclusion that has rightly been drawn by the learned trial Court while deciding issue No. 8C.

Property at Kullu:

28. As regards the property at Kullu, Mr. G.R. Palsra, learned counsel for the respondents had invited my attention to the copy of jamabandi Ext.DW-1/B pertaining to Phati Dhalpur for the year 2001-02 to vehemently canvass that the property reflected in this document has not been included in the suit.

29. I have gone through the aforesaid document and find that in columns No. 4 and 5, which pertain to the ownership and possession, it has specifically been recorded 'Avadi Pati Raghunathpur'. Once that be so, then it cannot be inferred that the properties mentioned in this jamabandi belongs to the parties.

30. However, learned counsel for the respondents would still insist that the property is shown as Abadi and, therefore, should be presumed that there are buildings standing over this land, which in turn belongs to the parties. I am afraid that this argument is totally fallacious and without merit. The respondents in order to establish that there was building(s) standing upon the aforesaid land was required to establish this fact by leading clear, cogent and convincing evidence and thereafter was further required to prove that the same were joint family property and thus was required to be put in the hotchpot.

Property at Ruaru:

31. Learned counsel for the respondents has vehemently argued that the properties in village Ruaru in Mauza Kot Kandi as reflected in jamabandi Exts.DW-1/C, DW-1/D, DW-1/E, DW-1/F, DW-1/G, DW-1/H and Ext.DW-1/J are joint family properties, but have not been included in the suit and, therefore, the suit being one for partial partition ought to be dismissed.

32. I have gone through the aforesaid documents, a perusal whereof reveals that the properties as mentioned therein again do not exclusively belong to either of the parties, but are even owned and possessed by the persons who have no relationship with the parties to the suit.

33. Once that be so, then obviously, the land of Village Ruaru could not have been included in the suit. Further the suit cannot be held to be one for partial partition because even as a Rule of Hindu law, if the property is not joint family property and the parties are not coparceners but are only co-owners or tenants-in-common, the rule of partition is not so rigid and even partial partition can be allowed. It is for the party contesting such partition to prove that much inconvenience shall be caused to them, otherwise in such given cases, it is then only a rule of processual law.

Substantial questions of law No. 1 and 2 are accordingly answered.

Substantial question of law No.3:

34. This question is no longer resintegra in view of the judgment rendered by a co-ordinate Bench (Justice Rajiv Sharma, J.) in ***Bahadur vs. Bratiya and others, 2016 AIR (HP) 58*** wherein it was categorically held that custom providing that the daughters will not inherit the property will be in derogation of the provision of Hindu Succession Act and cannot be recognized. It was further held that such custom would be in violation of Article 15 of the Constitution of India.

35. In view of the authoritative pronouncement on the point in issue, this question is virtually rendered academic and is answered accordingly.

36. Mr. G.R. Palsra, learned counsel for the respondents as last ditch effort would argue that the suit itself was not maintainable before the learned trial Court as the value of the property was worth several of crores, whereas the jurisdiction conferred upon the trial Court at the time of institution of the suit was hardly `5,00,000/- and thereafter subsequently enhanced to `10,00,000/-. I am afraid that even this submission of the learned counsel for the respondents cannot be countenanced firstly for the simple reason that the argument if accepted, would itself render the judgment in favour of the respondents by the first Appellate Court a nullity and that apart, even if it is assumed that the property is beyond the pecuniary jurisdiction of the trial Court, the same will have no bearing on the validity of the judgment and decree passed by it, more particularly when the respondents have failed to question the judgment and decree so passed on the ground that there has been prejudice on the merits (Refer: ***Kiran Singh*** versus ***Chaman Paswan AIR 1954 SC 340).***

37. This issue has already been considered by this Court in ***RSA No.115 of 2014, titled Surinder Singh Sautha*** *versus* ***Raja Yogindra Chandra***, decided on 29.05.2014, wherein it was held as under:-

> "18.The next point raised by learned counsel for the appellant is that the order passed by a Court lacking pecuniary jurisdiction is void, ab initio and, therefore, the judgment passed by the learned trial Court as affirmed by the learned lower Appellate Court is without jurisdiction and deserves to be set-aside. He referred to number of decisions of the various High Courts on the question viz. ***Mamraj Agarwala and others vs. Ahamad Ali Mahamad AIR 1919, Calcutta 984, Mool Chand Moti Lal vs. Ram Kishan and others AIR 1933 Allahabad 249, Shyam Nandan Sahay and others vs. Dhanpati Kuer and others AIR 1960 Patna 244 and Controller of Stores and another vs. M/s Kapoor Textile Agencies, AIR 1975 Punjab 321.***
>
> 19. The judgments relied upon by learned counsel for the appellant would not be of much significance and have lost efficacy in view of the judgment of the Hon'ble Supreme Court in ***Kiran Singh and others vs. Chaman Paswan and others AIR 1954 S.C.340*** wherein the Hon'ble Supreme Court held that when a case had been tried by a court on merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections of jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits. Further it may be observed that there have been a number of subsequent pronouncements of the Hon'ble Apex Court and also by this Court on this issue which otherwise are binding on this Court. The same are referred to and discussed in detail in the later part of the judgment.
>
> 20. The entire law with regard to the decree passed by a Court lacking pecuniary jurisdiction has been discussed in detail by the Hon'ble Supreme Court in ***Subhash Mahadevasa Habib vs. Nemasa Ambasa Dharmadas (dead) by LRs.***

And others (2007) 13 SCC 650 and the position has been summed up as follows:

> *"33. What is relevant in this context is the legal effect of the so-called finding in OS No. 4 of 1972 that the decree in OS No. 61 of 1971 was passed by a court which had no pecuniary jurisdiction to pass that decree. The Code of Civil Procedure has made a distinction between lack of inherent jurisdiction and objection to territorial jurisdiction and pecuniary jurisdiction. Whereas an inherent lack of jurisdiction may make a decree passed by that court one without jurisdiction or void in law, a decree passed by a court lacking territorial jurisdiction or pecuniary jurisdiction does not automatically become void. At best it is voidable in the sense that it could be challenged in appeal therefrom provided the conditions of Section 21 of the Code of Civil Procedure are satisfied.*
>
> *34. It may be noted that Section 21 provided that no objection as to place of the suing can be allowed by even an appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice. In 1976, the existing section was numbered as sub-section (1) and sub-section (2) was added relating to pecuniary jurisdiction by providing that no objection as to competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection had been taken in the first instance at the earliest possible opportunity and unless there had been a consequent failure of justice. Section 21-A also was introduced in 1976 with effect from 1.2.1977 creating a bar to the institution of any suit challenging the validity of a decree passed in a former suit between the same parties on any ground based on an objection as to the place of suing. The amendment by Act 104 of 1976 came into force only on 1.2.1977 when OS No. 4 of 1972 was pending. By virtue of Section 97 (2) (c) of the Amendment Act, 1976, the said suit had to be tried and disposed of as if Section 21 of the Code had not been amended by adding sub-section (2) thereto. Of course, by virtue of Section 97 (3) Section 21-A had to be applied, if it has application. But then, Section 21-A on its wording covers only what it calls a defect as to place of suing.*
>
> *35. Though Section 21-A of the Code speaks of a suit not being maintainable for challenging the validity of a prior decree between the same parties on a ground based on an objection as to "the place of suing", there is no reason to restrict its operation only to an objection based on territorial jurisdiction and excluding from its purview a defect based on pecuniary jurisdiction. In the sense in which the expression "place of suing" has been used in the Code it could be understood as taking within it both territorial jurisdiction and pecuniary jurisdiction.*
>
> *36. Section 15 of the Code deals with pecuniary jurisdiction and, Sections 15 to 20 of the Code deal with "place of This Court in Bahrein Petroleum Co. Ltd. v. P.J. Pappu AIR 1966 SC 634 made no distinction between Section 15 on the one hand and Sections 16 to 20 on the other, in the context of Section 21 of the Code. Even otherwise, considering the interpretation placed by this Court on Section 11 of the Suits Valuation Act and treating it as equivalent in effect to Section 21 of the Code of Civil Procedure as it existed prior to the amendment in 1976, it is possible to say, especially in the context of the amendment brought about in Section 21 of the Code by Amendment Act 104 of 1976, that Section 21-A was intended to cover a challenge to a prior decree as regards lack of*

jurisdiction, both territorial and pecuniary, with reference to the place of suing, meaning thereby the court in which the suit was instituted.

37. As can be seen, Amendment Act 104 of 1976 introduced sub-section (2) relating to pecuniary jurisdiction and put it on a par with the objection to territorial jurisdiction and the competence to raise an objection in that regard even in an appeal from the very decree. This was obviously done in the light of the interpretation placed on Section 21 of the Code as it existed and Section11 of the Suits Valuation Act by this Court in Kiran Singh v. Chaman Paswan AIR 1954 SC 340 followed by Hiralal Patni v. Kali Nath AIR 1962 SC 199 and Bahrein Petroleum Co. Ltd. v. P.J.Pappu AIR 1966 SC 634. Therefore, there is no justification in understanding the expression "objection as to place of suing" occurring in Section 21-A as being confined to an objection only in the territorial sense and not in the pecuniary sense. Both could be understood, especially in the context of the amendment to Section 21 brought about by the Amendment Act, as objection to place of suing.

38. It appears that when the Law Commission recommended insertion of Section 21-A into the Code, the specific provision subsequently introduced in sub-section (2) of Section 21 relating to pecuniary jurisdiction was not there. Therefore, when introducing sub-section (2) of Section 21 by Amendment Act 104 of 1976, the wordings of Section 21-A as proposed by the Law Commission were not suitably altered or made comprehensive. Perhaps, it was not necessary in view of the placing of Sections 15 to 20 in the Code and the approach of this Court in Bahrein Petroleum Co. Ltd. AIR 1966 SC 634. But we see that an objection to territorial jurisdiction and to pecuniary jurisdiction, is treated on a par by Section 21. The placing of Sections 15 to 20 under the heading "place of suing" also supports this position. Taking note of the object of the amendment in the light of the law as expounded by this Court, it would be incongruous to hold that Section 21-A takes in only an objection to territorial jurisdiction and not to pecuniary jurisdiction. We are therefore inclined to hold that in the suit OS No. 4 of 1972, the validity of the decree in OS No. 61 of 1971 could not have been questioned based on alleged lack of pecuniary jurisdiction. Of course, the suit itself was not for challenging the validity of the decree in OS No. 61 of 1971 an the question of the effect of the decree in OS No. 61 of 1971 only incidentally arose. In a strict sense, therefore, Section 21-A of the Code may not ipso facto apply to the situation.

39. But the fact that Section 21 (2) or Section 21-A of the Code may not apply would not make any difference in view of the fact that the position was covered by the relevant provision in the Suits Valuation Act, 1887. Section 11 of the Suits Valuation Act provided that notwithstanding anything contained in Section 578 (Section 99 of the present Code covering errors or irregularity) of the Code of Civil Procedure, an objection that a court which had no jurisdiction over a suit had exercised it by reason of undervaluation could not be entertained by an appellate court unless the objection was taken in the court of first instance at or before the hearing at which the issues were first framed or the appellate court is satisfied for reasons to be recorded in writing that the overvaluing or undervaluing of the suit has prejudicially affected the disposal of the suit. There was some confusion about the content of the section.

40. The entire question was considered by this Court in Kiran Singh v. Chaman Paswan, AIR 1954 SC 340. Since in the present case, the objection is based on the valuation of the suit or the pecuniary jurisdiction,

we think it proper to refer to that part of the judgment dealing with Section 11 of the Suits Valuation Act. Their Lordships held: (AIR p. 342, para 7)

> *"7. ….It provides that objections to the jurisdiction of a court based on overvaluation or undervaluation shall not be entertained by an appellate court except in the manner and to the extent mentioned in the section. It is a self-contained provision complete in itself, and no objection to jurisdiction based on overvaluation or undervaluation can be raised otherwise than in accordance with it.*

With reference to objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional court, unless there was a consequent failure of justice. It is the same principle that has been adopted in Section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying Sections 21 and 99 of the Civil Procedure Code and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits."

In Hiralal Patni v. Kali Nath, AIR 1962 SC 199, it was held that: (AIR p.201, para 4)

> *"4….. It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure."*

In Bahrein Petroleum Co. Ltd. v. P.J. Pappu AIR 1966 SC 634, it was held Section 21 is a statutory recognition of the principle that the defect as to the place of suing under Sections 15 to 20 of the Code may be waived and that even independently of Section 21, a defendant may waive the objection and may be subsequently precluded from taking it."

21. In fact, a similar proposition came up before this Court (Coram : Deepak Gupta, J, as his Lordship then was) in ***Tikam Ram and others vs. Purshotam Ram and others 2011 (3) Shim. L.C. 251*** wherein again after noticing all the relevant provisions along with law, it was held as under:

> *"19. To appreciate the rival contentions of the parties, it would be appropriate to refer to Section 21 of the CPC and Section 11 of the Suits Valuation Act which read as follows:*
>
> *Civil Procedure Code:*
>
> *"21. Objections to jurisdiction. – [(1) No. objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.*
>
> *(2) No objection as to the competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or*

Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice."

Suits Valuation Act

"11. Procedure where objection is taken on appeal on revision that a suit or appeal was not properly valued for jurisdictional purposes.- (1) Notwithstanding anything in [Section 578 of the Code of Civil Procedure (14 of 1882)] and objection that by reason of the over-valuation or under-valuation of suit or appeal a Court of first instance or lower Appellate Court which had no jurisdiction with respect to the suit or appeal exercise jurisdiction with respect thereto shall not be entertained by an Appellate Court unless.-

> *(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower Appellate Court in memorandum of appeal to that Court, or*
>
> *(b) the Appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and that the over-valuation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits.*

(2) If the objection was taken in the manner mentioned in clause (a) of sub-section (1), but the Appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeals as if there had been no defect of jurisdiction in the Court of first instance or lower Appellate Court.

(3) If the objection was taken in that manner and the Appellate Court is satisfied as to both those matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals; but if it remands the suits or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.

(4) The provisions of the Section with respect to an Appellate Court shall, so far as they can be made applicable, apply to a Court exercising revisional jurisdiction under [Section 622 of the Code of Civil Procedure (14 of 1882)] or other enactment for the time being in force.

(5) This Section shall come into force on the first day of July, 1887."

20. The Apex Court in Kiran Singh and others vs. Chaman Paswan and others, AIR 1954 (41), SC 340 was dealing with a case for recovery of possession of more than 12 acres of land. The suit was dismissed. The plaintiff thereafter filed an appeal in the court of District Judge who also dismissed the appeal. In the second appeal, the plaintiffs for the first time raised an objection that the suit itself had not been properly valued for the

purpose of Court fee and jurisdiction and prayed that their appeal should be treated as a first appeal against the order of the learned trial Court. The High Court rejected the plea of the plaintiffs on the ground that the defendants could succeed only when they established prejudice on the merits of the case. An appeal was filed before the Apex Court and it was urged that the decree passed by the District Judge was a nullity because in an original suit having valuation of Rs.9980/-, appeal would lie to the High Court alone and not to the District Judge. The Apex Court held as follows:-

> *"It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."*

21. Relying upon these observations, Sh. Bhupender Gupta, learned senior counsel for the respondents submits that the decree and judgment of the learned trial Court is a nullity and the learned District Judge was justified in ordering the return of the plaint. This argument cannot be accepted to be correct because it was after making these observations that the Apex Court dealt with Section 11 of the Suits Valuation Act.

22. Dealing with the import of the word prejudice occurring in Section 11, the Apex Court held as follows:-

> *"The language of Section 11 of the Suits Valuation Act is plainly against such a view. It provides that over valuation or undervaluation must have prejudicially affected the disposal of the case on the merits. The prejudice on the merits must be directly attributable to over valuation or under valuation and an error in a finding of fact reached on a consideration of the evidence cannot possibly be said to have been caused by over valuation or undervaluation. Mere errors in the conclusions on the points for determination would therefore be clearly precluded by the language of the Section."*

23. It is also important to note that the aforesaid decision of the Apex Court was rendered much before the amendment of Section 21 of the Code of Civil Procedure. Vide Code of Civil Procedure Amendment Act, 1976, sub-sections 2 and 3 were introduced in Section 21 and sub-section 2 clearly provides that no objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shal be allowed by any Appellate Court unless such objection was taken in the court of the first instance at the earliest possible opportunity before settlement of issues and unless there has been a consequent failure of justice. Sub section 2 clearly envisages that not only should the objections have been taken at the first instance but there should have been consequent failure of justice. If there is no failure of justice then the Court would not entertain the objection as to the competence of the Court with reference to its pecuniary limits. This aspect of the matter has not at all been considered by the lower appellate Court.

24. In Sat Paul and another v. Jai Bhan Ananta Saini, AIR 1973 Punjab and Haryana 58 decided prior to the amendment to Section 21 and only taking into consideration Section 11 of the Suits Valuation Act, a learned Single Judge of the Punjab and Haryana High Court held that without showing that any prejudice has been caused, the Appellate Court could not set aside the judgment only on the ground of the suit being improperly valued.

25. In Harshad Chiman Lal Modi v. DLF Universal Ltd. and another 2005 (7) SCC 791 the Apex Court held as follows:

> *"We are unable to uphold the contention. The jurisdiction of a Court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a Court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a Court having no jurisdiction is a nullity."*

26. The Apex Court further went on to hold that the Courts at Delhi did not have jurisdiction under Section 16 to decide the issue and, therefore, lacked inherent jurisdiction to decide the matter.

27. The then Hon'ble Chief Justice of this Court in Ajay Singh v. Tikka Brijendra Singh and others, 2006 (2) SLC 394 considered this question in detail and after noting the provisions of Sections 21 and 99 of the Civil Procedure Code and Section11 of the Suits Valuation Act held as follows:

> *"A combined reading of the aforesaid three provisions of law clearly suggests, first and foremost that no objection as to the competence of a Court with reference to its pecuniary limits of jurisdiction shall be allowed unless there has been a consequential failure of justice, and secondly, that no decree shall be reversed or substantially varied etc. on account of any error etc. including an error of jurisdiction which does not affect the merits of the case and thirdly, no objection about the jurisdiction of a Court for over valuation or under valuation of a suit etc. shall be entertained by an Appellate Court unless, apart from the objection having been taken in the Court of first instance etc., the Appeal Court is satisfied for reasons to be recorded in writing that such overvaluation or under valuation has prejudicially affected the disposal of the suit by the trial Court."*

28. In Hasham Abbas Sayyad v. Usman Abbas Sayyad and others, 2007 (2) SCC 355, the Apex Court held as follows:-

> *"24. We may, however, hasten to add that a distinction must be made between a decree passed by a Court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure, and a decree passed by a Court having no jurisdiction in regard to the subject matter of the suit. Whereas in*

the former case, the appellate Court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."

29. It would be pertinent to mention that the Apex Court and this Court clearly laid down that so far as objections to the territorial and pecuniary jurisdiction are concerned, the objections must be taken at the earliest possible opportunity and order of the Court not having pecuniary jurisdiction cannot be said to be an nullity. The Court does not lack jurisdiction to decide such a dispute. It only does not have the pecuniary jurisdiction to decide the dispute. Therefore, if it entertains and tries the matter and decides these disputes then the learned Appellate Court cannot set aside its findings unless it comes to the conclusion that prejudice has been caused in terms of Section 11 of the Suits Valuation Act and consequent failure of justice in terms of Section 21 (2) of the Code of Civil Procedure."

38. In view of the aforesaid discussion, I find merit in this appeal and the same is accordingly allowed and the judgment and decree passed by learned first Appellate Court is set-aside and the judgment and decree of the learned trial Court is restored. However, before parting, it needs to be observed that as the suit was filed about two decades back on 19.5.1997, the same has to be taken to its logical end expeditiously. Accordingly, in the event of the appellants approaching the learned trial Court for passing a final decree, the Court shall make all endeavour to pass a final decree as expeditiously as possible and in no event later than three months of the filing thereof.

The appeal is disposed of in the aforesaid terms, 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.

Rekha ……Petitioner.

Versus

The H.P. State Electricity Board & another ……Respondents.

CWP No. 3647 of 2011
Reserved on: 18.03.2017
Decided on: 1.04.2017

Constitution of India, 1950- Article 226- Deceased was standing- he was caught by electric wire, which was hanging very low- deceased was shifted to Hospital but he succumbed to the injuries- a writ petition was filed for seeking compensation- held that where there is prima facie evidence of negligence, the Court cannot grant relief in exercise of writ jurisdiction- deceased was a boy of 13 years whose life was curtailed due to accident- there is violation of right of life- respondent stated that deceased had died due to his own negligence but a person undertaking an activity involving hazardous or risky exposure to human life, is liable to compensate other person for the injury sustained by the other person – contributory negligence is no defence in such situation considering the age of the deceased, respondent directed to pay a compensation of Rs.6 lacs with interest @ 7.5% per annum. (Para-7 to 18)

Cases referred:

Nilabati Behera (Smt) alias Lalita Behera (through the Supreme Court Legal Aid Committee) vs. State of Orissa and others, (1993) 2 Supreme Court Cases 746

Chairman, Railway Board and Others vs. Chandrima Das (Mrs)and others, (2000) 2 Supreme Court Cases 465
Sube Singh vs. State of Haryana and others, (2006) 3 SCC 178
M.P. Electricity Board vs. Shail Kumari and others, (2002) 2 Supreme court Cases 162
Delhi Development Authority vs. Bhagwan and others, 2015 ACJ 324
Paramjit Kaur & others vs. State of Punjab & others, AIR 2009 Punjab and Haryana 27

For the petitioner: Ms. Uma Manta, Advocate.
For the respondents: Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioners, being parents of the deceased, Deepak Kumar (hereinafter referred to as 'the deceased'), maintained the present writ petition under Article 226 of the Constitution of India, seeking compensation from the respondents, i.e. Himachal Pradesh State Electricity Board, (hereinafter referred to as 'respondents-Board') on account of death the deceased due to electrocution, which as per the petitioners, was due to the negligence of the respondents-Board. During the pendency of the petition, petitioner No. 2 (father of the deceased) died and his legal representatives were brought on record.

2. Succinctly, the facts, as per the petitioners, essential for adjudication of this petition, are that on 18.04.2008 the deceased was standing on his lintel. Suddenly, the deceased was caught by the electric wires, which were hanging very low. The deceased, in an unconscious state, was shifted to Indira Gandhi Medical College on the same day, however, during hospitalization he died on 20.04.2008. The occurrence was also reported to the police on 18.04.2008. Postmortem report revealed that the deceased died due to electrocution. As per the petitioners, the deceased died due to the negligence of the respondents, as the respondents-Board did not lay the electric wires as per the prescribed norms under the Indian Electricity Act and Rules. It is further contended that the deceased was thirteen years of age at the time of the incident and was earning Rs. 4500/- per month by working in the locality. The deceased was contributing towards the expenses of the family and due to his death the family not only lost monetary contribution, but also lost his love, affection etc. As per the petitioners, the deceased died due to the negligence of the respondents-Board, as the respondents-Board is wholly responsible for upkeep and supply of electricity. It is further contended that the respondents have failed in supervising and taking necessary precautions while transmitting electricity through high tension electricity line. As per the petitioners, the respondents, by negligently discharging their statutory duties, not only endangered, but have taken away the life of the deceased, by contravening Article 21 of the Constitution of India, thus they are liable to pay compensation to the petitioners. The petitioners have sought compensation to the tune of Rs. 10,00,000/- (rupees ten lac) from the respondents by issuing a legal notice dated 29.09.2010, however, respondents turned deaf ear and neither replied the notice nor released any amount of compensation. Hence the petitioners were virtually forced to resort to the present writ petition.

3. The respondents, by way of filing reply to the petition, resisted the claim of the petitioners. As per the respondents, the petitioners have not approached this Court with clean hands, they have no locus standi and this Court has no jurisdiction to entertain the present petition. The respondents admitted the accident on 18.04.2008. As per the respondents, the accident took place in an under construction and unauthorized building of Shri Vicky and Shri Subhash (father of the deceased and his brother). The respondents on 16.04.2008 issued notice to Shri Subhash to stop the work, however, construction continued and the accident took place only due to the adamancy of Shri Subhash and Shri Vicky. The respondents have further averred that the electric line in question was erected in the year 1989 after taking all obligatory clearances and since then the same has been maintained by them properly. As per the

respondents, the accident took place due to the unauthorized construction being raised by Shri Subhash and Shri Vicky. The respondents have also issued notice for maintaining adequate distance from the 33KV HT line, thus they cannot be held liable for the negligence of the petitioners. The deceased while playing on the lintel with an iron stick. Which got in contact with live wires and due to shock fell down on the road. The owner of the building did not take mandatory clearances, as required under the law, from the respondents-Board and thus the petitioners are themselves liable for the accident.

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

5. The learned counsel for the petitioners has argued that the deceased died due to the negligence of the respondents. She has further argued that life of the deceased was curtailed due to the negligence of the respondents, so there is violation of right to life as provided under Article 21 of the Constitution of India and the respondents are liable to pay compensation to the petitioners. She has relied upon the following judicial pronouncements:

1. *M.P. Electricity Board vs. Shail Kumari and others, (2002) 2 Supreme court Cases 162;*
2. *Paramjit Kaur & others vs. State of Punjab & others, AIR 2009 Punjab and Haryana 27;*
3. *Delhi Development authority vs. Bhagwan and others, 2015 ACJ 324; and*
4. *Naval Kumar alias Rohit Kumar vs. Sate of H.P. & others, CWP No. 475 of 2013* (decided by a learned Single Judge of this Court on 09.01.2015).

6. Conversely, the learned counsel for the respondents-Board has argued that the deceased died due to the negligence of the petitioners, as they have raised unauthorized construction under the high tension electricity wires and despite notice of the respondents, they did not desist from raising construction. Thus, negligence cannot be attributed to the respondents-Board and they are not liable to pay any compensation to the petitioners.

7. The first and foremost question is - whether this Court can grant compensation while exercising jurisdiction under Article 226 of the Constitution of India, as the petitioners have willingly invoked the jurisdiction of this Court under Article 226 of the Constitution of India without taking recourse to other civil remedies available to them under the law?

8. The above question is no longer *res integra* and in number of judgments it has been addressed. In ***Nilabati Behera (Smt) alias Lalita Behera (through the Supreme Court Legal Aid Committee) vs. State of Orissa and others, (1993) 2 Supreme Court Cases 746,*** it has been held by the Hon'ble Supreme Court that compensation can be granted while exercising writ jurisdiction, however, there must be *prima facie* proof that the accident took place due to the negligence of the respondents and the writ Courts cannot shut its doors and relegate the approaching party to avail other efficacious remedies. It would be apt to extract para 17 of the judgment in ***Nilabati Behera's*** case (supra) herein:

> *"It follows that 'a claim in public law for compensation' for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to the remedy private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their*

powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution. This is what was indicated in Rudul Sah (AIR 1983 SC 1086) and is the basis of the subsequent decisions in which compensation was awarded under Arts. 32 and 226 of the Constitution, for contravention of fundamental rights."

9. In yet another decision of the Hon'ble Apex Court in ***Chairman, Railway Board and Others vs. Chandrima Das (Mrs)and others, (2000) 2 Supreme Court Cases 465,*** it has been held that a writ petition under Article 226 of the Constitution of India, seeking compensation against the State or its instrumentalities, is maintainable even if there are other alternative remedies available to the petitioner. Relevant paras of the judgment (supra) are reproduced hereinbelow:

"6. We may first dispose of the contention raised on behalf of the appellants that proceedings under Article 226 of the Constitution could not have been legally initiated for claiming damages from the Railways for the offence of rape committed on Smt. Hanuffa Khatoon and that Smt. Hanuffa Khatoon herself should have approached the court in the realm of private law so that all the questions of fact could have been considered on the basis of the ingredients of the commission of "tort" against the person of Smt. Hanuffa Khatoon wee made out, so as to be entitled to the relief of damages. We may also consider the question of locus standi as it is contended on behalf of the appellants that Mrs. Chandrima Das, who is a practicing advocate of the High Court of Calcutta, could not have legally instituted these proceedings.

… … … … … …

11. Having regard to what has been stated above, the contention that Smt. Hanuffa Khatoon should have approached the civil Court for damages and the matter should not have been considered in a petition under Article 226 of the Constitution, cannot be accepted. Where public functionaries are involved and the matter relates to the violation of fundamental rights or the enforcement of public duties, the remedy would still be available under the public law notwithstanding that a suit could be filed for damages under private law."

Therefore, keeping the above settled position of law in mind, the present writ petition is maintainable. The argument of the learned counsel for the respondents-Board that the compensation cannot be granted by this Court while exercising writ jurisdiction and the petitioners may be relegated to appropriate Civil Court seeking compensation, comes a cropper. Therefore, compensation can be granted by the writ Courts while exercising writ jurisdiction, provided there must be *prima facie* proof of negligence of the respondents.

10. The deceased, was a boy of 13 years, was electrocuted and accident has been admitted by the respondents. Moreover, it has also been established, through the postmortem report that the deceased died due to electrocution. The deceased had a right to life enshrined under Article 21 of the Constitution of India, however, his life was curtailed due to the accident. Thus, clearly there is violation of right to life of the deceased and the Hon'ble Apex Court in ***Sube Singh vs. State of Haryana and others, (2006) 3 SCC 178,*** held that grant of compensation against the State or its instrumentalities is an appropriate and effective remedy for redressal of an established infringement of a fundamental right under Article 21 of the Constitution of India. It is gainful to reproduce para 38 of the judgment (supra), which is as under:

"38. It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under Article 21, by a public servant. The quantum of compensation will, however, depend upon the facts and circumstances of each

case. Award of such compensation (by way of public law remedy) will not come in the way of the aggrieved person claiming additional compensation in a civil court, in enforcement of the private law remedy in tort, nor come in the way of the criminal court ordering compensation under section 357 of Code of Civil Procedure."

11. The next question arises as to whether the respondents were negligent in maintaining their 33KV HT line and due to their negligence the deceased died?

12. The expression 'negligence' is focal point in this case and liability of compensation can only be fastened upon the respondents in case it is found that they were negligent or careless in maintaining their 33KV HT line. Apparently, by way of filing reply to the writ petition, the respondents averred that the deceased died due to the negligence of the petitioners. As per the respondents, the father of the deceased and his brother were raising unauthorized construction under the high tension electricity line and during the construction work the deceased was working with iron stick, which touched the high tension line and he died due to electrocution. Thus, the respondents-Board attributed the negligence of the petitioners and virtually refuted their carelessness in maintaining their high tension line. However, the question of negligence still subsists in this case, as negligence means whether the authorities were vigilant enough **'to take due care'** in maintaining their high tension line and they, in order to obviate any danger to human life, taken all precautionary, protective and preventive measures while performing their duties to safeguard the human life. This point has already been set at right by the Hon'ble Apex Court in ***M.P. Electricity Board vs. Shail Kumari and others, (2002) 2 Supreme court Cases 162,*** wherein it was held that a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. For ready reference para No. 8 of the judgment (supra) is extracted as under:

"Even assuming that all such measures have been adopted, a person undertaking an activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. The basis of such liability is the foreseeable risk inherent in the very nature of such activity. The liability cast on such person is known, in law, as "strict liability". It differs from the liability which arises on account of the negligence or fault in this way i.e. the concept of negligence comprehends that the foreseeable harm could be avoided by taking reasonable precautions. If the defendant did all that which could be done for avoiding the harm he cannot be held liable when the action is based on any negligence attributed. But such consideration is not relevant in cases of strict liability where the defendant is held liable irrespective of whether he could have avoided the particular harm by taking precautions."

In view of the above referred ratio of law, the question of negligence does not at all arise in cases of strict liability, as the present one. In the present case as well, respondents were statutorily under duty to provide electricity, upkeep the electricity lines and also to prevent any peril to the human life. Thus, in cases of perilous threat to human life, contributory negligence of individual(s), as alleged by the respondents-Board, can always be given a go-by and the authority, which is under statutory duty to maintain such perilous activity, is under obligation to compensate for the injury/death of the individual(s). Therefore, the argument that the respondents were not negligent in maintaining their HT line and the deceased died due to the negligence of the petitioners is not acceptable, as irrespective of any negligence on the part of the respondents, they are liable to pay compensation to the petitioners and the respondents-Board cannot get the benefit of contributory negligence of the petitioners.

13. The learned counsel for the petitioners has also relied upon the judgment rendered by the Hon'ble Apex Court in ***M.P. Electricity Board vs. Shail Kumari and others, (2002) 2 Supreme court Cases 162,*** wherein it has been held that a person undertaking an

activity involving hazardous or risky exposure to human life, is liable under law of torts to compensate for the injury suffered by any other person, irrespective of any negligence or carelessness on the part of the managers of such undertakings. This judgment is applicable to the facts of the case in hand, thus the respondents are saddled with liability to pay damages to the petitioners.

14. In the instant case, the deceased was electrocuted and consequently he died. Admittedly, electricity is a dangerous commodity and statutory duty is on the shoulders of the respondents-Board. The respondents were duty bound to take preventive and protective measures to avoid perilous escape of electricity through their high tension electricity lines. The deceased came in contact with low and live high tension electricity wire, when he was working/playing on the lintel, thus the present is a case where principle of *'res ipsa loquitour'* is attracted. The principle of *res ipsa loquitour* means that *"the mere occurrence of some types of accident is sufficient to imply negligence"*, so accident only is sufficient for grant of compensation to the petitioners.

15. The judgment rendered by Hon'ble Delhi High Court in ***Delhi Development Authority vs. Bhagwan and others, 2015 ACJ 324,*** is also relied upon by the learned counsel for the petitioners, wherein it has been held that primary function of maxim *res ipsa loquitour* is to avoid injustice. Relevant portion of para 3 of the judgment (supra) is extracted as under:

> *"3. ....*
>
> *"(9) ... The maxim is only a convenient label to apply to a set of circumstances in which the plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. The principal function of the maxim is to prevent injustice which would result if a plaintiff was invariably compelled to prove the precise cause of the accident and the defendants responsible for it, even when the facts bearing on the matter are at the outset unknown to him and often within the knowledge of the defendant...The maxim is based on common sense and its purpose is to do justice when the facts bearing on the causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant."*

Thus, in the present set of circumstances, maxim *res ipsa loquitour* is relevant and applicable. The petitioners have a right to compensation, as mere occurrence of an accident, as in the present case, is sufficient to imply negligence of the respondents-Board and the judgment referred to above is also applicable to the facts of the present case.

16. The learned counsel for the petitioners has further relied upon a judgment of Hon'ble High Court of Punjab and Haryana rendered in ***Paramjit Kaur & others vs. State of Punjab & others, AIR 2009 Punjab and Haryana 27,*** wherein the deceased was 35 years of age and was earning Rs. 25,000/- per month, it was held that in cases of fatal accidents of electrocution while determining compensation underlying principles of Motor Vehicles Act, 1988, can be adopted. In the case in hand, the income of the deceased, as per the petitioners, was Rs. 4,500/- per month, however, there is nothing on record to establish this fact. So, the bald assertion of the petitioners, qua the income of the deceased, without any lateral support cannot be accepted. Therefore, the judgment (supra) is not applicable to the present case.

17. After exhaustively dealing both with facts and law, this Court is of the opinion that while exercising writ jurisdiction compensation can be granted and merely on the ground that other civil remedy was available to the petitioners, they cannot be relegated to resort to that, as that would defeat the very purpose of justice. This Court also comes to the conclusion that irrespective of any negligence or carelessness on the part of the respondents-Board, they are liable to pay compensation to the petitioners.

18. Now, the only point remains unaddressed is what should be the just and fair compensation? As already discussed above, parameters of Motor Vehicle Act, are not strictly

attracted in the present case, as nothing substantial, qua the income of the deceased, has come on record. As per the petitioners, the deceased, at the time of accident, was 13 years of age, however, income of the deceased cannot be construed only on the basis of pleadings made by the petitioners, especially when such pleadings lack any supporting mateiral. Therefore, this Court is left with no other option, but to grant lump sump general damages to the petitioners for non-pecuniary loss viz., pain, suffering, trauma, frustration, loss of love and affection etc. and the respondents-Board is directed to pay compensation of Rs. 6,00,000/- (Rupees six lac) to the petitioners within a period of three months, failing which it shall carry interest @ 7.5% per annum till disbursement of the same, from the date of passing of the judgment.

19. Taking into consideration the relationship of the petitioners with late Shri Vicky (father of deceased-Deepak Kumar), it is ordered that Smt. Rekha (mother of deceased-Deepak Kumar and wife of late Shri Vicky) is entitled to Rs. 2,00,000/- (Rupees two lac), Master Sahil (minor son of late Shri Vicky) is entitled to Rs. 2,00,000/- (Rupees two lac) and Smt. Dawarka Devi and Shri Biloo Ram alias Prithu (parents of late Shri Vicky) are entitled to Rs. 1,00,000/- (Rupees one lac) each. The amount falling to the share of Master Sahil be deposited in a Fixed Deposit till he attains the age of 25 years, however, the interest to be accrued thereupon will be disbursed to him after every three months, if he so chooses.

20. In view of the above, the writ petition is allowed and disposed. All pending application(s), if any, also stand(s) disposed of.

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

Smt. Ruma Devi ..... Petitioner.

Versus

State of H.P.& others ..... Respondents.

CWP No.867 of 2009
Date of Decision: 1st April, 2017

Constitution of India, 1950- Article 226- Petitioner was appointed as anganwadi worker- her appointment was quashed and set aside in an appeal filed by respondent No.6- the petitioner filed an appeal, which was initially allowed but the order was set aside in review- aggrieved from the order, the present writ petition has been filed- held that Divisional Commissioner had set aside his order in review but there is no provision of review in the scheme – writ petition allowed and the order passed by Divisional Commissioner set aside. (Para-8 and 9)

For the Petitioner: Dr.Lalit K. Sharma, Advocate.
For the Respondents: Mr. P.M.Negi, Additional Advocate General, with Mr. Ramesh Thakur, Deputy Advocate General, for respondents No.1 to 5.
Mr. G.R.Palsra, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Petitioner, being aggrieved and dissatisfied with the order dated 24.2.2009 **(Annexure P-7)**, passed by the Divisional Commissioner, Mandi Division, H.P., in Miscellaneous Appeal No.588 of 2008, whereby the Review Petition having been filed on behalf of respondent No.6 came to be allowed, has approached this Court by way of present writ petition seeking following reliefs:-

> *" That the impugned order dated 24.2.2009 passed by Divisional Commissioner Mandi annexure P-7 may kindly be set-aside and quashed and the respondent may be directed to allow the petitioner to continue to work against the post of Anganwadi Worker in Anganwadi Centre Sungarahan, Tehsil and District Mandi on the strength of annexure P-2 and annexure P-6."*

2. Briefly stated facts, as emerged from the record are that petitioner namely Ruma Devi was appointed as Anganwadi Worker in Anganwadi Centre, Sungrahan vide appointment letter **(Annexure P-2)**, dated 18.8.2007. Respondent No.6, being aggrieved with the selection of the petitioner, preferred an appeal before the Deputy Commissioner, Mandi, who vide order **(Annexure P-4),** dated 23.6.2008, accepted the appeal and quashed and set-aside the selection of the petitioner and also ordered that next in merit be appointed as Anganwadi worker.

3. The petitioner, being aggrieved and dissatisfied with the order (**Annexure P-4)**, dated 23.6.2008, preferred an appeal under Section 12 of the Anganwadi Rules and Notification issued by the Government of Himachal Pradesh, laying therein challenge to the order dated 23.6.2008, which came to be registered as miscellaneous Appeal No.588 of 2008. The Divisional Commissioner, Mandi on the basis of material adduced on record by the respective parties as well as record made available by the authorities, accepted the appeal of the petitioner and accordingly, set-aside the order dated 23.6.2008. However, the aforesaid order **(Annexure P-6),** passed by the Divisional Commissioner, Mandi in the appeal preferred by the petitioner Smt. Ruma Devi, was not accepted by respondent No.6 and as such she preferred the Review Petition before the same authority i.e. Divisional Commissioner Mandi, Division Mandi, HP.

4. Perusal of Annexure P-7, suggests that learned Divisional Commissioner reviewed his earlier order (**Annexure P-6),** dated 24.12.2008 and vide order **(Annexure P-7),** dated 24.02.2009 upheld the order dated 23.6.2008 passed by the Deputy Commissioner by setting-aside his own order, dated 24.12.2008 passed in the appeal having been preferred by the petitioner Smt. Ruma Devi

5. Dr. Lalit Sharma, learned counsel representing the petitioner vehemently argued that the impugned order **(Annexure P-7),** dated 24.2.2009 is not sustainable in the eyes of law as the same is without any jurisdiction because as per Anganwadi guidelines/Rules, Divisional Commissioner has no power, whatsoever, to review his/her own orders. To substantiate his aforesaid argument, he also made available copy of order dated 27.6.2009, passed by the same authority in some other case, whereby revision petition was dismissed on account of maintainability. Aforesaid order dated 27.6.2009, passed by the Divisional Commissioner is taken on record and is made part of the file.

6. Mr. G.R.Palsra, learned counsel representing the respondent No.6 supported the order dated 24.2.2009, passed by the Divisional Commissioner, Mandi and stated that since there was a patent illegality in the order dated 24.12.2008, passed by the Divisional Commissioner, Mandi in the appeal preferred by the petitioner, Divisional Commissioner has rightly reviewed his earlier order dated 24.12.2008. Mr. Palsra, further contended that in case this Court comes to the conclusion that the Divisional Commissioner had no authority/power to review his order, the matter may be remanded back to him with the direction to decide the same afresh in accordance with law.

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

8. Perusal of order dated 27.6.2009, passed by the Divisional Commissioner, Mandi suggests that the Divisional Commissioner had no power/ authority to entertain the review petition against his own orders. In the aforesaid order, referred hereinabove, Divisional Commissioner himself concluded that perusal of the provisions of the scheme dated 11.4.2007 framed by the Government of Himachal Pradesh for the engagement of Anganwadi Worker/ Helper in the State reveals that there is no specific provision in the said scheme for review of the order passed by the Divisional Commissioner in the appeal. This Court also perused

the scheme/guidelines (**Annexure P-1)** for the engagement of the Anganwadi workers/Helpers on honorary basis under ICDS scheme run by Social Justice and Empowerment Department, perusal whereof, nowhere suggests that power of review, if any, lies with the Divisional Commissioner to review his/her own orders passed in an appeal. Learned counsel representing the respondent No.6 was unable to point out any provision in the guidelines, referred hereinabove, with regard to power of review, if any, with the Divisional Commissioner.

9. Consequently, this Court has no hesitation to conclude that Divisional Commissioner had no power/ authority to review his own order**(Annexure P-6),** dated 24.12.2008 passed in miscellaneous Appeal No.588 of 2008 preferred by the petitioner that too in the review petition preferred by respondent No.6 and as such, order dated 24.2.2009 **(Annexure P-7**) deserves to be quashed and set-aside. Accordingly, present petition is allowed and order dated 24.2.2009 **(Annexure P-7**) is quashed and set-aside. However, respondent No.6 is at liberty to lay challenge, if any, to the order dated 24.12.2008 passed by the Divisional Commissioner in the appeal, in accordance with law.

The petition stands disposed of, so also pending applications, if any.

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

Rajender Kumar …Appellant.
Versus
State of Himachal Pradesh …Respondent.

Cr. Appeal No. 596 of 2015
Judgment reserved on:27.03.2017
Date of Decision: April 3 , 2017

Indian Penal Code, 1860- Section 302- Dead body of wife of accusedwas found- it was revealed that accused had murdered the deceased by giving multiple blows with a rod- accused was subjecting the deceased to cruelty for more than 10 years- accused was tried and convicted by the Trial Court- held in appeal that incident was witnessed by PW-14 who called PW-1, PW-2, PW-3, R and also K to the spot- they did not support the prosecution version- witnesses to the recovery also did not support the prosecution version- Trial Court had relied upon the circumstantial evidence to convict the accused, whereas, it was a case of direct evidence – it was not obligatory for the accused to explain the presence of the blood stains- further, prosecution witness has stated that accused took the deceased on his lap and tried to wake her, which would explain the presence of blood on the person of the accused - the possibility of involvement of others cannot be ruled out- it was not established that weapon of offence contained the blood of the deceased- prosecution evidence did not prove the guilt of the accused- Trial Court had erred in convicting the accused- appeal allowed and accused acquitted. (Para-6 to 41)

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
Bodhraj alias Bodha & others vs. State of Jammu and Kashmir, (2002) 8 SCC 45
Pudhu Raja and another Versus State Represented by Inspector of Police, (2012) 11 SCC 196;
Madhu Versus State of Kerala, (2012) 2 SCC 399
Dilip Singh Moti Singh versus State of Gujarat, (2010) 15 SCC 622
Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172

Trimukh Maroti Kiran versus State of Maharashtra, (2006) 10 SCC 681
Mulakh Raj and others Versus Satish Kumar and others, (1992) 3 SCC 43
Ashok Kumar Chatterjee vs. State of M.P., 1989 Supp. (1) SCC 560
Balwinder Singh vs. State of Punjab, (1987) 1 SCC 1
State of U.P. vs. Sukhbasi, 1985 Supp. SCC 79
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Earabhadrappa vs. State of Karnataka, (1983) 2 SCC 330
Hukam Singh vs. State of Rajasthan, (1977) 2 SCC 99
Eradu vs. State of Hyderabad, AIR 1956 SC 316
Sujit Biswas vs. State of Assam, (2013) 12 SCC 406
Hanumant Govind Nargundkar v. State of Madhya Pradesh, AIR 1952 SC 343
Dharam Deo Yadav v. State of Uttar Pradesh, (2014) 5 SCC 509
Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116
Yomeshbhai Pranshankar Bhatt vs. State of Gujarat, (2011) 6 SCC 312
Bhajju alias Karan Singh vs. State of Madhya Pradesh, (2012) 4 SCC 327
Ramesh Harijan vs. State of Uttar Pradesh, (2012) 5 SCC 777

For the Appellant: Mr. N.S. Chandel, Advocate, for the appellant.
For the Respondent: Mr. V.S. Chauhan, Additional Advocate General with M/s Vikram Thakur, Puneet Rajta, Deputy Advocate Generals, for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Convict/accused has assailed the judgment dated 30.09.2015/03.10.2015, passed by the Sessions Judge, Hamirpur, H.P., in Sessions Trial No.02 of 2015, titled as *State of H.P. Versus Rajinder Kumar*, whereby he stands convicted and sentenced to undergo imprisonment for life and pay fine of Rs. 10,000/- for having committed an commission of offence punishable under the provisions of Section 302 of the Indian Penal Code and in default thereof, to further undergo simple imprisonment for three months.

2. It is the case of prosecution that on 04.06.2014, police received information of death of a lady by the name of Rajni, in village Ghartheri Brahamna, Post Office, Salasi, Tehsil and District Hamirpur. Immediately, Investigating Officer SI Mahinder Singh (PW-15) visited the spot, where he recorded statement (Ex.PW.14/A) of Smt. Chetna Devi (PW-14), to the effect that accused Rajinder Kumar had murdered his wife by giving multiple blows with a rod. Necessary investigation was conducted on the spot, by *inter alia,* preparing inquest report (Ex.PW.15/A); taking into possession the dead body; collecting samples of blood soiled earth. Also accused was arrested. Postmortem of the dead body was conducted by Dr.Resham Singh (PW.16). Samples of blood and soil, so collected in the presence of independent witnesses Naresh Kuamr (PW.11) and Rumel Singh (PW.2) were sent for chemical analysis and report of the Chemical Analyst (Ex.PW.15/R), taken on record. Police recovered blood stained shirt worn by the accused, which also was sent for chemical analysis and report whereof (Ex.PW.15/R) taken on record.

3. Investigation revealed that Rajinder Kumar (accused) who was married to Rajni (deceased), had been subjecting her to cruelty for last more than ten years. On the fateful day he gave blows to his wife with the rod which resulted into her death. Also the incident came to be partially witnessed by the family members, namely, Rumel Singh (PW.2), Vikas Kumar (PW.3) and Ravinder (not examined). Further on 06.06.2014, while in police custody, accused made a disclosure statement (Ex.PW.9/B), to the effect that he could get recovered the weapon of offence (Ex.P-4) from the place he had concealed it. Such fact came to be revealed in the presence of independent witnesses Arun Kumar (PW.9) and Satish Kumar (PW.10). Pursuant thereto,

accused took the police to the said place and in the presence of the very same witnesses, got it recovered. Since stains of blood were found thereupon, it was also sent for chemical analysis and report (Ex. PW.15/R) taken on record. Such proceedings of discovery of fact i.e. recovery of weapon of offence was videographed and CD (Ex.PW.10/B) taken on record. Scientific evidence did establish the deceased to have sustained injuries with the weapon of offence (Ex.P-4), duly corroborated by the postmortem report (Ex.PW.16/A). Further report of the chemical analyst, established signs of blood to have been found not only on the weapon of offence, but also on the shirt (Ex.P-2) worn by the accused. Hence *prima facie* finding the accused to be involved in the crime, challan was presented in the Court for trial.

4. The accused was charged for having caused death of his wife Smt.Rajni, an offence punishable under the provisions of Section 302 of the IPC, with a knife/dagger, of a length of 17 inches, a prohibited arm and as such, committed an offence punishable under the provisions of Section 25(1-A) of Arms Act, 1959, to which he did not plead guilty and claimed trial.

5. For establishing the aforesaid offences, in all, prosecution examined as many as sixteen witnesses. Statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following defence/*alibi*:-

> "Witnesses have deposed against me falsely. On my return after dumping cow-dung in the field I saw my wife in an injured state but none told me who had killed my wife."

For probablizing the same, he got examined his co-villager Vreet Singh (DW.1).

6. It is not a case of circumstantial evidence. According to the prosecution, incident came to be witnessed by Smt. Chetna (PW.14), who immediately called for help, when firstly Akshay Kumar (PW.1) reached the spot. Thereafter, she again called and Rumel Singh (PW.2), Vikas Kumar (PW.3) and Ravinder (not examined) came. It is only thereafter that the matter came to be reported to the police. It is a matter of record that none of these witnesses have supported the prosecution. They were declared hostile and cross-examined by the Public Prosecutor. It is also a matter of record that witnesses to the recovery of incriminating articles i.e. blood soiled earth; shirt as also the disclosure statement leading to the recovery of weapon of offence, including such fact, have also not supported the prosecution. They are Rumel Singh (PW.2), Naresh Kumar (PW.11), Arun Kumar (PW.9) and Satish Kumar (PW.10).

7. Despite these witnesses not having supported the prosecution, trial Court convicted the accused on both counts, for the following reason(s): (i) independent witnesses, being close relatives, chose to side with the accused and as such not deposed in favour of the prosecution; (ii) viewing of CD (Ex.PW.10/B) as also photographs (Ex.PW.10/A-1 to Ex.PW.10/A-15), establish the accused to have taken the police to the spot of concealment of weapon of offence (Ex.P-4) wherefrom he got it recovered. As such, circumstance of discovery of fact came to be established on record; (iii) failure on the part of accused to have explained traces of human blood on the weapon of offence (Ex.P-4); (iv) failure on the part of accused to have explained presence of blood stains on his shirt, matching with that of the blood group of the deceased; (v) failure on the part of the accused to have probablized his defence by not inquiring about the presence of the person from whom, or the manner in which his wife sustained serious injuries; (vi) failure on the part of the accused to have probablized his defence of *alibi* i.e. being present in the fields near the house of Vreet Singh (DW.1); (vii) presence of the accused on the spot of crime; (viii) mere absence of motive of crime itself would not render the prosecution story to be doubtful, much less false; (ix) description of weapon of offence, be it rod or sword would not shatter the prosecution case, more so, in view of corroborative evidence in the nature of photographs and CD prepared by the police; (x) failure on the part of prosecution to have not established the weapon of offence to be used by the accused, by getting prints of his fingers and hands matched thereupon, is a mere irregularity and failure on the part of the investigating agency would not itself render the prosecution case to be false; and (xi) the wound sustained by the victim i.e. of width of 1 cm

with a weapon 4 inches of width, is dependent upon the resultant force used by the assailant. As such, weapon was used by the accused in committing the crime.

8. Reading of the impugned judgment reveals the trial Court convicted the accused on the basis of circumstantial evidence and that being: (a) disclosure statement resulting into discovery of fact i.e. weapon of offence; (b) corroborative evidence, scientific in nature, establishing use of weapon of offence and signs of blood found on the shirt worn by the accused; and (c) presence of the accused on the spot.

9. Having heard Mr. N.S. Chandel, learned Counsel on behalf of the appellant as also Mr. V.S. Chauhan, learned Additional Advocate General, assisted by M/s Vikram Thakur & Puneet Rajta, learned Deputy Advocate Generals, on behalf of the State, as also minutely examined the testimonies of witnesses and other documentary evidence, so placed on record by the prosecution, Court is of the considered view that trial Court committed grave illegality in convicting the accused, for the reasons discussed hereinafter.

10. In *Shivaji Sahabrao Bobade and another Versus State of Maharashtra,* (1973) 2 SCC 793, the apex Court, has held as under:

> "…Lord Russel delivering the judgment of the Board pointed out that there was "no indication in the Code of any limitation or restriction on the High Court in the exercise of its powers as an appellate Tribunal", that no distinction was drawn "between an appeal from an order of acquittal and an appeal from a conviction", and that "no limitation should be placed upon that power unless it be found expressly stated in the Code". … (Emphasis supplied)

[See: *Aher Raja Khima Versus State of Surashtra*, AIR 1956 SC 217].

11. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

12. 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.

13. Hon'ble Supreme Court of India in *Shivaji Sahabrao Bobade (supra)* has held that:-

> "6. Even at this stage we may remind ourselves of a necessary social perspectives in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary contest of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles of golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author [*Glanville Williams in 'Proof of Guilt'*] has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty.

Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that " a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent … …" In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analysing the evidence and appraising the soundness of the contrary conclusions reached by the Courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant. In India the law has been laid down on these times long ago." [Emphasis supplied]

14. In *Bodhraj alias Bodha & others vs. State of Jammu and Kashmir,* (2002) 8 SCC 45, Hon'ble the Supreme Court of India held that:-

"9. Before analysing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. ……………."

10. ………In *Bhagat Ram v. State of Punjab* [AIR 1954 SC 621], it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt." (Emphasis supplied)

15. Also it is a settled proposition of law that when there is no direct evidence of crime, guilt of the accused can be proved by circumstantial evidence, but then the circumstances from which conclusion of guilt is to be drawn, should be fully proved and such circumstances must be conclusive in nature, to fully connect the accused with crime. All the links in the chain of circumstances, must be established beyond reasonable doubt, and the proved circumstances should be consistent only with the hypothesis of guilt of the accused, being totally inconsistent with his innocence. While appreciating the circumstantial evidence, Court must adopt a very cautious approach and great caution must be taken to evaluate the circumstantial evidence. [See: *Pudhu Raja and another Versus State Represented by Inspector of Police,* (2012) 11 SCC 196; *Madhu Versus State of Kerala,* (2012) 2 SCC 399; *Dilip Singh Moti Singh versus State of Gujarat,* (2010) 15 SCC 622; *Ramreddy Rajesh Khanna Reddy v. State of A.P.*, (2006) 10 SCC 172; *Trimukh Maroti Kiran versus State of Maharashtra,* (2006) 10 SCC 681; *Mulakh Raj and others Versus Satish Kumar and others,* (1992) 3 SCC 43; *Ashok Kumar Chatterjee vs. State of M.P.,* 1989 Supp. (1) SCC 560; *Balwinder Singh vs. State of Punjab,* (1987) 1 SCC 1; *State of U.P. vs. Sukhbasi,* 1985 Supp. SCC 79; *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116; *Earabhadrappa vs. State of Karnataka,* (1983) 2 SCC 330; *Hukam Singh vs. State of Rajasthan,* (1977) 2 SCC 99; and *Eradu vs. State of Hyderabad,* AIR 1956 SC 316].

16. In *Sujit Biswas vs. State of Assam,* (2013) 12 SCC 406, Hon'ble the Supreme Court of India held that:-

"13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and

something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. [Vide: Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343; State through CBI v. Mahender Singh Dahiya, (2011) 3 SCC 109: AIR 2011 SC 1017; and Ramesh Harijan vs. State of U.P., (2012) 5 SCC 777].

14. In Kali Ram vs. State of Himachal Pradesh, (1973) 2 SCC 808: AIR 1973 SC 2773, this Court observed as under:

> "25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence.""

17. Relying upon its earlier decision in *Hanumant Govind Nargundkar v. State of Madhya Pradesh*, AIR 1952 SC 343, Hon'ble the Supreme Court of India in *Dharam Deo Yadav v. State of Uttar Pradesh,* (2014) 5 SCC 509, again reiterated that:-

> "15. …. … Each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. Even when there is no eye-witness to support the criminal charge, but prosecution has been able to establish the chain of circumstances which is complete leading to inference of guilt of accused and circumstances taken collectively are incapable of explanation on any reasonable hypothesis save of guilt sought to be proved, the accused may be convicted on the basis of such circumstantial evidence."

18. In *Sharad Birdhichand Sarda Versus State of Maharashtra,* (1984) 4 SCC 116, Hon'ble the Supreme Court of India held that:-

> "Moreover the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court." …

> … … "There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court."

19. Accused categorically denies his involvement in the alleged crime. It is his *alibi* that he had gone to the fields to throw the cow-dung and only on return, found his wife lying in an injured condition. None told him as to who had killed her. We find from the statement of Vreet Singh (DW.1) such defence and plea of *alibi* to have been probablized and established. This witness, at about 7.30-7.45 a.m. noticed the accused throw cow-dung in the fields. He is a shop keeper and in no manner associated with the accused, save and except that being an acquaintance.

20. Be that as it may, from the daily diary report (Ex.PW.4/A) it is also evident that initially Chetna Devi had only informed the police, on telephone, that Rajni had been murdered with a knife. Significantly information of the assailant was not disclosed. Also presence or involvement of the accused was not disclosed.

21. It is the case of prosecution that when SI Mahinder Singh (PW.15) reached the spot, Chetna Devi (PW.14) got recorded her statement to the effect that the accused had been subjecting his wife, i.e. the deceased, to physical cruelty. On 04.06.2014, at about 7.45 a.m. she noticed the accused abuse and give beatings to the deceased. One blow with an iron rod was given on the stomach and another on the back. This resulted in the bending of the iron rod i.e. the weapon of offence. Upon her raising alarm, her son Akshay Kumar (PW.1) reached and the accused ran away threatening to kill them. She immediately contacted the police. She further raised alarm which led Rumel Singh (PW.2) and his son Vikas Kumar (PW.3) reach the spot. Not only Rajni was not saying anything but accused was not allowing anybody to come near her. Though ambulance had come, but Rajni had expired on the spot.

22. Here her statement is self contradictory. If accused had run away then where was the question of his not allowing anyone to come near the deceased. What is the nature of threats is not explained.

23. Be that as it may, in Court, we find this witness not to have supported the prosecution. Despite being cross-examined, nothing fruitful could be elicited from her testimony. While admitting her signatures on statement (PW.14/A), she has explained that the document(s) came to be signed at the instance of the police. She is categorical of not having noticed the incident, much less accused having abused or given blows with an iron rod to the deceased. From her statement, it is evident that accused was married to the deceased for quite some time. He had three children and the elder one being 11 years of age. Her relationship with the accused is not cordial. She has explained that though accused resides in the neighbourhood but his house is not visible from her house. She could not see the spot of crime from her house. She is categorical that the accused arrived at the spot after sometime and inquired about the cause of injuries which the deceased had sustained. She is categorical that thereafter deceased tried to shake and awake the deceased by taking her in his lap. Hence, the star witness has not supported the prosecution.

24. At this juncture, we may only observe that all the other independent witnesses i.e. Akshay Kumar (PW.1), Rumel Singh (PW.2) and Vikas Kumar (PW.3), who also reached the spot, have not supported the prosecution. In fact, in one voice, they probablize the defence of the accused of not being present on the spot and having reached only after they noticed the deceased lying in an injured condition.

25. In *Yomeshbhai Pranshankar Bhatt vs. State of Gujarat,* (2011) 6 SCC 312 the apex Court has held that evidence of a hostile witness may contain elements of truth and should not be entirely discarded. Their Lordships have held that:

> "22. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement.

Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.

23. This Court has held in State of U.P. vs. Chetram and others, AIR 1989 SC 1543, that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548]. Similar view has been expressed by three-judge Bench of this Court in Khujji alias Surendra Tiwari vs. State of Madhya Pradesh, [AIR 1991 SC 1853]. At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out." [Emphasis supplied]

26. Further in *Bhajju alias Karan Singh vs. State of Madhya Pradesh,* (2012) 4 SCC 327 the Court held that evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. It further held that:

"36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the cases:

(a) Koli Lakhmanbhai Chanabhai v. State of Gujarat (1999) 8 SCC 624

(b) Prithi v. State of Haryana (2010) 8 SCC 536

(c) Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi) (2010) 6 SCC 1

(d) Ramkrushna v. State of Maharashtra (2007) 13 SCC 525"

[Emphasis supplied]

27. In *Ramesh Harijan vs. State of Uttar Pradesh,* (2012) 5 SCC 777 the Court held that seizure/recovery witnesses though turning hostile, but admitting their signatures/thumb impressions on recovery memo, could be relied on by prosecution and that:

"23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

> 24. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; and Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462. <u>Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence</u>. (See also: C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36)" **[Emphasis supplied]**

28. Thus the only thing which needs to be considered is as to whether that part of the testimony of the hostile witness, which inspires confidence, can be considered or not. In the given facts and circumstances, we do not find the witnesses, even when cross examined, to have deposed anything in favour of the prosecution. Their signatures on several documents stand explained by them. Only on the asking of the police they appended the same.

29. Assuming, as has been observed by the trial Court, that family members decided to side with the accused and not depose truthfully, still in our considered view, we do not find the prosecution to have established its case, beyond reasonable doubt, through the testimonies of police officials and other witnesses.

30. SI Mahinder Singh admits to have noticed only Chetna sitting near the dead body of the deceased. He has not ruled out the possibility of either her involvement or for that matter anyone else in the crime. He purely relied upon on her statement and conducted the investigation. Why children of the deceased were not associated remains unexplained. He could have also associated parents of the deceased to establish the nature of matrimonial relationship. There is no past history of violence. Also no local person from the community/village was associated. Undisputedly Chetna Devi was not in the best of the terms with the accused.

31. Significantly, there is discrepancy with regard to the use of weapon of offence and serious doubt with regard to its recovery, pursuant to the alleged disclosure statement.

32. Dr. Resham Singh (PW-16) who conducted the post mortem of the deceased, found following injuries on the dead body:

> "1) Stab wound 1.5 cm x 0.5 cm x 8 cm over the left side of chest 3 cm from the nipple, clotted blood positive, margins clean and everted.
>
> 2) Stab wound 1.5 cm x 0.5 cm x 8 cm over the left side of chest 2 cm from the injury No. 1, clotted blood positive, margins clean cut and everted, red in colour.
>
> 3) Stab would 1.5 cm x 1 cm x 6 cm over the left side of the chest 2 cm from the injury No. 2, clotted blood was positive, margins clean cut, everted and red in colour.
>
> 4) Stab wound .5 cm x .5 cm x 3 cm over the left side of chest 5 cm from the nipple laterly, clotted blood positive, margins clean cut and everted red in colour.
>
> 5) Stab would 4 cm x 2 cm x 3 cm over the T11 to T12 vertebra posteriorly, clotted blood around the wound positive, margins clean and everted and red in colour."

Also pericardium and heart were punctured which, as per opinion of the Expert, contributed to hemorrhagic shock and cause of death. Though the Doctor was of the view that injuries could have been caused with the weapon of offence (Ext. P-4), but in cross examination expressed doubt by stating that the width of the weapon qua injury No. (4) should have been 1 c.m. Chetna Devi (PW-14) is categorical that the blow was given on the stomach. If that were so then how could the lung be puncutured from the front side.

33. On the question of nature of weapon of offence itself, there is material contradiction. This issue, we are examining, notwithstanding the fact that independent witnesses to its recovery, namely Arun Kumar (PW-9) and Satish Kumar (PW-10), have not supported the prosecution. In the Daily Diary entry (Ext. PW-4/A), the weapon of offence is recorded as "chaaku" (knife). In the statement (Ext. PW-14/A) of Chetna Devi, so recorded under Section 154 Cr.P.C., it is recorded as an 'iron rod', which got twisted (bent) as a result of used force, whereas what police recovered and got scientifically examined is a 'sword' (Ext. PW-15/R).

34. It is a matter of record that weapon of offence was not found on the spot. Allegedly it was concealed by the accused who pursuant to disclosure statement (Ext. PW-9/B), got it recovered. Witnesses to the alleged disclosure statement have not supported the prosecution and despite their extensive cross examination, nothing fruitful could be elicited from their testimony. Be that as it may, these independent witnesses admit that it was the police who led them to the place of recovery of the said weapon. In our considered view, trial Court got swayed in assuming the prosecution case to be true, only, with the watching of the video (CD) so recorded by the police. In this regard, observations of the Court below, even on facts are incorrect. It was the police who led the witness to the place from where the weapon of offence was recovered and not the other way round. In view of the independent witnesses having turned hostile, Court below, should have looked into some more reliable piece of evidence, corroborating such fact. The video was not taken by a professional photographer. Also no respectable persons from the society were associated. There is serious doubt about the nature of weapon of offence used and its recovery, in the manner in which the police wants the Court to believe. Hence, it cannot be said to be a fact discovered, in accordance with law. Also we find the court below to have presupposed the weapon of crime, which assumption came from the fact that it contained blood. But then it lost sight of the fact that blood so found was insufficient for further serological examination. It is nobody's case that evidence stood tampered by the accused. Moreover, if stains of blood were insufficient for scientific evidence, at least, finger prints thereupon, could have got matched with that of the accused. No such attempt was made by the police.

35. Jurisprudentially, Court erred in observing that it was for the accused to have established as to how blood stains were found on the shirt worn by him. It be only observed that, in that regard, there is no scientific evidence on record. Any which way, Smt. Chetna explains in her uncontroverted and unrebutted testimony, by stating that after reaching the spot accused took the deceased on his lap and tried to wake her by shaking.

36. There was no basis for the Court below to have formed an opinion that the witnesses being close relatives were siding with the accused. In fact, from the testimony of Chetna (PW-14), it is clear that they did not enjoy best of relationship. Also it is not the case of prosecution that witnesses were won over by the accused or that during trial, accused intimidated or threatened them.

37. It is a settled principle of law that absence of motive alone would not render the prosecution story to be doubtful. But then, prosecution has to stand on its own legs and establish its case, beyond reasonable doubt.

38. In the instant case, suspicion alone, as has been discussed herein supra, cannot be a reason to hold the accused guilty, which in the instant case, erroneously, has been so done, by the trial Court. There is no evidence that accused alone used to reside in the house. Also there is no evidence that the children were not at home. Also there is no evidence that none else, except the accused, had access to his house or the deceased. Also possibility of involvement of others

has not been ruled out. It stands clarified that we have considered the case of the prosecution from both aspects. There is neither any direct nor any circumstantial evidence, worthy of credence, clinching affirmatively, factum of involvement of the accused alone, in the crime. As already observed, there was nothing on record to establish that the witnesses chose to side with the accused. At least, police had no such apprehension. Had it been so, they would have neither associated them during investigation nor examined them in Court. They would have not given up witnesses during trial. Additionally they would have associated or examined other persons from the neighbourhood. Evidence, by way of photographs and CD is only corroborative in nature. In this case primary evidence, linking the accused to the crime, is missing. The circumstance of discovery of fact, as discussed earlier remains unestablished on record. With certainty, it cannot be said that the weapon of offence, contained blood, only that of the deceased. Through the testimonies of the witnesses, it has come on record that the accused did try to talk to the deceased. In fact, he made an attempt of reviving her.

39. From the material placed on record, prosecution has failed to establish that accused is guilty of having committed the offences, 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.

40. Findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stand wrongly convicted for the charged offence.

41. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence, dated 30.09.2015/03.10.2015, passed by the Sessions Judge, Hamirpur, H.P., in Sessions Trial No.02 of 2015, titled as *State of H.P. Versus Rajinder Kumar,* is set aside and convict acquitted of the charged offences. Convict, who is in jail be released forthwith, if not required under any other process of law. Release warrants be prepared accordingly. Amount of fine, if deposited by the convict, be refunded to him.

42. Registrar (Judicial) to forthwith take appropriate action.

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
Hukam Chand and another ....Respondents.

Cr. Appeal No. 195 of 2007.
Date of Decision: 3rd April, 2017.

Indian Penal Code, 1860- Section 279 and 337- Complainant and her aunt were going to temple in a bus – when the complainant tried to get down from the bus, the conductor whistled - the complainant fell down and sustained injuries – the accused was tried and acquitted by the Trial Court- held in appeal that presence of PW-2 was suspect due to which the whole prosecution case also became suspect- it was admitted by the complainant in cross-examination that there was a heavy congestion of the passengers – possibility of complainant having fallen down cannot be ruled out –the Trial Court had correctly appreciated the evidence- appeal dismissed.(Para-9 to 13)

For the Appellant: Mr. R.S. Thakur, Addl. Advocate General.
For the Respondents: Ms. Arati Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of Himachal Pradesh against the judgment rendered on 17.3.2007 by the learned Judicial Magistrate 1st Class, Chamba in Crl. Case No. 96-1-03/99, whereby, he acquitted the accused for theirs allegedly committing offences punishable under Sections 279 and 337 of the IPC.

2. The facts relevant to decide the instant case are that on 26.5.1998, complainant Reena Devi recorded her statement under Section 154, Cr.P.C., with HC Narinder Kumar to the effect that on 26.5.1998 at about 10 a.m., she along with her aunt (Bua) Jai Dei was coming Sitla Temple for offering prayer and she had boarded into a bus at about 10.25 a.m. at bus stand Bhadrum. There was a great rush in the bus and when the bus stopped near Sitla bridge then, a person alighted from it and as soon as complainant tried to get down from the bus, then, conductor gave a whistle and driver started driving the bus as there was a rush at bus stop Sitla Bridge. Complainant fell down on the road from the bus and received simple injuries. The incident occurred by rash or negligent conduct of conductor and driver of the bus. Consequently, an FIR was registered in the concerned police station. Thereafter, the Investigating Officer concerned completed the codel formalities.

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

4. The accused stood charged by the learned trial Court for theirs committing offences punishable under Sections 279 and 337 of the IPC. In proof of the prosecution case, the prosecution examined 9 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned trial Court in which the accused claimed innocence and pleaded false implication in the case.

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

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded in favour of the accused/respondent by the learned trial Court. The learned Additional Advocate General for the State has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation by it of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the accused/respondents herein has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned trial Court standing based on a mature and balanced appreciation by him of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

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

9. When the complainant/injured was in the process of alighting from bus bearing No.48-0826, its conductor by blowing "whistle", hence, signaled the driver qua her safely

egressing therefrom, whereupon, co-accused driver drove it negligently, sequelling the victim/complainant, who yet had not safely egressed therefrom to fall onto the road, whereupon, she suffered injuries on her person as stand reflected in the apposite medical certificate borne on Ex.PW5/A. The prosecution stood enjoined to prove the imperative factum of both the co-accused, the driver and the conductor of the bus respectively holding the relevant mens rea qua the apposite penal inculpability ascribed qua them arising from the co-accused conductor without ascertaining qua the victim/complainant making a safe departure from the bus, his yet blowing "whistle" qua the victim/complainant safely egressing therefrom, signal whereof led the co-accused driver also without his not personally ascertaining the said factum, to his hence proceed to drive the bus in a rash and negligent manner, whereupon, the victim fell from the bus onto the road, in sequel whereof, injuries stood entailed upon her.

10. To succor the version embodied in the FIR borne on Ex.PW6/D, the complainant/victim stepped into the witnesses box, wherein, she spelt out qua the blowing of "whistle" by co-accused conductor standing engendered by his omitting to adhere to the standards of due care and caution arising from the factum of his not ascertaining the trite factum qua hers safely disembarking from the relevant vehicle, though, the aforesaid factum probandum voiced by the victim, stands lent corroborative vigour by PW-2, nonetheless, the deposition of PW-2 is discardable arising from the factum of the complainant/victim not disclosing in the apposite FIR qua hers standing accompanied by PW-2, omission whereof is significant, especially, when PW-2 is evidently a close relative of the complainant. Moreover, what further stains the testimony of PW-2 stands comprised in the factum of the Investigating Officer concerned belatedly recording her statement on 13.6.1998 with respect to the relevant accident which occurred prior thereto on 26.05.1998, thereupon, also hers belatedly standing associated by the Investigating Officer concerned, as a witness, to the relevant occurrence visibly arouses a suspicion qua the genesis of the prosecution case, wherefrom, on factum aforesaid standing construed in coagulation with the omission of the complainant to recite the name of PW-2 in the apposite FIR, an inevitable inference spurs qua PW-2 not along with the victim/complainant occupying the relevant bus nor hers, thereupon, holding the capacity to render any ocular account in respect thereto, whereupon, her testimony in purported corroboration to the testimony of PW1 does not enjoy any probative worth.

11. Be that as it may, even if, the sole testimony of the complainant, is sufficient to prove the genesis of the prosecution case, nonetheless, when the prosecution, for the reasons aforestated, invented a purported ocular witness thereto, thereupon, the apposite concert of the prosecution to prove the charge against the accused gets stained besides when the other ocular witness to the occurrence PW-3 though also stood enjoined to with utmost tandem depose in conformity with the testimony of the complainant qua the co-accused conductor of the bus without ascertaining hers safely disembarking from the relevant bus, his blowing "whistle", in sequel whereto,the co-accused driver, drove the apposite bus at a rash and negligent pace, leading her to fall from the bus on to the road, hence, sequelling hers suffering injuries on her person, whereas, with PW-3, not in her testification rendered any echoings therein qua the aforesaid factum probandum, corollary thereof, is qua the prosecution thereupon not succeeding in proving charge qua both the co-accused/respondents.

12. Even otherwise, the complainant in her deposition comprised in her cross-examination has purveyed affirmative answers to the apposite suggestions put to her by the learned defence counsel while holding her to cross-examination qua hers alighting from the front door of the relevant bus also she has acquiesced to the suggestion(s) put thereat to her qua thereat there occurring a heavy congestion of passengers, all of whom were striving to alight therefrom, wherefrom, it is befitting to draw an inference qua an imminent jostling occurring amongst the passengers for facilitating their concert to alight therefrom, in sequel whereto, the victim/complainant appears to suffer a fall from the bus onto the road, falling whereof of the victim/complainant, hence, does not, prove any penal inculpability qua the accused/respondents.

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

14. Consequently, there is no merit in the instant appeal which is accordingly dismissed. The judgment impugned before this Court is maintained and affirmed. Records be sent back forthwith.

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

State of H.P. ....Appellant.
Versus
Pradeep Singh ....Respondents.

Cr. Appeal No. 162 of 2008.
Date of Decision: 3rd April, 2017.

Indian Penal Code, 1860- Section 279, 337 and 201- Accused was driving a truck in a rash and negligent manner – the complainant was riding a scooter- the truck hit the scooter from the side as a result of which the complainant sustained injuries- accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed- held in appeal that it was duly proved that accused was driving the truck - accused had sped away from the spot which is inconsistent with his innocence – the Appellate Court had wrongly held that the identity of the accused was not established – the appeal allowed- judgment of Appellate Court set aside and judgment of Trial Court restored. (Para-9 to 12)

For the Appellant: Mr. R.S. Thakur, Addl. Advocate General.
For the Respondent: Mr. Raman Sethi, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of Himachal Pradesh against the judgment rendered on 03.10.2007 by the learned Addl. Sessions Judge, Fast Track Court, Solan, H.P. Case No. 12FTC/10 of 2007, whereby, he set aside the judgement of conviction and sentence recorded upon the accused/respondent herein, by the learned trial Court.

2. The facts relevant to decide the instant case are that on 2.12.1999, at about 8 P.M., one Jasvinder Singh was going on his scooter No. HP-12-0509 from Police Station, Parwanoo to Sector 3, Parwanoo. When he reached at Kasauli Chowk, Parwanoo, a truck bearing No. HP-11-2333, allegedly being driven by the accused rashly and negligently hit his scooter from the side as a result of which he along with scooter had fallen down and sustained injuries. The accused, after the accident had allegedly driven away the truck from the spot. Jaswinder Singh lodged report with the police on the basis of which FIR was recorded at Police Station, Parwanoo. Thereafter, the Investigating Officer concerned completed the codel formalities.

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

4. The accused stood charged by the learned trial Court for his committing offences punishable under Sections 279, 337 and 201 of the IPC. In proof of the prosecution case, the prosecution examined 8 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court 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 conviction upon the accused/respondent herein for his committing offences punishable under Sections 279, 337 and 201 of the IPC. In an appeal preferred therefrom by the accused/respondent herein before the learned Addl. Sessions Judge, Fast Track Court, Solan, H.P, the latter reversed the apposite findings of conviction and sentence recorded by the learned trial Court in its judgment also he acquitted the accused of the offence(s).

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded in favour of the accused/respondent by the learned Addl. Sessions Judge, Fast Track Court, Solan, H.P.. The Addl. Advocate General appearing for the State has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Addl. Sessions Judge, Una, standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by him of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the accused/respondent herein has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Addl. Sessions Judge standing based on a mature and balanced appreciation by him of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The complainant was atop scooter bearing No. HP-12-0609, on arrival whereof at Kasauli Chowk, Parwanoo, whereat a truck bearing registration No. HP-11-2333 stood parked on the inappropriate side of the road, it collided with the latter, collision inter se the aforesaid vehicles occurred, on the aforesaid truck standing abruptly driven by the accused, besides it standing suddenly put into motion by its driver, whereupon a penally incupable role stood ascribed to the accused/respondent. In sequel to the aforesaid collision, the complainant sustained injuries on his person, injuries whereof stand reflected in the apposite medical certificate borne on Ex. PW5/B. The learned Appellate Court imputed preponderance to the factum qua the independent ocular witnesses to the occurrence reneging from their previous statements recorded in writing also qua theirs not clinchingly deposing qua the accused assuredly being the person, who, at the relevant time occupied the driver's seat of the relevant truck, thereupon, it pronounced an order of acquittal upon the accused. However, the aforesaid reason as stood assigned by the learned Appellate Court to reverse the findings of conviction pronounced upon the accused by the learned trial Court, is unamenable to acceptance, even its slighting the testification of the owner of the vehicle, namely, PW-7 Smt. Madhu Kanwar, who therein categorically voiced qua the accused/respondent herein standing engaged by her as driver in the relevant truck, is grossly unwarranted. Consequently, when, thereupon, the factum of the accused/respondent, at the relevant time occupying the driver seat of the relevant truck, hence, stood conclusively established also concomitantly, his identity stood clinched dehors the purported ocular witnesses to the relevant incident not establishing his identity, it was insagacious for the learned Appellate Court to discard her testimony or to impute sanctity qua the factum aforesaid occurring in the testification of the purported ocular witnesses to the occurrence. In aftermath, with the identity of the accused/respondent standing hence convincingly established by the prosecution, thereupon, it stands concluded qua its succeeding in establishing the charge against the accused/respondent.

10. Even though, the purported ocular witnesses to the occurrence did not sustain the charge yet the sole testification of the complainant when construed in tandem with the factum of the accused/respondent fleeing from the site of occurrence hence evinces a marked echoing qua his aforesaid conduct being inconsistent with his innocence, surging forth whereof, dehors the purported ocular witnesses to the occurrence not sustaining the charge, hence, capatalizes a firm conclusion from this Court qua the findings of conviction recorded upon the accused by the learned trial Court standing based upon a mature and balanced appreciation of evidence on record.

11. For the reasons which have been recorded hereinabove, this Court holds that the learned Addl. Sessions Judge concerned 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 Addl. Sessions Judge concerned suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of germane evidence on record.

12. Consequently, the instant appeal is allowed. In sequel, the judgment of acquittal recorded by the learned Addl. Sessions Judge, Una in Case No. 12 FTC/10 of 2007 is quashed and set aside and the judgment of conviction recorded by the learned trial Court in Case No.84/2 of 2000 is affirmed and maintained. The learned trial Court is directed to henceforth put into prompt execution the sentences as imposed by it upon the convict/respondent herein. Records be sent back forthwith.

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

Tripta Devi and ors. …Appellants
Versus
Chuni Lal and ors. …Respondents

RSA No. 298/2002
Date of decision: 5th April, 2017

Code of Civil Procedure, 1908- Section 96- A suit for redemption was filed, which was decreed and a preliminary decree for redemption was passed- it was directed that the principal money be deposited along with interest @ 6% per annum within three months– an appeal was preferred, which was allowed on the ground that plaintiffs had failed to deposit the mortgage amount within the specified period – aggrieved from the decree, second appeal has been filed- held in appeal that the judgment and decree were passed on 16.12.1995- period of three months was granted to deposit the money – however, a stay order was issued by the Appellate Court prior to the expiry of the period – there was no willful disobedience on the part of the plaintiffs in not complying with the decree- the Appellate Court had wrongly allowed the appeal- judgment and decree of appellate court set aside.(Para-14 to 18)

For the appellants: Mr. Rajesh Mandhotra, Advocate
For the respondents: Mr. R.L. Chaudhary, Advocate, for respondents No. 1 to 6, 9 and 10.
Nemo for respondent No.14.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(oral)*

By way of this appeal, the appellants have challenged the judgment and decree dated 2.3.2002 passed by the court of learned Additional District Judge, Mandi, in Civil Appeal No.16/1996, vide which learned appellate court allowed the appeal filed by the present

respondents and set aside the judgment and decree dated 16.12.1995 passed by the learned trial court in Civil Suit No.65/1989 in favour of plaintiffs on the sole ground that the mortgage money was not deposited by the plaintiffs within the period so granted by the learned trial court.

2. Brief facts necessary for the adjudication of the present case are that the appellants (hereinafter referred to as the "plaintiffs") filed a suit for possession by way of redemption on the ground that the suit land comprised in Khewat Khatauni No.103 min/190, Khasra Nos. 1039, 1044, Kita 2, measuring 0-10-01 hectares was mortgaged by the father of plaintiffs, Sh. Narainoo to the predecessor-in-interest of defendants No. 1 and 2, Sh. Sant Ram on 25.3.1964. As per the plaintiffs, one Sh. Krishan Dayal, predecessor-in-interest of defendants No. 3 to 8 was closely related to Sh. Sant Ram being his brother-in-law. Sh. Sant Ram in connivance with the revenue staff as well as Sh. Krishan Dayal created tenancy, in papers only, in favour of predecessor-in-interest of defendants No. 3 to 8, for which Sh. Sant Ram had no right. Krishan Dayal, predecessor-in-interest of defendants No. 3 to 8, infact never occupied the suit land in his capacity as tenant prior to the mortgage. It was further the case of the plaintiffs that Sh. Sant Ram had executed a Will in favour of defendants No. 1 and 2. The original mortgagor, Sh. Narainoo, father of the plaintiffs, had executed a gift deed in favour of the plaintiffs. As per the plaintiffs, the entry of tenancy in favour of Sh. Krishan Dayal and thereafter in the name of defendants No. 3 to 8 was wrong and illegal as Sh. Sant Ram had no right to create any such tenancy over the mortgaged land. On these basis, the suit was filed and a decree for possession of the suit land by way of redemption was sought against the defendants.

3. No written statement was filed on behalf of defendants No. 1 and 2, though the suit was resisted by defendants No. 3 to 8 by filing joint written statement, who *inter alia* took the stand that the suit land was coming in possession of their father, Sh. Krishan Dayal as non-occupancy tenant since 1950, i.e. much prior to the alleged mortgage. As per the said defendants, the suit land was mortgaged by Sh. Narainoo, father of the plaintiffs with Sh. Sant Ram, father of defendants No. 1 and 2, however the suit land was previously in possession of their father, Sh. Krishan Dayal, in his capacity as non-occupancy tenant under Sh. Narainoo and after the death of Sh. Krishan Dayal, his tenancy rights devolved upon defendants No. 3 to 8, who thereafter were in possession of the suit land as non-occupancy tenants. It was further their case that at the time of creation of mortgage in favour of Sh. Sant Ram, the possession of the suit land was not delivered to him and rather, the mortgage with respect to ownership rights was created as possession was with Sh. Krishan Dayal as non-occupancy tenant. Though mutation No.83 regarding conferment of proprietary rights over the suit land was duly entered by Patwari Halqua on 24.3.1976, but the same was rejected by Assistant Collector, II grade, vide his order dated 23.5.1978 on the ground that since the plaintiffs were minor, proprietary rights qua the same could not be granted.

4. Replication was duly filed by the plaintiffs to the written statement filed by defendants No. 3 to 8, in which the plaintiffs reiterated their case.

5. On the basis of the pleadings of the parties, learned trial court framed the following issues:-

i) Whether the suit land was mortgaged by the father of the plaintiffs to deceased Sant Ram, as alleged ? OPP

ii) Whether deceased Sant Ram in connivance with the revenue staff created tenancy only on papers in favour of predecessor-in-interest of defendants No. 3 to 8 if so its effect ? OPP

iii) Whether the plaintiffs are entitled for the relief of possession by way of redemption ? OPP

iv) Whether suit is not maintainable ? OPD

v) Whether suit is barred by limitation ? OPD

vi) Whether suit is not properly valued for the purpose of court fee and jurisdiction, if so what is correct valuation ? OPD

vii) Whether suit is not properly verified if so to what effect ? OPD

viii) Whether suit is bad for mis-joinder and non-joinder of necessary party ? OPD.

ix) Whether suit is bad of principle of resjudicata and estoppel ? OPD

x) *Relief.*

6. On the basis of the evidence both documentary as well as ocular led by the respective parties, learned trial court returned the following findings to the issues so framed:

Issue No.1	*:*	*Yes*
Issue No.2	*:*	*Yes*
Issue No.3	*:*	*Yes*
Issue No.4	*:*	*No*
Issue No.5	*:*	*No*
Issue No.6	*:*	*No*
Issue No.7	*:*	*No*
Issue No.8	*:*	*No*
Issue No.9	*:*	*No*
Relief	*:*	*Suit decreed*

7. Learned trial court decreed the suit of the plaintiffs in the following terms on 16.12.1995:-

> *"As per my above discussion and reasons therefore the suit of the plaintiff is succeeded and preliminary decree be prepared to the effect that the plaintiffs are entitled for the possession of the suit land from the defendants which is compromised in Khewat khatauni No. 103 min/190 khasra Nos. 1039, 1044 kita 2 land measuring 0-10-01 hect, situated in village Dhatoli, Illaqua Hatli, Sub Tehsil Baldwara, District Mandi, H.P. by way of redemption, subject to their depositing in the court the principal money i.e. Rs. 565/- alongwith an interest @ 6% per annum from 25.3.64 till the date of preliminary decree alongwith an interest @ 6% per annum on the mortgage money from the date of preliminary decree till the depositing of the said amount in the court, within 3 months from the date of judgment".*

8. Feeling aggrieved with the judgment and decree so passed by the learned trial court, defendants therein preferred an appeal. In Appeal, learned appellate court while concurring with the findings returned by the learned trial court however set aside the judgment and decree so passed by the learned trial court on the ground that the plaintiffs had failed to deposit the mortgage money in order to redeem the mortgage as was directed by the learned trial court.

9. The judgment and decree so passed by the learned appellate court dated 2.3.2002 has been assailed by way this appeal by the plaintiffs. However, no appeal has been filed against the judgment and decree passed by the learned appellate court by the respondents herein.

10. This appeal was admitted by this Court on the following substantial question of law on 6.11.2003:-

> *"What is the effect of mortgagors not depositing the amount towards redemption of mortgage within the time allowed by the Court?"*

11. Mr. Rajesh Mandhotra, learned counsel for the appellants, has submitted that the judgment and decree passed by the learned appellate court is *prima facie* perverse as while allowing the appeal so filed by the defendants and setting aside the judgment and decree so passed by the learned trial court, learned appellate court erred in not appreciating the fact that the reason as to why the plaintiffs did not deposit the mortgaged money for the purpose of redeeming the mortgage, was that on an application filed under Order 41 Rule 5 CPC along with the appeal, there was an order passed by the learned appellate court staying the operation of judgment and decree so passed by the learned trial court. Mr. Mandhotra argued that it is not as if the plaintiffs did not purposely deposit the mortgage money as ordered by the learned trial court and even today they were ready and willing to deposit the amount. Mr. Mandhotra stated that amount could not be deposited as the operation of the impugned judgment and decree passed by the learned trial court was stayed by the learned appellate court and that too, at the behest of the defendants, who had filed an appeal against the judgment and decree so passed by the learned trial court. On these basis, he submitted that the factum of non deposition of mortgaged amount could not have gone against the plaintiffs as has been wrongly construed by the learned appellate court.

12. On the other hand, Mr. R.L. Chaudhary, learned counsel for respondents No. 1 to 6, 9 and 10 has argued that though there was an interim order passed by the learned appellate court, vide which the judgment and decree so passed by the learned trial court was stayed, however there was no embargo for the plaintiffs to have had deposited the mortgage money as ordered by the learned trial court. On these basis, he submitted that there is no perversity with the findings so returned by the learned appellate court and there is no merit in the instant appeal, which deserves dismissal.

13. I have heard learned counsel for the parties at length and have also gone through the judgments passed by the learned courts below as well as the record of the case.

14. In the present case, there are concurrent findings returned by both the learned courts below to the effect that the suit land was infact mortgaged by the father of the plaintiff with Sh. Sant Ram, predecessor in interest of defendants No. 1 and 2, who in connivance with the revenue staff as well as Sh. Krishan Dayal created tenancy, in papers only, in favour of predecessor-in-interest of defendants No. 3 to 8, therefore, the plaintiffs were entitled for relief of possession by way of redemption. The findings so returned by both the learned courts below are not under challenge in this appeal, as I have already stated above no appeal has been filed against the judgment and decree passed by the learned appellate court by the present respondents.

15. Be that as it may, the judgment and decree was passed by the learned trial court on 16.12.1995. As per the judgment and decree passed by the learned trial court, three months' time was granted to the plaintiffs to deposit the principal amount along with interest from the date of judgment and decree. Admittedly before expiry of period so granted by the learned trial court, the operation of the judgment and decree passed by the learned trial court was stayed by the learned appellate court in an appeal filed by the present respondents on 14.02.1996, on which date, the following order was passed:-

> "This appeal alongwith application under order 41 rule 5 C.P.C. moved before me as ld. District Judge, Mandi is on leave. Heard. Be put up before ld. District Judge, Mandi on 19-2-1996 and in the meantime, in view of the affidavit of the appellant, operation of the judgment and decree is stayed under order 41 rule 5 C.P.C. till further orders & status quo qua possession be maintained. Be put up before ld. District Judge, Mandi on 19-2-1996."

16. Therefore, in this view of the matter, learned appellate court has erred in not appreciating the fact that it is not as if there was a wilful disobedience on the part of the plaintiffs by not complying with the judgment and decree passed by the learned trial court, but it was on

account of the stay order so passed by the learned appellate court that the plaintiffs were not able to deposit the said amount as the operation of judgment and decree in compliance to which the plaintiffs were to deposit the money stood stayed by the learned appellate court.

17. Now, coming to the substantial question of law framed. In my considered view herein it is not a case that the mortgagors did not deposit the amount towards redemption of mortgage within the time allowed by the learned trial court *per se*. Here is a case where the mortgagors could not deposit the said amount within the time period so granted by the learned trial court as the operation of the judgment and decree passed by the learned trial court was stayed by the learned appellate court, therefore, there is no question of mortgagors not having deposited the mortgage amount within the time as was allowed by the learned trial court or disobeying the judgment and decree so passed by the learned trial court. The substantial question of law is answered accordingly.

18. In view of my findings returned above, the present appeal is allowed and the judgment and decree dated 2.3.2002 passed by the learned Additional District Judge, Mandi, in Civil Appeal No.16/1996 is set aside and the judgment and decree dated 16.12.1995 passed by the learned trial court in Civil Suit No.65/1989 is restored and upheld. The plaintiffs are further directed to comply with the judgment and decree dated 16.12.1995 on or before 30.6.2017. Pending application(s), if any, also stands disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, VACATION JUDGE

Sh. Arvind Sharma ….Petitioner.
Vs.
State of Himachal Pradesh and another …..Respondents.

CWP No.: 813 of 2011
Reserved on: 03.04.2017
Date of Decision: 06.04.2017

Constitution of India, 1950- Article 226- Petitioner has done his B.Sc. in Medical Laboratory Technology from Janardhan Rai Nagar, Rajasthan Vidyapith University, Udaypur- he applied for registration but the registration was declined – aggrieved from the order of non-registration, the present writ petition was filed – the respondent pleaded that the university is not competent to run extension Centre/study Centre/learning Centre outside the State of its origin – the University did not have recognition to run the course in the year 2005 – the recognition was given in the year 2007-08- the degree obtained by the petitioner is not valid – held thata person cannot be registered as a paramedical practitioner unless he possesses a recognized qualification- Centre in Kurukeshtra was an authorized Distance Education Study Centre of the University - ex post facto approval/recognition was granted till 2005 – thereafter provisional approval was granted for the year 2007-08 – the qualification gained by the petitioner between 2005 to 2007 cannot be said to be recognized- respondent No.2 had rightly declined the recognition to the petitioner – writ petition dismissed.(Para-6 to 22)

Cases referred:

Prof. Yashpal and Another Vs. State of Chhattisgarh and others, (2005) 5 Supreme Court cases 420

For the petitioner: Mr. Amit Singh Chandel, Advocate.
For the respondents: Mr. Pankaj Negi, Deputy Advocate General, for respondent No. 1.
Ms. Tanu Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this writ petition, the petitioner has prayed for the following reliefs:

"A. That Annexure P-2, dated 12.04.2010 may very kindly be quashed and set aside.

B. That respondents be directed to make the registration of the petitioner as Bachelor of Science in Medical Laboratory Technology from 12.11.2008 on which the petitioner applied for the registration.

C. That the relevant record may kindly be summoned.

D. Any other order which this Hon'ble Court deems just and proper in the facts and circumstances of the case submitted hereinafter may be passed in favour of petitioner and against the respondents."

2. The grievance of the petitioner is that he has done his B.Sc. (Bachelor of Science) degree in Medical Laboratory Technology from Janardan Rai Nagar Rajasthan Vidyapeeth University, Udaipur (hereinafter referred to as 'JRNRV University') in the year 2007 and thereafter he applied for registration with respondent No. 2 on 12.11.2008, however, respondent No. 2 rather than registering the petitioner with it, has denied his rightful claim on arbitrary and flimsy grounds. According to the petitioner, he completed the course in issue from Janardhan Rai Nagar Rajasthan Vidyapeeth University Udaipur, which was a deemed University, as per the notification issued by the Government of India, Ministry of Human Resource Development, dated 19.08.2003. It is further the case of the petitioner that vide Notification Annexure P-4, dated 08.10.2008, Indira Gandhi National Open University has confirmed the approval of programmes offered by the institution by according provisional recognition for academic year 2007-08, i.e. the year when the petitioner had obtained his Bachelor of Science degree in Medical Laboratory Technology from the said University. As per the petitioner, the issue of recognition of the degree stands settled by way of Annexure P-4, wherein it has been clarified by the University Grants Commission that the Joint Committee has already conveyed its provisional approval qua the degree which had been obtained by the petitioner from the said University. On these bases, it has been submitted by the petitioner that the act of respondent No. 2 of not registering the petitioner with it is an arbitrary act and amounts to malice in law on the part of the respondents as they have no legal excuse to deny recognition as well as registration of the petitioner with it.

3. In response, the stand of respondent No. 2 is that the petitioner has alleged that he has undergone 3 ½ years Bachelor of Science course in Medical Laboratory Technology and has also undergone a training of two years in the said course and one year certificate course in the same from G.N. Institute of Medical Technology, Kurukshetra, which as per petitioner is recognized to Janardhan Rai Nagar Rajasthan Vidyapeeth University, Udaipur, but the petitioner has not placed any material on record to demonstrate as to how the University in issue is running University Extension Centre/Study Centre/Learning Centre in Kurukshetra, Haryana, i.e. outside the State of its origin, especially in view of the law laid down by the Hon'ble Supreme Court in **Prof. Yashpal and Another** Vs. **State of Chhattisgarh and others**, (2005) 5 Supreme Court cases 420, wherein it has been held by the Hon'ble Supreme Court that no University can open Study Centres outside the territorial jurisdiction conferred upon it by its parent statute as far as the opening of Learning or Study Centres in Paramedical/Technical and Scientific Education is concerned. It is further the stand of respondent No. 2 that the petitioner was enrolled with the University in the year 2005, when the University in issue was not having any recognition to conduct the course in which degree has been obtained by the petitioner. It is further mentioned in the reply that though the University in issue was given provisional recognition in the year 2007-08, but the petitioner in fact had passed out the course before academic year 2007-08 in the year 2007 itself. Thus, the stand of the respondent-Council is that petitioner having enrolled with the University in the year 2005 and having passed out before the academic year 2007-2008

from the University concerned, in fact, was given a pass certificate for the academic year for which the University in issue was not having any recognition whether provisional or *post facto.* It was further stated in the reply that the University in issue had addressed a communication dated 3rd July, 2006 to Chairman of University Grants Commission, which demonstrated that the University in issue was given *ex post facto* approval under the Distance Education Mode from 1st June, 2001 to 31st August, 2005 upon an undertaking given by the said University to the effect that the said University would stop admitting students from 13th August, 2005 under Distance Education mode and that an advertisement to this effect was already published in the newspaper, however, as per the respondent-Council, the said University had breached its own undertaking and admitted students for the academic year 2005 also in 3 ½ year training course in Bachelor of Science in Medical Laboratory Technology. Thus, on these bases, the respondent-Council denied the claim of the petitioner.

4. On 19.04.2011, this Court had granted time to the petitioner to file rejoinder, however, no rejoinder has been filed by him nor any request was made in this regard during the course of arguments.

5. I have heard the learned counsel for the parties and have also perused the pleadings.

6. It is apparent from the pleadings as well as documents appended therewith that petitioner herein vide application dated 12.11.2008 (Annexure P-1) requested the Paramedical Council, IGMC to register his name in the said Council on the strength of his having completed his graduation in Science, i.e. B.Sc. (MLT) from JRNRV University in the year 2007.

7. Pursuant to this, vide communication dated 27.11.2008 (Annexure P-1/A), respondent No. 2 called upon the petitioner to produce documents as to from where he had gained two years training. In response to this, petitioner wrote a letter to Principal, GN Medical Institute, Jangra Dharamhala, Thaneshwar, Kurukshetra on the subject *"Registration with HP Para Medical Council, Shimla"* and requested them that as he was enrolled in the said institute from April, 2004 to September, 2007 for diploma/degree courses in Medical Lab Technology as a regular candidate from JRNRV University, Udaipur, therefore, he may be issued the documents of approval issued to the Study Centre by the University/State body alongwith copy of MOU of University for the courses in issue.

8. Vide communication dated 27.12.2008 (Annexure P-1/C), Registrar of respondent No. 2-Council was informed by Director of one G.N. Institute of Medical Technology, which as per this communication was Authorized Extention Centre of Rajasthan Vidya Peeth Deemed University, Udaipur, that the petitioner was imparted two years training from the said institute, which was fully recognized by Janardan Rai Nagar Rajasthan Vidyapeeth University Udaipur, (Rajasthan) and that in addition to above, the petitioner had also completed B.Sc. (MLT) degree from JRN Rajasthan Vidyapeeth University Udaipur.

9. On record, as part of Annexure P-1/C, is a diploma/certificate issued by Janardan Rai Nagar Rajasthan Vidyapeeth University issued in favour of the petitioner in Medical Lab Technology, in which it is mentioned that the petitioner attended two years course in this regard and passed out the examination in the year 2006. Now, incidentally this certificate is dated 16.01.2007 and beneath the subject of Medical Lab Technology, the words "LATERAL ENTRY" are mentioned.

10. Besides this, petitioner has also placed on record alongwith Annexure P-1/C three Memorandum of Marks. The first Memorandum of Marks pertains to diploma in Medical Lab Technology (Second Year) 2006, in which duration of course is mentioned as two years and the same is dated 10.08.2006. Second Memorandum of Marks pertains to Certificate Course in Medical Laboratory Technology in the year 2004 and the duration of the course is mentioned as one year. This certificate is dated 26.09.2004. The third Memorandum of Marks pertains to Certificate Course in the year 2005 and duration of course is one year and the same is dated 29.07.2005.

11. Petitioner has also placed on record alongwith Annexure P-1/C, a copy of certificate to the effect that the said certificate was being issued to the petitioner for having attended 3 ½ years course, who passed the examination in the year 2007 in " Science (Medical Laboratory Technology) (Lateral Entry). This certificate is dated 21.08.2008. Incidentally, it is not mentioned in the certificate as to whether it was a degree certificate or a diploma certificate. Alongwith this certificate, two Memorandum of Marks are appended, both dated 03 October, 2007 and 05 October, 2007, respectively, as per which, the petitioner had appeared in July/August, 2007 as a Lateral Entry regular candidate in Bachelor of Science in Medical Laboratory Technology (B.Sc.-MLT) in fifth and sixth semester respectively. He has also placed on record one more certificate dated 16.01.2007, in which it is mentioned that the petitioner has attended two years' course and has passed the examination in the year 2006 from the University in Medical Lab Technology (Lateral Entry). This certificate is also silent as to whether it is in lieu of a diploma course or a degree course. Alongwith this certificate, there is one Memorandum of Marks dated 10.08.2006, which reflects that it pertains to two years diploma in Medical Lab Technology (Second Year) 2006.

12. Thus, what is apparent and evident from the abovementioned Annexures, is that according to petitioner, he initially did two years diploma course in Medical Lab Technology and thereafter he took Lateral Entry in the degree course and after undergoing the degree course for one year, he was conferred 3 ½ years degree in the course named Bachelor of Science in Medical Laboratory Technology and on the strength of same, he had moved his application with respondent No. 2 to register him as such.

13. The Himachal Pradesh Paramedical Council is a statutory Council, which *inter alia* registers persons intending to carry on a para-clinical establishment. Section 38 of the same envisages that no person shall be registered on the State register as paramedical practitioner unless he possesses a recognized qualification. Section 43 of this Act further provides that a person who is aggrieved by rejection of his application *inter alia* under Section 38 may file an appeal against the said rejection to the State Government, whose decision in this regard shall be final. As the issue of alternative remedy was not seriously stressed, therefore, this Court is not dwelling on the same and the case is being decided on the merits of the case, as has been prayed for by the learned counsel for the parties.

14. Now, it is apparent from the stand of the respondent-Council that the said University was not having the requisite recognition for granting degree/diploma by way of Distance Education mode as has been done in the present case. In the present case, the petitioner claims himself to have undergone diploma/degree course in Medical Lab Technology from April 2004 to September 2007. Relevant issue for the purpose of adjudication of this Court is not whether the University in issue was granted the status of deemed University or not. Relevant issue is as to whether the course in issue was having the recognition to conduct courses through the Academic Centres/Study Centres/ Campus Centres by way of Distance Education. Memorandum of marks as well as diploma/degree certificates placed on record by the petitioner demonstrate that the same were issued to him from the year 2004 up to the year 2007. As per the petitioner, communication dated 04.04.2009, which is appended with Annexure P-1/D is self explanatory that G.N. Institute of Medical Technology, Jangra Dharamshala Campus, Near Chhota Railway Station, Kurukshetra (Haryana) was an authorized Distance Education Study Centre of Janardan Rai Nagar Rajasthan Vidyapeeth University, Udaipur. However, as per the respondent-Council, as JRNRV University has been granted *ex post facto* approval recognition only up till 2005 and thereafter provisional approval for the year 2007-08 only, the qualification gained by the petitioner between 2005-2007 cannot be recognized qualification as during this period, the University was not having any recognition either *post facto* or otherwise. This is evident from the stand taken by the respondent-Council in its communication dated 30.06.2009, which is on record as Annexure P-1/E.

15. There is another communication on record as Annexure P-2, dated 12.04.2010, which reads as under:

"To

Arvind Sharma,
S/o Ramesh Chand Sharma,
Village Rapper (Kharotta)
PO Berthin, Distt. Bilaspur
Pin -174029

Sub Registration in Para-Medical Council as B.Sc. (MLT).

Your letter has been received with the subject mentioned *above. As you are aware that the Council has written so many letters in response to your letters in which all queries from your side has been explained.*

A letter from this office HPPMC No. 3785 dated 30.6.2009 was sent to you in which it was clarified that you can be registered as Laboratory Technician one year Certificate course on the basis of your qualification as CMLT which you have done on or before 2005. Your registration with the qualification B.Sc. Medical Technology shall not be possible because as per the direction received from Director Indira Gandhi National Open University, it is clarified that the validity of Degrees during post facto approval is concerned, the students should have completed the Degrees during the period of post facto approval by DEC. Therefore, Council will not be able to register you with the qualification B.Sc. Medical Technology because you have completed your B.Sc. in the year 2007.

Yours faithfully,

Registrar,
HP Para-Medical Council
Old Dental Building
IGMC"

16. There is also on record communication dated 08.10.2008 (Annexure P-4) addressed from Indira Gandhi National Open University to Vice Chancellor, Janardan Rai Nagar Rajasthan Vidyapeeth (Deemed University) on the subject *"Continuation of provisional recognition-reg."*, which reads as under:

"Prof. Manjulika Srivastava

Subject: Continuation of provisional recognition-reg.

Dear Sir,

This has reference to your letter No. JRNRVU/DEW/2008-2009/811, dated 8 May, 2008 requesting Distance Education Council for continuation of recognition of your Institute for programmes offered through distance mode for the year 2008-09

In this connection we would like to inform you that vide our letter No. F.No. DEC/Univ./State/07/5739, dated 3.9.2007, your University was accorded Provisional recognition for one academic year i.e. 2007-08 for programmes offered through distance mode. Further, your proposal for grant of regular recognition of your University is under process. Meanwhile, your University has been granted continuation of provisional recognition till such time a visiting committee visits your Institute and submits its recommendation.

With regards,

Yours sincerely,
Sd/-
(Manjulika Srivastava)

Prof. Lokesh Bhatt
Vice Chancellor
Janardan Rai Nagar Rajasthan Vidyapeeth (Deemed University)
Pratap Nagar
Udaipur-313001
Rajasthan."

17. Now in this background, the moot issue which is to be answered by this Court is whether the diploma/degree in question gained by the petitioner can be said to be a recognized qualification for the purpose of petitioner being registered under the provisions of the Himachal Pradesh Paramedical Council Act.

18. It is borne out from the records and which fact was not disputed during the course of arguments also that the University from which diploma/degree has been obtained by the petitioner was not recognized between the year 2005 and the academic session 2007-2008. The certificate of diploma appended with the petition by the petitioner demonstrates that he was awarded this diploma in Medical Lab Technology (Lateral Entry) for having obtained two years course, examinations of which were passed by the petitioner in the year 2006. Now admittedly, in the year 2006, when the said diploma was obtained by the petitioner, University in issue was not having any recognition *post facto* or provisional or otherwise to impart education in the said course. Similarly, the certificate to the effect that the petitioner had obtained 3 ½ years course in Science (Medical Laboratory Technology) (Lateral Entry) demonstrates that the examinations of the same were held in the year 2007. Incidentally, the petitioner as per Memorandum of Marks appended with the petition is reflected to have had passed the backlog subjects as well as fresh subjects as a Lateral Entry candidate in one go in the months of July/August, 2007.

19. Be that as it may, the fact of the matter still remains that if this 3 ½ years course is to be taken as 3 years degree course undergone by the petitioner, then obviously this degree is undergone by the petitioner between 2005 and academic year 2007-2008, i.e. during the period for which the University in issue was not having any recognition. Incidentally, the University from which the diploma/degree was obtained by the petitioner was not even impleaded as a party respondent in the writ petition. Therefore, in these circumstances, when there is no material on record to demonstrate that the diploma/degree had been obtained by the petitioner during the period when the University in issue was duly authorized/recognized to offer said diploma/degree course, I do not find any fault with respondent No. 2-Medical Counsel for refusing to register the petitioner under the provisions of Himachal Pradesh Paramedical Council Act.

20. A coordinate Bench of this Court in **Jyoti Gautam** Vs. **State of Himachal Pradesh and others,** CWP No. 8917/2012-B has held:

> *"9. What emerges from the reading of Annexure P-15 is that the Allahabad Agriculture Institute (Deemed University) has been granted one time post-facto approval only upto 2005. Thereafter, the University has been granted provisional recognition for one academic year, i.e. 2007-08. The petitioner sat in the examination in the academic sessions 2005-2006 an d 2006-2007. There was no recognition for the years 2005-2006 and 2006-2007 by the Indira Gandhi National Open University. Petitioner's two academic sessions were under cloud. The State Government had again sought the clarification from the Indira Gandhi National Open University to clarify its position whether Allahabad Agriculture Institute (Deemed University) was recognized for the sessions 2005-2006 and 2006-2007, but no information was supplied to it.*

10. The matter is required to be considered from another angle. The Physiotherapist course is a paramedical course. The term "paramedical" has been explained by the Himachal Pradesh Paramedical Council Act, 2003 as under:

"Paramedical" means any person qualified in paramedical subject and who helps in teaching or practice of- (i) medicine with in the meaning of clause (f) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956); or (ii) medicine in Homoeopathy with in the meaning of clause (4) of section 2 of the Himachal Pradesh Homoeopathic Parishioners Act, 1979 (3 of 1980); or

(iii) medicine in Ayurvedic System and Unani System with in the meaning of clause (e) and (h) respectively of section 2 of the Himachal Pradesh Ayurvedic and Unani Practitioners Act, 1968 (2) of 1968).

11. The definition suggests that it is a technical course. The paramedical courses, nursing courses and engineering courses cannot be imparted through distance education. The candidates undertaking these courses have to attend the regular classes. The question whether the technical courses can be run by the distance education has been gone into by this Court in CWP No.1771 of 2012-H decided on31.12.2012. The Court has held as under:

"22. Mr. Bhuvnesh Sharma has also argued that the degree awarded by the Indira Gandhi National Open University is valid for the purpose of employment in the State of Himachal Pradesh. Now, the Court will advert to the question of great public importance whether the Indira Gandhi National Open University can award degrees in technical courses like B.Sc. Nursing, diploma/degree in Engineering and other technical courses. The Board of Management of the Indira Gandhi National Open University has resolved on 19.7.1991 to insert Statute 28 in the Statutes of the University. According to Statute 28, Distance Education Council, has been constituted to take all such steps as it may deem fit for the promotion of the Open University and distance education systems in the educational pattern of the country and for the coordination and determination of standards of teaching, evaluation and research in such systems and in pursuance of the objects of the University to encourage greater flexibility, diversity, accessibility, mobility and innovation in education at the university level by making full use of the latest scientific knowledge and new educational technology. The functions of the distance education council have already been quoted hereinabove. The powers and functions of the Distance Education Council are to develop a network of open universalities/distance education institutions in the country in consultation with the State Governments and other concerned agencies, to identify priority areas in which distance education programmes should be organized and to provide such support as may be considered necessary for organizing such programmes and also to identify the specific client groups and the types of programmes to be organized for them, and to promote and encourage the organization of such programmes through the network of open universities/distance education institutions and also to promote an innovative system of University level education, flexible and open, in regard to methods and pace of learning, combination of courses, eligibility for enrolment, age of entry, conduct of examination and organize various courses and programmes and also to promote the organization of programmes of human-resource development for the open university/distance education system and to initiate and organize measures for joint development of courses and programmes and research in distance education technology and practices. The Distance Education Council has also issued guidelines in the year 2006 for regulating the establishment and operation of Open and Distance Learning Institutions in India. The Institutions are required to give undertaking that the provisions of Distance Education

Council shall be observed. The parent institution which intends to start or which has already started Distance Education Institutions should have a provision in its Act/MoA for running Distance Education Programme. The parent institution cannot establish its Study Centres/Regional Centres outside its jurisdiction as specified in the parent institution Act/MoA. The parent institution is required to monitor the academic standard and quality of Distance Education within the parent institution.

23. What emerges from the combined reading of Statute 28 of the Indira Gandhi National Open University Statutes and the powers and functions of the Distance Education Council is that there is no provision for providing technical education by way of distance education. The courses of B.Sc. Nursing and M.Sc. Nursing are very technical in nature. The candidates besides possessing theoretical knowledge are also required to obtain practical knowledge. The candidates admitted in regular courses of B.Sc., M.Sc./B.E. in Engineering and other technical courses in recognized institution have to attend the minimum number of lectures in theory as well as in practical examination. The knowledge acquired by the candidates through regular courses cannot be compared with technical qualification obtained by way of distance education. The Regulations framed by the Indian Nursing Council are very comprehensive vis-à-vis the Regulations framed by the Indira Gandhi National Open University for awarding B.Sc. Nursing degree. The recognized/valid institutions are required to comply with all the academic regulations framed by the Indian Nursing Council with regard to the syllabus, curriculum, appointments of teachers, eligibility criteria, staffing pattern, including building etc. The major difference which has already been taken note of is that the duration of B.Sc. nursing course is four years as per the academic regulations framed by the Indian National Council and 3-5 years in case of Indira Gandhi National Open University. In the instant case, petitioner was admitted only for two years for the academic sessions 2007-2008 and 2008-2009.

12. Their Lordships of the Hon'ble Supreme Court in Annamalai University represented by Registrar Vs. Secretary to Government, Information and Tourism Department and others, (2009) 4 SCC 590 have held that the distinction between a formal system and an informal system is in the mode and manner in which education is imparted. Their Lordships have held as under:

"40. UGC Act was enacted by the Parliament in exercise of its power under Entry 66 of List I of the Seventh Schedule to the Constitution of India whereas Open University Act was enacted by the Parliament in exercise of its power under Entry 25 of List III thereof. The question of repugnancy of the provisions of the said two Acts, therefore, does not arise. It is true that the statement of objects and reasons of Open University Act shows that the formal system of education had not been able to provide an effective means to equalize educational opportunities. The system is rigid inter alia in respect of attendance in classrooms. Combinations of subjects are also inflexible.

41. Was the alternative system envisaged under the Open University Act was in substitution of the formal system is the question. In our opinion, in the matter of ensuring the standard of education, it is not. The distinction between a formal system and informal system is in the mode and manner in which education is imparted. UGC Act was enacted for effectuating co-ordination and determination of standards in Universities. The purport and object for which it was enacted must be given full effect."

13. What emerges from the analysis made hereinabove is that for two academic years, i.e. 2005-06 and 2006-07, there was no recognition by the Indira Gandhi National Open University. Moreover, the technical courses like

Physiotherapy cannot be undertaken by way of distance education. In view of this, there is no illegality or arbitrariness in the action of the respondents in denying the appointment to the petitioner to the post of Physiotherapist."

21. Coming to the facts of this case, the University was granted one time *post facto* approval only upto 2005 and thereafter the said University has been granted provisional recognition for one academic year, i.e. 2007-08. Petitioner appeared in the examination in the academic sessions 2005-2006 and 2006-2007, in which there was no recognition by Indira Gandhi National Open University. In this view of the matter, the aforesaid judgment aptly applies to the facts of this case also. In the present case also, the University which purportedly has issued the certificates in favour of the petitioner was not having any recognition in between 2005 and 2007, therefore, the diploma/degree certificates which have been obtained by the petitioner from the said University cannot be said to have been obtained by him during the academic session for which the said courses being run by the University were recognized either provisionally or *post facto.*

22. Therefore, in view of the discussion held above, I do not find any merit in the petition and the same is dismissed, so also miscellaneous applications, if any. No order as to costs.

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

Kishori Lal ….Petitioner.
Versus
Gian Chand & another ….Respondents.

Criminal Revision No. 66 of 2017.
Date of Decision: 6th April, 2017.

Negotiable Instruments Act, 1881- Section 138- Accused was convicted by the Trial Court for the commission of offence punishable under Section 138 of N.I. Act- an appeal was filed, which was dismissed for non-appearance of the counsel – held that the Court should not have dismissed the appeal for want of appearance and should have issued the warrants to procure the presence of the appellant – revision allowed and order of the Appellate Court set aside.
(Para-1 to 3)

For the Petitioner: Mr. G.R. Palsra, Advocate.
For Respondent No.1: Mr. T. S. Chauhan, Advocate.
For Respondent No.2: Mr. Vivek Singh Attri, Dy. A. G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The petitioner herein stood convicted by the learned Chief Judicial Magistrate, Mandi, for his committing an offence punishable under Section 138 of the Negotiable Instrument Act also consequent sentence(s) stood imposed upon him. Standing aggrieved there from, the petitioner herein preferred an appeal before the learned Additional Sessions Judge-1, Mandi. However, on 17.01.2017 neither the petitioner herein nor his counsel recorded their appearance before the learned Additional Sessions Judge-I, Mandi, whereupon, he for want of its prosecution, hence, stood constrained to dismiss Criminal Appeal No. 29 of 2013. Since, in pursuant to the order of conviction standing pronounced upon the petitioner herein by the learned Chief Judicial Magistrate, Mandi, also with consequent sentence(s) standing imposed upon him, thereupon, the petitioner/convict held the statutory facilitation to contest in appeal the apposite verdict

pronounced upon him by the learned Chief Judicial Magistrate also when for want of his appearance before the learned Additional Sessions Judge-I, Mandi on 17.01.2017, his appeal stood dismissed, for hence his inability to prosecute it, yet any affirmation by this Court of the impugned verdict, would entail upon him the ill fate of his suffering the sentence of imprisonment imposed upon him by the learned Chief Judicial Magistrate. The aforesaid causality would impinge upon his liberty also would disrobe him of his legitimate statutory right to contest his conviction and consequent imposition of sentence(s) upon him by the learned Chief Judicial Magistrate, Mandi.

2. Moreover, the learned Additional Sessions Judge, Mandi, despite the petitioner nor his counsel recording their respective appearance(s) therebefore on 17.01.2017 stood enjoined to in accordance with the apposite procedure prescribed in the Cr.P.C. proceed to elicit therebefore the presence of the petitioner herein, comprised in his issuing bailable warrants or non bailable warrants upon him rather than his in a summary manner proceeding to dismiss criminal appeal No. 29 of 2013, merely for want of appearance therebefore of the petitioner herein or his counsel. Also the aforesaid dismissal of criminal appeal No. 29 of 2013 by the learned Additional Sessions Judge-1, Mandi is beyond his jurisdictional domain, as the relevant procedure and laws do not empower the learned Additional Sessions Judge-1, Mandi, to, for want of appearance, on the relevant date, of the appellant/petitioner herein or his counsel, to proceed to hence dismiss his statutory appeal. In sequel, the order impugned hereat is jurisdictionally void also suffers from a vice of grave illegality or impropriety.

3. For the foregoing reasons, the instant petition is allowed and the order impugned hereat is quashed and set aside. The learned Additional Sessions Judge-1, Mandi is directed to restore criminal appeal No. 29 of 2013 to its original number and thereafter decide it in accordance with law. The petitioner herein as also the respondent/complainant are directed to appear before the learned Additional Sessions Judge-1, Mandi on 24th April, 2017. All pending applications also stand disposed of.

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

Ran Singh ....Petitioner.

Vs.

Himachal Pradesh Vidhan Sabha, Shimla and another ....Respondents.

CWP No.: 1973 of 2011
Reserved on: 08.03.2017
Date of Decision: 06.04.2017

Constitution of India, 1950- Article 226- Petitioner was appointed as a clerk in H.P. Vidhan Sabha Secretariat- he was promoted and was placed against the post of Superintendent (Ex-Cadre) in the year 2000- Himachal Pradesh Vidhan Sabha Secretariat (Recruitment and Condition of Service) Amendment Rules, 2008 were notified in the year 2008 – eight posts of Section Officers were to be filled on the basis of seniority – petitioner was promoted as Superintendent Grade-II on 1.7.2009 – respondent No.2 who was shown at Serial No.6 was promoted as Section Officer w.e.f. 1.4.2008 on notional basis – notional promotion of respondent No.2 was regularized and he was promoted on regular basis as Section Officer w.e.f. 1.10.2010 – respondent No.2 was wrongly promoted against ST category – respondent No.1 stated in the reply that the promotion was made in accordance with 13 points roster and in accordance with the instructions issued by Government from time to time – held that actual representation of incumbents belonging to different categories in a cadre isto be determined at the time of initial operation of the roster – any excess representation is to be adjusted at the time of future recruitment – respondent no.1 had wrongly adjusted a candidate belonging to ST category against

the post meant for unreserved category – ST candidate was to be adjusted against 7threplacement point and was adjusted against 6th replacement point – respondent No.2 could not have been adjusted against the reserved post for ST as it was already occupied by ST candidate- the petitioner was not unfit and was entitled to promotion – writ petition allowed- direction issued to consider the case of the petitioner for promotion in accordance with law and if the petitioner is found entitled to promotion, to grant him the consequential relief. (Para-9 to 20)

Case referred:

R.K. Sabharwal and others Vs. State of Punjab and others, (1995) 2 Supreme Court Cases 745

For the petitioner: Mr. Dilip Sharma, Senior Advocate, with Mr. Deven Khanna, Advocate.
For the respondents: Mr. Dushyant Dadwal, Advocate, for respondent No. 1.
Mr. Dibender Ghosh, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

***Ajay Mohan Goel, Judge*:**

By way of this writ petition, the petitioner has prayed for the following reliefs:

"(i) That the impugned notifications dated 01.10.2010, Annexure P-4 and P-4/A, promoting respondent No. 2 to the post of Section Officer w.e.f. 01.04.2008 on notional basis and 01.10.2010 on regular basis may be quashed and set aside.

(ii) That the respondent No. 1 may be directed to consider the petitioner for promotion to the post of Section Officer with effect from 01.10.2010, with all consequential benefits.

(iii) Any other relief deemed fit and proper in the facts and circumstances of the case may also be granted to the petitioner.

(iv) The cost of the petition may also be awarded."

2. Case of the petitioner is that he was initially appointed as Clerk in Himachal Pradesh Vidhan Sabha Secretariat on 15.10.1981 and was placed in the pay scale of Senior Clerk w.e.f. 23.04.1983. Thereafter, the petitioner was promoted to the post of Senior Assistant vide order dated 06.06.1989 and was placed against the post of Superintendent (Ex-cadre) vide order dated 06.05.2000. Himachal Pradesh Vidhan Subha Secretariat (Recruitment & Conditions of Service) Amendment Rules, 2008 were notified vide notification dated 04.12.2008. As per these Rules, there were eight posts of Section Officers, which are non-selection posts and were to be filled up on the basis of seniority subject to rejection of unfit. The mode of promotion prescribed in the Rules was as under:

9.	Section Officer (Rs.7220-11660)	Non-selection	100% by promotion	NA	By promotion from amongst Superintendent Grade-II with three years regular service or regular combined with continuous adhoc service rendered, if any, in the grade; failing which by promotion from amongst the Superintendent Grade-II with nine years regular service or regular combined with continuous adhoc service as Superintendent Grade-II/Senior Assistant/Senior Translator combined including two years service as Superintendent

					Grade-II failing both by promotion from amongst the Superintendent Grade-II/Sr. Assistants and Sr. Translators with 11 years regular service or regular combined with continuous adhoc service rendered, if any, in the grade. For the purpose of promotion, a combined seniority of Superintendent Grade-II/Supdt. (Ex-cadre)/Senior Assistants and Translators based on the length of service without disturbing their cadre wise seniority shall be prepared.

3. According to the petitioner, vide order dated 17.01.2009, a seniority list of Superintendent (Ex-cadre) and Assistants in the respondent-Vidhan Sabha, as on 01.01.2009, was circulated, in which the petitioner was at Sr. No. 4, whereas respondent No. 2 was reflected at Sr. No. 6. Vide order dated 01.07.2009, petitioner was promoted to the post of Superintendent Grade-II with immediate effect as a stop gap arrangement against a leave vacancy and he joined as such on the same day. Thereafter, vide order dated 01.10.2010, respondent No. 2 was promoted as Section Officer on notional basis w.e.f. 01.04.2008 and the said notional promotion of respondent No. 2 was regularized and he was promoted on regular basis as Section Officer w.e.f. 01.10.2010. It is further the case of the petitioner that vide communication No.PER(AP)-C-B(12)-1/98 Government of Himachal Pradesh, Department of Personnel (AP-III), dated 20th August, 1998 (Annexure P-5), instructions were issued for maintaining post based reservation roster on the subject:

> *"Reservation roster- Post based-Implementation of Supreme Court Judgment in the case of R.K. Sabharwal Vs. State of Punjab and enhancement of reservation in services for Other Backward Classes."*

4. According to the petitioner, as on 12.12.1997, the following persons stood adjusted against cadre strength in the initial recruitment:

Cadre strength	Initial recruitment	Incumbent recruited	Dated of appointment	Whether utilized by SC/ST/ OBC or UR	Remarks
1.	UR	T.K. Vashisht	14.11.91	UR	Promoted on 1.1.1998 (regular)
2.	UR	R.L. Jamwal	19.12.91	UR	Promoted on 1.1.1998 (regular 1.7.98)
3.	UR	Goverdhan Singh	1.11.94	UR	Promoted on 22.2.99 (regular 1.3.2000)
4.	UR	V.C. Thapliyal	1.11.94	UR	Promoted on 1.3.2000 (regular 1.1.2001)
5.	UR	Kesar Dass	1.11.94	SC	Promoted 13.6.2000
6.	UR	Chuni Lal	27.6.96	ST	Promoted on 3.3.2005
7.	SC	Hashmat Rai	1.9.96	UR	Expired.

5. It is further the case of the petitioner that on 12.12.1997, against the cadre strength of 7, 6 posts were to be manned by Un-reserved category candidate and one post was to be manned by SC category candidate as per 13 point roster and as on the effective date, factually, out of the 7 incumbents who were holding the post of Section Officer, 5 belonged to Un-Reserved category, 1 belonged to SC category and 1 belonged to ST category. The case of the petitioner is that in fact when DPC was held wherein respondent No. 2 was considered for promotion to the post of Section Officer, the DPC was held by assuming that the post in question was a selection post, whereas as per the Recruitment and Promotion Rules, post in question was a non-selection post and it appears that DPC was mis-informed about the nature of the post, as it was not brought to the notice of DPC that in the initial cadre strength of 7, sixth point stood utilized by a ST category candidate and in the first 13 point roster cycle including initial recruitment/replacement points, the point of ST category stood exhausted and the said point would have had subsequently been available only to ST category at replacement point 13 in the second cycle roster. However, ignoring this important aspect of the matter, respondent No. 2 stood promoted against ST category candidate without appreciating that the roster point against which he was promoted, was to be filled in by an Un-reserved category candidate.

6. Respondent No. 1 in its reply has justified its stand by stating that respondent No. 1 has framed the Himachal Pradesh Vidhan Sabha Secretariat (Recruitment and Conditions of Service) Rules, 1974, which were last amended on 4th December, 2008 and in the Second Schedule of the Rules at Sr. No. 9 was the mode prescribed for promotion to the post of Section Officer. As per respondent No. 1, instructions issued by the Government vide letter No. PER (AP)-C-B(12) 1/98, dated 20th August, 1998 were made applicable in the Himachal Pradesh Vidhan Sabha Secretariat and roster for direct recruitments and promotions of various cadres was being maintained and recruitment and promotions were being made accordingly. It was mentioned in the reply that pursuant to instructions dated 20th August, 1998 and keeping in view the principles laid therein, a 13 point reservation roster to the post of Section Officer was being maintained reflecting therein the position on 12.12.1997 onwards, in which, the incumbents who were eligible at the relevant point of time, were placed seriatumwise vis-à-vis the category to which they belonged and thereafter subsequent promotions of Section Officers were made from time to time strictly in accordance with 13 point reservation roster and in rotation after enhancement of cadre strength of Section Officer upto 8 posts, the 6th post which was meant for Scheduled Tribe category horizontally was filled in accordingly. Relevant extract of para 9 of the reply so filed by respondent No. 1 is quoted hereinbelow:

> *"9............That pursuant to the instructions issued by the Government vide letter No. PER (AP)-C-B(12_-1/98, dated 20.08.1998 and keeping in view the principles laid down thereunder, thirteen point reservation Roster to the post of Section Officer was maintained showing the position 12.12.97 onwards in which the incumbents who were in position at that point of time were placed seriatumwise by including the category to which they belonged. Thereafter subsequent promotions of Section Officers were made from time to time strictly according to the thirteen point reservation Roster and in rotation after enhancement of cadre strength of Section Officer upto eight posts the sixth point which was meant to Scheduled Tribe category horizontally was filled in accordingly. In the above referred to instructions dated 20.8.98 under para-7 it has specifically be laid down that excess, if any would be adjusted through future appointments and the existing appointments would not be disturbed, as such the point No. 6 which was occupied by the ST incumbent in view of his position in the old roster/instructions by placing him in the new Roster against unreserved point would be adjusted in future by appointing the unreserved eligible incumbent on becoming this unreserved point available.*
>
> *It is also clarified that during April 2000 the cadre strength of cadre of Section Officer rose to 8 from 7; and, accordingly the roster was correspondingly expanded in consonance with the contents of para-9 of the*

*Explanatory/Notes at **Annexure 'A'** to the instructions with regard to the implementation of the roster. It may be submitted here that Shri Chunni Lal was placed against the Scheduled Tribe category as per the instructions of 1998. Now by virtue of the roster Annexure P-5, Roster point 6 goes to the Scheduled Tribe Category and Shri Chander Prakash Negi was promoted against the same.*

It may be submitted here that the post of Section Officer is a 'non-selection' post as per provisions of the Himachal Pradesh Vidhan Sabha Secretariat (Recruitment and Conditions of Service) Rules, 1974 amended upto 4th December, 2008, but due to clerical mistake which occurred during the process of cut and paste this was shown as selection post, however to fill up the same by promotion, the process of filling up 'Non-selection' post has been adopted."

On the said basis, respondent No. 1 has justified its stand of promoting the private respondent over and above the petitioner.

7. Respondent No. 2 in its reply has also maintained that there is no violation of 13 point roster or instructions issued by the Government dated 20.08.1998, adopted by respondent No. 1, and in fact respondent No. 2 fulfilled the eligibility criteria and was found fit for promotion against 13 point reservation roster and in fact he was rightly promoted to the post of Section Officer. At the time of arguments, in the alternative, it was submitted on behalf of respondent No. 2 that in case this Court comes to the conclusion that the promotion conferred upon respondent No. 2 is not sustainable, then keeping in view the fact that said respondent already stands superannuated, this Court may consider grant of relief in favour of the petitioner without disturbing the promotion so conferred upon respondent No. 2.

8. I have heard the learned counsel for the parties and have also gone through the pleadings of the case.

9. Before proceeding further, it is relevant to mention here that pursuant to the judgment passed by the Hon'ble Supreme Court in **R.K. Sabharwal and others** Vs. **State of Punjab and others**, (1995) 2 Supreme Court Cases 745, the Department of Personnel, Government of Himachal Pradesh issued instructions dated 20th August, 1998 on the following subject:

"Subject: Reservation roster-Post based-Implementation of Supreme Court Judgment in the case of R.K. Sabharwal Vs. State of Punjab and enhancement of reservation in services for Other Backward Classes."

10. Clause 5(e) of these instructions deals with small cadres up to 13 posts, which is quoted hereinbelow:

"5(e) In small cadres of upto 13 posts, the method prescribed for preparation of rosters does not permit reservation to be made for all the three categories. In such cases, the concerned authorities may consider grouping of posts in different cadres in accordance with the existing instructions on the subject. In the event it is not possible to resort to such grouping, the enclosed rosters (Appendices to Annexure-B, C & D) for cadre strength upto 13 posts may be followed. The principles of operating these rosters are explained in the explanatory notes."

11. Clauses 6 and 7 of the said instructions provide as under:

"6. At the stage of initial operation of a roster, it will be necessary to adjust the existing appointments in the roster. This will also help in identifying the excesses, shortages, if any, in the respective categories in the cadre. This may be done starting from the earliest appointment and making an appropriate remark- "utilized by SC/ST/OBC/Gen. etc.", as the case may be against each point in the rosters as explained in the explanatory notes appended to the model rosters. In making these adjustments, appointments of candidates belonging to SCs/STs/OBCs which were made on merit (and not due to reservation) are not to

be counted towards reservation so far as direct recruitment is concerned. In other words, they are to be treated as general category appointments.

7. Excess, if any, would be adjusted through future appointments and the existing appointments would not be disturbed."

Clause 9 of the Explanatory Notes provides as under:

"9. Whenever there is any increase or decrease in the cadre strength, the roster shall be correspondingly expanded or contracted. The same will also apply whenever there is a change in recruitment rules which affects the proportion of posts to be filled by a particular mode of recruitment."

12. A perusal of said instructions demonstrates that it was mentioned therein that at the point of initial operation of the roster, it will be necessary to determine the actual representation of the incumbents belonging to different categories in a cadre vis-à-vis the points earmarked for each category, i.e. SC/ST/OBC and General in the roster by way of plotting the appointments made against each point of roster starting with the earliest appointee. It was further mentioned therein that if an earlier appointee in the cadre happens to be a candidate belonging to Scheduled Castes, against point No. 1 of the roster, the remark "utilized by SC" shall be entered. If the next appointee is a general category candidate, the remark "utilized by general category" shall be made against point No. 2 and so on and so forth till all appointments are adjusted in the respective rosters. It is further clarified therein that in making these adjustments, SC/ST/OBC candidates on merit, in direct recruitment, shall be treated as general category candidates and after completing the adjustment as indicated therein, a tally should be made to determine the actual percentages of representation of appointees belonging to different categories in the cadre and if there was excess representation of any of the reserved categories and if the same exceeded 50%, the same shall be adjusted in future recruitments and vacancies arising from retirement etc. of candidates belonging to such categories shall be filled by appointment of candidates belonging to the categories to which the relevant roster points against which the excesses occur belong. The relevant appendix to Annexure-"D" is quoted hereinbelow:

"APPENDIX TO ANNEXURE-"D"

Model Roster for promotion for cadre strength up to 13 posts

Cadre Strength	Initial Recruitment	REPLACEMENT NO. 1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	12th	13th
1.	UR	UR	UR	UR	UR	UR	SC	UR	UR	UR	UR	UR	UR	ST
2.	UR	UR	UR	UR	UR	SC	UR	UR	UR	UR	UR	UR	ST	
3.	UR	UR	UR	UR	SC	UR	UR	UR	UR	UR	UR	ST		
4.	UR	UR	UR	SC	UR	UR	UR	UR	UR	UR	ST			
5.	UR	UR	SC	UR	UR	UR	UR	UR	UR	ST				
6.	UR	SC	UR	UR	UR	UR	UR	UR	ST					
7.	SC	UR	UR	UR	UR	UR	UR	ST						
8.	UR	UR	UR	UR	UR	UR	ST							
9.	UR	UR	UR	UR	UR	ST								
10.	UR	UR	UR	UR	ST									
11.	UR	UR	UR	ST										
12.	UR	UR	ST											
13.	UR	ST"												

13. Now this Court will apply the said model roster provided in Appendix to Annexure "D" in order to ascertain as to whether the promotion conferred by respondent No. 1 to respondent No. 2 was in accordance with said roster so prepared under instructions dated 20th August, 1998 or not. It has come on record that the cadre strength of Section Officer in respondent No. 1 up to March 2000 was 7. The incumbents who were working as on the date when these instructions were implemented by respondent No. 1 were:

1. Sh. T.K. Vashishat General Category.
2. Sh. R.L. Jamwal General Category.
3. Sh. Goverdhan Singh General Category.
4. Sh. V.C. Thapliyal General Category.
5. Sh. Kesar Dass Scheduled Caste Category.
6. Sh. Chunni Lal Scheduled Tribe Category.
7. Sh. Hashmat Rai Scheduled Caste Category.

These details are available in para 9 of the petition, which have not been disputed by the respondents.

14. A perusal of roster of promotion for cadre strength up to 13 point, which is Appendix to Annexure "D" demonstrates that in a cadre of 7 posts, the post for a Scheduled Tribe candidate is available at 7th replacement point. Similarly, in a cadre strength of 8, the said post by way of promotion becomes available to Scheduled Tribe category at replacement point No. 6.

15. Now, it is evident and apparent from the reply which has been filed by respondent No. 1 that when the said 13 point roster was applied by respondent-Himachal Pradesh Vidhan Sabha, Shri Chunni LaL, who belonged to Scheduled Tribe category was adjusted by them at 6th vertical point of the said roster, which point otherwise belongs to Un-reserved category. It is further the stand of said respondent that as per Clause 7 of 1998 instructions, since excess appointment/promotion, if any, was to be adjusted through future appointments and existing appointments were not to be disturbed, therefore, the said respondent rightly adjusted Shri Chunni Lal at 6th vertical point and when a replacement point in its turn became available for Scheduled Tribe category candidate, the same was rightly offered to the private respondent.

16. In my considered view, respondent No. 1 has gravely erred in doing so. What has been done by respondent No. 1 is neither the letter nor spirit of 1998 instructions. In fact, a perusal of these instructions demonstrate that because it was the 7th replacement point which was available for a Scheduled Tribe category as per the model roster for cadre strength up to 7 posts, Shri Chunni Lal ought to have been adjusted by them against the 7th replacement point, that is the 7th horizontal point in the cadre strength of 7 and not against Sr. No. 6 against the vertical cadre strength, as reflected in the roster. Clause 7 of the instructions has also been totally misunderstood by respondent No. 1, because Clause-7 does not permit adjustment/plotting to be done in the roster as has been done by respondent No. 1, but intent of Clause 7 is that in case there is excess representation to a particular category under 13 point roster, then without disturbing the said incumbent, adjustments have to be made in future appointments.

17. In my considered view, gist of Clause 7 is that in case in a cadre of 7 posts, there happened to be two Scheduled Caste candidates and two Scheduled Tribe candidates available in its initial application, then simply because one post is available to Scheduled Caste category as well as Scheduled Tribe category in the 13 point roster, this does not means that the second initial appointee has to be disturbed. He has to be maintained in addition to the first candidate of the said category, however, when while applying 'L' shape roster the turn of this category comes, no further promotions are to be offered to the same and the vacancy which has now become available has to be so adjusted.

18. In this view of the matter, it is but obvious that respondent No. 1 has erred in offering respondent No. 2 replacement point meant for Scheduled Tribe category in the 13 point roster without appreciating that as the said replacement point stood consumed by Shri Chunni Lal, respondent No. 2 could not have had been offered the said roster point till this roster point was vacated by Shri Chunni Lal and the same again became available by applying 13 point roster in the mode and manner as is prescribed in the 1998 instructions in favour of Scheduled Tribe category. Therefore, the promotion of respondent No. 2 is in violation of the instructions dated 20th August, 1998. Not only this, even the point which has been erroneously reflected by respondent No. 1 as having been consumed by Shri Chunni Lal, has to be in fact taken to be consumed by a candidate belonging to Un-reserved category candidate. In addition, the roster point against which respondent No. 1 has promoted respondent No. 2, ought to have been offered to General Category candidate as per the Recruitment and Promotion Rules in force for filling up the vacancy in issue. It has not been disputed during the course of arguments that had this roster point been issued to a General Category candidate, then it was the turn of the petitioner for having been considered against the post in issue and as the post in issue was a non-selection post and as there was nothing against the petitioner from which it could be gathered that he was unfit for selection, he had all the chances of being promoted to the post in issue.

19. Besides this, as is evident from the discussion held hereinabove, here is a case where the right to be considered for promotion has been arbitrarily denied by respondent No. 1 to the petitioner. It is settled law that though right to promotion is not a fundamental right, but right to be considered for promotion is a fundamental right. As the petitioner was eligible to be considered for promotion to the post of Section Officer at the time when the Departmental Promotion Committee wrongly considered and promoted respondent No. 2 against the said post, in such circumstances, there is in fact a breach of fundamental right of the petitioner to be considered for promotion.

20. Accordingly, this writ petition is allowed. Though the notifications dated 01.10.2010, Annexure P-4 and Annexure P-4/A are not sustainable in the eyes of law, however, the same are not being quashed, as this Court is not setting aside the promotion which was conferred upon the private respondent. However, as this Court has come to the conclusion that the promotion conferred upon the private respondent was not as per law, therefore, the respondents are directed to consider and promote the petitioner to the post of Section Officer w.e.f. the date the private respondent was promoted to the said post, subject to the petitioner being found fit for the said promotion keeping in view the fact that the post in issue is a non-selection post and not a selection post. It is further directed that if the petitioner is not found otherwise unfit for the said promotion, he shall be given all consequential benefits which were conferred upon respondent No. 2 pursuant to his promotion as Section Officer, however, said consequential benefits will be deemed only and actual benefits shall be conferred upon the petitioner only from the date of his superannuation. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Surjit Singh …. Petitioner

Versus

Land Acquisition Collector, H.P. Housing and Urban Development Authority, Shimla.

…. Respondent

CWP No.2704/2014

Decided on : April 6, 2017

Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- Section 24- The Land was acquired, compensation was deposited and possession was taken – the acquisition was challenged by the petitioner pleading that the land

was not utilized and amount of compensation was not paid to the claimant – held that the Act was notified on 1.1.2004 before which date all actions were completed by the acquirer and beneficiaries- the actions taken under the earlier Act are saved by the saving clause – writ petition dismissed. (Para-3 to 7)

Case referred:
Pune Municipal Corporation and another vs. Harakchand Misirimal Solanki and others, (2014) 3 SCC 183

For the Petitioner : Ms. Megha Kapoor Gautam, Advocate, vice, Mr. Gaurav Gautam, Advocate.
For the Respondent : Mr. C.N. Singh, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

Land in question, undisputedly, was acquired by the beneficiary in terms of the Land Acquisition Act, 1894 (hereinafter referred to as the 'Act'). Possession of the claimant's land was taken over, in accordance with law, i.e. under the proceedings initiated under the Act.

2. According to the respondent, the amount of compensation so adjudicated by the Collector Land Acquisition, came to be deposited with the Collector Land Acquisition. This was so done in terms of Section 31 of the Act and pursuant to award passed under the Act.

3. In this petition, petitioner, taking strength of the provisions of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (hereinafter referred to as the 'Amended Act'), assails the actions initiated by the State under the Act. Challenge is two fold:- (a) land was never put to use by the beneficiary; (b) amount of compensation never came to be paid to the claimant.

4. With respect to ground (a), beneficiary points out that in fact, the land stands fully utilized and as such it is a disputed question of fact. With respect to the amount of compensation, it is pointed out that amount stood deposited, before the enactment of the Amended Act, in terms of the Act, before the appropriate authorities.

5. The Amended Act came to be notified only w.e.f. 1.1.2014, before which date, all actions, contemplated under the Act, stood initiated and completed by the acquirer and the beneficiary. Thus, it would not be open for the claimant to seek recourse to the provisions of Section 24 of the Amended Act which only contemplate following situation for initiation of such like action:-

(i) Where no award under Section 11 of the Act is issued;

(ii) Where no possession of land, for a period more than five years, prior to the commencement of the Amended Act, pursuant to award passed under Section 11 of the Act, came to be taken over by the acquirer or where no compensation in terms of the Act, stood paid under the provisions thereof.

6. It is no doubt true that the provisions of the Act, by virtue of Section 114 of the Amended Act came to be repealed, but then, there is a saving clause, contemplating all actions initiated under the Act, to be completed only in terms thereof and not under the provisions of the Amended Act, to the extent permissible in terms thereof.

7. The claimant seeks reliance on the decision rendered by the apex Court in *Pune Municipal Corporation and another vs. Harakchand Misirimal Solanki and others,* (2014) 3 SCC 183, which also is of no consequence or benefit to them. In fact, the ratio as laid down therein,

supports the beneficiary. The Court clarified that mere deposit of the amount for the land so acquired under the Act, in terms thereof, itself, would be sufficient enough, and it is not the mandate of law, that either the acquirer or the beneficiary is required to pay or offer the said amount to the claimant, more so, when, as is the position in the instant case, is not acceptable by the latter.

With the aforesaid observations, present petition, devoid of merit is dismissed, so also, pending application(s), if any.

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

Bajaj Allianz General Insurance Company Limited …Appellant.
Versus
Shrimati Reshma and others …Respondents.

FAO No. 300 of 2012
Decided on: 07.04.2017

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not possess a valid driving licence – held that owner/insured –cum- driver had a valid and effective driving licence to drive the offending vehicle – endorsement was not required and insurer was rightly saddled with liability- appeal dismissed. (Para-10 to 12)

For the appellant:	Mr. Aman Sood, Advocate.
For the respondents:	Mr. Nimish Gupta, Advocate, for respondents No. 1 to 5. Nemo for respondent No. 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

This appeal is directed against award, dated 23rd January, 2012, made by the Motor Accident Claims Tribunal, Chamba, Division Chamba, H.P. (for short "the Tribunal") in MAC Petition No. 14 of 2010, titled as Smt. Reshma and others versus Shri Kamal Deen and another, whereby compensation to the tune of ₹ 5,70,000/- 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 claimants and the insurer was saddled with liability (for short "the impugned award").

2. The claimants and the owner/insured-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. The appellant-insurer has questioned the impugned award on the following two grounds:

(i) That the owner/insured-cum-driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident; and

(ii) That the amount awarded is excessive.

4. Both the grounds are not sustainable for the following reasons:

5. The claimants filed claim petition before the Tribunal for grant of compensation, as per the break-ups given in the claim petition, was resisted by the respondents and the following issues came to be framed by the Tribunal:

"1. Whether deceased Raj Deen died because of rash and negligent driving of vehicle No. HP-73-0791 by respondent No. 1 on 27.3.2010 at Kaman near Chowari, Tehsil Bhattiyat, District Chamba as alleged? OPP

2. If issue No. 1 is proved in the affirmative, how much compensation the petitioners are entitled to and from whom? OPP

3. Whether the driver of vehicle in question was not holding a valid and effective driving licence at the relevant time, if so, its effect? OPR2

4. Whether the vehicle in question was being driven at the relevant time against the terms and conditions of Insurance Policy, as alleged? OPR2

5. Relief."

6. Parties have led evidence.

7. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation in favour of the claimants and saddled the insurer with liability in terms of the impugned award. Hence, the appeal.

Issue No. 1:

8. The Tribunal, while determining issue No. 1, held that deceased-Raj Deen died because of rash and negligent driving of the offending vehicle by its driver on 27th March, 2010 at Kaman. There is no dispute viz-a-viz the said findings. 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 prove that the driver of the offending vehicle was not holding a valid and effective driving licence at the time of the accident and the offending vehicle was being driven in violation of the terms and conditions of the insurance policy. Though, it has examined Shri Ashok Kumar, Senior Assistant from the office of RLA Chowari, as RW-1, but, has failed to prove both these issues.

11. I have gone through the record. There are two driving licences on the record as Ext. R-1 and Ext. RW-1/A. In terms of Ext. R-1, the owner/insured-cum-driver of the offending vehicle was having a valid and effective driving licence to drive the offending vehicle. Even if we take Ext. RW-1/A to be the original driving licence, then also the owner/insured-cum-driver of the offending vehicle was holding a valid and effecting driving licence to drive the offending vehicle, which is a light motor vehicle, as it has been held by the Apex Court and this Court in a series of cases that endorsement is not required.

12. The Tribunal has rightly made the discussion, while determining issues No. 3 and 4, in paras 20 and 21 of the impugned award, needs no interference. Accordingly, the findings returned by the Tribunal on issues No. 3 and 4 are upheld.

Issue No. 2:

13. The amount awarded is too meagre, but, unfortunately, the claimants have not questioned the same, is reluctantly upheld. Even otherwise, the insurer cannot question the adequacy of compensation. Accordingly, the findings returned by the Tribunal on issue No. 2 are also upheld.

14. Having glance of the above discussions, the impugned award is upheld and the appeal is dismissed.

15. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

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

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

Deputy Commissioner, Bilaspur …..Appellant
Versus
Mahender Kumar & others …Respondents

FAO No. 498 of 2010
Decided on : 07.04.2017

Motor Vehicles Act, 1988- Section 149- Claimant sustained injuries in an accident involving two cars - it was specifically pleaded that the drivers of both the cars were driving the vehicles rashly and negligently, which caused the accident – the Tribunal held both the drivers to be rash and negligent – the insurer had not led any evidence to absolve itself of liability – the injured had remained on leave for more than six months – the Tribunal had awarded just compensation- appeal dismissed. (Para-7 to 15)

For the Appellant :	Mr. Pramod Thakur, Additional Advocate General with Mr. Kush Sharma, Deputy Advocate General.
For the Respondents:	Mr. T.S. Chauhan, Advocate, for respondent No. 1. Nemo for respondent No. 2. Mr. Rajiv Rai, Advocate, for respondents No. 3 & 4. Mr. Lalit K. Sharma, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of this appeal is the award dated 4th June, 2010, made by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh (hereinafter referred to as 'the Tribunal') in MAC No. 39 of 2006/03, titled **Mahender Kumar versus Chhota Ram & others,** whereby compensation to the tune of Rs. 1,33,500/-, alongwith interest at the rate of 9% per annum and costs to the tune of Rs. 2,000/-, came to be awarded in favour of the claimant and owners and drivers of both the vehicles, i.e. car bearing registration No. HP-24-0007 and car bearing registration No. PB-02U-2934 were saddled with liability (for short the "impugned award").

2. The appellant-owner of vehicle-car bearing registration No. HP-24-0007 has questioned the impugned award on the grounds taken in the memo of appeal.

3. The claimant, drivers of both the offending vehicles, owner of car No. PB-02U-2934 and its insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far the same relates to them.

4. The claimant has specifically pleaded in the claim petition that drivers of both the offending vehicles were driving their vehicles rashly and negligently and caused the accident, in which the claimant sustained injuries and suffered 9% permanent disability. FIR was lodged against drivers of both the offending vehicles.

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

6. Following issues came to be framed by the Tribunal:

" 1. Whether the petitioner had suffered injuries on account of rash and negligent driving of respondent No. 1 and respondent No. 4?….OPP

2. If issue No. 1 is proved, to what amount of compensation and from whom is the petitioner entitled to? ….OPP

> 3. *Whether the respondent No. 4 had not been in possession of a valid and effective driving licence at the time of the accident, if so, with what effect? …OPR-5*
>
> 4. *Relief."*

Issue No. 1.

7. The parties have led evidence. The Tribunal after scanning the evidence, oral as well as documentary, has rightly held that drivers of both the offending vehicles had driven the said vehicles, rashly and negligently, at the relevant point of time and caused the accident.

8. Learned Counsel for the appellant was not able to show as to how the driver of vehicle No. HP-24-0007 was not rash and negligent while driving the said vehicle. The driver and owner of another vehicle has not questioned the findings returned by the Tribunal on Issue No. 1.

9. Having said so, the discussion made by the Tribunal in paras-9 to 18 of the impugned award needs no interference. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

10. Before dealing with Issue No. 2, I deem it proper to deal with Issue No. 3.

Issue No. 3.

11. It was for respondent No. 5-insurer of vehicle No. PB-02U-2934 to discharge the onus, has not led any evidence, thus has failed to do so. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 2.

12. Admittedly, the claimant sustained injuries in the said accident, was taken to Zonal Hospital, Bilaspur and thereafter was referred to PGI, Chandigarh and remained on medical and earned leave w.e.f. 29.06.2002 to 31.01.2003.

13. The Tribunal has made discussion in paras 20 to 30 of the impugned award relating to issue No. 2 and has awarded the just and appropriate compensation, is accordingly upheld.

14. Having said so, the impugned award is upheld.

15. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in his account.

16. The appeal stands disposed of, as indicated above.

17. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

Joginder Singh & another …..Appellants.

Versus

State of H.P. ….. Respondents.

RSA No. 579 of 2006

Reserved on: 03.04.2017

Date of Decision: 7th April,2017

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit seeking declaration that order of ejectment passed by the Collector is wrong, illegal, null and void and he be declared owner in possession of the suit land – the suit was decreed by the Trial Court- an appeal was

filed, which was allowed- held in appeal that the First Appeal is a valuable rights of the parties – the First Appellate Court is required to address itself to all issues and decide the appeal by giving reasons – no reasons were given for differing with the findings of the Trial Court – documents relied upon by the defendants were not referred – the judgment set aside- matter remanded to the Appellate Court for a fresh decision.(Para-8 to 12)

Cases referred:

Laliteshwar Prasad Singh versus S.P. Srivastava (2017) 2SCC 415

Shasidhar and others versus Ashwini Uma Mathad and another (2015)11 Supreme Court Cases 269

For the Appellants	Mr. Sanjeev Kuthiala, Advocate.
For the Respondent	Mr. P.M.Negi, Additional Advocate General, with Mr. Ramesh Thakur, Deputy Advocate General.

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 31.10.2006, passed by learned District Judge, Solan, District Solan, H.P., in Civil Appeal No. 32-NL/13 of 2006, reversing the judgment and decree dated 17.1.2006, passed by learned Civil Judge (Senior Division), Nalagarh, District Solan, H.P., in civil Suit No.9/1 of 2002, whereby suit of the plaintiff for declaration with consequential relief of permanent prohibitory injunction came to be decreed.

2. Having regard to the nature of the order, this Court purposes to pass after examining the record as well as hearing the submissions having been advanced on behalf of the learned counsel for the parties, it may not be necessary to deal with the facts of the case save and except that the respondent/ plaintiff ***(hereinafter referred to as the 'plaintiff)*** filed a suit for declaration with consequential relief of permanent prohibitory injunction against the defendant/ appellant ***(hereinafter referred to as the defendant),*** praying therein that the ejectment order Ex.P-9, dated 30.6.2001, passed by the Assistant Collector 1st Grade in case No.3 of 1999 and order Ex.P-13, dated 31.10.2001, passed by the Collector, Nalagarh in Appeal No.20-VIII/2001, may be declared wrong, illegal, null and void, inoperative, ineffective and incompetent against the mandatory provisions of law.

3. By way of aforesaid suit, plaintiff also claimed that he be declared owner in possession of the suit land measuring 0-18 biswas, bearing khasra No.618/152, situated in the area of village Dadi Kaniyan, Tehsil Nalagarh, District Solan, H.P., as entered in the jamabandi for the year1996-97. The learned trial Court vide judgment and decree dated 17.1.2006, decreed the suit of the plaintiff and declared him to be owner in possession of the suit land measuring 0-18 biswas bearing khasra No.618/152. The learned trial Court also declared that the ejectment order dated 30.6.2001 and order of Collector dated 31.10.2001, are wrong, illegal, null and void.

4. Defendant, being aggrieved and dissatisfied with the passing of aforesaid decree, preferred an appeal under Section 96 CPC before the learned District Judge, Solan, which came to be registered as Civil Appeal No.32-NL/13 of 2006. Learned District Judge vide judgment and decree dated 31.10.2006, allowed the appeal having been preferred by the defendant and set-aside the judgment and decree dated 17.1.2006, passed by the learned trial Court. In the aforesaid background, appellants/plaintiff approached this Court by way of instant appeal, praying therein for setting-aside the judgment and decree of the learned First Appellate Court and restoring the judgment and decree passed of learned trial Court.

5. This Court vide order dated 28.5.2007, admitted the instant Regular Second Appeal, on the following substantial questions of law:-

1. ***Whether there has been misreading of oral as well as documentary evidence in regard to the fact that plaintiff had become owner under the provisions of H.P. Tenancy and Land Reforms Act?.***
2. ***Whether without initiating any enquiry under Rule 9 of the H.P. Village Common Lands(Vesting & Utilization) Rules, 1975 and the provisions of Section 3(5) of the Act, 1974, eviction proceedings under Section 163 of the H.P. Land Revenue Act could be initiated and could be said to be valid and whether such orders would affect the rights of the person in possession and whether on such orders, the affected person was entitled to the permanent injunction?.***

6. While hearing the arguments having been advanced by the learned counsel for the parties, this Court had an occasion to peruse the impugned judgment passed by the learned First Appellate Court, perusal whereof, clearly suggests that learned First Appellate Court has not appreciated the evidence in its right perspective and while differing with the findings recorded by the learned trial Court, it has failed to assign its reasons for doing so. Learned First Appellate Court, after recording the brief facts of the case as well as submission having been made by the learned counsel for the parties, failed to examine the pleadings as well as evidence led on record by the respective parties *viz-a-viz* findings/reasoning recorded by the learned trial Court while allowing the suit having been filed by the plaintiff. Perusal of the evidence, more particularly documentary evidence available on record clearly suggest that the plaintiff in support of his contentions as raised in the plaint, placed reliance on the oral as well as ample documentary evidence, but, it appears that learned First Appellate Court failed to take note of the same and merely on the basis of one document i.e.Ex.P-15 proceeded to hold that entry with respect of possession of the plaintiff in the revenue record has been with respect to two bighas seven biswas of land denoted by khasra Nos.653/152/5 and 655/152/11.

7. This Court after carefully examining the material available on record has no hesitation to conclude that learned First Appellate Court while returning the aforesaid findings on the basis of Ex.P-15, has miserably failed to take note of pleadings of the parties, wherein apparently dispute is/was with regard to land allotted to the plaintiff by the Gram Panchayat Kirpalpur vide resolution Ex.P-1, dated 20.9.1970. Since, this Court after being satisfied that learned First Appellate Court has failed to address itself to all issues and decide the same by giving reasons in support of such findings, intends to remand the case back to learned First Appellate Court for deciding afresh and as such, has purposely avoided to make any findings/observations qua the evidence, be it ocular or documentary available on record. Perusal of the judgment passed by the learned trial Court clearly suggests that on the basis of the pleadings of the parties, as many as seven issues were framed and decided the same on the basis of the evidence led on record. But unfortunately, learned First Appellate Court has not dealt with all issues and merely passed its findings on one document Ex.P-15. Otherwise, also careful perusal of para-8 of the judgment passed by the learned First Appellate Court itself suggests that learned First Appellate Court has returned contradictory findings while placing reliance on Ex.P-15.

8. It is well settled that first appeal is a valuable right of the parties and parties have right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons in support of such findings. This Court is unable to find any reason much less cogent and convincing reasons assigned by the learned first appellate Court while differing with the findings returned by the learned trial Court. It is always open for the learned first appellate court to take different view on question of facts after adverting to the reasons given by the trial Court in arriving at findings in question. Court of first appeal must cover all important questions involved in the case and they should not be general and vague. Moreover, when first appellate court reserves findings of trial

Court, it is expected to record findings in clear terms, specifically stating therein, in what manner, reasoning of trial court is erroneous. In this regard reliance is placed upon the judgment passed by the Hon'ble Apex Court ***in Laliteshwar Prasad Singh versus S.P. Srivastava*** reported in (2017) 2SCC 415, wherein, it has been held as under:-

> "13. An appellate court is the final court of facts. The judgment of the appellate court must therefore reflect court's application of mind and record its findings supported by reasons. The law relating to powers and duties of the first appellate court is well fortified by the legal provisions and judicial pronouncements. Considering the nature and scope of duty of first appellate court, in Vinod Kumar v. Gangadhar (2015) 1 SCC 391, it was held as under:-
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> "12. In Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, this Court held as under: (SCC pp. 188- 89, para 15)
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> "15. ... The appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. ... while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it."
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> The above view has been followed by a three-Judge Bench decision of this Court in Madhukar v. Sangram (2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.
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> 13. In H.K.N. Swami v. Irshad Basith (2005) 10 SCC 243, this Court stated as under: (SCC p. 244, para 3) "3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."
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> 14. Again in Jagannath v. Arulappa (2005) 12 SCC 303, while considering the scope of Section 96 of the Code of Civil Procedure, 1908, this Court observed as follows: (SCC p. 303, para 2)
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> 15. Again in B.V. Nagesh v. H.V. Sreenivasa Murthy (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp. 530-31, paras 3-5)
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> "3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:
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> (a) the points for determination;
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> (b) the decision thereon;
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> (c) the reasons for the decision; and
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> (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

> 4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, SCC p. 188, para 15 and Madhukar v. Sangram (2001) 4 SCC 756 SCC p. 758, para 5.)
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> 5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."
>
> 14. The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. When appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasoning of the trial court is erroneous."

9. Careful perusal of law, as referred above, clearly suggests that first appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law and as such, judgment of the appellate Court must, therefore, reflect its conscious application of mind and must record findings supported by reasons on all the issues arising from the pleadings of the parties. In the instant case, record made available to this Court clearly suggest that plaintiff in support of his claim placed reliance upon as much as 16 documents i.e. Ex.P-1 to P-16, which were also taken note of by the learned trial Court while decreeing the suit of the plaintiff, but as has been noticed above, learned first appellate Court while accepting the appeal preferred by the defendant has failed even to refer these documents in the judgment, which action of the learned first appellate Court certainly compels this Court to draw an inference that there is non application of mind while passing the judgment in appeal. Once, learned first appellate court proceeded to reverse the findings returned by the learned trial Court, it must have recorded reasons while differing with the findings assigned by the learned trial Court while decreeing the suit of the plaintiff.

10. Issues, as were framed by the learned trial Court certainly suggests that it required proper analysis of evidence led on record by the respective parties. This court sees substantial force in the arguments of the learned counsel for the appellants/plaintiff that there is no attempt to appreciate the evidence adduced on record by the parties. It has been repeatedly held by the Hon'ble Apex Court as well as this Court that first appellate court being last fact finding court is bound to take into consideration all issues raised in the appeal and decide the

same by giving cogent and convincing reasoning. In the instant case, learned first appellate Court has failed to exercise its power under Section 96 read with Order XLI Rule 31 of the CPC because first appeal is valuable right of the appellant and as such, matter needs to be decided afresh by the learned first appellate Court.

11. After carefully examining the judgment passed by the learned first appellate Court, it can be safely concluded that learned first appellate court failed to discuss the evidence, assign reasons for its conclusion and has passed cryptic order. Keeping in view the controversy involved in the matter, learned first appellate Court ought to have appreciated entire evidence led on record by the respective parties in its proper perspective and then recorded findings regarding the claim of the plaintiff qua the suit land. In this regard, reliance is placed upon the judgment passed by the Hon'ble Apex Court in ***Shasidhar and others versus Ashwini Uma Mathad and anothe***r (2015)11 Supreme Court Cases 269, wherein it has been held as under:-

> "10. The powers of the first appellate Court, while deciding the first appeal under Section 96 read with Order XLI Rule 31 of the Code, are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra.
>
> 11. As far back in 1969, the learned Judge - V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the CPC in Kurian Chacko vs. Varkey Ouseph, AIR 1969 Kerala 316, reminded the first appellate Court of its duty as to how the first appeal under Section 96 should be decided. In his distinctive style of writing and subtle power of expression, the learned judge held as under: (SCC Online Ker Paras 1-3)
>
> > "1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.
> >
> > 2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court.
> >
> > 3. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation....."(Emphasis supplied)
>
> 12. This Court in a number of cases while affirming and then reiterating the aforesaid principle has laid down the scope and powers of the first appellate Court under Section 96 of the Code. We consider it apposite to refer to some of the decisions.
>
> 16. In Santosh Hazari vs. Purushottam Tiwari(2001)3 SCC 179, this Court held as under: (SCC pp 188-189)
>
> > 15."........the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the

> contentions put forth, and pressed by the parties for decision of the appellate court......while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it..........."

The above view has been followed by a three-Judge Bench decision of this Court in Madhukar & Ors. v. Sangram & Ors.,(2001) 4 SCC 756, wherein it was reiterated that sitting as a court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

14***. In H.K.N. Swami v. Irshad Basith***,(2005) 10 SCC 243, this Court stated as under (SCC p. 244,para-3):

> "3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title."

15. Again in Jagannath v. Arulappa (2005) 12 SCC 303, while considering the scope of Section 96 of the Code this Court observed as follows: (SCC pp. 303, para 2)

> "2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion........"

16. Again in B.V Nagesh vs. H.V. Sreenivasa Murthy, (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words: (SCC pp.530-31, paras 305)

> "3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:
>
> (a) the points for determination;
>
> (b) the decision thereon;
>
> (c) the reasons for the decision; and
>
> (d) where the decree appealed from is reversed or varied,

the relief to which the appellant is entitled.

> 4. The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide

it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 at p. 188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756 at p. 758, para 5.)

5. In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law."

17. The aforementioned cases were relied upon by this Court while reiterating the same principle in State Bank of India & Anr. vs. Emmsons International Ltd. & Anr., (2011) 12 SCC 174. This Court has recently taken the same view on similar facts arising in Vinod Kumar vs. Gangadhar, 2015(1) SCC 391.

18. Applying the aforesaid principle to the facts of the case, we find that the High Court while deciding the first appeal failed to keep the aforesaid principle in consideration and rendered the impugned decision. Indeed, it is clear by mere reading of the impugned order quoted below: (Shasidhar case 2012 SCC Online Kar 8774).

"1.The appellants are defendants in the suit. The plaintiffs are the respondents. The respondents are the children of the 1st appellant born in the wedlock between 1st appellant and his divorced wife Smt. Uma Mathad. It is admitted fact that the 1st appellant has married the 2nd respondent after the divorce and in the wedlock he has two children and they are appellant Nos.3 and 4. The suit properties at item Nos.1 and 4 are admitted to be the ancestral properties. Item Nos.2 and 3 are the properties belonging to the mother of the 1st appellant and after her demise the said properties are bequeathed to the 1st appellant. Therefore, the said properties acquired the status of self-acquired properties.

2.The respondents filed a suit for partition. The parties are governed by Bombay School of Hindu Law. In view of the provisions of Hindu Succession Amendment Act of 2005, respondent Nos. 1 and 2 are entitled to a share as co-parceners in the ancestral properties. The wife who is the second appellant also would be entitled to a share in the partition. In that view, appellant Nos. 1 and 2 and respondent Nos.1 and 2 will have 1/4th share each in item Nos.1 and 4 of the suit properties.

3.The learned counsel for the appellants submitted that appellants 2 to 4 would not claim any independent share in items 1 and 4 of the suit properties, but they would take share in the 1/4th share allotted to their father.

4.In view of the said submissions, the appellant Nos.1 and 2 and respondent Nos.1 and 2 would be entitled to 1/4th share in item Nos.1 and 4 of the suit properties.

5.Accordingly, a preliminary decree to be drawn and the appeal and cross objections are disposed of in the terms indicated above."

19. In our considered opinion, the High Court did not deal with any of the submissions urged by the appellants and/or respondents nor it took note of the

grounds taken by the appellants in grounds of the appeal nor took note of cross objections filed by the plaintiffs under Order XLI Rule 22 of the Code and nor made any attempt to appreciate the evidence adduced by the parties in the light of the settled legal principles and decided case laws applicable to the issues arising in the case with a view to find out as to whether the judgment of the trial Court can be sustained or not and if so, how, and if not, why? "

12. Consequently, in view of the detailed discussion made hereinabove as well as salutary principles, as have been laid down by the Hon'ble Apex Court in the judgments referred hereinabove, this Court is of the view that learned First Appellate Court has failed to discharge the obligation placed on it being a First appellate Court. Accordingly, without going into the merits of the claim of both the parties, impugned judgment passed by the learned First Appellate Court is quashed and set-aside and the case is remanded back to the learned first appellate Court with the direction to decide the same afresh in accordance with law. While passing the aforesaid judgment, this Court has not passed any order on the merits of the case and as such, any observations made in the process of passing of this judgment may not be construed as opinion of this Court, especially qua the issues involved in the present controversy. The learned first appellate Court may decide the case afresh without being influenced by any of the observation made in the present judgment passed by this Court.

13. The parties through their respective counsel are directed to appear before the learned First Appellate Court on **21.4.2017.** Since, the parties are litigating in the Court of law since 2002, learned First Appellate Court is expected to decide the matter within a period of six months from the date of passing of this judgment. The record of the learned trial Court be returned back forthwith to enable the learned First Appellate Court to do the needful in terms of the instant judgment.

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

****

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

FAOs No. 249 & 266 of 2011
Decided on: 07.04.2017

FAO No. 249 of 2011

Oriental Insurance Company …Appellant.
Versus
Smt. Achari Devi and others …Respondents.

FAO No. 266 of 2011

Achari Devi and others …Appellants.
Versus
Smt. Savitri Devi and others …Respondents.

Motor Vehicles Act, 1988- Section 149- It was contended by the Insurer that licence of the owner/insured-cum-driver had expired on 17.12.2007 – accident took place on 6.1.2008 and the Tribunal wrongly held the Insurer to be liable – held that as per proviso to Section 14 of Motor Vehicles Act, 1988 licence continues to be effective for a period of 30 days from the date of its expiry – the accident had taken place within 30 days from the date of expiry and the licence was valid – there was no requirement of endorsement – the insurer was rightly saddled with liability- appeal dismissed.(Para-12 to 33)

Cases referred:

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

National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906
Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110,
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 SCC 738
Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

FAO No. 249 of 2011:
For the appellant: Mr. Deepak Gupta, Advocate.
For the respondents: Mr. Raman Sethi, Advocate, for respondents No. 1 to 3.
Mr. G.S. Rathore, Advocate, for respondents No. 4 to 9.

FAO No. 266 of 2011:
For the appellant: Mr. Raman Sethi, Advocate.
For the respondents: Mr. G.S. Rathore, Advocate, for respondents No. 1 to 6.
Mr. Deepak Gupta, Advocate, for respondent No. 7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Since both these appeals are outcome of common award, the same are clubbed and being disposed of by this common judgment.

2. Subject matter of both these appeals is award, dated 30th March, 2011, made by the Motor Accident Claims Tribunal, Shimla (for short "the Tribunal") in M.A.C. Petition No. 33-S/2 of 2008, titled as Smt. Achari Devi and others versus Smt. Savatri Devi and others, whereby compensation to the tune of ₹ 3,02,400/- with interest @ 8% per annum from the date of institution of the claim petition till its realization and costs assessed at ₹ 5,000/- came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

3. The insurer has called in question the impugned award by the medium of FAO No. 249 of 2011 on the ground that the Tribunal has fallen in an error in saddling it with liability as the owner/insured-cum-driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident.

4. The claimants have questioned the impugned award by the medium of FAO No. 266 of 2011 on the ground of adequacy of compensation.

5. In order to determine both 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.

6. The claimants filed claim petition before the Tribunal for grant of compensation, 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 owner/insured-cum-driver, namely Shri Keshav Ram Sharma, while driving Bolero Camper, bearing registration No. HP-01 A-3718, rashly and negligently on 6th January, 2008 at about 5.35. P.M. near Shilli Mor, in which Shri Parma Nand sustained injuries and succumbed to the same. It is apt to record herein that the owner/insured-cum-driver of the offending vehicle also died in the said accident.

7. The claim petition was resisted by the respondents and the following issues came to be framed by the Tribunal:

> *"i). Whether Sh. Parma Nand died due to rash and negligent driving of Maxi Cab No. HP-01 A-3718 by Sh. Keshav Ram? OPP*
>
> *ii) If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP*
>
> *iii) Whether the petition is result of collusion between the petitioners and respondents No. 1 to 6? OPR-7*
>
> *iv). Whether the vehicle in question was being driven in contravention of the terms and conditions of the insurance policy? OPR-7*
>
> *v) Whether Sh. Keshav Ram was not holding valid and effective driving licence at the time of accident? OPR-7*
>
> *vi). Whether Sh. Parma Nand was a gratuitous/unauthorized passenger in the vehicle at the time of accident? OPR-7*
>
> *vii) Whether the petition is not maintainable? OPR-1 to 6*
>
> *viii) Relief."*

8. Parties have led evidence.

Issue No. (i):

9. The Tribunal, after examining the evidence, oral as well as documentary, held that the owner/insured-cum-driver of the offending vehicle had driven the same rashly and negligently at the time of the accident and caused the accident in which deceased-Parma Nand sustained injuries and succumbed to the injuries, thus, decided issue No. (i) accordingly.

10. There is no dispute viz-a-viz the findings recorded on issues No. (i). However, I have perused the impugned award and gone through the record and am of the considered view that the Tribunal has rightly determined issue No. (i), needs no interference. Accordingly, the findings recorded by the Tribunal on issue No. (i) are upheld.

11. Before dealing with issue No. (ii), I deem it proper to determine issues No. (iii) to (vii).

Issues No. (iii), (iv) and (vi):

12. It was for the insurer to prove these issues, have not led any evidence to prove the same, thus, has failed to discharge the onus. Even otherwise, there is not even a single iota of evidence on record to prove the said issues. The Tribunal has rightly made the discussion and determined the said issues. Accordingly, the findings returned by the Tribunal on issues No. (iii), (iv) and (vi) are upheld.

Issue No. (v):

13. It was for the insurer to prove that the owner/insured-cum-driver of the offending vehicle was not having a valid and effective driving licence to drive the same at the time of the accident, has failed to do so.

14. Learned counsel for the insurer argued that the driving licence of the owner/insured-cum-driver of the offending vehicle had expired on 17th December, 2007 and the accident took place on 6th January, 2008, thus, the Tribunal has fallen in an error in saddling the insurer with liability.

15. The argument, though attractive, is devoid of any force for the reason that the proviso to Section 14 of the Motor Vehicles Act, 1988 (for short "MV Act") provides that every driving licence shall continue to be effective for a period of thirty days from the date of its expiry.

16. It is apt to reproduce the relevant portion of Section 14 of the MV Act herein:

> ***"14. Currency of licences to drive motor vehicles.***

....

PROVIDED that every driving licence shall, notwithstanding its expiry under this sub-section continue to be effective for a period of thirty days from such expiry."

17. In the instant case, admittedly, the accident has taken place within thirty days of the expiry of the driving licence, thus, it cannot lie in the mouth of the insurer that the owner/insured-cum-driver of the offending vehicle was not having a valid and effective driving licence.

18. At this stage, learned counsel for the insurer argued that there was no endorsement on the driving licence. This argument is also not forceful for the following reasons:

19. Admittedly, the owner/insured-cum-driver was driving the offending vehicle, i.e. Bolero Camper, bearing registration No. HP-01 A-3718, at the relevant point of time, the gross vehicle weight of which is 2480 kilograms, as per the insurance policy, Ext. RW-1/B, is a light motor vehicle.

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

"2. ....

(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.

xxx xxx xxx

(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."

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

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

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

*“**3. Necessity for driving licence.** - (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*

(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government.”

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

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

*“**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description.”

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

27. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive “LMV” requires no “PSV” endorsement. It is apt to reproduce the relevant portion of the judgment herein:

“The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in

the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-

> *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
>
> *.........................*
>
> *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*

In the given circumstances of the case PSV endorsement was not required at all."

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

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.*
>
> *20. ....*
>
> *21. ....*
>
> *22. ....*

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

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

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

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

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

9. ....

10. ....

11. ....

12. ....

13. ....

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

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

15. ....

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

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

30. The Apex Court in the latest judgment in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** held that PSV endorsement is not required.

31. The same principle has been laid down by this Court in a series of cases.

32. The owner/insured-cum-driver was having a driving licence to drive 'LMV', as has been stated by RW-2, Smt. Sheela Shyam, the Licence Clerk from the office of SDM Theog, thus, was having a valid and effective driving licence to drive the offending vehicle.

33. Having said so, the Tribunal has rightly determined issue No. (v) and saddled the insurer with liability. Accordingly, the finding returned by the Tribunal on issue No. (v) are upheld.

Issue No. (vii):

34. It was for respondents No. 1 to 6 in the claim petition to prove how the claim petition was not maintainable, have not led any evidence to this effect, thus, have failed to discharge the onus. Accordingly, the findings returned by the Tribunal on the said issue are also upheld.

Issue No. (ii):

35. The claimants have sought enhancement of the awarded amount. I have gone through the impugned award and the record and am of the considered view that the Tribunal has rightly assessed the amount of compensation and no ground for interference is made out. However, the Tribunal has fallen in an error in not awarding compensation under the heads 'loss of consortium', 'funeral expenses', 'loss of love and affection' and 'loss of estate'. Accordingly, the claimants are also held entitled to compensation to the tune of ₹ 10,000/- each under the heads 'loss of consortium', 'funeral expenses', 'loss of love and affection' and 'loss of estate'.

36. The Tribunal has also committed a legal mistake while awarding interest @ 8% per annum, which was to be awarded as per the prevailing rates.

37. 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.

38. 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.

39. Having glance of the above discussions, compensation to the tune of ₹ 3,02,400/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 3,42,400/- with interest @ 7.5% per annum alongwith costs assessed at ₹ 5,000/- is awarded in favour of the claimants and the insurer is saddled with liability.

40. In view of the above, the impugned award is modified, as indicated hereinabove, and both the appeals are disposed of accordingly.

41. The enhanced amount of compensation 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.

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

****

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

Oriental Insurance Company …Appellant.

Versus

Sunita Devi and others …Respondents.

FAO No. 187 of 2011
Decided on: 07.04.2017

Motor Vehicles Act, 1988- Section 149- Deceased died in a motor vehicle accident- claimants filed a claim petition, which was allowed- aggrieved from the award, present appeal has been filed contending that deceased was travelling as gratuitous passenger and Insurer is not liable – held that claimants had specifically pleaded that deceased had boarded the vehicle with his luggage and other household goods – this fact was admitted by the owners – thus, it was rightly held by the Tribunal that Insurer is liable – appeal dismissed. (Para-6 to 12)

For the appellant: Mr. Deepak Gupta, Advocate.
For the respondents: Mr. Vikrant Chandel, Advocate, vice Mr. Lovneesh Kanwar, 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)*

Subject matter of this appeal is award, dated 16th February, 2011, made by the Motor Accident Claims Tribunal-cum-Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 99/2003; 78/2005, titled as Sunita Devi and another versus Krishana Devi and another, whereby compensation to the tune of ₹ 9,55,448/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the insurer was 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 on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

4. Learned counsel for the appellant-insurer argued that deceased-Bihari Lal was travelling in the offending vehicle as a gratuitous passenger at the time of the accident, thus, the Tribunal has fallen in an error in saddling the appellant-insurer with liability.

5. The argument, though attractive, is devoid of any force for the following reasons:

6. The claimants have specifically pleaded in para 24 of the claim petition that deceased-Bihari Lal had boarded the offending vehicle alongwith his luggage and other household goods. The said fact has been admitted by the owner-insured in her reply. It is apt to reproduce relevant portion of para 24 of the reply filed by owner-insured herein:

> *"24. Para No. 24 of the petition is admitted to the extent that deceased boarded the truck No. HP-14-7073, at Darcha for Kanaid, Teh. Sunder Nagar, Distt. Mandi, H.P. and also carried his luggage and others house hold goods in the said truck to his home at Kanaid as this fact came to notice of respondent No. 1 after accident. However it is submitted that the deceased alongwith some other persons hired the truck and were sitting in the truck as a custodian of luggage and other household goods............."*

7. Viewed thus, there is an admission on the part of the owner-insured that deceased-Bihari Lal was travelling in the offending vehicle as owner/custodian of the luggage and household goods and not as a gratuitous passenger.

8. Learned counsel for the appellant-insurer has drawn attention of this Court to the definition of 'goods' contained in Section 2 (13) of the Motor Vehicles Act, 1988 (for short "MV Act"), which reads as under:

> ***"2. Definitions. -***
>
> *...........*
>
> *(13) "goods" includes live-stock, and anything (other than equipment ordinarily used with the vehicle) carried by a vehicle except living persons, but does not include luggage or personal effects carried in a motor car or in a trailer attached to a motor car or the personal luggage of passengers travelling in the vehicle."*

9. The said provision of law contains definition, which is inclusive and not exclusive. Deceased-Bihari Lal was travelling in the offending vehicle alongwith his luggage and household goods. Thus, by no stretch of imagination, it can be said that deceased-Bihari Lal was travelling in the offending vehicle as a gratuitous passenger.

10. Having said so, the Tribunal has rightly held that deceased-Bihari Lal was not a gratuitous passenger but was travelling in the offending vehicle as the owner of the goods.

11. Even otherwise, there was no need to determine the issue for the reason that the owner-insured of the offending vehicle has made admission and the judgment was to be made on the basis of said admission in terms of the mandate of Order XII Rule 6 of the Code of Civil Procedure (for short "CPC").

12. The offending vehicle was duly insured with the appellant-insurer and the appellant-insurer has failed to prove that the owner-insured of the offending vehicle had committed any willful breach. Viewed thus, the Tribunal has rightly saddled the appellant-insurer with liability in terms of the impugned award, is legal one and needs no interference.

13. Having glance of the above discussions, the impugned award is upheld and the appeal is dismissed.

14. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

15. 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.

Sabita Sharma and others ...Appellants.

Versus

Amrit Pal Singh and others ...Respondents.

FAO No. 354 of 2012
Decided on: 07.04.2017

Motor Vehicles Act, 1988- Section 166- The Tribunal held that the deceased had contributed to the cause of accident as he was carrying two pillion riders in violation of Section 128(1) – held that Section 128 clearly provides that the driver of two wheeled motorcycle shall not carry more than one person in addition to himself – the deceased had violated this provision by carrying two pillion riders- the Tribunal had rightly saddled the insurer of the vehicle with liability to the

extent of 70% - however, Tribunal fell in error in deducting 1/3rd towards personal expenses – claimants were four in number and 1/4th was to be deducted towards personal expenses – his salary was Rs.19,400/- per month after deducting 1/4th amount towards personal expenses, claimants have suffered loss of dependency to the extent of Rs.14,550/- per month – age of the deceased was 42 years and multiplier of 14 is applicable – thus, claimants are entitled to Rs.14,550 x 12 x 14= Rs. 24,44,400/- under the head loss of income- claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses – since the deceased had contributed towards the accident to the extent of 30%, therefore, compensation of Rs.17,39,080/- awarded in favour of the claimants with interest @ 7.5% per annum. (Para- 7 to 24)

Cases referred:

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 SCC 738
Smt. Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellants: Mr. Shanti Swaroop, Advocate.
For the respondents: Nemo for respondents No. 1 and 2.
Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Duni Singh, 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 13th April, 2012, made by the Motor Accident Claims Tribunal, Fast Track Court, Una, Distt. Una, H.P. (for short "the Tribunal") in M.A.C. Petition No. 01/2010, titled as Sabita Sharma and others versus Amritpal Singh and others, whereby after holding the deceased to be negligent to the extent of 30% in causing the accident, compensation to the tune of ₹ 15,40,000/- with interest @ 7% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability to the extent of 70% (for short "the impugned award").

2. 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 appellants-claimants have questioned the impugned award on the following grounds:

(i) That the Tribunal has awarded inadequate compensation; and

(ii) That the accident was caused by the driver of the offending vehicle, i.e. Bolero car, bearing registration No. RJ-03U-0070 and deceased-Gurbir Kumar had not contributed towards the cause of accident, thus, the insurer was to be saddled with the entire liability.

4. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the instant appeal.

5. The claimants invoked the jurisdiction of the Tribunal in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988 (for short “MV Act”) for grant of compensation to the tune of ₹ 35,00,000/-, as per the break-ups given in the claim petition. The claim petition was resisted by the respondents and the following issues came to be framed by the Tribunal:

> *“1. Whether deceased Gurbir Kumar died in an accident on 2.12.2009 at about 9.30 a.m. at Chowk Kuthar Beet due to rash and negligent driving of Bolero car bearing registration No.RJ-03U-0070 by respondent No. 1? OPP*
>
> *2. If issue No. 1 is proved in affirmative whether the petitioners are entitled to compensation, if so, how much and from whom? OPP*
>
> *3. Whether the petitioners have no cause of action? OPR-3*
>
> *4. Whether the vehicle No. RJ-03U-0070 was being used against the terms and conditions of insurance policy? OPR-3*
>
> *5.Whether respondent No. 1 driver of the vehicle was not holding valid and effective driving licence at the time of accident? OPR-3*
>
> *6. Whether the vehicle was being plied without any valid RC, fitness certificate? OPR-3*
>
> *7. Whether the petition is bad for non-joinder of necessary parties? OPR-1&2*
>
> *8. Relief.”*

6. The claimants have examined HC Vipon Kumar as PW-1, Shri Dilbag as PW-3, Shri Yash Maurya as PW-4 and one of the claimants, Smt. Savita Sharma, herself appeared in the witness box as PW-2. The driver of the offending vehicle, namely Shri Amrit Pal Singh, himself stepped into the witness box as RW-1 and examined Smt. Anjana, Criminal Ahlmad from the office of JMIC, Court No. 2, Una, as RW-2. It is apt to record herein that the owner-insured and insurer of the offending vehicle have not led any evidence.

<u>Issue No. 1:</u>

7. The Tribunal, after scanning evidence, oral as well as documentary, held that deceased-Gurbir Kumar had also contributed towards the cause of the accident for the reason that at the time of the accident, he was carrying two pillion riders, which is violation of Section 128 (1) of the MV Act.

8. It is apt to reproduce Section 128 (1) of the MV Act herein:

> *“**128. Safety measures for drivers and pillion riders.** (1) No driver of a two-wheeled motor cycle shall carry more than one person in addition to himself on the motor cycle and no such person shall be carried otherwise than sitting on a proper seat securely fixed to the motor cycle behind the driver's seat with appropriate safety measures.”*

9. The said provision of law clearly mandates that the driver of a two wheeler shall not carry more than one person in addition to himself. Thus, deceased-Gurbir Kumar had committed breach of the mandate of Section 128 of the MV Act, therefore, was himself rash and negligent and contributed towards the cause of the accident.

10. The Tribunal has rightly made the discussions and relied upon the judgments made by the Apex Court, this Court and other High Courts, in paras 8 to 28 of the impugned award, need no interference. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

11. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 7.

Issues No. 3 to 6:

12. It was for the insurer to prove all these issues, has not led any evidence, thus, has failed to discharge the onus. Accordingly, the findings returned by the Tribunal on issues No. 3 to 6 are upheld.

Issue No. 7:

13. It was for the driver and owner-insured of the offending vehicle to prove how the claim petition was suffering from mis-joinder of necessary parties, have not led any evidence to this effect, thus, have failed to discharge the onus. Accordingly, the findings returned by the Tribunal on issue No. 7 are also upheld.

Issue No. 2:

14. The Tribunal has rightly saddled the insurer of the offending vehicle with liability to the extent of 70% by holding that the deceased himself had contributed towards the cause of the accident to the extent of 30%, but has fallen in an error in deducting one third towards the personal expenses of the deceased, as the claimants were four in number, thus, one fourth was to be deducted in terms of para 30 of the judgment rendered by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which reads as under:

> *"30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in Trilok Chandra, the general practice is to apply standardised deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceeds six."*

15. Admittedly, the deceased was a government employee and his salary was ₹ 19,400/- per month, as per the discussions made by the Tribunal in para 27 of the impugned award, which is not in dispute. Accordingly, it is held that the claimants have suffered loss of dependency to the tune of ₹ 14,550/- per month.

16. The age of the deceased was 42 years at the time of the accident. Thus, the Tribunal has rightly applied the multiplier of '14' keeping in view the ratio laid down by the Apex Court in the case titled as **Sarla Verma's case (supra),** which has been upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** read with the Second Schedule appended with the MV Act.

17. Viewed thus, the claimants are held entitled to compensation to the tune of ₹ 14,550/- x 12 x 14 = ₹ 24,44,400/- under the head 'loss of income'.

18. The amount of compensation awarded under the head 'loss of consortium' to the tune of ₹ 10,000/-and ₹ 10,000/- under the head 'loss of love and affection' is just and appropriate, is accordingly upheld.

19. The amount awarded by the Tribunal under the head 'funeral charges' to the tune of ₹ 5,000/- is too meagre. The Tribunal has also fallen in an error in not awarding compensation under the head 'loss of estate'. Viewed thus, the claimants are also held entitled to compensation to the tune of ₹ 10,000/- each under the head 'funeral charges' and 'loss of estate'.

20. Having said so, it is held that the claimants are entitled to compensation to the tune of ₹ 24,44,400/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 24,84,400/-. Since the deceased has been held to have contributed towards the cause of accident to the extent of 30%, compensation to the tune of ₹ 17,39,080/- is awarded in favour of the claimants.

21. The Tribunal has also committed a legal mistake while awarding interest @ 7% per annum, which was to be awarded as per the prevailing rates.

22. 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.

23. 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.

24. The insurer is directed to deposit the enhanced awarded amount before the Registry of this Court within eight weeks. On deposit, the same be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

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

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

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

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

Versus

Narender Chand ....Respondent.

Cr. Appeal No. 159 of 2008.
Date of Decision: 7th April, 2017.

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a bus in a rash and negligent manner – the bus hit a car due to which one occupant of the car sustained injuries and one occupant died at the spot- the accused was tried and acquitted by the Trial Court- held in appeal that the vehicles were moved after the accident and site plan does not reflect the position at the time of accident– however, the pieces of glass were found in the middle of the road, which shows that bus was being driven on inappropriate side of the road – identity of the accused was established – the Trial Court had not properly appreciated the evidence- appeal allowed- judgment of the Trial Court set aside.(Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondent: Mr. Bhuvnesh Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of Himachal Pradesh against the judgment rendered on 04.12.2007 by the learned Judicial Magistrate 1st Class, Court No. III, Hamirpur, H.P. in Police Challan No. 60-1-2005, RBT 2-II-05, whereby, he acquitted the accused for his allegedly committing offences punishable under Sections 279, 337, 338 and 304-A of the IPC.

2. The facts relevant to decide the instant case are that on 2.7.2004 an information was received at police station, Hamirpur about accident having taken place near Jhaniari on Nadaun road and that injured had been brought to Zonal Hospital, Hamirpur. In the hospital, complainant Ranjit Singh Rana, got his statement recorded under Section 154 of the Cr.P.C., whereby he unfolded that on 2.7.2004, he had started from Shimla to his village and the car was being driven by him. His friend L.R. Rana and wife Tripta Rana were also travelling along with him. At about 4.45 p.m near Jhaniari, Dinesh Bus No. HP-55-4390 came from the opposite side and struck against his car. Because of the impact his friend Lekh Ram Rana died whereas he along with his wife got injured. The accident stated to have taken place due to the rash and negligent driving of the bus by its driver. On the aforesaid statement of the complainant, FIR was registered in the police station concerned. Thereafter, the Investigating Officer concerned completed the codel formalities.

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

4. The accused stood charged by the learned trial Court for his committing offences punishable under Sections 279, 337, 338 and 304-A of the IPC. In proof of the prosecution case, the prosecution examined 13 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the learned trial Court in which the accused claimed innocence and pleaded false implication.

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

6. The State of H.P. stands aggrieved by the judgment of acquittal recorded in favour of the accused/respondent by the learned trial Court. The learned Deputy Advocate General for the State has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. On the other hand, the learned counsel appearing for the accused/respondent herein has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned trial Court standing based on a mature and balanced appreciation by him of the evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

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

9. In a collision which occurred inter se the bus driven by the accused/respondent vis-a-vis the car driven by the complainant, an occupant in the latter vehicle, as divulged by postmortem report comprised in Ex.PW8/C, suffered his demise, on account of injuries reflected therein, befalling upon him. Also the complainant suffered on his person injuries as stand reflected in MLC Ex.PW8/B besides his wife also suffered injuries on her person, injuries whereof stand borne on Ex.PW8/A.

10. The learned trial Court had proceeded to pronounce findings of acquittal upon the accused/respondent, on anvil of a purported eye witness to the occurrence, one Sh. Jagdish Chand, PW-6, benumbing in his testification ascriptions of negligence vis-a-vis the accused, as comprised in the charge, whereupon, the accused/respondent faced trial, contrarily, he attributed negligence upon the complainant, comprised in his disclosing qua his driving the relevant car on the inappropriate site of the road. He also voiced in his testification qua bus bearing No. HP-55-4390 standing driven by the accused on the appropriate side of the road besides has echoed therein qua despite the utmost strenuous efforts made by the accused/respondent to forestall the ill-fated collision, comprised in his maneuvering the relevant bus to the katcha portion of the road, yet not ensuring its obviation given, the enormous speed at which the complainant was plying his car on the inappropriate side of the road.

11. The efficacy of the aforesaid testification purveyed qua the occurrence by PW-6, is to be tested by making an allusion to the relevant unfoldments borne on site plan embodied in Ex.PW12/A. A wholesome reading of the deposition of PW-12, who prepared site plan borne on Ex.PW12/A, unfolds qua his preparing it at a stage when the positions of the relevant vehicles stood disturbed, for hence facilitating the smooth plying of vehicles on the road whereat the ill-fated collision occurred, thereupon, the reflections embodied in Ex.PW12/A do not prima facie warrant qua implicit reliance standing placed thereupon for, hence, concluding the trite factum qua whether the bus or the car stood plied on the inappropriate or the appropriate side of the road. However, the learned Deputy Advocate General submits that with reflection occurring at serial No.4 of Ex.PW12/A qua broken pieces of glasses finding their existence on the middle of the road, thereupon, with the aforesaid portion of the road constituting the appropriate portion of the road vis-a-vis the car, thereupon, it naturally constituting the inappropriate portion of the road for the plying thereon of the bus driven by the accused/respondent whereupon the charge qua the accused stands proven. Nowat, it is to be determined whether the glasses of the car or of the bus suffered breakage, arising from the impact of the collision which occurred inter se both. A perusal of the photographs unveils qua the window panes besides the front glasses of the car suffering breakage, whereas, the glasses of the bus apparently did not suffer any damage nor they got broken, corollary whereof is qua the occurrence, on the middle of the road, of pieces of glass, hence, warranting a conclusion qua theirs comprising the broken glasses of the car, breakage whereof occurred, in sequel to the impact of a collision which occurred thereat inter se the bus and the car. Since, the place denoted as 'X' in Ex.PW12/A stands concluded to be the site whereat the accident occurred also with its constituting the appropriate side of the road for the plying thereon of the car driven by the complainant besides its constituting the inappropriate side of the road for plying thereon of the bus driven by the respondent/accused, yet the mere occurrence of glasses at point 'X' in Ex.PW12/A stands contended by the learned counsel for the accused/respondent, to not constrain this Court to conclude qua its constituting the site of collision which occurred inter se the car and the bus. Nonetheless, the aforesaid submission is inefficacious, significantly, when with at the time contemporaneous to the preparation of Ex.PW12/A, the position of the vehicles stood disturbed also with accused/respondent while holding the prosecution witnesses to cross-examination, his merely suggesting them to qua on account of rain fall, the broken glasses of the car finding their existence at point 'X' in Ex.PW12/A. Consequently, the aforesaid stray suggestion(s) unaccompanied by best evidence comprised in the adduction of photographic evidence by the defence witnesses, with portrayals therein qua the occurrence of glasses at point "X", owing their existence thereat owing to heavy rainfall, yet the aforesaid evidence stood unadduced, whereupon, this Court is constrained to conclude qua the aforesaid endeavour of the defence for benumbing the incriminatory role of the accused/respondent, hence, holding no efficacy. In sequel, this Court on anvil of mark 'X' depicted in site plan Ex.PW12/A concludes qua it constituting the site of occurrence also when it constituted the appropriate site of the road for plying thereon of the vehicle driven by the complainant besides its constituting the inappropriate side of the road vis-a-vis the plying thereon of the bus driven by the accused/respondent, thereupon, the testification of PW-6, wherein he omits to lend succor to the prosecution case, does not hold the apposite creditworthiness, his testification vis-a-vis the defence of the accused/respondent ensuing from

his holding inclinations vis-a-vis him, inclination vis-a-vis the accused stemming from his being his employer. Also with the evident arrival at the site of occurrence, of PW-6, being subsequent to the relevant collision taking place thereat thereupon his purportedly, rendering an ocular version qua the occurrence does not hold any crediworthiness .

12. The learned trial Court had pronounced an order of acquittal upon the accused/respondent, on the anvil of the complainant revealing the identity of the accused to be one Naresh, whereas the name of the accused/respondent being Narender Chand. However, the aforesaid prime factum is not sufficient to conclude qua the prosecution not succeeding in establishing the factum of the accused/respondent occupying the driver(s) seat of the bus, especially when, the complainant had identified the accused/respondent in Court besides when the best evidence to succor the defence of the accused/respondent qua his not holding the apposite employment under the owner(s) of the bus, stood comprised in the learned defence counsel putting apposite suggestion to PW-6, the owner of the offending bus, holding communications in repudiation to his not holding the relevant employment under him, whereas, his omission(s) to put the apposite suggestions to PW-6 constrains this Court to conclude qua his thereupon acquiescing qua hence the accused also acquiescing qua his holding the apposite employment as a driver in the relevant bus under PW-6 also his thereupon acquiescing qua his at the relevant time manning the driver's seat of the relevant bus. Moreover, the learned defence counsel throughout during the course of his holding the prosecution witnesses to cross-examination nor in his statement recorded under Section 313 Cr.P.C., has made any disclosure therein qua his not holding the driving licence for driving the category of the vehicle wherewithin the relevant bus fell or his not holding the relevant employment under its owner rather his holding employment under some other person, thereupon also it is befitting to conclude qua the prosecution establishing the identity of the accused/respondent.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

14. Consequently, the instant appeal is allowed and the impugned judgment is set aside. In sequel, the accused/respondent is convicted for his committing offences punishable under Sections 279, 337, 338 and 304-A of the IPC. The accused/convict/respondent be produced before this Court on 28.04.2017 for his being heard on the quantum of sentence.

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

The Kohinoor Sarvahitkari Parivahan Sahkari Sabha Samiti .....Petitioner.

Versus

State of Himachal Pradesh and others .....Respondents.

CWP No.3564 of 2015.

Date of decision: 7th April, 2017.

Constitution of India, 1950- Article 226-Respondent No.4 was engaged by the petitioner – a dispute arose between different societies, which was ultimately referred to Divisional Commissioner- work was re-distributed and the petitioner was left with no work – a decision was taken to remove respondent No.4- a demand was raised by respondents No. 4 and 5– Labour Inspector-cum-Conciliation Officer directed the petitioner to re-engage the respondents No. 4 and 5– aggrieved from the order, present writ petition has been filed – held that conciliation had not taken place and the Conciliation Officer has no adjudicatory powers- his duties are administrative

and not judicial – petition allowed – order of the Labour Officer set aside.(Para-5 to 8)

For the Petitioner : Mr.Rajiv Rai, Advocate.
For the Respondents: Ms.Meenakshi Sharma & Mr.Rupinder Singh, Additional Advocate Generals, for respondents No. 1 to 3.
Mr.Tara Singh Chauhan, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The moot question involved in this petition is as to whether the Conciliation Officer under the Industrial Disputes Act can direct reinstatement of a workman?

Necessary facts may be noticed.

2. Respondent No.4 was engaged by the Managing Committee of the petitioner-Society vide resolution dated 03.06.2010. Thereafter, some dispute arose amongst the various Co-operative Societies relating to allocation of transportation work which eventually reached this Court. This Court directed the Divisional Commissioner, Mandi, to convene a meeting of the representatives of the Societies on 01.07.2010 wherein it was decided that the transportation work for the time being would be carried out through the Bilaspur District Co-operative Federation (for short 'Federation') and consequently the work of the petitioner-Society came to be shifted and allocated to the Federation. Now that there was no work left for the Society, it took a decision to remove respondent No.4 vide resolution dated 02.09.2012. Respondent No.4 alongwith respondent No.5 thereafter raised a demand notice dated 29.10.2013 before the Labour Inspector-cum-Conciliation Officer (respondent No.3), who during the course of conciliation proceedings directed the petitioner to re-engage respondents No.4 and 5.

3. It is this order which has been assailed in the instant petition as being contrary and in violation of law, more particularly, the provisions of the Industrial Disputes Act (for short 'Act').

4. Reply has been filed only on behalf of the official respondents wherein they have sought to justify the action of respondent No.3 by placing reliance upon Section 12 of the Act and would further contend that it was not a direction but an amicable settlement that had been reached during the course of conciliation between the petitioner and the workmen i.e. respondents No.4 and 5.

I have heard the learned counsel for the parties and gone through the material placed on record.

5. The proceedings conducted by respondent No.3 on 10.03.2014 are placed as Annexure P-5 and read thus:-

"<u>Conciliation Proceeding dated 10-03-2014</u>

Sh. Durga Singh Thakur, Secretary of the Society appeared in dispute. Sh. Vinod Rana advocate appeared on behalf of Pradhan/Kohinoor Sarvhitkari Parivahan Sahkari Sabha Samiti Rani Kotla, VPO Ranikotla, Tehsil Sadar, Distt. Bilaspur, H.P. appeared in the conciliation meeting.

Sh. Gopal Verma appeared in the conciliation meeting and Sh. Pravesh Chandel advocate appeared on behalf of Sh. Gopal Verma, Sh. Ranjeet Singh in the meeting.

No reply and record has been submitted by the Pradhan/Secretary in this office despite of order issued by this office in the conciliation meeting.

<u>Sh.Durga Singh Thakur, Secretary has stated that the record of Society has been lost and in lack of any record, the Labour Inspector, Bilaspur, has decided that these two workers named, Sh.Gopal Verma and Sh. Ranjeet Singh be reinstated</u>

from the date of order. The intimation to this office be given on the implementation of this order.

The Pradhan and the Secretary be directed to implement the same order w.e.f. the date of order. Case closed."

6. It would be evidently clear from the aforesaid order that no conciliation infact had taken place and rather respondent No.3 of his own had directed reinstatement of the workmen. Therefore, in the given facts and circumstances whether respondent No.3 could have legally adopted such a course or was vested with such power and authority to order reinstatement is a question which really brooks no dispute. For, it is more than settled that a Conciliation Officer is not an adjudicatory authority under the Act nor is he a Court within the meaning of Section 195(1)(c) of the Code of Criminal Procedure. He is not invested with the powers to adjudicate on industrial disputes even though there are opposing parties and various points at issue between them before him during the course of conciliation. All that he can do is to try to persuade the parties to come to a fair and amicable settlement. In other words, his duties are only administrative and are purely incidental to industrial adjudication. His function under Section 12 (upon which much reliance has been placed by the official respondents) is not of judicial or quasi-judicial nature, for if it were so, then in connection with everything he does, the formalities of a judicial trial would have to be observed.

7. Therefore, once it is concluded that a Conciliation Officer is neither an adjudicatory authority nor is vested with judicial or quasi-judicial powers, then obviously, the proceedings held on 10.03.2014 whereby the Conciliation Officer directed reinstatement of respondents No.4 and 5 cannot withstand the test of judicial scrutiny and is accordingly set aside.

8. The petition is accordingly allowed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

9. Before parting, it needs to be observed that this order shall not come in the way of the petitioners in resorting to such remedies, as may be available to them, under the law and in case they so choose to avail of any of the available remedies within one month from the date of receipt of this order, then in that event, the Authority, Tribunal/Court, as the case may be, will decide their claim, as expeditiously as possible and in no event later than 31.12.2017.

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

Anil Kumar …..Petitioner/tenant.

Versus

Vijay Kumar and another …..Respondents/landlords.

Civil Revision No. 23 of 2015.
Reserved on :30th March, 2017.
Decided on : 10th April, 2017.

H.P. Urban Rent Control, 1987- Section 14- An eviction petition was filed on the ground of arrears of rent, the premises being more than 100 years old having outlived its life, the premises having become unfit and unsafe for human habitation, the tenant having sublet the premises and the premises being required bonafide for reconstruction, which cannot be carried out without vacating the building – the petition was allowed by the Rent Controller- an appeal was filed, which was allowed and the order of the Rent Controller was set aside- held in revision that the eviction petition has been filed for eviction of the tenant from the ground floor but no eviction petition was filed for eviction of the tenant residing on the upper floor- the premises is owned by various co-owners and all of them have not been impleaded- the Appellate Authority had not

taken into consideration the relevant factors while deciding the appeal- revision allowed and order of Appellate Authority set aside.(Para-8 to 12)

For the Petitioner : Mr. N. S. Chandel, Advocate.
For the Respondents: Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Civil Revision Petition stands directed against the impugned order recorded by the learned Appellate Authority-IV, Shimla in Rent Appeal No. 37-S/14 of 2013/2011 on 11.11.2014, whereby, it reversed the verdict recorded by the learned Rent Controller, Shimla in Rent Petition No. 76-2 of 2008, whereby, the latter had partly allowed the apposite petition constituted therebefore by the landlords/respondents herein, wherein they sought the eviction of the petitioner herein/tenant, from the demised premises.

2. Briefly stated the facts of the case are that the respondents herein claimed themselves to be the owners of a four storeyed building also housing a shop having dimension of 7x8 feet situated in ground floor of the building as specifically depicted in the enclosed site plan, hereinafter referred to as demised premises, situated in Lakkar Bazar, had sought the eviction of the tenant from the demised premises on the ground that the petitioner herein/tenant has been in possession of demised premises as tenant on monthly rent of Rs.300/-, since 1.7.1998, has not paid rent thereof to them w.e.f. 01.07.1999 and that as such he is now also liable to pay statutory interest at the rate of 9% per annum thereon. Moreover, the building housing the demised premises is more than 100 years old and has outlived its life. Its wall constructed in stone and brick masonry with wooden rafters (dhajji) have plumbed. CGI sheets laid down on the roof have rusted and as a consequence, thereof, during the rainy and winter season, the water percolates therefrom into the walls and as a result thereof cracks have occurred in the walls. In fact the structure as a whole has been rendered unsafe and unfit for human habitation. Respondent is running a shop I the demised premises. In the first floor thereof, they are residing. The second floor thereof is in possession of one Sh. O.P. Sharma as tenant. The top floor which earlier was in the tenancy of Sh. O.P. Sharma, is in possession of same third person who has been unauthorisedly inducted therein as a tenant by above referred Sh. O.P. Sharma without their permission and consent. The building is situated in heart of the town and as such has vast commercial potential. They, intend to demolish the present structure and construct in place thereof a modern RCC structure with a view to exploit its commercial potentiality so as to enhance their income. To accomplish their plan, they are also going to file a separate eviction petition against above named Sh. O.P. Sharma and would also vacate their part of premises as proposed reconstruction is not feasible without vacation of the entire structure by all the occupants. They are having sufficient resources at their command to put their plan into action and in this behalf, they have also moved Municipal Corporation, Shimla for obtaining requisite permission for reconstructing a new structure on old lines. Hence, the present petition.

3. The petitioner herein/tenant contested the petition and filed reply thereto, wherein, he had taken preliminary objection qua malafide, maintainability, non joinder of necessary party and cause of action. On merits, he did not dispute his status as tenant in respect to the demised premises but questioned the status of the petitioners as landlord by taking the plea that they in fact are representatives of the landlord and he has been paying rent to him in that capacity. He however, did not deny the factum of arrears of rent but refuted the reasons there for. He submitted that he has been always willing to pay the arrears of rent and thus denied his liability to pay any interest there over. As regard averments with respect to reconstruction, he denied that the building has outlived its life or that it has become unsafe and unfit for human habitation. Renovation work of the ground floor as well as that of the first floor had been done in the year 1997-98 by the predecessors-in-interest of the petitioners and after the

execution of the aforesaid work, the building is now in good condition. He pleaded that the petitioners are only owners to the extent of 33% and the remaining shares are owned by different owners. AS such, in the absence of the consent of the remaining owners, the petition preferred is not maintainable. Hence, he prayed for the dismissal of the petition.

4. The landlords/respondents herein filed rejoinder to the reply of the tenant/petitioner herein, wherein, they denied the contents of the reply and re-affirmed and re-asserted the averments, made in the petition.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the respondent is in arrears of rent, if so to what amount? OPP
2. Whether the suit premises is bonafide required for reconstruction and rebuilding which is not possible without getting the suit premises vacated? OPP
3. Whether the petition is not maintainable ?OPR
4. Whether the petition is bad for non joinder of necessary parties? OPR
5. Whether the petitioner has no cause of action? OPR
6. Relief.

6. On an appraisal of evidence, adduced before the learned Rent Controller, the learned Rent Controller partly allowed the petition of the landlords/respondents herein. In an appeal, preferred therefrom by the landlords/respondents herein before the learned Appellate Authority, the Appellate Authority allowed the appeal and set aside the order(s) recorded by the learned Rent Controller.

7. Now the tenant/petitioner herein has instituted the instant Civil Revision Petition before this Court assailing the findings recorded in its impugned order by the learned Appellate Authority.

8. The demised premises are located on the ground floor of a building situated in 19/34 Lakkar Bazar, Shimla, wherein, the tenant/petitioner herein is running a commercial venture. The relevant contestable ground qua the firm entitlement of the landlords/respondents herein to seek eviction of the tenant/petitioner herein from the aforesaid demised premises, stands anvilled upon the latter satiating, by adduction of cogent evidence, the factum probandum qua ill health besides the dilapidated condition of the demised premises, whereupon, hence, its reconstruction is warranted, for facilitation whereof, the eviction of the tenant therefrom is imperative. In proof of the aforesaid ill health of the demised premises also qua its dilapidated condition, whereupon, its reconstruction is necessitated, for leveraging facilitation whereof, the eviction therefrom of the petitioner herein/tenant is imperative, the landlords/respondents herein had led into witness box, one Shri Shiv Saran, PW-2. In his deposition the aforestated witness has succored the relevant pleadings echoed in the apposite petition wherein unfoldments occur qua the dilapidated condition of the demised premises also has testified therein qua its warranting its reconstruction, for facilitation whereof, the eviction of the tenant/petitioner herein, from the relevant demised premises occurring on its ground floor, is imperative, importantly when the reconstruction of the building has to commence from its base, by excavation of foundations thereto. The aforesaid communications occurring in the testimony of PW-2, the purported expert, though succor the apposite pleadings constituted in the apposite petition for eviction, wherein unfoldments occur qua the ill health of the demised premises also qua unless the petitioner herein/tenant is ordered to be evicted therefrom, its reconstruction when is a dire necessity for hence improving its health also for enhancing its longevity, would hence stand forestalled, nonetheless, the import of his testification qua the entire building warranting reconstruction, in a portion whereof, the relevant demised premises occur, cannot neither stand undermined nor slighted nor also can the admission(s) held in the pleadings constituted in the

apposite petition qua on the top floor of the relevant building, a tenant named one Shri O.P. Sharma holding occupation thereof, in respect wheretowhom, no petition for eviction stands instituted besides with the landlord while testifying as PW-1 omitting to underscore therein qua any apposite petition for seeking eviction of one Mr. O.P. Sharma, who holds occupation as a tenant in a part of the building, remaining yet instituted, whereupon, the effect of both the aforesaid material/pronouncements is qua the respondents herein/landlords singularly selecting the petitioner herein/tenant for seeking his eviction from the demised premises, whereas, their excluding other tenant(s) in the building, for seeking their eviction from portions occupied therein by him/them as tenant(s). The further effect of the aforesaid pronouncements occurring in the aforesaid material, is qua with PW-2 testifying qua the entire building being in a state of ill health also in a state of dilapidation, whereupon, its reconstruction is warranted for hence enhancing its longevity, when nowat, stand coagulated with the relevant demised premises hereat evidently occurring on the ground floor of the building, whereas, portions above it stand occupied by other tenant(s) qua whom no petition for their eviction therefrom stand instituted, thereupon, if the apposite petition for seeking eviction of the petitioner herein/tenant, who occupies the ground floor of the relevant building, wherefrom, the reconstruction activity of the building is to commence, is hence permitted to succeed, it would sequel the collapsing of the entire building, begetting the concomitant inapt sequel, of the tenant(s) occupying the floors existing above the demised floor with respect to whom, no petition for their eviction therefrom stand instituted, hence, ipso facto suffering their eviction therefrom despite no pronouncement standing rendered upon them by competent Courts. Also their/his eviction would naturally ensue(s) on the floors occurring above the ground floor, upper floor(s) whereof stand occupied by him/them, on commencement, after eviction of the tenant hereat of the relevant reconstruction from its base, portion whereof is the relevant demised premises, hence, naturally obviously collapsing. In case, the aforesaid eventuality is permitted to be effectuated, thereupon, the inevitable ensuing sequel therefrom would be even without the fiat of the Courts of law pronouncing upon the eviction of tenants occupying the floor(s) above the relevant premises, the upper floors standing impermissibly subjected to reconstruction, permitting occurrence of eventuality whereof would tantamount to rendition of a grossly unwarranted order.

9. Be that as it may, the learned Appellate Authority had dispelled the vigour of the aforesaid pleadings constituted in the apposite rent petition also it had blunted the effect of the testification of PW-2, who had in his relevant testification voiced qua the relevant reconstruction activity warranting its commencement from its base, whereat the demised premises stand located, significantly also it drove rough shod qua the factum of floor(s) above the ground floor standing occupied by a tenant in respect whereto no executable decree of eviction stood pronounced by competent courts of law, floors whereof would collapse, if the decree impugned herebefore stands affirmed leading to the ill-fate of tenant(s) occupying them hence ipso fato without authority of law hence suffering eviction therefrom, whereupon, it has committed a gross illegality or impropriety. Contrarily, the effect of the aforesaid pleadings unfolded in the apposite petition for eviction also the effect of the testification of the aforesaid PW-2, is qua the choosing besides selecting by the respondents herein, of the petitioner herein/tenant for his eviction from the demised premises, being palpably construable to be an invention or a concoction bereft of any virtues of any bonafides inhering in the respondent(s) herein, for hence theirs seeking his eviction therefrom on the score of the ill-health of the building besides on the score of its dilapidated condition, in a part whereof the demised premises stand located, hence, its thereupon warranting its immediate reconstruction, for facilitation whereof, the eviction of the tenant is imperative. Resultantly, contrived besides invented grounds for eviction,on facet aforesaid, of the petitioner herein/tenant from the demised premises, cannot come to be either sustained or countenanced by this Court.

10. Dehors the above, the respondents herein are co-owners along with other co-owners in the building, in part whereof, the petitioner herein is a tenant under the respondents herein, yet other co-owners stood not impleaded as co-petitioners with the respondents herein. Though, the non impleadment of other co-owners along with the respondents herein, as co-

petitioners in the apposite eviction petition would not preempt, the learned Courts below to pronounce a conditional order of eviction upon the petitioner herein/tenant, significantly, when the petitioner herein uncontrovertedly attorns only qua the respondents herein, yet with surfacing of evidence herebefore unveiling qua the entire building warranting reconstruction, whereupon, its commercial utility would stand enhanced also when on its reconstruction it would hence rear incremental pecuniary benefits qua the co-owners of the building yet uncontrovertedly with the relevant building standing located within municipal limits, whereupon, with the ground for eviction of the tenant hereat residing in a part thereof, standing strived besides anchored upon its warranting its reconstruction, for absolute success whereof, all the co-owners stood enjoined to obtain the apposite sanction for its reconstruction from the Municipal Corporation, Shimla, whereas, with no sanction for the relevant purpose standing obtained therefrom by all the co-owners of the building renders the apposite ground, whereupon, the respondents herein seek eviction of the tenant from the demised premises to be also construable to be contrived or invented. However, though, even want of apposite sanction by the Municipal Corporation, Shimla, for the relevant purpose would not forestall Courts of law to pass a conditional decree qua eviction of the tenant herein from the building, building whereof is concerted to, on their eviction therefrom, to be rebuilt, yet, the effect of non joinder of all the co-owners of the relevant building by the respondents herein as co-petitioners with them in the apposite eviction petition, when construed in tandem with the factum of Ex.PW4/A comprising the plan for reconstruction of the building submitted for approval before the Municipal Corporation, Shimla, not holding the signatures of all the co-owners nor any affidavit standing placed on record, of all the co-owners, holding articulations qua theirs consenting to the submission of Ex.PW4/A before the Municipal Corporation, Shimla for its approval therefrom, wherefrom, it appears qua the omission of joinder by the respondents herein of other co-owners as co-petitioner(s) in the apposite eviction petition, standing engendered by theirs in their relevant endeavour of rebuilding it, not holding their consensus ad idem qua its rebuilding nor also hence the aspiration of the respondents herein being for their monetary betterment. Contrarily, it appears qua theirs with utmost stealth contriving a pretextual ground of eviction of the petitioner herein/tenant from the demised premises. Moreover, the effect of the respondents herein not obtaining the signatures of the co-owners on Ex.PW4/A nor tendering into evidence their affidavits unveiling qua theirs consenting for the reconstruction of the building , renders open an inference qua, thereupon, Ex.PW4/A suffering rejection from the Municipal Corporation, Shimla, whereas, its approval therefrom would facilitate this Court to render a conditional decree of eviction upon the tenant/petitioner herein, corollary whereof is dehors the non approval yet of Ex.PW 4/A by the Municipal Corporation, Shimla, no conditional decree of eviction of the tenant being amenable for pronouncement, its submission therebefore lacking the consent of other co-owners, whereupon, it would suffer rejection hence rendering the ground qua reconstruction of the relevant building to be illusory besides unwarranted.

11. The above discussion unfolds qua the conclusions arrived by the learned Appellate Authority standing not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned Appellate Authority has excluded germane and apposite material from consideration.

12. In view of above discussion, the present petition is allowed and the judgment rendered by the learned Appellate Authority in Rent Appeal No. 37-S/14 of 2013/2011 on 11.11.2014 is set aside. In sequel, the order rendered by learned Rent Controller, Shimla, in Rent Petition No. 76/2 of 2008 on 17.10.2011 is affirmed and maintained. All pending applications also stand disposed of. No order as to costs.

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

Brestua & ors. ……Appellants.

Versus

Rajinder Singh & ors. …….Respondents.

RSA No. 394 of 2003.
Decided on: 10.4.2017.

Specific Relief Act, 1963- Section 38- Plaintiffs claimed right of passage through the edges (mainds) by way of custom – he further pleaded that the passage was blocked by the defendants without any right to do so- the defendants denied the existence of passage – held that wazib-ul-arj shows the existence of custom of using the passage through the edges – oral evidence also proved the existence of the passage – courts had rightly appreciated the evidence - appeal dismissed. (Para-7 to 15)

For the appellant(s): Mr. G.D.Verma, Sr. Advocate with Mr. B.C.Verma, Advocate.

For the respondents: Mr. Rajnish K. Lall, Advocate, vice counsel for respondents No. 1, 5 to 7.
Respondent No. 3 already deleted.
Respondents No. 4(a) and 4(b) already ex parte.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J.

The judgment and decree dated 13.6.2003 passed by learned District Judge, Kinnaur, at Rampur Bushahr, H.P. in Civil Appeal No. 26 of 1999 is under challenge in this appeal. The appeal has been admitted on the following substantial question of law:

> "1. Whether the findings arrived at by the trial Court as affirmed by the first Appellate Court are perverse and dehors the evidence on record?"

2. Therefore, in order to determine the legality and validity of the impugned judgment and decree, facts of the case and evidence produced by the parties on both sides is required to be taken note of briefly.

3. The dispute in the present lis is qua the existence of path allegedly through edges (mainds) of the fields of appellant-defendant No. 2 Rati Sukh bearing Khata Khatoni No. 77 min/151 min Kh. No. 774, measuring 0-40-68 hectares and that of Bhaginar appellant-defendant No. 3 entered in Khata Khatoni No. 80/154, Kh. No. 696 measuring 0-23-58 hectares and Kh. No. 697 measuring 0-01-68 hectares situated in Up-mohal Powari Tehsil Kalpa, Distt. Kinnaur.

4. The plaintiffs (respondents herein) claim that as per the custom prevalent in the area where the abovesaid land is situated, they were exercising their rights of using the edges (mainds) of the western end of upper part of field of defendant No. 3 bearing Kh. No. 697 and that of defendant No. 2 bearing Kh. No. 774 and Kh. No. 775 alongside water channel (Kuhl) shown with points A to B in the tatima Ext. PW-7/A to have access to their adjoining fields and orchard along with other members of their family, labourers, bullocks and cattle etc. openly, continuously and without any interruption by the defendants. It is, however, in June, 1992, the defendants had blocked the said access by fencing the same with barbed wire and thorny bushes at points A to B in the tatima and also by constructing a wall over their fields bearing Kh. Nos. 774 and 775 as well as at the western end of upper portion of Kh. No. 697. The parties, being agriculturist by profession and the fields in their area, generally small in size, surrounded by the fields of others, is not connected by a private or public path. As such, the right of using edges (mainds) of each other fields to have access to their respective fields along with other members of their families,

labourers, cattle and bullock etc. is a customary right and in the exercise of such right, the plaintiffs are entitled to have access and use the passage running alongside edges of the fields of defendants for agricultural purposes. The obstruction to the exercise of their right at the behest of the defendants, was claimed to be illegal, arbitrary and against the factual position on the spot. Therefore, the defendants by a decree of permanent prohibitory injunction were sought to be restrained from causing interference with the plaintiffs' right of using the said approach to their respective fields through the abovesaid fields of the defendants.

5. The defendants when put to notice, by contesting the suit, in preliminary, have raised various objections qua the maintainability, valuation and jurisdiction of the trial Court etc. On merits, while claiming that the land belonging to the plaintiffs was barren (banjar) up to 1980, they never used the edges of the fields of the defendants to have access to their land for carrying out agricultural pursuits. While disputing the sale-deeds and ownership as well as possession of the plaintiffs over the land in question, it has been claimed that the sale thereof being violative of the provisions of Registration Act, is *void abinitio* and as such the land in question should vest in the State of H.P. It is denied that there exists a path over their field bearing Kh. Nos. 697, 774 or 775. Points A to B of the *Tatima,* allegedly prepared by the Patwari, are against the true facts of the case being prepared in connivance with the plaintiffs. No such path is stated to be shown in *Shajra* of Up-Mohal Powari. The indication drawn in the form of a line in the *Shajra* infact is local water channel and not a path. The plaintiffs allegedly manipulated and created a false tatima which is contrary to the possession reflected in the *Shajra* on the spot. The complaint under Section 133 Cr.P.C. filed by the plaintiffs against one Liaq Ram and the defendants allegedly stands dismissed by the Sub Divisional Magistrate, Kalpa. Another complaint in which the plaintiffs have claimed that the disputed path is the only path available for them to have access to their fields is stated to be pending before the SDM, Kalpa. The plaintiffs, who allegedly are claiming the path illegally through the fields of the defendants, are influential persons and they intend to carve out a new path which is not legally permissible. It is denied that the defendants had blocked the path in question in the year 1992 as no such path is in existence on the spot.

6. On such pleadings of the parties, the following issues were framed:

"1. Whether the plaintiffs have customary right of easement to pass through the disputed land as alleged? OPP.

2. Whether the defendants have raised temporary structure over the disputed path and thereby blocked the same as alleged? OPP.

3. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction as prayed for? OPP.

4. Whether the plaintiffs are entitled for mandatory injunction? OPP.

5. Whether the plaintiffs have no locus-standi to file the present suit? OPD.

6. Whether the suit does not disclose any cause of action and therefore, liable to be dismissed? OPD.

7. Whether the suit has not been properly valued for the purpose of Court fees and jurisdiction? OPD.

8. If issue No. 7 is proved whether this Court has no pecuniary jurisdiction to try the present suit? OPD.

9. Whether the suit is not competent in view of preliminary objection No. 7? OPD.

10. Whether the suit is barred by limitation? OPD.

11. Whether the suit is bad for mis-joinder of the parties? OPD.

12. Relief."

7. Now, if coming to the evidence, comprising oral as well as documentary, the copy of ***'Wazib-ul-Arj'*** is Ext. PB. The relevant extract of the same reads as follows:

"न. फसल काश्त करते समय हल के बैल खड़ी फसल के होते हुअ छीका या रस्सी मुँह में लगा कर एक दूसरे को मलकियत से बिना रोके टोके ले जा सकते है /

प. एक दूसरे की मर्जी से मनुषय के चलने के वास्ते जो काश्त करने से मादूम हो जाते है और फिर चलने से जारी हो जाते है, ऐसे रस्ते जाल में चलने की कोई रोक टोक नहीं है/"

8. The document Ext. PB, therefore makes it crystal clear that as per the customs prevalent in the area, edges of the fields of each other in the area are being used by the local residents to have access to their fields along with bullocks, cattle and for carrying agricultural implements for ploughing/cultivating their fields. The only precaution need to be taken is to tie the mouth of the cattle with a cover made of rope or with rope. The another material piece of evidence is the Tatima Ext. PW-7/A, the same has been proved by PW-7 Kishan Singh, the then Patwari, Patwar Circle Tangling. The Tatima has been prepared by this witness after spot inspection The path in existence is alongside the fields bearing Kh. Nos. 774, 775 and the same is marked A to B in red dotted line. This path, according to him is also in existence over the field bearing Kh. No. 696 and 697. There is nothing to disbelieve the statement of PW-7 Patwari Kishan Singh.

9. The position, as reflected in Tatima Ext. PW-7/A, finds support from the oral evidence as has come on record by way of the testimony of PW-1 Gian Singh (plaintiff No. 4), who has categorically stated that the path shown in the tatima Ext. PW-7/A crosses through the edges of the fields of defendants and that as per the customs prevalent in the area they are using the same to have access to their fields since time immemorial. As per his further version, defendants did not object to the use of the edges of their fields by the plaintiffs to have access to their fields till June, 1992. It is, however, in the month of June 1992, the defendants blocked the passage in question by way of fencing and putting thorny bushes on the spot. The obstruction was removed by them consequent upon the interim order passed by the Civil Court, however, blocked again in violation of the said order. Not only this, but as per his further version a complaint under Section 133 Cr.P.C. was also filed before SDM, Kalpa.

10. Another material witness examined by the plaintiffs is Balak Ram PW-2, the then Field Kanungo, Kalpa. According to him, Mohal Powari where the land of the parties situates was under his jurisdiction and in the year 1988 when he went to the spot to demarcate the land, he used the path in question. When again he went to the spot to demarcate the land of one Surinder in the year 1990, this path was used by him. In the year 1991, when he evicted one Charan Sukh, he used the said path at that time also. When in the year 1992, he visited the spot as per the direction of the Sub Divisional Magistrate, the path was found to have been blocked by the defendants. The path, according to him, exists along side the edges of water channel. The defendants had blocked the path by putting barbed wire and thorny bushes. Prior to 1992, this path, according to him was open. The suggestion given to him that the path in question as a whole exists on the edges of the water channel has been admitted being correct. It is, thus seen that by putting such suggestion to this witness, the defendants have themselves admitted the existence of path on the spot.

11. PW-3 Kundan Sain and PW-4 Sahi Ram, both have deposed qua the existence of the path in question. According to them, the same was being used by the plaintiffs for taking their cattle to their fields and that no alternative path is in existence for being used by them. They have also deposed about the path blocked by the defendants in the year 1992 by putting barbed wire, thorny bushes and raising construction of kiosk (kutcha dhara). PW-5 Bhagi Dass also belongs to the same village and as per his version also, the path in dispute is the only path for the plaintiffs to have access to their fields. He has also deposed about the customs in the area to use the fields of each other to have access to their land for performing agricultural pursuits through the edges of the fields of each other. Similar is the version of PW-6 Kuljan Tenzin as according to him being the employee of Gian Singh (PW-1), during the period from 1974 to 1980, he used the path in question to have access to the fields of said Sh. Gian Singh for performing

agricultural pursuits and to take cattle for ploughing the fields. As per his version also, no other path is in existence to have access to the fields of the plaintiffs.

12. The another material witness is PW-8 Vishwa Karma Negi, the then Tehsildar, Kalpa. He remained posted as such during the period from 1990 to 1994. According to him, the land of the parties situate in Mousima Talingpi and he had visited the same many a times for different purposes. On one occasion, he went there to demarcate the land and at that time he had seen the disputed path in existence on the spot. The path, according to him starts from main road Shong Tong-Purvani, Mauza Balinga and reaches at the orchard of Amar Singh, Subhash and Gian Singh etc. The path runs partly along side the kuhl and partly through the land of defendants.

13. On the other hand, Shiv Ram, defendant No. 4 has stepped into the witness-box as DW-1 and examined Narpur DW-2 and Chet Ram DW-3. No doubt, they all have stated in one voice that no path is in existence over the land of the defendants, however, in view of the overwhelming documentary as well as oral evidence produced by the plaintiffs and discussed supra belies their testimony. They, as such, have deposed falsely to defeat the just and legitimate claim of the plaintiffs to have access to their fields through the fields belonging to the defendants.

14. The contentions raised on behalf of the defendants that the plaintiffs have neither pleaded nor proved the existence of any customary right to use path in question are without any substance for the reason that the ***'Wazib-ul-Arj'*** Ext. PB amply demonstrate that the custom of using mainds of fields of other right holders is long standing and right holders had been using the mainds of the fields of each other to have access to their respective fields to perform agricultural pursuits. The plaintiffs have sufficiently proved so in the plaint. In order to prove the same, plaintiff No. 4 has himself stepped into the witness-box as PW-1. The remaining plaintiffs' witnesses, whose testimony is discussed in detail in para supra have also supported the plaintiffs case qua existence of customary rights of right holders to use mainds of the fields of each other to have access to their respective fields. The plaintiffs, as such, have established the existence of customary right on record and as such, learned lower appellate Court has not committed any illegality or irregularity while decreeing the suit to the limited extent of restraining the defendants from causing any interference in the rights of the plaintiffs to use the edges of the fields of the defendants bearing Kh. Nos. 696, 697, 774 and 775 to have access to their fields situated in Up-Mohal Powari Khas, Tehsil Kalpa, District Kinnaur, of course, for performing agricultural pursuits alone. The defendants by way of a direction mandatory in nature, have also been rightly directed to remove the barbed wire and thorny bushes put there to block the path in question and also to remove the construction of kiosk raised on the spot. The plaintiffs, in modification of the judgment and decree passed by learned trial Court have however been rightly not held entitled to claim path from middle of the fields of the defendants.

15. As a matter of fact, the path in question is not a general or public path and rather exists partly along side water channel whereas partly through the mainds of the fields of the defendants. The same is meant to have access by the plaintiffs to their adjoining fields for the purpose of performing agricultural pursuits. The plaintiffs have satisfactorily proved this part of their case. This path may have not been entered in the revenue record and in *girdawris* being not general path. As already said, the path in dispute is not a general or public path and rather being used for limited purpose i.e. to have access to the fields to perform agricultural pursuits and as such this path is not permanent and rather temporary being not entered in the revenue record and used by the villagers with mutual understanding and as an arrangement personal to them. Support in this regard can be drawn from the judgment of this Court in ***Smt. Kamla Devi vs. Uttam Singh, RSA No. 241 of 2004 decided on 20.6.2015***. The present, as such, is not a case where it can be said that on account of mis-appreciation and misreading of the evidence, the findings arrived at by the trial Court and affirmed by the first appellate Court are perverse and dehors the evidence. The substantial question of law as arises for determination in this appeal is, therefore, answered accordingly.

16. In view of what has been said hereinabove, there is no force in this appeal and the same is accordingly dismissed. No orders as to costs.

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

Smt. Hazar Mani ……Appellant.
Versus
The Secretary, H.P. State Electricity Board & another …….Respondents.

FAO No. 404 of 2012.
Decided on: 10.04.2017.

Employees Compensation Act, 1923- Section 4- S was employed as additional foreman-cum-driver with H.P. Power Corporation Limited – he died while discharging his duties- Commissioner assessed the compensation as Rs.2,71,120/- and awarded the same without interest- aggrieved from the award, present appeal has been filed- held that where an employer is in default in paying due compensation, the Commissioner shall award the interest @ 12% per annum or higher – the interest of 12% per annum is statutory and has to be awarded along with compensation- appeal allowed- interest awarded @ 12% per annum from a date after one month when the same fell due. (Para- 2 to 5)

For the appellant: Mr. H.S.Rawat, Advocate.
For the respondents: Mr. Satyen Vaidya Sr. Advocate with Mr. Vivek Sharma, Advocate, for respondent No.1.
Mr. Y.S. Thakur, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

In this appeal the impugned award dated 28.8.2012 passed by learned Commissioner, Employees' Compensation, Rohru, District Shimla, in case RBT No. 8-2 of 2011 is under challenge to the limited extent that on the compensation awarded by learned Commissioner, the statutory interest on the default of the employer to pay the compensation due to the appellant-claimant within one month when it fell due has not been awarded. Being so, on the compensation i.e. Rs. 2,71,120/- awarded to the appellant-claimant by learned Commissioner below, interest @ 12% per annum has been sought to be awarded.

2. One Sh. Saina Ram, husband of the appellant-claimant Hazar Mani was employed as Additional Foreman-cum- Driver in Sawra Kuddu Hydro Electric Project, H.P. Power Corporation Limited (HCL), Rohru on secondment basis. He died on 17.12.2008. In a claim petition filed under Section 22 of the Employees Compensation Act, 1923 (hereinafter referred to as he Act), learned Commissioner below while holding that said Sh. Saina Ram was employee of the respondents and died during the course of his employment, has assessed the compensation to the tune of Rs. 2,71,120/- and awarded the same to the appellant-claimant, however, without statutory interest @ 12% as the employer has admittedly failed to pay the compensation to the appellant-claimant within one month from the date when the same fell due to her.

3. Section 4-A (3)(a) of the Act provides that where any employer is in default in paying the compensation due within one month when the same fell due, the Commissioner shall in addition to the compensation amount due to the claimant shall order to pay the same together with simple interest @ 12% per annum or at such higher rate not exceeding the maximum of the lending rates of the scheduled bank.

4. It is seen that the interest @ 12% per annum is statutory and in a case where the employer fails to pay the compensation due to the claimant within one month from the date when the same fell due, the compensation payable to the claimant should be awarded together with interest @ 12% per annum from the date i.e. one month when the same fell due to the claimant.

5. Learned counsel representing the respondents has failed to persuade this Court to concur with that part of the award which provides for award of interest on happening of an event i.e. the failure of the respondents to pay the awarded amount within one month from the date of the impugned award. Therefore, instead of awarding the interest @ 12% per annum on happening of an event i.e. failure of the respondents to pay the awarded amount to the appellant-claimant within one month from the date of award, the compensation should have been awarded to her together with simple interest @ 12% per annum from a date after one month when the same had fallen due to her. Admittedly, the compensation due to the appellant-claimant under the Act has not been paid to her within one month when the same fell due to her. Therefore, this appeal is allowed and consequently the compensation i.e. 2,71,120/- awarded by the learned Commissioner below to the appellant-claimant shall carry simple interest @ 12% per annum from a date after one month when the same fell due to her. The impugned order shall stand modified to this limited extent.

6. The appeal is accordingly disposed of in the above terms, so also the pending application(s), if any.

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

HP State Civil Supplies Corporation Ltd. ....Petitioner
Versus
Presiding Judge and another ....Respondents

CWP No. 2417 of 2009
Decided on : April 10, 2017

Industrial Disputes Act, 1947- Section 25- The workman was employed as a helper on daily wage basis for a period of one month – the employment continued and the workman completed 240 days each year during the period of employment – his services were terminated by an oral order without assigning any reason- a reference was made and the Labour Court ordered the reinstatement of the workman with seniority and continuity of service – however, he was not held entitled for the back wages– aggrieved from the award, present writ petition has been filed- held that workman was employed on 12.12.1995 – an office order regarding the appointment being co terminus with the tenure of chairman was issued on 5.2.1997 –the order issued in 1997 cannot govern the appointment made in the year 1995 - workman had completed more than 240 days in a calendar year and a notice under Section 25-F was required to be issued prior to the termination of his services – no notice was issued – the award was rightly passed – High Court has limited jurisdiction to re-appreciate the facts while deciding writ petition - no error of law was pointed out - writ petition dismissed.(Para-8 to 11)

Case referred:

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

For the petitioner : Mr. Navlesh Verma, Advocate.
For the respondents : Nemo for respondent No.1.
Mr. P.P. Chauhan, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of instant petition filed under Article 226 of the Constitution of India, petitioner-Corporation ('Corporation', hereafter) has laid challenge to the award dated 24.3.2009, passed by the learned Industrial Tribunal-cum-Labour Court, Shimla ('Tribunal', for short) in Ref. No. 17 of 2002, whereby reference has been answered against the Corporation.

2. Briefly stated facts, as emerge from the record are that respondent No.2-workman ('workman', hereafter) claimed that he was appointed as a Helper with the Corporation with effect from 23.12.1995. Being aggrieved with his termination by the Corporation, workman served a demand notice under Section 2A of the Industrial Disputes Act (in short, 'Act') before the Labour Officer-cum-Conciliation Officer, Shimla but, since there was no amicable settlement of dispute inter se parties, matter was referred under Section 10 of the Act to the Tribunal below by the appropriate Government, for adjudication of following term of reference:

> "Whether the termination of the services of Shri Puran Dutt s/o Shri Bala Ram w.e.f. 5.2.1997 by the Managing Director, HP Civil Supplies Corporation Ltd. Shimla without serving notice and without complying section 25-F of the Industrial Disputes Act, 1947 is proper and justified? If not, what salary, seniority, service benefits and amount of compensation, the above workman is entitled to?"

3. Workman, by way of filing statement of claim before the Tribunal below stated that he was appointed as a Helper on daily wage basis with effect from 23.12.1995 for one month in the headquarters and then he continued with further extension and had completed 240 days in each calendar year prior to the alleged termination. He further stated that he was discharging his duties to the best of his abilities and entire satisfaction of his superiors. Workman further claimed that on 5.2.1997, his services were terminated by oral order without assigning any reason, which action of the Corporation was arbitrary, malafide and in colourable exercise of power. By way of aforesaid statement of claim, workman further claimed that the action of Corporation in resorting to offering him contract appointment instead of appointing him on ad hoc basis and subsequently on regular basis on a regular post, is/was in sheer violation of Rules, Regulations and Standing Orders as well as provisions contained in Articles 14 and 16 of the Constitution of India. Workman further claimed that his services were terminated solely with a view to prevent him from completing 240 days in each calendar year so that he may not become eligible to be regularized with the afflux of time. Workman further claimed that since while terminating his services, no speaking order was passed, same can not be allowed to be sustained being totally contrary to the provisions of law as contained in the Act. In the aforesaid background, workman claimed that since his termination was against the provisions of Sections 25-F, 25-G and 35-H of the Act, Corporation was estopped on account of its own act, conduct, deed and omission from issuing impugned order and Corporation was bound to retain his services till regularization in accordance with law, against the vacant post, on which he was already working.

4. Corporation, by way of filing detailed reply to the statement of claim, resisted aforesaid claim of the workman by raising preliminary objections that workman was not a 'workman' and as such dispute, if any, before the Tribunal below was not maintainable. However, on merits, Corporation admitted that the workman had completed 240 days in calendar year and he was appointed on daily wage basis on 12.12.1995, vide order dated 5.2.1997, after obtaining ex post facto sanction in the case, on co-terminus basis with the appointment of Chairman and as such provisions of Section 25-F are not applicable as the appointment on daily wages was specifically for the limited period i.e. upto the tenure of the then Chairman of the Corporation and after the resignation of the Chairman, on 24.1.1998, services of workman automatically ceased as per office order dated 5.2.1997. Corporation further contended before the learned Tribunal below that since the workman was initially appointed for a specific period with the tenure of the then

Chairman, action of the Corporation in not continuing with the services of workman after expiry of the tenure of the then Chairman is/was in accordance with law and there is no requirement for the Corporation to comply provisions of the Act. Corporation specifically denied that the workman was appointed on regular basis and he was entitled to any notice under Section 25-F of the Act. Corporation specifically placing reliance upon order dated 5.2.1997, whereby services of workman were made co-terminus with the office of Chairman, claimed that there is no violation of any provisions of the Act and prayed for dismissal of the claim petition having been filed by the workman. Learned Tribunal below, on the basis of pleadings, framed following issues:

> "1. Whether the services of the petitioner were illegally terminated w.e.f. 5.2.1997 without complying the provisions of section 25-F of the ID Act, 1947? If so, its effect? OPP
>
> 2. If issue no. 1 is proved in affirmative, whether the petitioner is entitled for relief claimed? OPP
>
> 3. Whether the petition is not maintainable in the present form? OPR
>
> 4. Relief."

5. However, subsequently, vide award dated 24.3.2009, learned Tribunal below accepted the claim petition of the workman and answered the reference in the affirmative, against the Corporation. Vide aforesaid award, learned Tribunal below ordered reinstatement of the workman in service forthwith, with seniority and continuity in service, however, workman was not held entitled for back-wages. In the aforesaid background Corporation approached this Court, by way of instant petition.

6. Mr. Navlesh Verma, learned counsel representing the Corporation vehemently argued that impugned award is not sustainable in the eyes of law as the same is contrary to the provisions of law, as such, same deserves to be set aside. While referring to the impugned award passed by learned Tribunal below, Mr. Verma, strenuously argued that provisions of Section 25-F, 25-G and 35-H of the Act could not be made applicable in the present case as the Corporation does not fall under the category of 'industrial establishment' or 'industry', as such on this very ground, impugned award passed by the learned Tribunal below deserves to be set aside. Mr. Verma, contended further that the learned Tribunal below while adjudicating reference made to it, failed to appreciate that services of the workman automatically ceased strictly in terms of appointment order dated 5.2.1997, issued by it and as such there was no occasion for the Corporation to comply with the provisions contained in the Act. Learned counsel representing the Corporation, while placing reliance on order dated 5.2.1997 (Ext. PX), forcefully contended that learned Tribunal below miserably failed to appreciate that workman was engaged as daily wager peon on co-terminus basis and his services were to be dispensed with automatically with the tenure of the Chairman of the Corporation. Learned counsel representing the Corporation further contended that the learned Tribunal below erred in coming to the conclusion that condition of appointment being co-terminus with the tenure of Chairman of the Corporation, was not incorporated in the appointment letter of the workman in 1995 and as such condition contained in the letter, which is of subsequent date, shows malafides on the part of the Corporation, which amounts to unfair labour practice. To substantiate his aforesaid argument, Mr. Verma argued that the learned Tribunal below failed to appreciate that once the workman had entered into service contract with the Corporation, and he was aware of the fact that his services would be terminated with the tenure of the Chairman of the Corporation, he could not be allowed to raise aforesaid issue at the time of adjudication of the reference by the learned Tribunal below. While concluding his arguments, learned counsel representing the Corporation contended that learned Tribunal below erred in concluding that the petitioner failed to comply with the mandatory provisions of law under Section 25 of the Act, while deciding issue No.1, without appreciating provisions contained in aforesaid provisions of law, because, admittedly, Section 25 of the Act is/was not applicable to the workman since he was appointed purely on co-terminus basis and his services were bound to be terminated with the tenure of Chairman as per service contact. In the aforesaid background, learned counsel representing the Corporation prayed that impugned award passed by learned Tribunal below may be quashed and set aside.

7. Mr. P.P. Chauhan, learned counsel representing the workman supported the impugned award passed by the learned Tribunal below. Mr. Chauhan, while referring to the impugned award passed by learned Tribunal below, strenuously argued that there is no illegality or infirmity in the same as such there is no scope of interference by this Court, especially in the writ proceedings, where findings of fact have been recorded by the Court below that too on the appreciation of the evidence adduced before it. While specifically inviting attention of this Court to impugned award passed by learned Tribunal below, Mr. Chauhan, stated that the learned Tribunal below has specifically returned its findings qua terms of reference as sent to it by the appropriate Government, for adjudication to demonstrate that the learned Tribunal below, while adjudicating the claim of the workman, Mr. Chauhan invited attention of this Court to the terms of reference made to the learned Tribunal below by the appropriate Government, for adjudication, to demonstrate that learned Tribunal below has rightly answered the reference, that too on the basis of evidence adduced on record by respective parties and by no stretch of imagination, it can be said that the learned Tribunal below exceeded its jurisdiction while adjudicating claim referred to it. Mr. Chauhan, further contended that it is admitted case of the parties that the workman was appointed with the Corporation with effect from 12.12.1995 and as such he continued till his illegal termination on 5.2.1997, meaning thereby that the workman before his illegal termination had completed 240 days in preceding calendar year and as such there was a requirement of serving him with notice as envisaged under Section 25 of the Act. Apart from above, Mr. Chauhan, also invited attention of this Court to the award to suggest that question of jurisdiction, if any, of the learned Tribunal below to adjudicate the claim of the workman was never raised before the learned Tribunal below and as such same can not be allowed to be raised at this stage. Mr. Chauhan, further contended that only objection raised before the learned Tribunal below was that respondent No.2 was not a 'workman' but no evidence worth the name was led on record to prove that he was not a workman and as such learned Tribunal below rightly concluded that before terminating services of workman, Corporation ought to have issued notice as envisaged under Section 25-F of the Act. While concluding his arguments, Mr. Chauhan contended that since workman had completed 240 days in calendar year, prior to his termination, it was incumbent upon the Corporation to have served notice upon him under Section 25-F of the Act. He further contended that there is no illegality or infirmity in the impugned award passed by learned Tribunal below and same is based upon correct appreciation of evidence adduced on record by the respective parties and as such there is no scope of interference by this Court, especially while exercising writ jurisdiction. While refuting the submissions having been made by the learned counsel representing the Corporation, Mr. Chauhan, contended that points raised before this Court by the learned counsel representing the Corporation were never raised before the learned Tribunal below, and as such, present petition deserves to be dismissed. Mr. Chauhan further contended that no cogent and convincing evidence was led on record by the Corporation to prove its case within the ambit of the question posed to the learned Tribunal below by the appropriate Government as such there is no force in the contentions of the learned counsel representing the Corporation.

8. During the proceedings of the case, this Court had an occasion to peruse the pleadings as well as documents annexed there to, perusal whereof clearly suggests that the learned Tribunal below while exploring answer to the specific term of reference has dealt with each and every aspect of the matter meticulously and this Court sees no force, much less substantial, in the arguments having been advanced on behalf of the Corporation that evidence adduced on record by the respective parties has not been dealt in its right perspective. It is admitted case of the parties that the workman was appointed as Helper with the Corporation with effect from 12.12.1995 and as such he continued to work till 5.2.1997, when his services were allegedly terminated illegally, without resorting to the provisions of Industrial Disputes Act. Workman while making statement of claim before the learned Tribunal below specifically stated that he was appointed as a Helper with the Corporation with effect from 12.12.1995, for one month but his services were extended from time to time and as such he completed more than 240 days in each calendar year. Workman further stated before the learned Tribunal below that though he was discharging his duties to the best of his abilities and entire satisfaction of his

superiors, but on 5.2.1997, his services were terminated by an oral order without assigning any reason. In his cross-examination, workman admitted that he was engaged as daily wager with Shri Singhi Ram, the then Chairman of the Corporation. However, workman denied the suggestion put to him that appointment was co-terminus with the Chairman. Workman admitted office order dated 5.2.1997 but specifically denied that his appointment was co-terminus with the office of Chairman. On the other hand, Corporation examined one Shri Attar Singh, Assistant Divisional Manager who deposed before the learned Tribunal below that workman was engaged as daily wage basis with the then Chairman on 12.12.1995 on co-terminus basis and in this regard, proved appointment letter Ext. PX on record. Aforesaid officer while placing reliance upon Ext. PX specifically deposed before the learned Tribunal below that workman has no legal right to claim his reengagement with the Corporation. However, in his cross-examination, he admitted that workman was engaged in 1995 but office order dated 5.2.1997 was issued in 1997. Aforesaid witness feigned ignorance that why office order dated 5.2.1997 was issued in 1997 instead of 1995, when workman was initially engaged. He also stated that he does not know whether any office order was issued in 1995 when the workman was engaged and he also feigned ignorance whether staff is only provided when the Chairman is not a Minister.

9. Conjoint reading of evidence adduced on record by the respective parties proves beyond doubt that workman was initially appointed with the Corporation on 12.12.1995 and at that time no appointment letter was ever issued whereby his services were held to be co-terminus with the Chairman, rather careful perusal of office order dated 5.2.1997 (Ext. PX) clearly suggests that workman was appointed on daily wage basis with effect from 12.12.1995 but vide aforesaid letter, ex post facto sanction was obtained and his appointment was held to be co-terminus with the tenure of Chairman. Since it is admitted case of the parties that the office order Ext. PX was issued on 5.2.1997, condition contained in the same could not be made applicable to the appointment, which was admittedly made on 12.12.1995.

10. In nutshell, case of the workman before the learned Tribunal below is that since he had worked for more than 240 days, his termination without there being any notice and compensation as envisaged under Section 25-F of the Act, is illegal and as such he is entitled for protection of Section 25 of the Industrial Disputes Act. Careful perusal of documents available on record suggests that workman successfully proved on record that prior to his illegal termination, he had completed more than 240 days in calendar year and as such Corporation ought to have issued notice as per Section 25-F of the Act before terminating his service. Though, the Corporation by way of filing reply to the claim petition made an attempt to prove that workman was engaged as daily wager on co-terminus basis as Peon, whose services were required to be suspended with the Chairman of Corporation on his resignation but save and except communication dated 5.2.1997, there is no evidence worth the name led on record by the Corporation suggestive of the fact that before alleged termination of workman, workman had not completed 240 days in a calendar year. It stands proved on record that workman was engaged as daily wager peon in 1995 but condition if any, contained in office order Ext. PX, which is admittedly dated 5.2.1997 can not have any bearing upon the initial appointment of workman, who successfully proved on record that at the time of his illegal termination, he had completed more than 240 days in preceding calendar year. There is no explanation worth the name available on record by the Corporation that why letter of appointment, if any, to the workman was issued on 5.2.1997, incorporating therein condition that services of workman would be co-terminus with the Chairman. Similarly, there is no evidence available on record suggestive of the fact that condition of appointment of workman being co-terminus with the Chairman of the Corporation was incorporated in initial appointment of workman in 1995 as such, learned Tribunal below rightly came to the conclusion that mere issuance of appointment letter in the year 1997, suggests malafides on the part of the Corporation, which amounts to unfair labour practice, especially when workman successfully proved on record that he had been working as Peon on daily wage basis since 1995 without any interruption and completed 240 days in calendar year proceeding his termination. At the cost of repetition, it is stated that condition, if any contained in letter dated 5.2.1997 Ext. PX could not be made applicable in the case of workman, who was

admittedly appointed in 1995. There is no evidence available on record suggestive of the fact that prior to illegal retrenchment, workman had not completed 240 days in every calendar year preceding to his termination. This Court was not able to lay its hand to any document led on record by the Corporation save and except Ext. PX suggestive of the fact that workman had not completed 240 days in calendar year preceding to his termination, as such termination of workman without there being compliance of mandatory provisions of law as contained in Section 25 of the Act, can not be allowed to sustain, as such, was rightly set aside by the learned Tribunal below. Otherwise also, no reliance, if any, could be placed upon appointment letter dated 5.2.1997, as relied upon by the Corporation, because, condition of appointment being co-terminus as contained in aforesaid letter could not be imposed subsequently, especially when workman had worked for two years from 1995, without there being any condition as contained in the aforesaid letter.

11. Hence, this Court after carefully perusing impugned award, which is based upon correct appreciation of evidence adduced on record by the respective parties, has no hesitation to conclude that there is no illegality or infirmity in the same.

12. Another contention of the learned counsel representing the Corporation is that the learned Tribunal below had no jurisdiction to entertain the claim of the workman, also deserves to be rejected because, admittedly, pleadings as well as impugned award nowhere suggest that aforesaid point ever was raised before the learned Tribunal below and as such same can not be allowed to be raised at this stage, in writ proceedings, where legality of impugned award is under challenge. Learned Tribunal below in reference petition was only bound to answer specific term of reference referred to it. Term of reference, nowhere suggests that learned Tribunal below was required to decide with regard to its jurisdiction to decide the claim of workman, who successfully proved on record that he had completed 240 days in calendar year preceding his termination.

13. This Court, is in agreement with the arguments having been made by the learned counsel representing the workman that this Court has very limited jurisdiction to re-appreciate findings of fact returned by the learned Tribunal below, while exercising writ jurisdiction under Article 226 of the Constitution of India and it has a limited scope of appreciating findings of fact. In this regard, reliance is placed upon judgment passed in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.***

14. As far as judgment passed by the Hon'ble Apex Court in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.*** is concerned, there can not be any quarrel with the settled proposition of law that the Courts while examining correctness and genuineness of the Award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same can not be questioned in writ proceedings and writ court can not act as an appellate Court. Careful perusal of aforesaid judgment having been relied upon by the learned counsel representing the Management, clearly suggests that error of law which is apparent on the face of record, can be corrected by writ Court but not an error of fact, however, grave it may appear to be. Hon'ble Apex Court has further held in the aforesaid judgment that if finding of fact is based upon no evidence that would be recorded as error of law which can be corrected by a writ of certiorari. Hon'ble Apex Court has further held that in regard to findings of fact recorded by Tribunal, writ of certiorari can be issued, if it is shown that in recording said findings, tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings. It would be profitable to reproduce following paras of the judgment:

> "16. ....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior

> Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

15. In the instant case, learned counsel representing the Corporation was unable to point out any error of law committed by the Tribunal while allowing claim of the workman. Similarly, learned counsel representing the Corporation was unable to point out any illegality committed by the learned Tribunal below, while recording findings of fact, as such, this Court sees no perversity or illegality in the award passed by the learned Tribunal below.

16. Accordingly, the writ petition is dismissed. Impugned award passed by the learned Tribunal below is upheld. Pending applications are disposed of.

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

Smt. Loti ….Plaintiff-Appellant

Versus

Shri Balak Ram & Another ….Respondents-Defendants

Regular Second Appeal No.439 of 2008

Date of decision: 10.04.2017

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that K had executed a Will in her favour– defendant No.1 executed a sale deed in favour of defendant No.2 in order to deprive the plaintiff of her rightful property – mutation was wrongly attested in favour of the defendant on the basis of the forged will – defendant No.1 pleaded that K was his legally wedded wife and had executed a Will in her sound disposing state of mind – suit was dismissed by the Trial Court- an appeal was filed which was dismissed – held in second appeal thatversion of the plaintiff that K was unmarried was not proved – the version of the defendant that K was married to defendant

No.1 was duly proved – the Will of the plaintiff was shrouded in suspicious circumstances while the Will of the defendant was duly proved- the Courts had dealt with the matter in a proper manner- appeal dismissed.(Para-14 to 38)

Cases referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443.
Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529
Daulat Ram and Others vs. Sodha and Others, (2005)1 SCC 40

For the Appellant: Mr.Vivek Singh Thakur, Advocate.
For the Respondents: Mr.Rajnish K.Lall, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure is directed against the impugned judgment and decree dated 28.05.2008 passed by learned District Judge, Kullu in Civil Appeal No.27/07, affirming therein judgment and decree dated 10.7.2007, passed by learned Civil Judge(Junior Division), Manali in Civil Suit No.32/05, whereby suit for declaration having been filed by the appellant-plaintiff came to be dismissed.

2. Briefly stated facts, as emerged from the record, are that the plaintiff filed a suit seeking declaration to the effect that she has become owner in possession of land comprised in Khata/Katauni No.631/1045 bearing Khasra No.5224, measuring 5-0-0 bigha, situated in Phati Burua Kothi and Tehsil Manali, District Kullu as per Jamabandi for the year 1988-89 *(hereinafter referred to as the 'suit land')* on the basis of last and final Will dated 1.3.2002 executed by deceased Khekhi Devi. Plaintiff also prayed by way of aforesaid suit that Mutation No.3158, dated 29.6.2002, which has wrongly been attested and sanctioned in the name of defendants, may also be declared wrong, illegal, null and void, inoperative against the plaintiff and defendants be restrained from causing any sort of interference in peaceful ownership and possession of the plaintiff in the suit land. Plaintiff claimed that Smt.Kheki Devi daughter of Uttam Ram, who was unmarried, was owner in possession of the suit land and was her real sister. Plaintiff also claimed herself to be sole legal heir of Smt.Kheki Devi. As per plaintiff, Smt.Kheki Devi was residing at village Goshal Phati Burua Kothi, Tehsil Manali, District Kullu, at her parental house because she was unmarried uptill her death. The plaintiff alongwith her family members used to render services to Smt.Kheki Devi, who, inturn having pleased with the services rendered by the plaintiff and her family members, executed last Will dated 1.3.2002 bequeathing thereby suit land in favour of plaintiff. Plaintiff-appellant claimed that Smt.Kheki Devi, after executing Will dated 1.3.2002 in her favour, deposited the same with Registrar, Kullu vide document No.1 dated 1.3.2002. Plaintiff further averred that Kheki Devi died on 10.6.2002 at village Goshal and her last rites were performed by her. Plaintiff further claimed that defendant No.1 has sold the entire suit land to defendant No.2 in order to deprive her from the right which accrued to her after execution of Will in her favour by Smt.Kheki Devi and as such sale deed is mere paper entry and is not binding upon her. Plaintiff further claimed that since no possession was ever delivered to defendant No.2, sale deed being a mere paper entry cannot be looked into. Plaintiff further claimed that in terms of Will dated 1.3.2002 executed by deceased Kheki Devi, she has inherited the entire estate of deceased and has become owner in possession of the suit land. Plaintiff further alleged that defendant in the month of June, 2004 alongwith one Chattar Singh of village Goshal came to the plaintiff and asked her to leave the entire suit land because they have become owners of the suit land. Subsequently, on inquiry, it emerged that the defendant, in connivance with revenue officials, has got mutation No.3158 dated 29.6.2002 attested in his favour on the

basis of some forged and fictitious Will. Since, both the Patwari Halqua as well as the defendant refused to enter and admit the last and final Will of Kheki Devi, she was compelled to file the instant suit.

3. Both the defendants, by way of detailed separate written statements, raised various preliminary objections qua maintainability and competency of the suit, suit being bad for non-joinder of necessary parties, *locus standi*, plaintiff estopped by her acts and conduct to file the present suit and suit not being properly valued for the purpose of court fee and resisted the aforesaid claim of the plaintiff. Aforesaid defendants specifically stated that the plaintiff has not approached this Court with clean hands and concealed the material facts from the Court. On merits, defendant No.1 specifically stated in his written statement that deceased Kheki Devi was owner in possession of the suit land, however, he pleaded that Smt.Kheki before her marriage with him had acquired the suit land by way of Nautor and thereafter, solemnized marriage with him and she lived with him as his wife uptill her death. He also admitted that deceased Kheki was sister of plaintiff, but, denied that deceased Kheki was unmarried and the plaintiff was only legal heir of deceased Kheki. The aforesaid defendant No.1 specifically pleaded in his written statement that deceased Kheki Devi daughter of Uttam Chand, resident of village Goshal Phati Burua Kothi Manali, District Kullu, is his legally wedded wife as their marriage took place according to the local custom in the year 1977 and deceased Kheki was living with him at his house and he was looking after, maintaining and rendering all kinds of services to his wife during her life time, who in turn having been pleased with the services rendered by the defendant to her, executed her last Will on 8.6.2002 and Mutation No.3158, dated 29.6.2002 was rightly attested and sanctioned in his favour. Defendants further denied the assertion having been made by the plaintiff that Kheki being unmarried was residing at her parental house at village Goshal Phati Burua and plaintiff and her family members had rendered services to her, who, in turn, having been pleased with the services rendered by the plaintiff and her family members, executed Will dated 1.3.2002 in favour of plaintiff. Defendant No.1 also denied that the plaintiff, on the basis of Will dated 1.3.2002, became owner in possession of the suit land and claimed that alleged Will dated 1.3.2002 was managed and procured by the plaintiff by mis-representation and undue influence and on the basis of aforesaid Will dated 1.3.2002 the plaintiff is not entitled to inherit the suit land. Similarly, defendant though admitted that Smt.Kheki Devi died on 10.6.2002 but specifically denied that she died at village Goshal. Defendant No.1, while denying that the plaintiff is in possession of the suit land, has specifically pleaded that he had sold the suit land to defendant No.2 Chhatar Singh for a sale consideration of Rs.3,50,000/- vide sale deed No.329, dated 27.12.2003 and since then defendant No.2 is sole absolute owner of the suit land. Defendant No.2, in his separate written statement, has adopted the defence as taken by defendant No.1 and has also denied the execution of Will dated 1.3.2002 in favour of plaintiff by deceased Kheki. Defendant No.2 also pleaded that deceased Kheki has executed Will dated 8.6.2002 as her last Will in favour of her husband defendant No.1, in her sound disposing state of mind. He also supported the version put forth by defendant No.1 that after death of deceased Kheki Devi, defendant No.1 had performed her last rites and inherited the suit land qua which mutation No.3158 dated 29.6.2002 had been attested and sanctioned rightly. Apart from above, defendant No.2 also claimed himself to be bonafide purchaser of the suit land and claimed that he is owner in possession of the same because he had purchased the same from defendant No.1 for consideration of Rs.3,50,000/- vide sale deed No.379, dated 27.12.2003. In the aforesaid background, defendants sought dismissal of the suit having been filed by the plaintiffs.

4. On the pleadings of the parties, the learned trial Court framed the following issues:-

"1. Whether the plaintiff is owner-in-possession of suit land on the basis of Will dated 1.3.2002 alleged to have been executed by deceased Smt.Kheki Devi as alleged? OPP.

2. Whether Mutation No.3158 dated 29.6.2002 is wrong, illegal and void as alleged? OPP.

3. *Whether the plaintiff is entitled for consequential relief of injunction as prayed for? OPP.*
4. *Whether the suit of plaintiff is not maintainable in the present form? OPD.*
5. *Whether the suit of plaintiff is bad for non-joinder for necessary parties as alleged? OPD.*
6. *Whether the plaintiff is estopped from filing the present suit by her act and conduct? OPD.*
7. *Whether the suit of plaintiff is not properly valued for the purpose of court fee and jurisdiction? OPD.*
8. *Whether deceased Kheki Devi executed valid Will dated 8.6.2002 in favour of defendant No.1, if so, its effect? OPD-1*
9. *Whether defendant No.2 is bonafide purchaser for consideration of the suit land as alleged? OPD-2.*
10. *Relief".*

5. Subsequently, vide judgment and decree dated 10.7.2007, learned trial Court dismissed the aforesaid suit of the plaintiff.

6. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, appellant-plaintiff filed an appeal under Section 96 of the Code of Civil Procedure *(for short `CPC')* before the learned District Judge, Kullu, which came to be registered as Civil Appeal No.27/07, however, fact remains that appeal was dismissed, as a result of which judgment and decree passed by learned trial Court below came to be upheld. In the aforesaid background, appellant-plaintiff approached this Court in the instant proceedings praying therein for decreeing her suit after setting aside the judgment and decree passed by both the Courts below.

7. This Court, on 3.9.2008, admitted the instant appeal on the following substantial question of law:

"(1) Whether the ld.Courts below mis-read and mis-appreciated the bare provision of law regarding the due execution of the will dated 1.3.2002 and findings to the contrary are sustainable in the eyes of law or not?

2. Whether the document can be reliable even which is registered under the authority of registration and further the registered document can be discarded in the light of the unregistered document, even when registration and execution of the registered document has been proved?"

8. Mr.Vivek Singh Thakur, learned counsel representing the plaintiff, vehemently argued that the impugned judgments passed by the learned Courts below are not sustainable in the eyes of law as the same are not based upon proper appreciation of evidence and as such the same deserve to be quashed and set aside. Mr.Thakur, while specifically referring to the impugned judgment passed by first appellate Court, contended that bare perusal of the same suggests that learned Courts below have failed to appreciate the evidence in its right perspective as a result of which erroneous findings have come on record to the detriment of plaintiff, who successfully proved on record that the deceased Kheki Devi had executed Ex.PW-1/A, Will dated 1.3.2002 in her favour bequeathing thereby entire movable and immovable property in her favour. With a view to substantiate his aforesaid arguments, Mr.Thakur also invited the attention of this Court to the statements of plaintiff witnesses i.e. PW-1 and PW-2 as well as documentary evidence to demonstrate that plaintiff successfully proved on record that Will Ex.PW-1/A was duly executed by Smt.Kheki Devi in favour of the plaintiff and as such judgment and decree passed by the Courts below deserve to be quashed and set aside being contrary to the record available on the file. Mr.Thakur further contended that learned Courts below have specifically failed to return findings qua each issue separately as was incumbent upon them in terms of the provisions contained in Order 20 Rule 5 CPC, but, while referring to the issues framed by Courts

below, Mr.Thakur contended that bare perusal of the judgments passed by both the Courts below clearly suggest that none of the issues were discussed and decided separately by assigning cogent and convincing reasons as a result of which great prejudice has been caused to the plaintiff, who, by way of leading cogent and convincing evidence, successfully proved on record that she was the only legal heirs of Smt.Kheki Devi, who died unmarried.

9. Mr.Thakur further contended that both the Courts below have failed to take note of the fact that Will Ex.PW-1/A dated 1.3.2002 was registered document and its execution was duly proved in accordance with law by the plaintiff, but despite that learned Courts below placed undue reliance upon the other registered Will placed on record by defendants to defeat the genuine claim of the plaintiff. While specifically inviting the attention of this Court towards the statement given by defendant, Mr.Thakur contended that defendants specifically admitted before the Courts below that land in question was of deceased Kheki Devi and same was acquired by her before her marriage and as such presumption of truth is/was attached to execution of Will in favour of plaintiff-appellant, more particularly, when defendant No.1 claimed himself to be legally wedded husband of deceased Kheki Devi.

10. While concluding his arguments, Mr.Thakur contended that there is no evidence led on record by the defendants suggestive of the fact that he was legally wedded husband of Smt.Kheki Devi, who, as per plaintiff, was unmarried. Mr.Thakur, while specifically inviting the attention of this Court to Ex.DW-2/A i.e. Will executed by Kheki Devi in favour of defendant No.1, forcefully contended that learned Courts below failed to appreciate that the same is/was shrouded by suspicious circumstance because no mention, if any, has been made of date of earlier Will executed by Kheki Devi in favour of plaintiff, while making recitement, if any, with regard to withdrawal of earlier Will made in favour of plaintiff. Mr.Thakur also stated that age of the testator; namely; Kheki Devi has been shown to be 75 years at the time of execution of Will, whereas, age of the defendant as recorded at the time of recording his statement was 55 years and as such it could not be accepted by the Courts below that defendant No.1 was legally wedded husband of deceased Kheki Devi. In the aforesaid background, Mr.Thakur prayed that the suit having been filed by the plaintiff may be decreed after setting aside the judgment passed by both the Courts below.

11. Mr.Rajnish K.Lall, learned counsel appearing for the respondents, supported the impugned judgments passed by both the Courts below. Mr.Lall, while specifically inviting the attention of this Court to the impugned judgments passed by both the Courts below, strenuously argued that the same are based upon correct appreciation of evidence led on record by the respective parties and as such there is no occasion for this Court to interfere in the well reasoned findings of both the Courts below, especially when perusal of the same suggests that Courts below have dealt with each and every aspect of the matter very meticulously. While refuting the arguments having been made by Mr.Thakur, learned counsel representing the plaintiff, Mr.Lall invited the attention of this Court to the plaintiffs witnesses to demonstrate that none of plaintiff's witness was able to prove due execution of Will Ex.PW-1/A in favour of plaintiff. Mr.Lall, while specifically referring to the statement made by the plaintiff witnesses, stated that learned Courts below rightly concluded that Will Ex.PW-1/A was actually scribed at the behest of plaintiff. Mr.Lall further contended that none of the marginal witnesses as cited by the plaintiff could prove due execution of Will in favour of plaintiff. Mr.Lall specifically invited the attention of this Court to the statement of PW-3 Chhavinder Thakur i.e. Scribe of the Will to demonstrate that Will Ex.PW-1/A, allegedly executed by Kheki Devi in favour of plaintiff, was wholly doubtful and as such learned Courts below rightly came to the conclusion that Will Ex.PW-1/A is shrouded by suspicious circumstances. While referring to the evidence led on record by defendants, Mr.Lall contended that bare perusal of pleadings as well as evidence adduced on record by defendants clearly suggests that subsequent Will Ex.DW-2/A was executed by Smt.Kheki Devi in sound, disposing state of mind in favour of defendant No.1 bequeathing thereby her entire movable and immovable property in favour of defendant No.1.

12. While concluding his arguments, Mr.Lall contended that this Court has very limited jurisdiction to re-appreciate the evidence especially in view of the concurrent findings on the facts as well as on law recorded 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.**

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

14. Needless to say that law regarding nature and onus of the proof of the Will is by way of propounder and in that regard the manner, in which the evidence is required to be appreciated, has been duly prescribed in the judgment passed by the Hon'ble Apex Court in ***H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443***.

15. Guidelines framed in ***H.Venkatachala Iyengar*** case (*supra*) were further reiterated by Constitutional Bench of Hon'ble Apex Court in ***Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529.*** The Court held:

> *"4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, 1959 (S1) SCR 426 : 1959 AIR(SC) 443) and Rani Purniama Devi v. Khagendra Narayan Dev, 1962 (3) SCR 195 : 1962 AIR(SC) 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no. such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested.*
>
> *(Page-531)*

16. Though normally onus to prove the execution and validity of the Will lies upon the propounder but in case when it is alleged by the opposite party that Will is not genuine document, onus shifts on the person who alleges the Will to be forged, to prove the same.

17. In ***Daulat Ram and Others vs. Sodha and Others,*** (***2005)1 SCC 40,*** the Hon'ble Apex Court held:

> *"10. Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is*

required to be attested, as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so." (Page 43)

18. Since both the substantial questions of law, as reproduced hereinabove, are interlinked, they are taken up together for consideration.

19. This Court carefully examined the pleadings as well as evidence adduced on record by respective parties to explore the answer to the aforesaid substantial questions of law, perusal whereof nowhere suggests that there has been misreading and mis-appreciation of evidence led on record by the respective parties, rather, this Court has no hesitation to conclude that both the Courts below had dealt with each and every aspect of the matter meticulously and has assigned valid reasons in support of its findings. This Court sees no force much less substantial in the arguments having been made by learned counsel representing the plaintiff that both the Courts below have erred in concluding that Will Ex.PW-1/A is shrouded by suspicious circumstance. It clearly emerge from the pleadings as well as evidence, be it ocular or documentary, that there is no dispute, if any, with regard to the fact that deceased Smt.Kheki Devi was owner in possession of the suit land. Similarly, there is no dispute with regard to fact that the plaintiff is/was sister of deceased Smt.Kheki Devi and deceased Smt.Kheki Devi had passed away on 10.6.2002. As per plaintiff, Smt.Kheki Devi was unmarried and she before her death was residing at Goshal Phati Burwa with plaintiff and her family members. But, interestingly, there is no evidence led on record by the plaintiff suggestive of the fact that Smt.Kheki Devi was unmarried and she had been residing with the plaintiff at her native village Gushal till her death.

20. PW-1 Smt.Kalpna Sharma, Registration Clerk in the office of Registrar, Kullu, deposed before the Court that as per record brought by her, there is/was entry in Register No.3 qua depositing of Will in the office of Registrar, Kullu by Ms.Kheki Devi. She also stated that after the death of Ms.Kheki Devi, plaintiff Loti Devi applied for the Will and after unsealing the sealed parcel, copy of Will was given to Kheki Devi and copy of the same was kept in the record. She further stated that Will Ex.PW-1/A was given to plaintiff Loti Devi by the office of Registrar. She also stated that perusal of Will dated 1.3.2002 Ex.PW-1/A suggests that the same was scribed by Chhavinder Thakur, Advocate and the same was attested by attesting witnesses; namely; Hukam Ram and Mehar Singh.

21. Plaintiff herself appeared as PW-2 and deposed before the Court that her father was owner of the suit land and Kheki Devi was her sister. It has also come in her statement that Kheki Devi used to live with her during her life time and she executed Will Ex.PW-1/A bequeathing thereby whole property in her favour. She also stated that Will Ex.PW-1/A was deposited in the office of Registrar, Kullu and she was also taken by her sister. Aforesaid witness

also stated that after death of deceased Kheki Devi, her son performed her last rites and since then she is in possession of the suit land.

22. PW-3 Chhavinder Thakur, Advocate Scribe of the Will Ex.PW-1/A stated before the Court that Will Ex.PW-1/A was got scribed from him by Kheki Devi and he read-over the contents of the same to Kheki Devi, who, after admitting the same to be correct, appended her thumb impression. However, in his cross-examination, he admitted that he did not recognize Kheki Devi personally. But, interestingly, submissions having been made by the plaintiff witnesses suggest that he stated before the Court that at the time of making statement, Kheki Devi was also sitting in the Court room. But, perusal of statement having been made by PW-3 clearly suggests that aforesaid witness was examined by the Court on 10.1.2006, whereas it is undisputed that deceased Kheki Devi had died on 10.6.2002. Hence, admission having been made by PW-3 Chhavinder Thakur in his cross-examination that Kheki Devi was present in the Court at the time of his making statement completely falsify the claim of the plaintiff qua valid execution of Will dated 1.3.2002 Ex.PW-1/A by deceased Kheki Devi. Since Kheki Devi had expired on 10.6.2002, there was no occasion for the aforesaid PW-3 to see Kheki Devi on 10.1.2006, which certainly suggests that at the time of execution of alleged Will deceased Kheki Devi was not present, rather some other woman was produced before him.

23. Similarly, PW-4 Mehar Singh and PW-5 Hukam Ram, who are alleged attesting witnesses, also not supported the case of the plaintiff. If the statements having been made by the aforesaid marginal and attesting witnesses are examined and read in its entirety, these nowhere suggest that Will Ex.PW-1/A was got scribed by Kheki Devi from PW-3 Chhavinder Thakur, rather, it can easily be inferred that Will was got scribed by plaintiff Loti Devi. Both the aforesaid witnesses have categorically stated that they did not know Kheki Devi personally, rather, they were called by plaintiff Loti Devi to be witnesses of the Will Ex.PW-1/A. Aforesaid witnesses have also stated that they were informed by Loti Devi that Kheki Devi, her sister, was to execute Will in her favour and they put their signatures on the same by reposing faith on plaintiff Loti Devi.

24. Apart from above, perusal of the statements of plaintiff witnesses as referred hereinabove, nowhere suggests that they saw deceased Kheki Devi appending her thumb impression in their presence. None of these witnesses categorically stated that deceased Kheki Devi, after admitting the contents of the Will to be correct, appended her thumb impression in their presence and as such Courts below have rightly came to the conclusion that statements of PW-4 and PW-5 do not prove the due execution of Will dated 1.3.2002 Ex.PW-1/A.

25. Conjoint reading of aforesaid plaintiff witnesses nowhere suggests that plaintiff was successfully able to prove on record by leading cogent and convincing evidence that Will Ex.PW-1/A was duly executed by Smt.Kheki Devi bequeathing thereby movable and immovable property in favour of the plaintiff. Rather, this Court, after carefully examining the statements having been made by the plaintiff witnesses, has no hesitation to conclude that Ex.PW-1/A was scribed at the behest of plaintiff Loti Devi.

26. Apart from above, alleged marginal witness stated before the Court that they had come at the place of scribing of Will at the behest of plaintiff, meaning thereby learned trial Court below rightly concluded that plaintiff Loti Devi took active part in the preparation of Will. Learned counsel appearing for the plaintiff placed much reliance upon statement of PW-1 i.e. Smt.Kalpana Sharma, Registration Clerk to demonstrate that Will in question being registered could not be ignored by the Courts below, but his aforesaid arguments deserves outright rejection solely for the reasons that bare perusal of statement of PW-1 nowhere proves execution of Will, if any, by Smt.Kheki Devi. True, it is that PW-1 in her statement stated that there is/was entry with regard to depositing of Will in the office of Registrar by Kheki Devi, but as has been observed above, there is no convincing evidence suggestive of the fact that Will in question Ex.PW-1/A was actually executed by Smt.Kheki Devi in favour of plaintiff. Aforesaid witness though has stated that Will in question was deposited in the office of Registrar, Kullu by Kheki Devi, but she has nowhere stated that at the time of depositing of Will somebody identified Kheki Devi, who

allegedly deposited the Will in the office of Sub Registrar, Kullu. Since, this Court after carefully examining the version put forth by PW-3 Chhavinder Thakur, Scribe of the Will, has also come to the conclusion that execution of Will Ex.PW-1/A is wholly doubtful, especially in view the admission made by PW-3 in his cross-examination, which was made on 10.1.2006 that Smt.Kheki Devi was present in the Court at the time of making statement, no much reliance can be placed upon statement of PW-1, who otherwise referred to be as official witness.

27. Leaving everything aside, this Court was unable to find reference, if any, in the statement of aforesaid plaintiff witness with regard to marital status of Smt.Kheki Devi who, as per plaintiff was unmarried, during her life time. Since defendant No.1, by way of written statement, claimed himself to be legally wedded husband of deceased Smt.Kheki Devi, onus was definitely upon plaintiff to prove on record by leading cogent and convincing evidence that Kheki Devi was not legally wedded wife of defendant No.1. But, interestingly, none of the plaintiff witnesses stated anything with regard to marriage, if any, of Kheki Devi with defendant No.1. In this view of the matter, this Court sees that there was sufficient evidence on record that Will Ex.PW-1/A, dated 1.3.2002, allegedly executed by Smt.Kheki Devi in favour of plaintiff, was shrouded by suspicious circumstances and as such onus was upon the plaintiff being propounder of the Will to dispel such suspicious circumstances. But perusal of evidence led on record clearly suggests that plaintiff was not able to prove beyond reasonable doubt that Will Ex.PW-1/A was free from suspicion.

28. On the other hand, defendant No.1 successfully proved execution of Will dated 8.6.2002, Ex.DW-2/A executed by Kheki Devi in his favour bequeathing thereby her entire property in favour of defendant No.1.

29. DW-2 Gokul Chand, Scribe of the Will dated 8.6.2002 specifically stated that plaintiff Loti Devi is his grandmother in relation. He specifically stated that Will Ex.DW-2/A was scribed by him at the instance of Kheki Devi and he read-over the contents of the same to Kheki Devi, who, after admitting the contents of the Will to be correct, appended her thumb impression on the Will in the presence of witnesses. At the time of execution of aforesaid Will, mental position of Kheki Devi was well and Kheki Devi executed the Will in favour of her husband Balak Ram and witnesses put their signatures on the Will at the instance of Kheki Devi. If statements of aforesaid witness is read in its entirety, it also suggest that Kheki Devi was married to defendant No.1 in the year 1977 and since then they used to reside as husband and wife. He also stated that after death of Kheki Devi, her last rites were performed by defendant No.1 Balak Ram and plaintiff did not do anything. In his cross-examination DW-2 specifically denied that due to illness, Kheki Devi was not able to remember anything. But, interestingly, there is no suggestion, if any, put to this witness with regard to marital status of Kheki Devi, who, as per plaintiff, remained unmarried throughout her life, meaning thereby assertion put forth by plaintiff witness in examination-in-chief remained un-rebutted where he specifically stated that Kheki Devi was married with defendant No.1 and since then they used to reside as husband and wife.

30. DW-3 Chaman Lal, attesting witness of the Will dated 8.6.2002 Ex.DW-2/A, also corroborated the version put forth by DW-2 with regard to due execution of Will dated 8.6.2002 and stated that he was earlier Up-Pradhan and he recognized Kheki Devi, who was wife of Balak Ram. He also stated that Kheki Devi executed Will Ex.DW-2/A in favour of Balak Ram. He also stated that Will was scribed by DW-2 Gokul Chand at the instance of Kheki Devi, who, after admitting the contents of the same to be correct, appended her thumb impression upon the said Will. Similarly, there is nothing in the cross-examination of this witness from where it can be inferred that plaintiff was able to shatter the testimony of aforesaid witness, rather, careful perusal of statements having been made by DW-2 and DW-3 prove beyond reasonable doubt that Will Ex.DW-2/A was executed by Smt.Kheki Devi in favour of defendants.

31. Similarly, aforesaid witnesses clearly proved on record that Smt.Kheki Devi was legally wedded wife of defendant No.1 and they were married in the year 1977 and since then they had been residing together.

32. Defendant No.1 Balak Ram, while appearing as DW-1, also corroborated the version put forth by him in his written statement and specifically stated that he was married to deceased Kheki Devi in the year 1977 and since then they had been residing together. He also stated that deceased Kheki Devi executed Will Ex.DW-2/A in his favour. Close scrutiny of statement of DW-1 also clearly proves on record that marriage of Kheki Devi daughter of Uttam Chand was solemnized with defendant No.1 in the year 1977, according to the local custom and since then they had been residing at village Gushal. This Court also carefully examined the cross-examination, conducted on this witness, perusal whereof suggests that he has not stated anything contrary what he has deposed in his examination-in-chief. Similarly, this Court sees no suggestion, if any, with regard to marital status of defendant No.1 as well as Smt.Kheki Devi, meaning thereby that version put forth by DW-1, DW-2 and DW-3 with regard to marriage of Smt.Kheki Devi remained unrebuted and as such both the Courts below rightly came to the conclusion that Smt.Kheki Devi was legally wedded wife of defendant No.1.

33. Hence, after carefully examining the pleadings as well as evidence led on record, this Court has no hesitation to conclude that defendants have successfully proved on record that deceased Kheki Devi had executed Will dated 8.6.2002 Ex.DW-2/A, bequeathing her entire property in sound disposing state of mind in favour of defendant No.1. Since Will dated 8.6.2002 Ex.DW-2/A stands duly proved to be executed by deceased Kheki Devi in favour of defendant No.1 qua her property, there is no illegality, if any, can be found with the Mutation No.3158 dated 29.6.2002 because suit land was inherited by defendant No.1 Balak Ram on the basis of Will Ex.DW-2/A and he had become owner in possession of the suit land and as such there is no illegality, if any, of further sale made by him in favour of defendant No.2.

34. This Court, after perusing evidence led on record by the defendant, has no hesitation to conclude that defendant was able to prove on record that Will Ex.DW-2/A was duly executed by late Smt.Kheki Devi in his favour in sound disposing state of mind. At this juncture, it would be relevant to refer to the provisions of Section 63 of the Indian Succession Act, 1925:

> *"63. Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [12] [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 has received from the testator a personal acknowledgement of his signature or mark, or 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."*

"Section 68 of Indian Evidence Act, 1872"

> *"68 Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been*

registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

35. Perusal of aforesaid provision clearly suggests that for valid attestation of Will, it must be proved that Will was attested by at least two witnesses and each of these witnesses must either see the testator signing or affixing his mark on the Will or it shall be signed by some other person, in their presence, on the direction of testatrix. Similarly, these witnesses must receive from the testator a personal acknowledgement of his signature or mark or the signature of such other person. Apart from above, these witnesses must sign Will in the presence of the testator.

36. 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 appears to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case *supra***,** wherein the Court has held as under:

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

37. In view of detailed discussion made hereinabove, this Court is of the view that there is no illegality and infirmity in the judgment and decree passed by the Courts below, which are based upon proper appreciation of evidence, be it ocular or documentary, adduced on record. Similarly, this Court sees no reason to differ with the findings returned by the Courts below that the plaintiff has miserably failed to prove on record by leading cogent and convincing evidence that a valid will has been executed in her favour by Smt.Kheki Devi. Therefore, substantial questions of law are answered accordingly.

38. Consequently, in view of the facts and circumstances discussed hereinabove, this Court is of the view that there is no illegality and infirmity in the judgments passed by both the learned Courts below and as such the same do not warrant any interference by this Court, moreover, as has been discussed in detail hereinabove, appellant-plaintiff was not able to make out her case to persuade this Court that Will Ex.DW-2/A is fake and fictitious document procured by the defendant by undue influence. Similarly, this Court, after perusing the evidence led on record by the plaintiff, was unable to see any circumstance which could compel this Court to return the findings that Will Ex.DW-2/A is shrouded by suspicious circumstances. Hence present appeal fails and is dismissed, accordingly.

39. All the interim orders are vacated. All the miscellaneous applications are disposed of.

****

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

Sunil Dutt ....Petitioner
Versus
Mohan Lal ....Respondent

Cr. Revision No. 118 of 2016
Decided on: April 10, 2017

Negotiable Instruments Act, 1881- Section 138- Complainant handed over Rs.60,000/- to the accused and accused issued a cheque for the return of the amount- cheque was dishonoured – notice was issued but the amount was not paid – accused was tried and convicted by the Trial Court- an appeal was filed, which was partly allowed and the sentence was modified – held in revision that the power of revision can be exercised, when there is failure of justice or misuse of judicial mechanism or where procedure, sentence or order is not correct- issuance of cheque and signature on the same were admitted – advancing of money was also proved – the defence taken by the accused that cheque was issued as a security was not established – the accused was rightly convicted in these circumstances - revision dismissed.(Para-7 to 14)

Cases referred:

State of Kerala versus Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Jugesh Sehgal vs. Shamsheer Singh Gogi reported in 2009 (2) SLJ (SC) 1385

For the petitioner: Mr. B.C. Verma, Advocate.
For the respondent: Ms. Kulbhushan Khajuria, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant revision petition under Section 397 CrPC is directed against judgment dated 11.12.2015 passed by the Additional Sessions Judge (II) Shimla, camp at Rohru, in Criminal Appeal No. 6-S/10 of 2015, partly modifying the judgment dated 27.8.2015 passed by Additional Chief Judicial Magistrate, Rohru, Shimla in Criminal Case No. 243-3 of 2011, whereby the learned trial Court while holding present petitioner-accused (hereafter, 'accused') guilty of having committed offence under punishable under Section 138 of the Negotiable Instruments Act, ('Act', for short) sentenced him to undergo simple imprisonment for a period of six months and further to pay compensation of Rs. 80,000/- to the complainant.

2. Brief facts, as emerge from the record are that the respondent-complainant, (hereafter, 'complainant') filed a complaint under Section 138 of the Act in the court of Additional Chief Judicial Magistrate, Rohru stating therein that he was running a barber shop in the name of '4-in-one beauty parlour', near Meat Market, Rohru. On 1.9.2011, accused approached him and demanded Rs. 60,000/- as he was in dire need of money to run his mobile business. The complainant handed over Rs. 60,000/- in cash to the accused and accused agreed to return aforesaid amount within two months. In order to discharge aforesaid legal liability, accused issued a cheque bearing No. 995319 amounting to Rs. 60,000/- drawn on Punjab National Bank, Branch at Rohru. Accused at the time of handing over the cheque assured that he was having sufficient funds in his bank account and cheque would be encashed on presentation in the Bank. However, on presentation, same was dishonoured on account of 'insufficient funds' in the account of the accused. Accordingly, on 17.11.2011, complainant got issued a legal notice through registered A.D. to the accused, advising him to make payment within 15 days. Since

accused failed to pay the amount as demanded by way of legal notice, complainant was compelled to initiate proceedings under Section 138 of the Act, in the trial Court. Learned trial Court, on the basis of material adduced on record by the respective parties, held accused guilty of having committed offence punishable under Section 138 of the Act and accordingly, sentenced him to undergo simple imprisonment and to pay compensation, as described above.

3. Being aggrieved and dissatisfied with the aforesaid judgment of conviction, accused filed an appeal before the Additional Sessions Judge, (II), Shimla, camp at Rohru, which came to be registered as Civil Appeal No. 6-S/10 of 2015. Aforesaid appeal was dismissed by the first appellate Court, however, the amount of compensation was modified to Rs. 70,000/-. Hence, this petition by the accused praying for acquittal after setting aside the judgments passed by both the learned Courts below.

4. Mr. B.C. Verma, learned counsel representing the accused vehemently argued that the impugned judgments of conviction as recorded by the learned Courts below are not sustainable as the same are not based upon correct appreciation of evidence adduced on record by the respective parties and deserve to be set aside. Mr. Verma, while referring to the impugned judgments passed by the first appellate Court and trial Court, strenuously argued that a bare perusal of same suggests that the Courts below have failed to appreciate the evidence in its right perspective, as a result of which, erroneous findings have been recorded to the detriment of the accused, who successfully proved on record that no amount was payable to the complainant as claimed in the complaint filed under Section 138 of the Act. Mr. Verma while referring to the cross-examination conducted upon accused, forcefully contended that it is ample clear that cheque, if any, was issued as security and not towards any lawful discharge of his liability as claimed by the complainant. In the aforesaid background, Mr. Verma sought acquittal of the accused, after setting aside the judgments of conviction and compensation recorded by the Courts below.

5. Mr. Kulbhushan Khajuria, learned counsel representing the complainant, supported the judgments passed by both the learned Courts below. While refuting aforesaid contentions having been raised by the learned counsel representing the accused, Mr. Khajuria invited attention of this Court to the findings recorded by the Courts below to demonstrate that each and every aspect of the matter has been dealt with meticulously by the Courts below and there is no scope of interference by this Court, especially in view of concurrent findings of facts and law recorded by the Courts below. Mr. Khajuria, also invited attention of this Court to the statement made on record by the accused under Section 313 CrPC, wherein he has admitted his signatures as well as issuance of cheque. While concluding his arguments, Mr. Khajuria also reminded this Court of its limited jurisdiction under Section 397 as far as re-appreciation of evidence is concerned. He 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. I have heard learned counsel representing the parties and have carefully gone through the record made available.

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 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.

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 Versus Krishnaveni and another*****, (1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality or sentence or order. The relevant para of the judgment is reproduced as under:-

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

9. During proceedings of the case, this Court had occasion to peruse the pleadings as well as entire record of the Court below, perusal whereof clearly suggests that there is no mis-appreciation and misconstruction of evidence by the courts below, as alleged by the learned counsel representing the accused, rather, close scrutiny of evidence available on record clearly suggests that both the learned Courts below have dealt with each and every aspect of the matter meticulously and have rightly held accused guilty of having committed offences punishable under Section 138 of the Act.

10. After carefully examining the statement having been made by the accused under Section 313 CrPC before the learned trial Court, there can not be any dispute, if any, with regard to the issuance of cheque as well as signatures of accused on the same, because, he himself stated before the Court that he had to pay Rs. 25,000/- to the complainant, which he had paid. Though he admitted his signatures on the cheque but denied that he had issued any cheque dated 3.11.2011 amounting to Rs. 60,000/- in favour of the complainant to discharge his legal liability, rather, his defence simpliciter is that aforesaid cheque was unsigned and was paid as security towards amount of Rs. 25,000/-, which he had taken from the complainant. On the other hand, complainant namely Shri Mohan Lal with a view to prove the averments made in the complaint, examined himself as CW-1 and also tendered his evidence by way of affidavit i.e. Ext. CW-2/A. Aforesaid witness categorically stated that he had advanced Rs. 60,000/- to the accused on his asking. Accused had re-assured that amount would be returned within stipulated time. He further stated that accused issued cheque amounting to Rs. 60,000/- in his favour but the same was dishonoured on presentation to the Bank, on account of 'insufficient funds'.

11. This Court carefully perused the cross-examination conducted on this witness, perusal whereof nowhere suggests that defence was able to extract anything contrary to what was stated in the examination in chief. Much emphasis was laid on the answer given by the complainant to the suggestion put by the defence that blank cheque was issued but even to that

suggestion, complainant replied in negative. Hence, this Court sees no force in the averments as well as substance in the arguments having been made by the learned counsel representing the accused that there is admission on the part of complainant with regard to issuance of blank cheque in his favour. Apart from above oral evidence, accused also placed on record cheque Ext. CW-2/A, dishonouring memo Ext. CW-2/C, copy of legal notice Ext. CW-2/D, and postal receipt, Ext. CW-2/E, perusal whereof clearly suggest that cheque in question was presented to the Bank for encashment but the same was dishonoured on account of, 'insufficient funds'. Similarly, perusal of Exts. CW-1/D and CW-1/E clearly suggests that after dishonour of cheque, legal notice was issued to the accused, to make payment within 15 days.

12. After carefully examining the oral as well as documentary evidence as discussed herein above, this Court has no hesitation to conclude that complainant successfully proved on record ingredients/requirements of Section 138 of the Act, required under law for proving his case. Though the learned counsel representing the accused vehemently argued that the learned Courts below failed to take note of the fact that cheque in question was issued as a security and not towards lawful discharge of the liability towards complainant but there is no evidence worth the name available on record suggestive of the fact that cheque in question was ever issued as security, rather own admission of accused in his statement recorded under Section 313 CrPC, proves beyond doubt that cheque in question was issued towards discharge of lawful liability.

13. Perusal of judgment of the learned trial Court suggests that while holding accused guilty of having committed offence punishable under Section 138 of the Act, it has rightly placed reliance upon judgment passed by Apex Court in **Jugesh Sehgal** vs. **Shamsheer Singh Gogi** reported in 2009 (2) SLJ (SC) 1385, wherein the Apex Court has laid down certain factors, which are to be weighed by the Court while ascertaining whether accused is guilty of having committed offence punishable under Section 138 of the Act or not.

14. In the instant case, though the accused has taken defence that cheque in question was issued as a security but as has been stated above, there is nothing on record suggestive of the fact that cheque was ever issued as security. Similarly, accused has not led any evidence to demonstrate that he had not issued any cheque for the discharge of his lawful liability and as such learned Courts below rightly came to the conclusion that presumption in the instant case is required to be held in favour of the complainant under Section 118-A of the Act that cheque in question was issued by the accused to the complainant for discharge of his lawful liability.

15. After bestowing my thoughtful consideration to the material on record, I see no reason to interfere in the well reasoned judgments passed by the learned Courts below.

16. In view of above, the present revision petition is dismissed. Judgments passed by the trial court and appellate Court are upheld. Pending applications, if any are disposed of. Bail bonds, if any, furnished by the accused are cancelled.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Balbir Singh …Petitioner

Versus

State of H.P. and others …Respondents.

Review Petition No. 47 of 2016.
Judgment reserved on: 28.3.2017
Date of Decision : 11 April, 2017.

Code of Civil Procedure, 1908- Order 47 Rule 1- Section 114- An application was filed for review of the judgment passed by the Court vide which the appeal filed by the petitioner was dismissed with a cost of Rs.10,000/- - it was pleaded that there is an error apparent on the face of record as the Court had wrongly concluded that allotment was not questioned – held that review proceedings are not similar to the appeal – an error which is self-evident can be called to be an error apparent on the face of record – the error which is to be established by long drawn reasoning is not an error apparent on face of record – it was contended that the order was challenged in a civil suit before Learned Civil Judge- however, no declaration was sought regarding its invalidity – the Court had rightly concluded that the order was not challenged- the review petition is an abuse of the process of the Court- hence, dismissed with the cost of Rs.50,000/-. (Para-7 to 22)

Cases referred:
Kamlesh Verma vs. Mayawati and others (2013) 8 SCC 320
South Eastern Coalfields Limited vs. State of M.P. and others (2003) 8 SCC 648
Indian Council for Enviro Legal-Action vs. Union of India and others (2011) 8 SCC 161

For the Petitioner	Ms. Ritta Goswami, Advocate.
For the respondents	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocate Generals with Mr. J.K.Verma, Deputy Advocate General, for respondents No. 1 to 4. Mr. Dushyant Dadwal, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition under Order 47 Rule 1 and Section 114 of the Code of Civil Procedure read with Civil Writ Rules 13 read with Original Side Rule 1.18 seeks review of the judgment passed by this Court on 26.4.2016 in LPA No. 172 of 2014 whereby the appeal filed by the review petitioner against the judgment of the learned writ Court came to be dismissed with costs of Rs. 10,000/-..

2. It is averred that there is an error apparent on the face of the record inasmuch as this Court while deciding the appeal has erred in concluding that none of the parties had questioned the order of allotment of the shops and had further erred in concluding that the shop No.18 had been allotted to the petitioner and in fact it was shop No. 17 that had been allotted in his favour.

3. The official respondents have filed reply to this petition wherein it has been specifically averred that as regards the shop No. 17, the same was allotted to respondent No.5 herein (original writ petitioner), whereas no shop was allotted to the review petitioner.

4. Respondent No.5 has filed separate reply wherein it is averred that the review petitioner was never allotted shop No.17 as alleged, therefore, he had no right to remain in possession thereof.

5. The learned writ Court had directed respondent No.5 to be put in possession of shop No. 17 which admittedly was in possession of the review petitioner and said findings had been affirmed by us vide the impugned judgment.

6. As noticed above, the only question required to be determined by this Court in LPA was whether the review petitioner in fact had a right to remain in possession of shop No.17 and this question as observed earlier had been answered against the petitioner.

7. However, before considering the case on merits, the scope of review is required to be considered. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1 and Section 114 of CPC. There must be an error apparent on the face of the record. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Similarly, wherein an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by way of review. Review Petition has a limited purpose and cannot be allowed to be "an appeal in disguise".

8. What would be the scope and ambit of review petition has been considered in detail by the Hon'ble Supreme Court in ***Kamlesh Verma vs. Mayawati and others (2013) 8 SCC 320*** and thereafter the legal position has been summarized as follows:

> ***Summary of the Principles:***
>
> ***20***. *Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:*
>
> ***20.1***. *When the review will be maintainable:-*
>
> *(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;*
>
> *(ii) Mistake or error apparent on the face of the record;*
>
> *(iii) Any other sufficient reason.*
>
> *The words "any other sufficient reason" has been interpreted in Chhajju Ram vs. Neki, AIR 1922 PC 112 and approved by this Court in Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors. , (1955) 1 SCR 520, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". The same principles have been reiterated in Union of India vs. Sandur Manganese & Iron Ores Ltd. & Ors., JT 2013 (8) SC 275.*
>
> ***20.2***. *When the review will not be maintainable:-*
>
> *(i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.*
>
> *(ii) Minor mistakes of inconsequential import.*
>
> *(iii) Review proceedings cannot be equated with the original hearing of the case.*
>
> *(iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.*
>
> *(v) A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error.*
>
> *(vi) The mere possibility of two views on the subject cannot be a ground for review.*
>
> *(vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.*
>
> *(viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.*
>
> *(ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived."*

9. The same principle has been laid down by this Court in **M/s Harvel Agua India Private Limited Versus State of H.P. & Ors., Review Petition No. 4084 of 2013,** decided on **9th July, 2014** and in a very recent judgment delivered on 28.3.2017 in ***Review Petition No. 45 of 2015, titled Kameshwar Sharma and others*** Versus ***State of H.P. and others.***

10. Adverting to the facts of the case, it would be noticed that on 28.12.1999, a Committee was constituted by the official respondents to allot the shops firstly to the existing tenants and only thereafter consider the claim of the new allottees through open auction. Respondent No.5, who was the writ petitioner before this Court was allotted shop No.17 by the Additional Deputy Commissioner, Kangra vide his order dated 7.4.2000 and was simultaneously directed to remove the *Khokha* which had unauthorisedly been constructed by him. However, the writ petitioner failed to get the possession of shop No. 17 and had instead been allotted shop No.18, which constrained him to approach this Court by filing CWP No. 6159 of 2010, claiming therein the following relief:

> *"(a) Direct the respondents to allot Shop No.17, at Shopping Complex, Jawalamukhi Temple Road, Dehra, District Kangra and to give the possession of shop No.17 to the petitioner in terms of order dated 7.4.2000 (Annexure PD)".*

11. In the reply filed by the official respondents, it was admitted that the shop No.17 had been allotted to respondent No.5 herein, but the said shop was in illegal and unauthorized use and occupation of the review petitioner since 1998 and, therefore, the shop No.17 could not be allotted to respondent No.5.

12. As observed earlier, learned writ Court allowed the writ petition by directing the official respondents to evict the review petitioner from the shop No.17, which judgment was affirmed by us vide the impugned judgment sought to be reviewed.

13. Ms. Ritta Goswami, learned counsel for the petitioner would vehemently argue that the findings rendered by this Court that the order of allotment made by the Additional Deputy Commissioner was not assailed by any of the parties is factually incorrect, inasmuch as the review petitioner had specifically assailed this order by filing a suit before the learned Civil Court i.e. the Court of Sub Judge, Dehra, District Kangra.

14. Now, adverting to the suit filed by the review petitioner, it would be noticed that the same has been filed under Sections 38 and 39 of the Specific Relief Act whereby only a decree for perpetual and prohibitory injunction restraining the official respondents from interfering in the possession and dispossessing the petitioner from shop No.17 has been sought for, while no separate declaration under Section 34 assailing the order of allotment had been prayed for.

15. Ms. Ritta Goswami, learned counsel for the petitioner would vehemently argue that in para-6 of the plaint, a specific reference has been made with regard to the order passed by learned Additional Deputy Commissioner, Kangra dated 7.4.2000 and would contend that the challenge to the decision is therefore implicit in the suit so filed.

16. We are afraid that this contention is rather too far-fetched. In case the petitioner was really aggrieved by the order passed by the learned Additional Deputy Commissioner whereby shop No.17 was allotted to respondent No. 5, then it was incumbent upon him to have sought a specific declaration to this effect under Section 34 of the Specific Relief Act and having failed to do so, this Court has rightly concluded that none of the parties had assailed the order of allotment of the shops.

17. As a matter of fact, this Court while disposing of LPA No.172 of 2014, had in no uncertain terms concluded that the petitioner in order to retain the premises which were in his illegal possession had instituted the aforesaid frivolous appeal and yet the review petitioner does not seem to have learnt any lesson despite this Court having imposed costs upon him. Therefore,

this Court has no hesitation to once again hold that this petition is nothing but an abuse of the process of the Court.

18. This Court while disposing of LPA No.172 of 2014 had observed as follows:

> *"19. It is evident from the material placed on record that the entire endeavour of both the parties was only to get illegal and undue enrichment that too by raising untenable pleas. It is well settled that a party, who approaches a court of law, must not only come with clean hands, but also clean heart, clear mind and clear objective. The court proceedings are not a game of chess. At no cost can the stream of justice be permitted to be polluted by unscrupulous litigants. The writ court while exercising the writ jurisdiction exercises equitable jurisdiction. The estoppel stems from equitable doctrine and it requires that he who seeks equity must do equity. Not only this, a person who seeks equity, must act in a fair and equitable manner. The equitable jurisdiction cannot be exercised in case of a person who himself has acted unfairly. Even compassion cannot be shown in such cases. The compassion cannot be allowed to bend the arms of justice in a case where an individual(s) have tried to acquire the property by unscrupulous method and by forcibly occupying the premises which neither belong to them nor have been allotted in their favour.*
>
> *20. Now, coming to the question of adjustment of equities. As already observed earlier, the principle that one who seeks equity must do equity is well known. Writ jurisdiction is equitable jurisdiction. It is well settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priorly, before invoking the jurisdiction of the High Court, the court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief.*
>
> *21. We have referred to the provisions of Article 226 of the Constitution being fully conscious of the fact that we are dealing with Letters Patent Appeal. As it is more than settled that a writ appeal is a continuation of the writ petition and merely because it is an appeal under the Letters Patent of the Court, it does not change its character from being a writ appeal and, therefore, the appellate powers of this Court cannot be circumscribed and would remain the same as that of the writ Court. It is equally settled that Letters Patent Appeal being an intra-Court appeal and in continuation of the writ petition under Article 226 of the Constitution of India, the relief prayed for can be moulded and final relief can be granted. The proceedings of the intra-Court appeal are, normally, governed and regulated by the statutory provisions conferring right of appeal and jurisdiction to decide the appeal. However, intra-Court appeal under Clause 10 of the Letters Patent, arising out of the proceedings under Article 226 of the Constitution, is not at par with other statutory intra-Court appeals. It is, indeed, continuation of the proceedings under Article 226 of the Constitution.*
>
> *22. Evidently, both the parties to the lis have reaped undue advantage by resorting to all sorts of unscrupulous methods in order to retain possession of the properties which had not even been allotted to them. None of the parties had the right to take law in their own hands and were required to approach the official respondents to resolve any difficulty rather than forcibly occupying the shops as per their convenience. Even the writ petitioner could not have retained and carried his business from the Khokha in violation to the orders passed by the Samiti. To say the least, the conduct of both the parties has been reprehensible and definitely not above board.*
>
> *23. In view of the aforesaid discussion, there is no merit in this appeal and the same is dismissed with costs assessed at Rs. 10,000/- to be paid by the appellant to the Samiti. However, at the same time, even the conduct of the writ petitioner has been totally unfair and he is therefore, required to compensate the Samiti for having gained unfair advantage*

by retaining possession of the Khokha as also shop No.18, therefore, before taking possession of shop No. 17, the writ petitioner is directed to pay a sum of Rs. 20,000/- to the Panchayat Samiti towards unfair advantage gained by him prior to filing of the petition."

19. As would be evident from the aforesaid discussion, despite this Court having made scathing observations against the conduct of both the individual parties to this lis, the petitioner does not appear to have taken these seriously and has rather ventured for another misadventure by instituting this frivolous review petition which clearly establishes that his conduct is nothing short of being cantankerous. The manner in which the petitioner has successfully managed to prolong this litigation not only indicates rather establishes that he has successfully turned this litigation into a fruitful litigation. It is, therefore, the duty of this Court to neutralize any unjust enrichment and undeserved gain made by any litigants only on account of keeping the litigation alive.

20. The Hon'ble Supreme Court in ***South Eastern Coalfields Limited vs. State of M.P. and others (2003) 8 SCC 648***, held as under:

"28 ......Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."

21. Similar issue came up before the Hon'ble Supreme Court in ***Indian Council for Enviro Legal-Action vs. Union of India and others (2011) 8 SCC 161***, wherein after taking into notice the conduct of the parties, the Hon'ble Supreme Court held as follows: -

"197. The other aspect which has been dealt with in great details is to neutralize any unjust enrichment and undeserved gain made by the litigants. While adjudicating, the courts must keep the following principles in view:

1. *It is the bounden duty and obligation of the court to neutralize any unjust enrichment and undeserved gain made by any party by invoking the jurisdiction of the court.*
2. *When a party applies and gets a stay or injunction from the court, it is always at the risk and responsibility of the party applying. An order of stay cannot be presumed to be conferment of additional right upon the litigating party.*
3. *Unscrupulous litigants be prevented from taking undue advantage by invoking jurisdiction of the Court.*
4. *A person in wrongful possession should not only be removed from that place as early as possible but be compelled to pay for wrongful use of that premises fine, penalty and costs. Any leniency would seriously affect the credibility of the judicial system.*
5. *No litigant can derive benefit from the mere pendency of a case in a court of law.*
6. *A party cannot be allowed to take any benefit of his own wrongs.*

> 7. *Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court.*
>
> 8. *The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts."*

22. In view of aforesaid discussion, not only has the petitioner failed to make out a case calling for interference in this review petition, but we are of the firm view that by keeping the litigation alive, the petitioner has reaped certain undue benefits which needs to be neutralized. Accordingly, the review petition is dismissed with costs of Rs. 50,000/- to be paid by the petitioner to respondent No.2 within 30 days from the receipt of this order, failing which, the respondents shall be at liberty to execute the said order, which needless to say shall be entirely at the risk, peril and costs of the review petitioner.

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

Jai Kishan and others ..Appellants

Versus

Mehar Chand and others ..Respondents

RSA No. 128 of 2017
Date of decision: 11/04/2017

Code of Civil Procedure, 1908- Order 22 Rule 4- Respondent No.30 died during the pendency of the appeal before the Appellate Court, while the respondent No.38, 50 and 51 had died during the pendency of the civil suit before the Trial Court- the judgments passed by the Courts are nullity – hence, they are set aside and matter remanded to the Appellate Court. (Para-2 to 5)

For the appellants: Mr. Aman Deep Sharma, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (Oral):

Heard. Considering the grounds meted in the application qua the applicants thereupon being deterred to move this Court within time for filing an appeal herebefore against the impugned judgements and decree, hence delay, stands satisfactorily explained. Consequently, the apposite delay stands condoned. Application allowed.

Be registered.

CMP (M) No. 2144 of 2016.

2. The learned counsel for the appellants seeks permission to withdraw the instant application. Permission granted. Accordingly, the application stands dismissed as withdrawn.

CMP (M) No. 8504 of 2016.

3. In the afore-stated CMP, an unfoldment occurs qua demise of respondent No. 30 Smt. Bhago Devi occurring on 25.12.2012, demise of co-respondent No. 38 Jai Devi occurring on 7.8.2006, demise of co-respondent No. 50 Nardu Devi occurring on 17.10.2007 and the demise of co-respondent No. 51 Smt. Prarti Devi occurring on 8.10.2007. Apparently, the demise of co-respondent No. 30 Bhago Devi occurred during the pendency of the apposite civil appeal before the learned Appellate Court, whereas the demise of co-respondent(s) No. 38, 50 and 51

respectively occurred during the pendency of the Civil Suit before the learned trial Court. However, through the instant application, the applicants strive to constrain this Court for ordering qua the deletion of the name(s) of the aforesaid deceased co-respondents from the apposite array, significantly when their estates stand already sufficiently represented, comprised in their proposed LRs standing already arrayed in the apposite array of co-respondent(s). The aforesaid prayer made by the learned counsel for the applicants remains unopposed by the counsel for the respondents. Cumulatively, the effect of all the evident factum aforesaid, of demise of co-respondent No. 30 Bhago Devi even if occurring before the learned First Appellate Court also the respective demise(s) of co-respondents No. 38, 50 and 51 even if occurring during the pendency of the Civil Suit before the learned trial Court, stirs the counsel for the respondents to espouse qua dehors the factum qua on their respective demise(s) thereat besides theirs not standing ordered to be substituted by their respective LRs, to, yet not work as a constraint upon this Court, to, order for the deletion of their names from the apposite array of respondents, reiteratedly when their respective estates stand sufficiently represented, comprised in their legal representative(s) standing already arrayed in the array of co-respondents, thereafter the learned counsel for the respondents, proceeds to submit with utmost vigour qua the mere occurrence of the names of the aforesaid deceased co-respondents in the apposite memos of parties in the verdicts pronounced respectively by the learned First Appellate Court besides by the learned trial Court also not begetting the ill-sequel qua 'the suit' suffering abatement nor hence any injunction standing fastened upon this Court to decide the question of abatement. Also he contends qua a simplicitor order pronounced by this Court for deleting the name(s) of the aforesaid deceased respondents from the memo of parties held in the aforesaid verdicts pronounced respectively by the learned First Appellate Court and by the learned trial Court also would thereupon constitute an exception qua the normal rule qua whereat the demise of a deceased litigant occurs, qua thereat, an appropriate application for the relevant purpose standing constituted also the Court concerned alone standing bestowed with the jurisdiction to render an order for his substitution or to render an order for his deletion from the apposite array of contestants. The aforesaid submission addressed herebefore by the learned counsel for the respondents, stands considered with utmost circumspection by this Court, yet the solitary factum of occurrence of the name of co-respondent No. 30 Smt. Bhago Devi in the apposite array of co-respondents in the memo of parties of the verdict pronounced by the learned First Appellate Court besides the occurrence of names of deceased co-respondents concerned in the memo of parties of the verdict pronounced by the learned trial Court, dehors the factum of their respective estate(s) standing sufficiently represented, thereupon would ipso facto vitiate the pronouncement(s) made both by the learned First Appellate Court besides by the learned trial Court, whereupon, concomitantly this Court stands constrained to conclude qua the jurisdiction for the ordering qua the deletion of the name of deceased co-respondent No. 30 from the apposite array of co-respondents besides of the names of other deceased co-respondents, names whereof stand unveiled in the memo of parties occurring in the verdicts respectively pronounced by the courts below, standing solitary bestowed upon the learned First Appellate Court and upon the trial Court, wherefrom this Court concludes qua the application constituted herebefore for the aforesaid purpose warranting its standing dismissed. Significantly, when the judgement(s) rendered by the first Appellate Court and by the learned trial Court respectively constitute the documents of adjudication(s) authored respectively by them, thereupon rendition of any order by the Court qua the name(s) of deceased co-respondents being thereupon ordered to be deleted from the respective memo(s) of parties occurring in the respective verdicts of the aforesaid 'Courts' would tantamount to this Court tampering with documents of adjudication authored respectively by the learned First Appellate Court and by the ld. trial Court, whereas the respective adjudicating forums who authored them alone hold the jurisdiction to make apposite alterations therein.

4. Consequently, with the learned First Appellate Court proceeding to pronounce its impugned verdict, with the occurrence in the memo of parties thereof, the name of deceased co-respondent No. 30 one Bhago Devi and the learned trial Court also proceeding to likewise pronounce an adjudication despite occurrence in the apposite memo of parties thereof, the names of deceased co-respondents concerned, thereupon their respective verdicts visibly stands

pronounced against dead persons whereupon they acquire a stain of nullity thereupon the verdicts rendered by the learned First Appellate Court and by the learned trial Court are quashed and set-aside. The learned First Appellate Court, is directed to, on an apposite motion standing made therebefore, proceed to strike/delete the name of deceased co-respondent No. 30 from the apposite memo of parties whereafter it shall proceed to remand the matter to the learned trial Court, for facilitating the latter Court, to beget apposite rectifications in its judgement, it, standing afflicted with an inherent legal malady qua its standing pronounced upon respectively deceased co-respondent No. 38, 50 and 51, all of whose demise(s) occurred during the pendency of the Civil Suit therebefore, rectification whereof would stand comprised, in its, on an apposite motion promptly made therebefore hence order for deletion of the names of the aforesaid deceased co-respondents from the apposite array of co-respondents, whereafter the learned trial Court shall record a fresh pronouncement upon the Civil Suit. The pronouncement recorded upon the suit by the learned trial Court after its receiving, it, on remand from the learned First Appellate Court, shall stand recorded thereon within three months since its receiving the file of the Civil Suit from the learned first Appellate Court. Moreover, the learned First Appellate Court is directed to upon the Civil Appeal instituted therebefore by the aggrieved, make an adjudication thereon within two months thereafter.

5. The parties are directed to appear before the learned First Appellate Court on 28.5.2017 whereat the counsel for the defendants is directed to on the date aforesaid, file an application before the learned First Appellate Court, for deletion of the name of Bhago Devi from the array of co-respondents whereafter the learned First Appellate Court shall pronounce an order within one month and remand it to the learned trial Court. The application is disposed of accordingly. RSA also accordingly allowed and disposed of.

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

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

Cr. Revision No. 78 of 2017.
Date of Decision: 11.4.2017.

H.P. Excise Act, 2011- Section 39- A vehicle was seized for transporting 7 bottles of English Wine - An application for release of vehicle was filed, which was dismissed by the Trial Court- aggrieved from the order, present revision has been filed- held that there is provision of confiscation of the vehicle under Section 60 of the Act – however, this power can be exercised only after final adjudication of the case – this provision is not relevant while deciding the interim custody of the vehicle - there is no bar for the interim release of the vehicle – the order set aside and direction issued to the Trial Court to decide the same afresh.(Para-7 to 16)

Cases referred:

Bhim Sen v. State of U.P., AIR 1955 SC 435 (Vol.42, C.N. 71)
Sunderbhai Ambalal Desai v. State of Gujarat, AIR 2003 SC 638

For the petitioner: Mr. H.S. Rangra, Advocate.
For the respondent: Mr. P.M. Negi, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant criminal revision petition filed under Sections 397/401 of the Criminal Procedure Code, the petitioner-applicant has laid challenge to the order dated 15.3.2017 passed by the learned Judicial Magistrate, Ist Class, Court No. 3 Mandi, District Mandi, passed in Criminal complaint No. 136/17, whereby the application for release of vehicle having been filed by the petitioner-applicant stood dismissed.

2. Briefly stated facts as emerge from the pleadings as well as impugned order having been passed by the learned court below suggests that the applicant petitioner preferred an application for interim release of vehicle bearing registration No. HP-33-1022 (LML Vespa) Scooter along with its documents and key, which was impounded by the police, police post Mandi, District Mandi, in case FIR No. 52/2017 dated 6.3.2017 under Section 39 of the HP Excise Act, 2011 (In short "the Act"). It also emerge from the impugned order passed by the learned trial Court that investigation in the case is/was complete and vehicle is/was no more required by the police. By way of application, the petitioner prayed for interim release of the vehicle in question on spurdari and stated that he is ready to furnish surety bonds of reasonable amounts and also will abide by all the terms and conditions, which shall be imposed by the Court. As per the report of the police, vehicle in question was being used to carry seven bottles of English wine (Green Label) and the applicant-petitioner is the actual owner of the vehicle and he used the scooter for commission of offence under Section 39 of the HP Excise Act.

3. Learned court below on the basis of police report as well as arguments having been made by the learned counsel representing the respondent-State rejected the application filed for interim custody of the vehicle in question having been filed by the petitioner-accused, by concluding that the Magistrate has no power to order for interim custody/release of the impounded vehicle. Learned court further concluded that only authorized officer as prescribed under Section 62 of the Act is empowered to confiscate or set penalty of the said vehicle. The petitioner applicant aggrieved and dis-satisfied with the aforesaid order having been passed by the learned trial Court has approached this Court by way of instant proceedings, praying therein for interim custody of vehicle after setting aside the impugned order dated 15.3.2017, passed by the learned court below.

4. Mr. H.S. Rangra, Advocate, representing the petitioner, vehemently argued that the impugned order passed by the court below is against the law and fact and as such, same cannot be allowed to sustain. While referring to the impugned order passed by the court below, Mr. Rangra, strenuously argued that court below has failed to exercise the jurisdiction vested in it by not giving the interim custody of vehicle in favour of the applicant-petitioner, who happened to be the owner of the vehicle. Mr. Rangra, while inviting attention of this Court to the impugned order passed by the learned trial Court also stated that police specifically stated before the Court that investigation in the case is complete and the vehicle is no more required by the police but despite aforesaid fact, learned trial Court failed to order for interim custody of vehicle in favour of the petitioner, which action of the court is illegal and deserves to be quashed and set-aside. Mr. Rangra, further contended that the court below failed to appreciate the fact that when police had conducted investigation and had submitted the challan before the Judicial Magistrate, it was only the court of learned judicial magistrate, which was competent to order for interim custody of the vehicle during the pendency of the trial. While specifically inviting attention of this court to the Section 51 of the Act, Mr. Rangra contended that provision of criminal procedure Code, 1973 are applicable in the present case and as such, learned court below wrongly and illegally interpreted the provisions of the Act and arrived at wrong conclusion that order for interim custody of vehicle could only be passed by the authorized officer as prescribed under Sections 61 and 62 of the Act. While concluding his arguments, learned counsel for the petitioner vehemently contended that Judicial magistrate, Ist Class is empowered to adjudicate all the matters/ trial under the said act and also competent to dispose the property/articles seized under the Act and as such, finding

returned by the court below is totally perverse and same is required to be rectified in accordance with the law. Mr. Rangra, further contended that even the impugned order having been passed by the learned trial Court is totally contradictory because while refusing to pass order for interim custody, learned counsel itself has concluded that there is no specific bar in the Act for this Court to order interim custody of the vehicle in question to its owner.

5. Per contra, Mr. P.M. Negi, learned Additional Advocate General, duly assisted by Mr. Ramesh Thakur, learned Deputy Advocate General, representing the respondent-State supported the impugned order passed by the learned trial Court and stated that there is no illegality and infirmity in the same and same deserves to be upheld. While specifically referring to the impugned order passed by the learned trial Court, Mr. Negi contended that in the event of any seizure of vehicle or conveyance under the Act, power to confiscate such vehicle or investigation is vested in the Excise officer in charge of District, who is only authorized to confiscate the seized vehicle or accept penalty. Hence, learned trial Court has rightly concluded that the authorized officer as described under HP Excise Act, 2011 is only empowered to give the interim custody/release of the vehicle. While refuting the contention of learned counsel for the petitioner that provisions of Cr.PC are also applicable, Mr. Negi contended that only authorized officer is empowered to confiscate or accept penalty of seized vehicle under the Act and as such, power vested in Magistrate in terms of Section 451 of the Cr.PC for interim custody/release of the vehicle under the Cr.PC, cannot be invoked in such cases, especially when Excise Act is a special law and the same shall prevail upon the general law. Though, Mr. Negi during arguments having been made by him fairly stated that there is no specific bar in the HP Excise Act as far as jurisdiction of judicial Magistrate to release the vehicle is concerned but he stated that when there is specific provision with regard to confiscation/release of vehicle provided in the Act, learned court rightly chose not to exercise the power which vests with the Exercise Officer in-charge of District, for interim custody of vehicle.

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

7. There is no dispute inter-se the parties qua the fact that police of police post Mandi, District Mandi, in excise of its power, under Section 9 of the HP Excise Act, 2011 registered a FIR bearing No. 52 of 2017 dated 6.3.2017, against the applicant-petitioner under Section 39 of HP Excise Act. By way of application, applicant-petitioner sought interim custody of vehicle in question on spurdari but learned trial Court rejected the same on the ground that order, if any, for interim custody can only be passed by the Excise Officer in charge of District, who in terms of Sections 60 to 64 of the HP Excise Act, 2011, is only competent authority to pass order of interim custody.

8. Before ascertaining the merit of the impugned order, it would be profitable to reproduce herein below Sections 60 to 64 of the HP Excise Act:-

> *60. Confiscation of article in respect of which offence committed:*
>
> *(1) Whenever an offence punishable under this Act has been committed,-*
>
> *(a) every liquor or excise bottle in respect of which such offence has been committed, together with the contents of such bottle, if any;*
>
> *(b) every still, utensil, implement or apparatus and all material in respect of or by means of which such offence has been committed;*
>
> *(c) every liquor or excise bottle lawfully imported, transported or manufactured, had in possession or sold alongwith or in addition to, any liquor liable to confiscation under clause (a);*
>
> *(d) every receptacle, package, container and covering in which any liquor, excise bottle, materials, still, utensil, implement or apparatus as aforesaid is or are found together with the other*

contents, if any, of such receptacle, package, container or covering; and

(e) every cart, vessel, raft or other conveyance used in carrying such receptacle, package, container, covering or articles as aforesaid; shall be liable to confiscation.

(2) when in the trial of any offence punishable under this Act, the Judicial magistrate decides that anything specified in clauses (a), (b), (c) or (d) of sub-section (1) is liable to confiscation, he may order confiscation thereof, except the liquor, the vehicle or the conveyance as specified in section 61.

(3) When there is reason to believe that an offence under this Act has been committed, but the offender is not known or cannot be found and when anything liable to confiscation under this Act and not in the possession of any person cannot be satisfactory accounted for, the case shall be enquired into and determined by the Collector concerned, who may order confiscation thereof:

Provided that no such order shall be made until the expiration of one month from the date of seizing the thing in question or without hearing the person, if any, claiming any right thereto, and considering the evidence, if any, which he produces in support of his claim:

Provided further that if the thing in question is liable to speedy and natural decay or if the Collector concerned is of opinion that the sale of the thing in question would be for the benefit of its owner, he may, at any time, direct it to be sold; and the provisions of this section and section 62 shall, so far as may be, apply to the net proceeds of such sale.

61. Inspection and seizure of vehicle, conveyance and liquor liable to confiscation.-

(1) Any Excise Officer may, if he has reasons to believe that a vehicle or conveyance has been or is being used in the commission of offence under section 39 of this Act, require the driver or other person-in–charge of such vehicle or conveyance to stop it and cause it to remain stationary as long as may reasonably be necessary to examine the contents in it and inspect all records relating thereto, which are in the possession of such driver or other person-in-charge of such vehicle or conveyance.

(2) When there is reason to believe that an offence has been committed under section 39, in respect of any liquor, such liquor together with vehicle or conveyance used in committing such offence, may be seized by any Excise Officer.

(3) Every Excise Officer seizing any liquor or vehicle or conveyance under this section shall place on such liquor or vehicle or conveyance a mark indicating that the same has been seized and shall, as soon as may be, make a report of such seizure to the Excise Officer-in-charge of the district.

(4) The Excise Officer seizing the liquor or vehicle or conveyance shall take appropriate steps for the safe custody of the liquor, vehicle or conveyance till the orders under Section 62 are passed by the Excise Officer-in-charge of the district.

62. Confiscation of vehicle or conveyance by Excise Officer in certain cases.-(1) Where an offence is believed to have been committed under section 39 of this Act, in respect of any liquor, the Excise Officer-in –charge of the district on being satisfied that the vehicle or conveyance has been used for commission of offence under section 39, may order confiscation of the vehicle or conveyance so seized together with the liquor.

(2) Where the Excise Officer-in-charge of the district, after passing an order of confiscation under sub-section (1) , is of the opinion that it is expedient in the public interest so to do, he may order confiscated vehicle or conveyance or liquor to be sold by public auction, and the proceeds thereof, after deduction of the expenses of any such auction or other incidental expenses relating thereto, shall, where the order of the confiscation made under sub-section (1) is set aside or annulled by an order under section 68 or 69, be paid to the owner thereof or the person from whom it was seized.

63. Issue of show cause notice before confiscation under section 62.-

(1) No order confiscating any vehicle or conveyance shall be made under section 62, except after notice in writing to the person from whom it is seized and the registered owner thereof, and considering their objections, if any.

(2) Without prejudice to the provisions of sub-section (1), no order confiscating any vehicle or conveyance shall be made under section 62 of this Act, if the owner of such vehicle or conveyance proves to the satisfaction of the Excise Officer-in-charge of the district that it was used in carrying the liquor without the knowledge or connivance of the owner himself, his agent, if any, and the person-in-charge of such vehicle or conveyance and that each of them had taken all reasonable and necessary precautions against such use:

Provided that the confiscation made under section 62 of this Act shall not affect the punishment of the accused for the offence for which he is liable under this Act.

64. Penalty in lieu of confiscation-

Notwithstanding anything contained in section 62, the Excise Officer-in-charge of the district may, in lieu of confiscation of the vehicle, accept by way of penalty a sum not exceeding the market price of the vehicle or the conveyance."

Careful perusal of the aforesaid provisions of law as contained in the Excise Act, clearly suggests that these provisions mainly deal with confiscation of vehicle, conveyance and liquor allegedly used for commission of offence under Section 39 of the Act. Similarly Section 9 of the Act empowers the Excise Officer, to investigate into the matter. It would be apt to reproduce the relevant paras of the Section 9 herein below:-

"9. Power to investigate-

(1) The State government may, by notification, invest any Excise Officer, with power to investigate any offence punishable under this Act, committed within the limits of the area in which the officer exercises jurisdiction.

(2) Every officer so empowered may within those limits exercise the same powers in respect of such investigation as an officer-in-charge of a police station may exercise in a cognizable case under the provisions of Chapter XII of the Code of Criminal Procedure, 1973."

Aforesaid Section empowers the Excise Officer to investigate any offence punishable under this Act, committed within the limits of the area in which the officer exercises jurisdiction. Similarly Section 9 (2) also suggests that every officer so empowered by the State Government can also investigate any offence punishable under this Act committed within their territorial jurisdiction.

9. Section 60 of the Act suggests that conveyance and vehicle used in carrying such liquor in violation of provision of Act, shall be liable to confiscation. But careful perusal of Section 60 (2) suggests that if Judicial Magistrate comes to conclusion that anything specified in clauses (a) to (d) of sub-section (1) of Section 60 is liable, to be confiscated, he or she may order

confiscation thereof, except the liquor, vehicle or the conveyance as specified under Section 61, meaning thereby, wherever the Judicial Magistrate comes to conclusion that there is a violation of aforesaid provisions of act, he/she may order for confiscation of the articles taken into custody at the time of registration of the case by the authority/Excise Department or police, who are empowered to investigate in terms of Section 9 of the Act, save and except liquor and vehicle involved in the case. Conjoint reading of Sections 60 to 64 clearly suggests that order of confiscation of liquor as well as vehicle impounded at the time of commission of offence can only be passed by the Excise Officer in-charge of District, who is vested with the power to pass order of confiscation.

10. Section 62 clearly provides that wherever the Excise Officer in charge of District is convinced and satisfied that the offence has been committed under Section 39 of the Act, and the vehicle or conveyance has been used for commission of offence, he/she may order for the confiscation of the vehicle or conveyance so seized together with the liquor, Section 63 of the Act further provides that before passing any order of confiscation of any vehicle or conveyance, authority concerned is bound to issue notice to the person from whom it is seized and registered owner thereof. Section 64 suggests that Excise Officer, in-charge of District may accept penalty i.e. a sum not exceeding the market price of the vehicle or the conveyance, in lieu of confiscation of vehicle.

11. This Court after carefully examining the provisions contained in Sections 60 to 64 of the Himachal Pradesh Excise Act, has no hesitation to conclude that provisions contained in aforesaid sections relate to confiscation of vehicle or conveyance as well as liquor seized at the time of registration of case. But authority concerned can only order for confiscation of vehicle as well as liquor as referred above, after final adjudication of the case by the concerned Judicial Magistrate, who, on the basis of material adduced on record by the prosecution, be it police or excise officer, may either acquit the accused or may hold him guilty of having committed offences punishable under this Act. Provisions contained in the aforesaid sections 61 to 64, would only come to operation once learned Magistrate comes to conclusion that offence punishable under this Act has been committed and property seized at the time of commission of offence is required to be confiscated in terms of Section 60.

12. True it is, in terms of section 60, learned Judicial Magistrate has no power to order for confiscation of liquor, vehicle or conveyance and in that regard, only Excise Officer in charge of District is authorized to either confiscate the vehicle or to release the same in terms of Section 64 in lieu of penalty of sum not exceeding the market price of the vehicle or conveyance but provisions as contained in 60 to 64 of the Act shall only come to operation after final adjudication of the dispute by the Judicial Magistrate, before whom challan is presented either by police or by Excise Officer in terms of Section 9 of the Act. As far as power to give interim custody by Judicial Magistrate, during the pendency of trial is concerned, there is no specific bar as such, contained in the Act and Judicial Magistrate is competent to release the vehicle in favour of registered owner on spurdari subject to certain conditions as envisaged under Section 451 of the Cr.PC.

13. In the instant case, perusal of impugned order clearly suggests that learned court below misdirected itself by referring to provisions contained in Sections 61 to 64 of the Act because admittedly, those are/were not relevant at the time of consideration of the application for interim release of vehicle preferred by the registered owner of the vehicle and in no manner these provisions could be construed as a bar for Judicial Magistrate to order for interim custody of the vehicle during the pendency of the trial. Rather at the cost of repetition, it may be stated that provisions contained in the aforesaid sections shall only come into operation after final adjudication of the matter. After adjudication of the case, by Judicial Magistrate, power to confiscate, if any, can be exercised by the Excise Officer in-charge not by the Judicial Magistrate. In the instant case, where admittedly FIR was registered by the police against the registered owner under Section 39 of the Act and pursuant to same, challan, if any, may be submitted by the police in the competent court of law, meaning thereby, it was only police, who is/was in

custody of articles/vehicle seized at the time of registration of case. Since police is required to present challan after the completion of investigation before the Judicial Magistrate, proper course for registered owner for interim custody of vehicle in question is to only file application before the Judicial Magistrate before whom the challan is presented or to be presented. It is not the case of the respondent-state that in the instant case, case was registered by the Excise Officer and as such, order if any, for interim custody of the vehicle was to be passed only by the excise officer, rather, case is /was registered by the police, which was also authorized under Section 9 of the Act to investigate the case.

14. After careful examination of the aforesaid provisions of law there cannot be any quarrel with regard to the limited power of Judicial Magistrate to order for confiscation of articles including vehicle after completion of trial, but definitely, he/she is not precluded from ordering interim custody of vehicle in exercise of power conferred upon him/her under Section 451 of Cr.PC, on the application of registered owner. Further perusal of aforesaid provisions of law leaves no doubt in the mind of the Court that confiscation in terms of Sections 61 to 64 though can be ordered by the Excise Officer in-charge of the area but same can only be ordered after completion of trial and as such, there cannot be any bar for Judicial Magistrate to order for interim custody of vehicle to the registered owner during the pendency of the trial. Provisions contained in Section 4 (i) of the Cr.PC, clearly suggest that all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the Cr.PC. Similarly Section 4 (ii) suggests that all offences under any other law are required to be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences. It is apt to reproduce Section 4 of the Cr.PC, herein below:-

> *"(i). All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.*
>
> *(ii). All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the lime being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."*

Careful perusal of aforesaid provisions as contained in Section 4 of the Cr.PC certainly suggests that jurisdiction of the Court to deal with the matter and pass order in accordance with the Cr.PC, should be presumed and to hold contrary, there must be specific bar. In this regard, reliance is placed upon judgment titled ***Bhim Sen v. State of U.P., AIR 1955 SC 435*** (Vol.42, C.N. 71), wherein the Hon'ble Apex Court has held as under:-

> *"5.Now, in these circumstances, it has to be considered whether the trial of this case by the ordinary criminal Court is barred. The bar of the jurisdiction of the ordinary criminal Court is brought about by Section 55 of the Act. But it requires to be noticed that the bar which is brought about by the section, is a bar which relates to the case as a whole. Because, in, terms, what it says is "no court shall take cognizance of any case which is cognizable under the Act by a Panchayati Adalat". Under Section 2(a) of the Act a "case" is defined as meaning "criminal proceeding in respect of an offence triable by a Panchayati Adalat" and "Panchayati Adalat" is defined as "including a bench thereof". It is clear, therefore, that this bar has reference to the entire proceeding, i.e., as involving all the accused together. Such a bar in. respect of the entire case can be operative only where there is a valid machinery for the trial thereof. In the present case in which at 'least one of the accused (though not this very. appellant) is a person coming from an area outside the local extent of the Act, any -bench of the Adalat that can be validly formed there-. under cannot try the three accused together and hence can have no Jurisdiction over the whole case. The jurisdiction of the regular*

criminal court in respect of such a case cannot be taken away by the operation of Section 55 of the Act. It is to be remembered that the jurisdiction of the criminal courts under section 5 of the Code of Criminal Procedure is comprehensive. That section enjoins, that all offences under the Indian Penal Code shall be investigated, enquired into, tried and otherwise dealt with "according 'to the provisions hereinafter contained". To the extent that no valid machinery is set up under the U.P. Panchayat Raj' Act for the trial of any Particular case, the jurisdiction of the ordinary criminal court under Section 5 Code of Criminal Procedure cannot be held to have been excluded. Exclusion of jurisdiction of a court of general jurisdiction, can be brought about by the setting no of a court of limited jurisdiction, in respect of the limited field, only if the vesting and the exercise of that limited jurisdiction is clear and operative. Where, as in this case, there is no adequate machinery for the exercise of this jurisdiction in a specific case, we -cannot hold that the exercise of jurisdiction in respect of such a case by the Court of general jurisdiction is illegal."

15. In view of the discussion made herein above, as well as specific provisions contained in the HP Excise Act, wherein, admittedly, no bar as such, has been created/provided for interim release of the vehicle by the Judicial Magistrate before whom the application for release of vehicle is filed, this Court has no hesitation to conclude that learned trial Court, while rejecting the application for release of vehicle having been preferred on behalf of the registered owner, wrongly placed reliance upon Sections 61 to 64 of the HP Excise Act, which are definitely not attracted/ applicable in the present case at this stage. Provisions as contained in Sections 61 to 64 shall only come into operation after final adjudication of the case. Let the matter be viewed from another angle, if competent Court of law i.e. Judicial Magistrate, after conclusion of trial comes to conclusion that no case is made out pursuant to case registered by the Investigating Agency under the Excise Act, natural corollary of the same would be the release of seized articles including vehicle in favour of the owner/proprietor. Under Section 452 Cr.PC, after conclusion of inquiry or trial, Court is empowered to pass order or as it thinks fit for disposal, by destruction, confiscation or delivery to any person claiming it to be entitled to possession thereof. It is apt to reproduce Section 452 (1) of the Cr.PC, herein below:-

"1. When an inquiry or trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitle to possession thereof or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed, or which has been used for the commission of any offence."

Certainly, in cases as prescribed under the HP Excise Act, 2011, order with regard to confiscation, if any, after conclusion of trial can only be passed by the Excise Officer In-charge, as prescribed under Sections 61 to 64 of the HP Excise Act, but admittedly, there is no embargo, as such, for the Judicial magistrate to order for interim custody and disposal of property pending trial in certain cases while exercising power under Section 451 Cr.PC. Section 451 Cr.PC, is being reproduced as follows:-

"451. Order for custody and disposal of property pending trial in certain cases-

When any property is produced before any Criminal Court during an inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy and natural decay, or if it is otherwise expedient so to do, the Court may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.

Explanation – For the purposes of this section, "property" includes:

(a) property of any kind or document which is produced before the Court or which is in its custody.

(b) any property regarding which an offence appears to have been committed or which appears to have been used for the commission of any offence."

Careful perusal of Section 451, reproduced herein above, suggests that criminal Court is empowered to pass order as it thinks fit for such property pending conclusion or inquiry or trial. Aforesaid provision of law empowers the criminal Court to even pass order for sale of the property which is subject to speedy and natural decay. The Hon'ble Apex Court has specifically held in ***Sunderbhai Ambalal Desai v. State of Gujarat, AIR 2003 SC 638*** that power under Section 451 should be exercised expeditiously and judiciously, the relevant paras whereof, are being reproduced herein below:-

6. It is submitted that despite wide powers proper orders are not passed by the Courts. It is also pointed out that in the State of Gujarat there is Gujarat Police Manual for disposal and custody of such articles. As per the Manual also, various circulars are issued for maintenance of proper registers for keeping the muddamal articles in safe custody.

7. In our view, the powers under Section 451 Cr.P.C. should be exercised expeditiously and judiciously. It would serve various purposes, namely:-

1. Owner of the article would not suffer because of its remaining unused or by its misappropriation.

2. Court or the police would not be required to keep the article in safe custody;

3. If the proper panchanama before handing over possession of article is prepared, that can be used in evidence instead of its production before the Court during the trial. If necessary, evidence could also be recorded describing the nature of the properly in detail; and

4. This jurisdiction of the Court to record evidence should be exercised promptly so that there may not be further chance of tampering with the articles.

21. However these powers are to be exercised by the concerned Magistrate. We hope and trust that the concerned Magistrate would take immediate action for seeing that powers under Section 451 Cr.P.C. are properly and promptly exercised and articles are not kept for a long time at the police station, in any case, for not more than fifteen days to one month. This object can also be achieved if there is proper supervision by the Registry of the concerned High Court in seeing that the rules framed by the High Court with regard to such articles are implemented properly."

16. Consequently, for the reasons stated herein above, present petition is allowed and the impugned order is quashed and set-aside. In view of the above, let learned court below decide the application afresh within a period of ten days from the date of receipt of the copy of the judgment taking into consideration the observations/findings returned in the instant judgment.

17. Parties are directed to appear before the learned trial Court on **1.5.2017** so that the needful is done within the stipulated time. Record, if any, of the case be also sent back forthwith. Pending applications, if any, also stand disposed of. Copy **dasti.**

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

CWP Nos. 8035 and 11826 of 2011
Date of Decision: 11.4.2017

CWP No. 8035 of 2011

Nagar Panchayat Santokhgarh. ....Petitioner

Versus

Kamal Dev. ...Respondent

CWP No. 11826 of 2011

Kamal Dev. ....Petitioner

Versus

State of H.P. & another. ...Respondents

Industrial Disputes Act, 1947- Section 25- K was engaged by Nagar Panchayat on 5.9.1999- he was disengaged on 30.6.2004 – he approached the authority under Industrial Disputes Act, which set aside the disengagement and directed re-engagement with consequential benefits- aggrieved from the said order, present writ petitionhas been filed – held that K was engaged for a work, which was continuously available – however, the nomenclature was contract assignment – some other person was engaged after dis-engaging K- the benefit of the legislation cannot be denied by using clever phraseology – no error was committed by the Labour Court by directing the re-engagement of K – however, keeping in view the fact that the work has been outsourced, direction issued to pay compensation of Rs.1 lac to K with interest @ 7.5% per annum from the date of award of Labour Court. (Para- 6 to 25)

Cases referred:

Transport Corporation of India Vs. Employees' State Insurance Corpn. and another, (2000) 1 SCC 332

Delhi Gymkhana Club Limited vs. Employees' State Insurance Corporation, (2015) 1 SCC 142

Union of India and another Vs. Surendra Pandey (2015) 13 SCC 625

Royal Western India Turf Club Limited Vs. Employees' State Insurance Corporation and others, (2016) 4 SCC 521

Raj Kumar Vs. Director of Education and others (2016) 6 SCC 541

S.M. Nilajkar and Others Vs. Telecom District Manager, Karnataka AIR 2003 SC 3553=(2003) 4 SCC 27

Bangalore Water Supply & Sewerage Board Vs. A. Rajappa & others AIR 1978 SC 548=(1978) 2 SCC 213

Senior Superintendent Telegraph (Traffic), Bhopal Vs. Santosh Kumar Seal and others (2010) 6 SCC 773

Bharat Sanchchar Nigam Limited Vs. Man Singh (2012) 1 SCC 558

Assistant Engineer Rajasthan Development Corporation and another Vs. Gitam Singh (2013) 5 SCC 136

CWP No. 8035 of 2011

For the Petitioner: Mr.N.K. Thakur, Senior Advocate with Mr.Divya Raj Singh, Advocate.

For the Respondent: Mr. Dalip K. Sharma, Advocate.

CWP No. 11826 of 2011

For the Petitioner: Mr.Dalip K. Sharma, Advocate.

For the Respondents: Mr.Pankaj Negi, Deputy Advocate General, for respondent No. 1.
Mr.N.K. Thakur, Senior Advocate with Mr.Divya Raj Singh, Advocate for respondent No. 2.

The following judgment of the Court was delivered:

Vivek Singh Thakur , Judge (Oral)

Award dated 28.4.2011 passed in Reference No. 169 of 2006 by Presiding Judge Industrial Tribunal cum Labour Court directing Nagar Panchayat, Santokhgarh Una (herein after referred as Nagar Panchayat) to reengage Kamal Dev forthwith on same terms and conditions, he was working with Nagar Panchayat i.e. on the basis of trips made by him on the tractor trolley as

per existing rate, is subject matter of both writ petitions CWP No. 8035 of 2011 and CWP No. 11826 of 2011. Hence both are heard and decided with this common judgment.

2. In CWP No. 8035 of 2011 Nagar Panchayat has prayed for quashing and setting aside of impugned award, whereas in CWP No. 11826 of 2011 Kamal Dev has prayed for modification of award so as to grant him all consequential benefits, seniority and back wages from due date in addition to relief already granted by the Labour Court.

3. It is admitted case of parties that Kamal Dev, engaged by Nagar Panchayat on 5.9.1999, worked with Nagar Panchayat till 30.6.2004 and thereafter he was disengaged, whereupon he approached the authority under Industrial Disputes Act, in pursuance of which a reference was made by appropriate authority to Labour Court for adjudication as under:-

> *"Whether the termination of services of Sh.Kamal Dev S/o Shri Krishan Chand by the Secretary, Nagar Panchayat, Santokhgarh, District Una, H.P. w.e.f. 01.07.2004 without complying the provisions of the Industrial Disputes Act, 1947 as alleged by the workman is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"*

4. Kamal Dev submitted claim before Labour Court asserting that he was engaged by Nagar Panchayat w.e.f. 5.6.1999 till 30.6.2004 for cleaning streets, roads and clean garbage bins etc. and also for loading and unloading of solid waste in tractor trolley for dumping and he was made to work on all 7 days of the week and in lieu of that he was drawing Rs. 1800/- per month on the date of his termination. It was also claimed that one Mr.Showara Singh, junior to him had been entrusted the work being performed by him and he was terminated without any charge-sheet, inquiry or show cause notice and in violation of principles of natural justice and Nagar Panchayat has committed breach of Section 25-F of Industrial Disputes Act. He claimed reengagement with all consequential benefits including continuity of service.

5. As per stand of Nagar Panchayat, Kamal Dev was not falling in definition of 'workman' as defined in Industrial Disputes Act as he had been engaged for disposal of solid waste with tractor trolley on trip basis at the rate of Rs. 50-60/- per trip and workman was a contract labourer and payment to him was being made on trip basis. To substantiate its claim, Nagar Panchayat also placed on record various receipts of payment made to Kamal Dev on trip basis. Nagar Panchayat disputed stand of Kamal Dev as 'workman' and consequently disputed claim of Kamal Dev being retrenched under I.D. Act.

6. Section 2(s) of the Industrial Disputes Act provides definition of 'workman' as under:-

> *"2(s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—*
>
> > *(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 957 (62 of 1957); or*
> >
> > *(ii) who is employed in the police service or as an officer or other employee of a prison; or*
> >
> > *(iii) who is employed mainly in a managerial or administrative capacity; or*
> >
> > *(iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."*

7. Retrenchment has been defined under Section 2(oo) of I.D. Act, which reads as under:-

> *"2(oo). retrenchment means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include-*
>
> *(a) voluntary retirement of the workman; or*
>
> *(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or*
>
> *(bb) termination of the service of the workman as a result of the non- renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or*
>
> *(c) termination of the service of a workman on the ground of continued ill- health."*

8. The workman in any industry in continuous service for not less than 1 year shall not be retrenched without complying the provisions of Section 25-F of I.D. Act. Section 25-F of the Act reads as under:-

> *"25-F. Conditions precedent to retrenchment of workmen.- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-*
>
> *(a) the workman has been given one month' s notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:*
>
> *(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay 2 for every completed year of continuous service] or any part thereof in excess of six months; and*
>
> *(c) notice in the prescribed manner is served on the appropriate Government 3 or such authority as may be specified by the appropriate Government by notification in the Official Gazette."*

9. Dealing with cases related to Employees' State Insurance Act, 1948, the Apex Court in case titled ***Transport Corporation of India Vs. Employees' State Insurance Corpn. and another, reported in (2000) 1 SCC 332*** has held as under:-

> *"27. Before parting with the discussion on this point, it is necessary to keep in view the salient fact that the Act is a beneficial piece of legislation intended to provide benefits to employees in case of sickness, maternity, employment injury and for certain other matters in relation thereto. It is enacted with a view to ensuring social welfare and for providing safe insurance cover to employees who were likely to suffer from various physical illnesses during the course of their employment. Such a beneficial piece of legislation has to be construed in its correct perspective so as to fructify the legislative intention underlying its enactment. When two views are possible on its applicability to a given set of employees, that view which furthers the legislative intention should be preferred to the one which would frustrate it………"*

10. Similarly, in case ***Delhi Gymkhana Club Limited vs. Employees' State Insurance Corporation,*** reported in ***(2015) 1 SCC 142*** the Apex Court has held that in a beneficial legislation, a liberal interpretation has to be adopted. (see para 20).

11. Dealing with a case related to the Entitlement Rules for Casualty Pensionary Awards, 1982, titled ***Union of India and another Vs. Surendra Pandey*** reported in ***(2015) 13***

SCC 625, Hon'ble Supreme Court, referring its earlier judgments, re-iterated that legislation, beneficial in nature, ought to be liberally construed. (see para 15).

12. In a recent case pertaining to Employees' State Insurance Act, 1948, titled ***Royal Western India Turf Club Limited Vs. Employees' State Insurance Corporation and others,*** reported in ***(2016) 4 SCC 521,*** the Apex Court has held as under:-

> *"5……. The Act is a welfare legislation and is required to be interpreted so as to ensure extension of benefits to the employees and not to deprive them of the same which are available under the Act."*

13. Recently, in case related to Industrial Disputes Act, titled ***Raj Kumar Vs. Director of Education and others*** reported in ***(2016) 6 SCC 541***, the Apex Court re-iterated the spirit and scheme of I.D. Act as under:-

> *"25. The spirit and scheme of the ID Act was discussed by a Seven-Judge Bench of this Court in the case of Bangalore Water Supply and Sewerage Board v. A. Rajappa (1978) 2 SCC 213 as under: (SCC p. 323, para 18)*
>
> > *"18. …..To sum up, the personality of the whole statute, be it remembered, has a welfare basis, it being a beneficial legislation which protects Labour, promotes their contentment and regulates situations of crisis and tension where production may be imperiled by untenable strikes and blackmail lock- outs. The mechanism of the Act is geared to conferment of regulated benefits to workmen and resolution, according to a sympathetic rule of law, of the conflicts, actual or potential, between managements and workmen. Its goal is amelioration of the conditions of workers, tempered by a practical sense of peaceful co-existence, to the benefit of both-not a neutral position but restraints on laissez faire and concern for the welfare of the weaker lot. Empathy with the statute is necessary to understand not merely its spirit, but also its sense."* *(emphasis supplied).*

14. Industrial Disputes Act is a beneficial legislation for protection of labour class and therefore, where two interpretations or view are possible, the interpretation favourable to beneficiary is to be adopted by the Court.

15. In light of above principle, material on record in present case is to be considered for deciding the legality of impugned award.

16. Kamal Dev had filed affidavit in his evidence, reiterating his statement of claim filed before Labour Court. He was cross-examined on behalf of Nagar Panchayat. In cross-examination, he admitted signatures on bills/receipts produced by Nagar Panchayat as Ex. R-1 to R-29 and also payment of amount to him every month on the basis of these bills, but denied knowledge about calculation of amount on trip basis. There was positive suggestion to him that he was assigned work to transport garbage in tractor trolley. It was also suggested to him that person appointed in his place was also being paid on trip basis.

17. From evidence on record, it was clearly established that Kamal Dev was engaged by Nagar Panchayat for a work which was continuously available with them, but nomenclature to his assignment was given as a contract assignment on trip basis, whereas he was regularly assigned work for about 5 years and was paid every month for his work. Therefore, he cannot be considered as a casual labourer. The work of loading and unloading in tractor trolley was not only continuously available during his engagement but even after his removal, as it was admitted case of Nagar Panchayat, that someone else was engaged w.e.f. 1.7.2004 who was also being paid on trip basis.

18. By using clever phraseology or merely changing nomenclature, one cannot be denied benefits for which he is otherwise entitled under beneficial legislation on the basis of ground reality of the case. The Court, always, has power to unveil the truth.

19. Kamal Dev was disengaged for engaging someone else and not on account of unsatisfactory work, punishment for disciplinary action, continued ill health, voluntarily retirement or on retirement attaining age of superannuation. It is claimed that engagement of Kamal Dev was a trip based contract engagement. But even then, this contract was not time bound but against the work which was available continuously. In absence of term of contract engaging a workman, he should not be removed/replaced arbitrarily in derogation of law. Removal/replacement of Kamal Dev is neither a result of non-renewal of contract of employment on expiry of such contract nor on termination of contract under a stipulation contained in such contract. Therefore, replacement/removal of Kamal Dev is retrenchment under I.D. Act.

20. Kamal Dev was hired for a continuous work, though payment for his work was not termed as daily wage, but payment on trip basis, but it is hard fact that removal and transportation of garbage work is of continuous and regular work, which is available with any Nagar Panchayat and therefore, payment on trip basis for performing a work, which was bound to be available every day, tantamounts to payment on daily basis at the end of every month.

21. Learned Labour Court has considered provisions of I.D. Act as well as ratio of law laid down by Hon'ble Apex Court in ***S.M. Nilajkar and Others Vs. Telecom District Manager, Karnataka AIR 2003 SC 3553=(2003) 4 SCC 27*** and ***Bangalore Water Supply & Sewerage Board Vs. A. Rajappa & others AIR 1978 SC 548=(1978) 2 SCC 213*** and has rightly held that Kamal Dev was a workman for the purpose of I.D. Act and Nagar Panchayat has violated provisions of Section 25-F of the Act in dispensing his services.

22. There is no material illegality or irregularity in the proceedings of Labour Court and also there is no error or mistake in appreciating the evidence on record and Labour Court has completely and correctly appreciated the material placed before it and no ground for interference, in findings that Kamal Dev was a workman under I.D. Act and his replacement/removal was illegal as Nagar Panchayat has violated the provisions of Section 25-F of the Act, is made out.

23. Labour Court has directed to reengage Kamal Dev on the same terms and conditions, he was working. Learned counsel for Nagar Panchayat, under instructions of Executive Officer of Nagar Panchayat, submits that as of now system has changed and Nagar Panchayat has discontinued engaging person(s) itself for disposal of garbage and now work of cleaning and management of solid waste has been out sourced and there is neither work nor post with Nagar Panchayat to re-engage Kamal Dev and therefore, the directions issued by Labour Court is practically impossible to execute and relief granted to Kamal Dev has become redundant.

24. Learned counsel for respondent relying upon judgments of Hon'ble Apex Court in ***Senior Superintendent Telegraph (Traffic), Bhopal Vs. Santosh Kumar Seal and others (2010) 6 SCC 773, Bharat Sanchchar Nigam Limited Vs. Man Singh (2012) 1 SCC 558*** and ***Assistant Engineer Rajasthan Development Corporation and another Vs. Gitam Singh (2013) 5 SCC 136*** submits that in view of ratio of law laid down by Hon'ble Apex Court, in case of impossibility of re-engagement of his client, reasonable compensation in lieu of his re-engagement for his unlawful termination by Nagar Panchayat be awarded to him.

25. Respondent was engaged 17 years back and he worked for 5 years till his removal/replacement by another. At present scenario has changed as Nagar Panchayat has opted for outsourcing the work of solid waste management, therefore, in any case, even after 2004, working for some years, Kamal Dev was bound to be disengaged on adopting different mode and manner for cleaning and management of solid waste by Nagar Panchayat. Therefore, keeping in view the overall aspect of the case, it would be appropriate that instead of directions to reengage Kamal Dev with or without back wages, Nagar Panchayat is directed to pay a lump sum compensation of Rs. 1,00,000/- to Kamal Dev. The said payment shall be made by Nagar Panchayat, Santokgarh, District Una, H.P. to Kamal Dev on or before 30th June, 2017. In case amount of compensation is not paid on or before 30th June, 2017, Kamal Dev shall also be

entitled for interest @ 7 ½ % per annum from the date of award passed by the Labour Court till realization of the same.

26. Both petitions are disposed of in above terms along with pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rahul Thakur @ Lucky ....Petitioner

Versus

State of Himachal Pradesh ....Respondent

Cr. MP(M) No. 389 of 2017

Decided on: 11th April, 2017

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the accused for the commission of offences punishable under Sections 376, 354-A, 328 and 506 of I.P.C. and Sections 4 and 8 of POCSO Act – the petitioner filed an application seeking bail pleading that he is innocent and has been falsely implicated – he is behind bar for a long time and he be released from custody – held that the Court has to consider nature of crime, seriousness of the offence, character of the evidence, circumstances of the case, possibility of securing the presence of the accused, apprehension of the witnesses being tampered with and the larger interest of the public – prosecutrix had made material improvements in her statement- no injury was found on her person- there was delay in recording the FIR – hence, the bail application allowed and petitioner ordered to be released on bail of Rs.25,000/- with one surety for the like amount.(Para-7 to 10)

Cases referred:

State of Maharashtra vs. Anand Chintaman Dighe, 1990(1) SCC 397

The State of Rajasthan vs. Balchand, 1977(4) SCC 308

Mohd. Juyal vs. State, 2014(17) R.C. R.(Criminal) 704

For the petitioner: Mr. Anoop Chitkara and Ms. Neha Scott, Advocates.

For the respondent: Mr. Virender Kumar Verma, Additional Advocate General, with Mr. Rajat Chauhan, Law Officer.

ASI Ashok Kumar, I.O. P.S. Nerwa, District Shimla, H.P.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No.2 of 2017, dated 04.01.2017, under Sections 376, 354(A), 328, 506 IPC & Sections 4 and 8 of POCSO Act, registered at Police Station, Nerwa, District Shimla, H.P.

2. As per the petitioner, he is innocent and has been falsely implicated in the present case. The petitioner has further averred that taking into consideration his age and the time since when he is behind the bars, he may be released on bail.

3. Police reports stand filed. As per the prosecution, on 04.01.2017 the child victim/prosecutrix (name withheld) made a statement under Section 154 Cr.P.C. before the police, wherein it has been alleged that she is a student of 10+1 and on 31.12.2016, after the school she was staying in her uncle's room at Bhatti Nala. On the subsequent morning, the

prosecutrix did not go to her home, as her cousin sister (uncle's daughter) was alone. Around 8:15 p.m., the petitioner, who was acquainted with the prosecutrix, called her on her mobile. The petitioner was willing to come to the house where the prosecutrix was staying. Around 9:15 p.m. the petitioner came there and they (petitioner, prosecutrix and her cousin sister) remained seated near the heater. The prosecutrix felt stomach pain, upon which the petitioner gave her a pain killer and she consumed the same, however, she did not know about the said pain killer. After some time, when the prosecutrix was talking with the petitioner, she felt restlessness and giddiness. Thereafter, all of them went to sleep separately. The prosecutrix lost her consciousness. On the subsequent morning, around 10:30 a.m., the prosecutrix was awakened by her cousin, but she could not stand. At that time the petitioner was there in the room. All of them came to Nerwa and around 11:00 a.m. the cousin sister of the prosecutrix went to her house. The prosecutrix also wanted to go to her native place, however, she could not go as she forget her bag in the room of her uncle. The petitioner and prosecutrix again came back to the room for taking the bag, however, as she was still under the influence of medicine, which the petitioner gave to her, she slept in the room. The petitioner took advantage of the unconsciousness of the prosecutrix and committed rape upon her. The proseuctix was feeling intense pain and due to that she consumed 5-6 tablets of pain killer, which she was having in her purse. The petitioner also threatened the prosecutrix and then she became unconscious. When the prosecutrix regained consciousness, around 2:30 p.m., she was at Bhatti Nala. On being noticed by her neighbourers, her brother was telephonically informed, however, in the interregnum, the petitioner and cousin sister of the prosecutrix also came there and they took her to Nerwa hospital, in a private vehicle. While they were enroute, near Shawala road, brother of the prosecutrix reached and he took all of them to Nerwa Hospital. The prosecutrix was admitted in the hospital. The petitioner and cousin sister of the prosecutrix left the hospital. On 02.01.2017, the prosecutrix was referred to I.G.M.C. Shimla. On the statement of the prosecutrix, police investigated the matter and FIR was registered. The prosecutrix was medically examined and statements of the witnesses were also recorded. Section 328 IPC was added in the case. Accused was arrested and medically examined. After completing all the codal formalities, police presented the challan in the learned Trial Court. Lastly, the prosecution has prayed that the bail application of the petitioner may be dismissed.

4. I have heard Mr. Anoop Chitkara, learned counsel for the petitioner, Mr. Virender Kumar Verma, learned Additional Advocate General and has gone through the record carefully.

5. Mr. Chitkara, learned counsel for the petitioner has argued that the prosecutrix divulged her medical history to the doctor, while she was being medically examined by the doctor. However, her medical history, recorded by the doctor, nowhere suggests that any offence was committed on her by the petitioner. He has further argued that there is no case of sexual assault, as no semen was traced/found on any of the recovered articles. As per the learned counsel for the petitioner, taking into consideration the statement of the prosecutrix, on its face value, present is a totally false case. He has argued that the petitioner is only 19 years of age and has been falsely implicated. The learned counsel for the petitioner has placed reliance on the following judicial pronouncements:

1. ***State of Maharashtra vs. Anand Chintaman Dighe, 1990(1) SCC 397;***
2. ***The State of Rajasthan vs. Balchand, 1977(4) SCC 308; &***
3. ***Mohd. Juyal vs. State, 2014(17) R.C. R.(Criminal) 704.***

Conversely, Mr. Verma, learned Additional Advocate General, has argued that the petitioner has committed a heinous crime. He has further argued that the petitioner had no right to visit the prosecutrix when she was staying with her cousin. He has further argued that the petitioner has also no business to accompany the prosecutrix on the subsequent day. In case the petitioner is enlarged on bail, it will give a wrong signal in the society. Lastly, he has argued that keeping in view the heinousness of the offence, the bail application of the petitioner may be rejected. In rebuttal, Mr. Chitkara, learned counsel for the petitioner has vehemently argued that no case is

made-out against the petitioner and the petitioner has been falsely implicated in the present case. He has further argued that taking into consideration the facts, which have come on record, the petitioner may be released on bail.

6. I have gone through the rival contentions of the parties and the police reports in detail.

7. Firstly, this Court would like to deal with the judicial pronouncements cited by Mr. Chitkara. The Hon'ble Apex Court in ***State of Maharashtra vs. Anand Chintaman Dighe, 1990(1) SCC 397,*** has held as under vide para 7 of the judgment:

> ***"7. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the court. Where the offence is of serious nature the court has to decide the question of grant of bail in the light of such considerations as the nature and seriousness of offence, character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of presence of the accused not being secured at the trial and the reasonable apprehension of witness being tampered with, the larger interest of the public or such similar other considerations."***

The learned counsel for the petitioner has primarily accentuated that even at the stage of bail, the Court is required to go into the merits of the case. The above referred judgment also exemplifies that in cases of serious crimes, the Court has to consider nature of crime, seriousness of the offence, character of the evidence, circumstances of the case, possibility of securing the presence of the accused, apprehension of witnesses being tampered with and the larger interest of the public. Another vital aspect, which the above referred judgment deals with, is that there are no hard and fast rules qua grant/refusal of bail and each case has to be considered on its own merits. This Court is also of the opinion that merits of the case are to be touched while exercising discretionary jurisdiction under Section 439 Cr.P.C. The spirit of the judgment (supra) is fully applicable to the facts of the present case.

8. Mr. Chitkara has also placed reliance on another judgment of Hon'ble Apex Court in ***The State of Rajasthan vs. Balchand, 1977(4) SCC 308,*** wherein vide para 2 of the judgment it has been held as under:

> ***"2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail from the Court. We do not intend to be exhaustive but only illustrative."***

It is beaten law of the land that the fundamental rule is bail, not jail. This Court is also of the opinion that there is no denial to the above rule, thus the judgment (supra) is also fully applicable to the present case.

9. Lastly, Mr. Chitkara, has relied upon judgment of Hon'ble Delhi High Court, rendered in ***Mohd. Juyal vs. State, 2014(17) R.C. R.(Criminal) 704,*** wherein it has been held that the nature of allegations are required to be considered at the stage of the bail. This Court is also of the view that while granting/refusing bail, the nature of the allegations does play an imperative role and the same cannot be overlooked at any cost.

10. It has come in the prosecution story that when the prosecutrix was taken for treatment and examined by the doctor, she did not disclose anything with respect to offence committed upon her by the petitioner. Further, as per the final opinion of the doctor, the possibility of sexual assault cannot be ruled-out. The prosecutrix, as per her own statement, on

the next day consumed 5-6 tablets, which she was carrying in her purse. The prosecutrix has made material improvements time and again when her statement was recorded. She has also made many improvements in her statement under Section 164 Cr.P.C. Further no semen was detected from any exhibits in the forensic science laboratory. No injury was found on the person of the prosecutrix by the doctor. The presence of the cousin of the prosecutrix in the room and other material aspects, which have come on record, have also been considered and without discussing the same at this stage, and also considering the age of the petitioner, delay in recording the statement of the prosecutrix under Section 164 Cr.P.C., wherein she has made improvements and also the law, as citied by the learned counsel for the petitioner, and the fact that the petitioner is not in a position to tamper with the prosecution evidence and also not in a position to flee from justice, this Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in his favour. Therefore, it is ordered that the petitioner be released forthwith on bail, on his furnishing personal bond to the tune of Rs. 25,000/- (rupees twenty five thousand only) with one surety in the like amount to the satisfaction of learned Trial Court, in case FIR No.2 of 2017, dated 04.01.2017, under Sections 376, 354(A), 328, 506 IPC & Sections 4 and 8 of POCSO Act, registered at Police Station, Nerwa, District Shimla, H.P. The bail is granted subject to the following conditions:

(i) That the petitioner will appear before the learned Trial Court as and when required.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

11. In view of the above, the petition is disposed of.

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

Ramesh Chand ....Petitioner

Versus

State of Himachal Pradesh ....Respondent

Cr. Revision No. 49 of 2010

Decided on: April 11, 2017

Indian Penal Code, 1860- Section 498-A- Complainant was married to the petitioner – petitioner and the other accused started maltreating the complainant- she was not provided with clothes and shoes and when she demanded them, petitioner and other accused misbehaved with her – she was told that she had not brought any dowry – she replied that her parents were poor and unable to give anything – petitioner and other accused started beating the complainant - the matter was reported to the police- petitioner and other accused were tried - petitioner was convicted by the Trial Court while other accused were acquitted- an appeal was preferred, which was dismissed – aggrieved from the judgment, present petition has been filed – held that the Court has very limited power to re-appreciate the evidence while exercising revisional jurisdiction- however, where there is failure of justice or misuse of judicial mechanism, it is the duty of the High Court to prevent miscarriage of justice – no specific allegation of cruelty was made against the petitioner- no specific allegation of demand of dowry was made against the petitioner – there was delay in reporting the matter to the police for which no explanation was provided – the

allegations were made against all members of the family and once the members of the family were acquitted, there was no occasion for convicting the petitioner on the same set of evidence – the Courts had wrongly convicted the accused – revision allowed and accused acquitted.

(Para- 10 to 27)

Cases referred:

State of Kerala versus Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Raj Rani v. State (Delhi Admn.), AIR 2000 SC 3559
Girdhar Shankar Tawade v. State of Maharashtra, AIR 2002 SC 2078
Manju Ram Kalita v. State of Assam, (2009) 13 SCC 330
Sarla Prabhakar Waghmare v. State of Maharashtra, 1990 CrLJ 407
Jiwan Lal V/s State of Himachal Pradesh, Latest HLJ 2012 (HP) Vol. 1. 231
Shobha Rani v. Madhukar Reddi, AIR 1988 SC 121
Samar Ghosh vs. Jaya Ghosh, (2007) 4 SCC 511
Manisha Tyagi vs. Deepak Kumar, 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi, (2010) 4 SCC 476

For the petitioner: Mr. Vinay Thakur, Advocate.
For the respondent: Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition is directed against judgment dated 9.12.2009 passed by the learned Sessions Judge, Sirmaur at Nahan, in Cr. Appeal No. 08-Cr.A/10 of 2006, affirming judgment and order of conviction dated 16.2.2006/17.2.2006 passed by the Additional Chief Judicial Magistrate, Rajgarh, District Sirmaur, Himachal Pradesh in Cr. Case No. 22/2 of 2005, whereby the learned trial Court while holding petitioner guilty of having committed offence punishable under Section 498A IPC, convicted and sentenced him to undergo simple imprisonment, for a period of six months and to pay a fine of `3,000/- and in default of payment of fine, to further undergo simple imprisonment for two months.

2. Briefly stated the facts as emerge from the record are that the complainant, namely Promila Devi, who happened to be wife of the petitioner Ramesh Chand, lodged an FIR i.e. Ext. PW-1/A in the Police Station, stating therein that her marriage was solemnized with petitioner on 23.6.2004 according to Hindu rites and ceremonies and local customs. After two months of marriage, in the month of August, 2004, petitioner and other accused persons i.e. father-in-law, mother-in-law and sister-in-law of the complainant, started maltreating her. She further stated that she kept on tolerating the atrocities of the petitioner so that family does not break. She also complained that she was not provided with clothes and shoes to wear and whenever she asked her husband for such things, he did not behave properly. Complainant further reported to the police that petitioner repeatedly teased her that she had not brought any money at the time of her marriage and she replied that since her parents are poor, she was not able to give them anything. Complainant further reported that whenever, accused accompanied her to her parents' house in village Dhali Dibber, Tehsil Rajgarh, he did not stay with her, rather visited other ladies in the village. She further alleged that with the passage of time, petitioner started proclaiming that he would not keep her at his house. His beatings increased with the passage of time. Finally, after becoming totally helpless, she narrated entire facts to her parents and sister, who repeatedly counseled petitioner to behave properly with the complainant but to no avail. Complainant specifically complained that her mother-in-law, father-in-law and sister-in-law, also misbehaved with her and she was not provided meals etc. As per complainant, she

became pregnant but despite that petitioner kept on committing atrocities upon her and finally in August, 2004, she with her two months old pregnancy, was left in the house of her parents, by the mother-in-law, Smt. Kaulan Devi. Complainant while lodging report on 9.4.2015, also proclaimed that she was pregnant for the last nine months and during this period, nobody from her in-laws bothered to maintain her and as such sought action against her in-laws including her husband, in terms of Section 498A IPC.

3. Subsequently, on the basis of investigation carried out by the police, pursuant to registration of FIR, as referred above, and on the conclusion thereof, police presented challan in the competent court of law. Learned trial Court being satisfied that prima facie case exists against petitioner, proceeded to frame charge under Section 498A IPC against the petitioner as well as other family members of the petitioner, to which they pleaded not guilty and claimed trial. Accused also got recorded their statements under Section 313 CrPC, wherein they denied the case of the prosecution in toto. However, the fact remains that the learned trial Court below, on the basis of material adduced on record by the prosecution held petitioner guilty of having committed offence punishable under Section 498A IPC and acquitted other co-accused.

4. Being aggrieved with the aforesaid judgment passed by learned trial Court, petitioner preferred an appeal before the learned Sessions Judge, Sirmaur at Nahan, who also dismissed the same while upholding the judgment of conviction passed by learned trial Court. Hence, this petition by the petitioner praying therein for his acquittal after setting aside judgments of conviction passed by the learned Courts below.

5. Mr. Vinay Thakur, learned counsel representing the petitioner, vehemently argued that impugned judgments of conviction recorded by the Courts below are not sustainable as the same are not based upon correct appreciation of evidence adduced on record by the respective parties, hence deserve to be set aside. Mr. Thakur, while inviting attention of this Court to the impugned judgments passed by the learned Courts below, strenuously argued that bare perusal of same suggests that the courts below have not appreciated evidence in its right perspective, as a result of which, erroneous findings have come on record to the detriment of the petitioner, who is an innocent person. Mr. Vinay Thakur specifically invited attention of this Court to Section 498A IPC, to state that cruelty, if any, was required to be proved by the prosecution within the ambit of explanation as provided to Section 498A IPC, but in the instant case, bare perusal of evidence available on record nowhere suggests that prosecution was able to prove beyond reasonable doubt that cruelty, if any, was meted out to the complainant by the petitioner, as defined under Section 498A IPC, and, as such, no conviction, if any, could be recoded by the learned Courts below. Mr. Thakur, while advancing arguments fairly conceded that though defence was taken by the petitioner that complainant was not his legally wedded wife, but it stands duly proved on record that complainant is/was legally wedded wife of the petitioner and as such that aspect of the matter need not be looked into by this Court.

6. While concluding his arguments, Mr. Thakur made this Court to travel through the evidence adduced on record by the prosecution to demonstrate that there is no iota of evidence suggestive of the fact that complainant was maltreated and dowry, if any, was ever demanded, which could compel her to cause grave injury or danger to her life. Mr. Vinay Thakur, also contended that approach adopted by the learned Courts below also can not be accepted because, on the same set of evidence, other co-accused have been acquitted whereas, petitioner has been held guilty of having committed offence punishable under Section 498A IPC, as such judgments passed by learned Courts below deserve to be set aside. Mr. Vinay Thakur, also stated that both the learned Courts below failed to take note of the fact that as per own statement of the complainant, she had left house of petitioner in the month of August, 2004, whereas, FIR in question was lodged in the month of April, 2005 i.e. approximately after nine months of leaving the house by the complainant. Mr. Thakur, further contended that there is no explanation worth the name that why complainant kept mum for nearly nine months, if cruelty, if any, was meted to her by the petitioner and his family members.

7. Mr. Ramesh Thakur, Deputy Advocate General, supported the impugned judgments passed by the courts below. Mr. Ramesh Thakur vehemently argued that bare perusal of the impugned judgments of conviction recorded by courts below suggests that same are based upon correct appreciation of evidence adduced on record by the respective parties and there is no scope of interference by his Court, especially in view of the concurrent findings of fact and law recoded by the courts below. Mr. Thakur, with a view to refute aforesaid contentions having been made by the learned counsel representing the petitioner, also invited attention of this Court to the judgments passed by the courts below to demonstrate that each and every aspect of the matter has been dealt with meticulously by the Courts below while holding petitioner guilty of having committed offence punishable under Section 498-A IPC and as such there is no illegality or infirmity in the impugned judgments and same deserve to be upheld. While concluding his arguments,

8. Mr. Ramesh Thakur, Deputy Advocate General, reminded this Court of its limited jurisdiction under Section 397 as far as re-appreciation of evidence is concerned. He 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."

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

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 convicted and sentenced under Sections 498-A IPC, 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.

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

12. While hearing arguments having been made by the learned counsel representing the parties, this Court had occasion to peruse records of the courts below, perusal whereof certainly compels this Court to agree with the arguments having been made by the learned counsel representing the petitioner that there was no occasion for the Courts below to hold the petitioner guilty on the same set of evidence, on the basis of which other co-accused were acquitted, because, bare perusal of evidence led on record by the prosecution suggests that allegations of cruelty, if any were not specifically against petitioner and there was no specific allegation of cruelty as provided under Section 498 IPC against the petitioner, which could compel the Courts below to record conviction under Section 498-A IPC against petitioner. Since, there is no dispute, if any, with regard to the factum of marriage inter se complainant and petitioner, this Court, need not look into that aspect, as agreed by the learned counsel representing the petitioner also. This Court, solely with a view to find answer to the arguments having been made by the learned counsel representing the petitioner, carefully perused Section 498-A IPC, perusal whereof certainly suggests that 'cruelty', if any, is to be construed strictly in terms of explanation given to aforesaid Section. At this stage, it may be profitable to reproduce Section 498A IPC as under:

> "498A. Husband or relative of husband of a woman subjecting her to cruelty.--Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
>
> Explanation.-For the purposes of this section, "cruelty" means-
>
> (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or
>
> (b) harassment of the woman where such harassment is with a
>
> view to coercing 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.]."

13. Perusal of aforesaid provision of law, clearly suggest that if husband or relatives of the husband of woman subject(s) such woman to cruelty, would be liable to be punished with imprisonment for a term, which may exceed to 3 years. For the purpose of this Section, 'cruelty' has been specifically defined. Hence, Courts below, while adjudicating whether any cruelty is/was metered out to the complainant, were bound to ascertain the question with regard to "cruelty", if any, within parameters as provided in the definition of 'cruelty' under Section 498-A IPC. This Court, after carefully examining the evidence led on record by prosecution, sees substantial force in the arguments having been made by the learned counsel representing the petitioner that the prosecution was unable to prove on record that complainant was meted cruelty as defined under Section 498A IPC and as such no conviction, if any, could be recorded against the petitioner under Section 498A IPC. This Court, after carefully examining evidence is also of the view that complainant made general allegations and there is no specific allegation, if any, of demand of dowry either by the petitioner or by his family members. There is nothing in the statement of the complainant suggestive of the fact that demand was ever made by petitioner or his family members, directly or indirectly, from the complainant or from her parents, rather, complainant herself stated that when she asked for maintenance from her husband, petitioner told her that she had not brought anything from her house. Complainant has also stated that since her

parents were poor, she had not brought anything. But definitely, she stated nothing with regard to demand of dowry made by the petitioner or family members of the accused. Similarly, there is nothing in the statement of the complainant as well as other material prosecution witnesses suggestive of the fact that conduct, if any, of the petitioner caused stress, if any, to the complainant, which could drive the complainant to either to commit suicide or cause grave injury.

14. Interestingly, apart from above, there is no explanation worth the name on record that what prevented the complainant from making complaint either to the police or Gram Panchayat from August, 2004 to 9.4.2005, which inaction on the part of the complainant certainly compels this Court to draw an adverse inference against the complainant, who, admittedly, kept mum for approximately for nine months. If she was actually maltreated or meted cruelty, strictly in terms of explanations (a) and (b) to Section 498A IPC, she would have lodged complaint with the Gram Panchayat or to the police immediately in the month of August, 2004 but, neither complainant nor her family members with whom she admittedly started living in August, 2004, bothered to lodge complaint against petitioner as well as his family members.

15. In the instant case, this Court was unable to lay its hand on any evidence, be it ocular or documentary, suggestive of the fact that petitioner had ever proclaimed publically or teased the complainant that she was not his legally wedded wife and similarly, this Court was unable to see any evidence on record that the petitioner ever proclaimed publically that he was not the father of the child born to the complainant. Careful perusal of complaint submitted by the complainant to the police praying therein for initiating action against petitioner and his family members, under Section 498-A IPC, also nowhere discloses aforesaid allegations, as such, it is not understood how the first appellate Court came to the conclusion that denial of marriage as well as pregnancy of complainant amounts to 'cruelty' punishable under Section 498A IPC. At the cost of repetition, it may be stated that there is/was no allegation as such, made by the complainant rather, allegations, if any, were of misbehaviour by the petitioner and his family members. Though complainant made an attempt to state before police that she was given repeated beatings but, unfortunately, there is no evidence available on record to support the contention, if any, with regard to beatings.

16. This Court, after carefully examining the record is of the view that the petitioner solely with a view to defend himself in the proceedings under Section 498A IPC, initiated at the behest of the complainant, took the defence, whereby he claimed that complainant was not his legally wedded wife but, certainly, aforesaid defence taken by the petitioner before the court below in the proceedings under Section 498A IPC nowhere amounts to 'cruelty', as defined under Section 498A IPC. Had the complainant alleged in the complaint and stated before the Court that petitioner proclaimed publically that the complainant was not his legally wedded wife and had the petitioner disputed paternity of the child born to the complainant, Courts below would have been right in concluding that complainant successfully proved 'cruelty' in terms of Section 498-A IPC.

17. Further, there are no specific allegations against petitioner and all the allegations, if any, are/were against the whole of the family, that too general and vague. Hence, once the courts below acquitted other accused on same set of evidence, conviction of petitioner is also not sustainable.

18. Their lordships of Supreme Court in **Raj Rani** v. **State (Delhi Admn.)** reported in AIR 2000 SC 3559 have held that it is not enough that the deceased felt those words hurting. It must be subjected to judicial scrutiny and the Court must be in a position to hold that those words were sufficiently hurting enough as to amount to 'cruelty' falling within the pararmeters fixed in S. 498-A of the Indian Penal Code. Their lordships have held as under:

> "3. Both sides submitted that the only reliable evidence which can be looked into is the suicide note left behind by Veena which should have been scribed by her on 17-4-1984, the date of the commission of suicide.

4. We have gone through the entire writings contained in the suicide note. It makes a serious castigation against her husband for being an addict to narcotic drugs. Then she made a general allegation against her mother-in-law and in a lesser degree towards the appellant. But unfortunately she did not advert to any concrete instance which can be termed as cruelty as defined in Section 498A of the Indian Penal Code. The utterances said to have been made by the appellant towards the deceased were to her chagrin and she had taken them very seriously in the suicide note she described such utterances as not worthy of reproduction.

5. It is not enough that the deceased felt those words hurting, it must be subjected to judicial scrutiny and the Court must be in a position to hold that those words were sufficiently hurting enough as to amount to "cruelty" falling within the parameters fixed in Section 498A of the Indian Penal Code. The area remains grey and vague. Not a single word said to have been spoken to by the appellant as against the deceased had been put on record by the deceased in the suicide note in spite of the fact that the said note is a very lengthy letter running into several paragraphs. The tenor and language of the suicide note would reflect that she was not an illiterate lady. As the Court is rendered helpless to judge whether the words which deceased heard from the appellant would amount to cruelty, it is far from possibility for the Criminal Court to hold that she is guilty of the offence of cruelty as envisaged in the section. It is also to be pointed out that the deceased did not mention a single deed which the appellant would have done against her. All that is said against the appellant were that she spoke same thing which she took objectionable."

19. Their lordships of Hon'ble Apex Court in **Girdhar Shankar Tawade** v. **State of Maharashtra** reported in AIR 2002 SC 2078, have held that in the absence of cogent evidence to bring home charge under S. 498-A, accused was entitled to be acquitted. Their lordships have held as under:

"16. We have already noted Section 498-A herein before in this judgment and as such we need not delve upon the same in greater detail herein excepting recording that the same stands 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 rule out then in that event applicability of Section 498-A can be had only in terms of explanation (b) thereto which 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 to 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. The three letters said to have been written and as noticed earlier cannot possibly lend any credence to the requirement of the Statute or even a simple demand for dowry."

20. Their lordships of Hon'ble Apex Court in **Manju Ram Kalita** v. **State of Assam** reported in (2009) 13 SCC 330 have held that cruelty for purpose of S. 498-A is to be established in that context as it may be different from other statutory provisions. It is to be determined/ inferred by considering conduct of the man, weighing gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide etc. Their lordships have held as under:

"12 Issue no. 2 relates to the applicability of 498A I.P.C. As it has been alleged by the complainant that she had been given physical and mental torture by the appellant and it was not possible for her to stay with the appellant after

1993 though she was having seven months' pregnancy at that time. She gave birth to a male child in the hospital and the appellant did not even come to see the child. The question would arise as to whether in the facts and circumstances where the complainant had left the matrimonial home and started living with her father in 1993, could a case be registered against the appellant under Section 498A I.P.C. in 1997?

13. The provisions of Section 498A IPC read as under :

> "498A. Husband or relative of husband of a woman subjecting her to cruelty. - Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation. - For the purposes of this section `cruelty' means -

> (a) any welful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman;
>
> (b) harassment of the woman where such harassment is with a view to coercing her to 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."

Cruelty has been defined by the explanation added to the Section itself. The basic ingredients of Section 498A I.P.C. are cruelty and harassment.

14. In the instant case, as the allegation of demand of dowry is not there, we are not concerned with clause (b) of the explanation. The elements of cruelty so far as clause (a) is concerned, have been classified as follows :

> (i) any `wilful' conduct which is of such a nature as is likely to drive the woman to commit suicide; or
>
> (ii) any `wilful' conduct which is likely to cause grave injury to the woman; or
>
> (iii) any `wilful' act which is likely to cause danger to life, limb or health, whether physical or mental of the woman.

15 In S. Hanumantha Rao v. S. Ramani, AIR 1999 SC 1318, this Court considered the meaning of cruelty in the context of the provisions under Section 13 of the Hindu Marriage Act, 1955 and observed that :

> "mental cruelty broadly means, when either party causes mental pain, agony or suffering of such a magnitude that it severs the bond between the wife and husband and as a result of which it becomes impossible for the party who has suffered to live with the other party. In other words, the party who has committed wrong is not expected to live with the other party."

17. In V. Bhagat v. Mrs. D. Bhagat, AIR 1994 SC 710, this court, while dealing with the issue of cruelty in the context of Section 13 of the Hindu Marriage Act, observed as under :

> "17. ....It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all

other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made...........

The context and the set up in which the word `cruelty' has been used in the section seems to us, that intention is not necessary element in cruelty. That word has to be understood in the ordinary sense of the term in matrimonial affairs. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty."

18. In Mohd. Hoshan v. State of A.P.; (2002) 7 SCC 414, this Court while dealing with the similar issue held that mental or physical torture should be "continuously" practiced by the accused on the wife. The Court further observed as under :

"Whether one spouse has been guilty of cruelty to the other is essentially a question of fact. The impart 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."

21. Single Judge of the Bombay High Court in **Sarla Prabhakar Waghmare** v. **State of Maharashtra** reported in 1990 CrLJ 407 has held that it is not every harassment or every type of cruelty that would attract S. 498-A. It must be established that beating and harassment was with a view to force wife to commit suicide or to fulfil illegal demands of husband and in-laws. The Single Judge has held as under:

“3. After incident of burning, the applicant had gone to stay with her parents at Nandura and from there she filed the proceedings under Section 125, Criminal Procedure Code, at Malkapur. The proceedings were withdrawn by her in view of the assurance that was given by her husband that he would take her and keep her with him. It is difficult to appreciate this conduct on the part of the applicant. It is alleged that thereafter again she was subjected to harassment and beating by the non-applicants. It is not every harassment or every type of cruelty that would attract Section 498-A, which reads as under, makes it absolutely clear "498-A. Husband or relative of husband of a woman subjecting her to cruelty :-

Whoever, being the husband or the relative of the husband of a woman, subject such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation :- For the purposes of this section, "cruelty" means

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman, or

(b) harassment of the woman where such harassment is with a view to coercing 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."

After going through her evidence it does not appear that she has conclusively established that the beating and harassment was with a view to force her to commit suicide or to fulfil the illegal demands of the non-applicants. The trial Court has discussed this aspect at some length and has recorded a finding that offence under Section 498-A, Indian Penal Code, is not established. I do not see any reason to interfere with the same in my revisional jurisdiction at the instance of the complainant, particularly when the State has not challenged the impugned order."

22. A single judge of this Court in **Jiwan Lal** V/s **State of Himachal Pradesh**, reported in Latest HLJ 2012 (HP) Vol. 1. 231 has held that to constitute 'cruelty', under clause (b), there has to be harassment to coerce her or any person related to her to meet any unlawful demand and case has to be made out that there is a failure to meet such demand. The Single Judge has held as under:

"22. "Cruelty" has not been defined in the Indian Penal Code but the above explanations added to the Section spells out the ingredients of the offence of "cruelty" which are cruelty and harassment. The elements of cruelty so far as clause (a) is concerned can be classified as follows:

(i) any 'willful' misconduct which is of such a nature as is likely to drive the woman to commit suicide; or

(ii) any 'willful' conduct which is likely to cause grave injury to the woman; or

(iii) any 'willful' act which islikely to cause danger to life, limb or health, whether physical or mental of the woman.

23. In order to constitute "cruelty" under clause (b), there has to be a harassment of the woman with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or a case is to be made out to the effect that there is a failure by her or any person related to her to meet such demand.

24. In Smt. Raj Rani v. State (Delhi Administration); AIR 2000 SC 3559 the apex Court held that while considering the case of cruelty in the context to the provisions of Section 498-A IPC, the court must examine that allegations/accusations must be of a very grave nature and should be proved beyond reasonable doubt.

25. Further, in another case Girdhar Shankar Tawade v. State of Maharashtra, AIR 2002 SC 2078, the Supreme Court held that "cruelty" has to be understood having a specific statutory meaning provided in Section 498-A I.P.C. and there should be a case of continuous state of affairs of torture by one to another.

26. Taking note of the above judgments amongst others Supreme Court in Manju Ram Kalita v. State of Assam 2009 (2) S.L.J. (S.C.) 1036 observed that "cruelty" for the purpose of Section 498-A Indian Penal Code is to be established in the context of S. 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"."

23. After bestowing my thoughtful consideration to the pleadings as well as evidence available on record, I have no hesitation to conclude that both the learned Courts below have erred in holding petitioner guilty of having committed offence punishable under Section 498A IPC, especially when there is/was no evidence adduced on record by the prosecution specifically proving cruelty in terms of Section 498A IPC.

24. Their Lordships of the Hon'ble Supreme Court in case **Shobha Rani v. Madhukar Reddi** reported in **AIR 1988 SC 121** have explained the term "cruelty" as under:

> "4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in elation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.
>
> 5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."

25. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour, which may be important in dealing with the cases of mental cruelty, as under:

> "98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must

be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

26. Their Lordships of the Hon'ble Supreme Court in **Manisha Tyagi vs. Deepak Kumar** reported in **2010(1) Divorce & Matrimonial Cases 451**, have explained the term 'cruelty' as under:

"24. This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonable be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that would be harmful or injurious to continue the cohabitation with the other spouse. Therefore, to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce."

27. Their Lordships of the Hon'ble Supreme Court in **Ravi Kumar vs. Julumidevi** reported in (2010) 4 SCC 476, have explained the term 'cruelty' as under:

"19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it ma be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial case can be of infinite variety – it may be subtle or even brutal and may be by gestures and word. That

possible explains why Lord Denning in Sheldon v. Sheldon held that categories of cruelty in matrimonial case are never closed.

21. This Court is reminded of what was said by Lord Reid in Gollins v. Gollins about judging cruelty in matrimonial cases. The pertinent observations are (AC p.660)

> ".. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."

22. " About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi at AIR p. 123, para 5 of the report: (SCC p.108, para 5)

> "5. It will be necessary to bear in mind that there has been (a) marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties."

28. Consequently, in view of the aforesaid discussion, the impugned judgments of conviction recorded by the Courts below are set aside. Petitioner is acquitted of offence under Section 498A IPC. Bail bonds, if any, furnished by the petitioner are discharged. Fine amount, if any, deposited by the petitioner is also ordered to be refunded to him. Pending applications, if any, are disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Manish Kumar Aggarwal …….Petitioner.
Versus
Union of India & ors. …….Respondents.

CWP No. 9646 of 2013.
Reserved on: 9.3.2017.
Decided on: 12.4.2017.

Constitution of India, 1950- Article 226- Petitioner has purchased the land from the previous owners who were inducted as non-occupancy tenants and had become the owners on the commencement of H.P. Tenancy and Land Reforms Act- the petitioner constructed a site office and a store after obtaining permission from Municipal Corporation, Nahan- the respondent directed the Jawans to obstruct the passage leading to the land in dispute – demarcation was conducted and the path was found to be owned by M.C., Nahan- army jawans trespassed into the

suit land and demolished the site office, store and retaining wall – FIR was registered – the petitioner restarted the construction but it was also demolished - a civil suit was filed, which was decreed- proceedings for eviction of the petitioner were initiated under Public Premises (Eviction of Unauthorized Occupants) Act, 1971 and an order of eviction was passed – an appeal was filed, which was dismissed- aggrieved from the order, present writ petition has been filed- held that the land was in the ownership of the State Government - proprietary rights could not have been conferred upon the tenants – the plea of the petitioner that he had acquired ownership from the previous owner is not tenable- the petitioner is a trespasser – civil court has already held the Government to be the owner and liberty was granted to initiate proceedings for eviction of the tenants in accordance with law – the appeal was dismissed – hence, the proceedings for eviction under the Act are maintainable – the orders passed by the estate officer and appellate authority are legal – writ petition dismissed. (Para-8 to 18)

Cases referred:
State of Rajasthan vs. Padmavati Devi & ors., 1995 Supp. (2) SCC 290
Government of Andhra Pradesh vs. Thummala Krishna Rao and another, (1982) 2 SCC 134
Metro Studio vs. Canara Bank, 2003(2) RCR 664

For the petitioner: Mr. Bhupinder Gupta, Sr. Advocate with Mr. Ajeet Jaswal, Advocate.
For the respondents: Mr. Ashok Sharma, ASGI with Mr. Ajay Chauhan, Advocate for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J.

The subject matter of dispute in this Writ Petition is the land entered in Khewat/Khatauni No. 122 min/174 min, 176 min and 177 min, bearing Kh. Nos. 1241, 1236/4, 1237/1, 1242, 1240/1 and 1243 (6 plots), measuring 0-39-91 hectares, situated at revenue estate Shamsherpur Chhawani (Chiranwali), Nahan, District Sirmaur. The petitioner claims himself to be the owner-in-possession of the land in dispute as according to him, he has purchased the same from its previous owners who were inducted as non-occupancy tenants by the landlords/Government and on conferment of proprietary rights under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972, had become owners thereof. The petitioner, after having obtained the permission from Municipal Council, Nahan for sub division of plots in November, 2007 started development of the land in dispute and constructed a site office as well as store thereon. Besides a retaining wall for levelling the plots was also constructed whereas uneven surface of the land levelled by deploying machines and manual labour after spending huge amount. The respondents, however, with malafide intention to grab the land in dispute directed the Jawans to obstruct the passage leading to the land in dispute who dug pits in the passage with a view to obstruct egress and ingress of the petitioner, the labour and machines etc. to the land in dispute. The petitioner requested them not to violate the law and stop interference in the municipal road but of no avail and as a result thereof, he approached the District Collector, Sirmaur who got the demarcation of the land conducted through Asstt. Collector (Ist Grade), Nahan. On demarcation, the path in question was found to be that of Municipal Council, Nahan. However, to the utter surprise of the petitioner, the Army Jawans trespassed into the suit land and demolished the site office and also the store as well as retaining wall. Besides, the machinery deployed there, was also damaged. This has led in registration of FIR No. 182 on 15.7.2008 under Sections 447, 448, 147, 149 & 427 of the Indian Penal Code against respondent No. 2. After registration of the FIR, the petitioner remained under the impression that better sense would prevail and the respondents may not cause interference in the land in dispute and as such again started the construction work but of no avail as the Army jawans again trespassed into the land in question and pulled down the shed which was reconstructed by the petitioner

during the night intervening 23rd and 24th July, 2008. Again, FIR No. 192 dated 24.7.2008 under Sections 447, 448, 147, 148, 149, 427 and 506 of the Indian Penal Code was registered against the said respondent.

2. Not only this, but the petitioner has filed Civil Suit No. 77/1 of 2008 for the decree of perpetual prohibitory injunction restraining the defendants from interfering or trespassing into the land in dispute in any manner whatsoever. The suit was contested by the first and second respondents who were arrayed as defendants. Learned Civil Judge (Jr. Divn.), Nahan, District Sirmaur vide judgment and decree dated 29.6.2011, Annexure P-1, while decreeing the suit partly, has restrained the defendants from obstructing the petitioner from use of a passage to have egress and ingress to the land in dispute qua which it is the respondents who were declared to be the owners, however, not in possession. Since it is the petitioner who was found to be in possession of the land in dispute, therefore, respondents were directed not to evict him from the suit land while resorting to extra judicial method and rather it was left open to them to evict the petitioner therefrom in accordance with law.

3. The judgment and decree Annexure P-1 was further assailed by the petitioner in appeal registered as civil appeal No. 66-CA/13 of 2011 in the Court of learned District Judge, Sirmaur, District at Nahan, however, unsuccessfully because the appeal was dismissed by learned appellate Court vide judgment and decree dated 4.6.2012, Annexure P-2. The judgment and decree, Annexure P-2 was, however, not assailed any further by the petitioner. On the other hand, since it was left open to the respondents to evict the petitioner from the land in dispute in accordance with law, therefore, the second respondent in the capacity of Estate Officer had served the petitioner with show-cause-notice, Annexure P-3 and thereby he was called upon to show cause why an order of his eviction from the land in dispute is not passed against him. Reply to the show-cause-notice is Annexure P-4. The second respondent after hearing the petitioner and going through the reply Annexure P-4 as well as judgment and decree passed by the Civil Court, has held that the petitioner is in unauthorized occupation of the land in dispute and as such ordered him to vacate the same on or before 20.7.2013, vide order Annexure P-5. The order Annexure P-5 was assailed before the appellate Authority i.e. learned Addl. District Judge, Sirmaur District at Nahan in an appeal under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as the Public Premises Act). The memorandum of appeal is Annexure P-6. Learned appellate Authority, however, has dismissed the appeal vide judgment dated 25.11.2013 Annexure P-7, while arriving at a conclusion that the Civil Court has already declared Union of India as owner of the land in dispute.

4. It is in this backdrop, this writ petition came to be filed in this Court with the following prayers:

> "(a) Quashing Annexure P-5 and Annexure P-7 being illegal, arbitrary, unconstitutional and without jurisdiction.
>
> (b) Directing the respondents to produce the entire record.
>
> (c) Awarding cost in favour of the petitioner against the respondents of the proceedings throughout.
>
> (d) Any other such other order, writ or direction that may be found appropriate in the facts and circumstances of the case in favour of the petitioner."

5. Order Annexure P-5 passed by respondent No. 2 in the capacity of Estate Officer and Annexure P-7 by learned Addl. District Judge, Sirmaur District at Nahan have been assailed on the grounds, inter alia, that the proceedings for eviction initiated under the provisions of the Act are without any jurisdiction. Otherwise also, the proceedings initiated against the petitioner by the respondents could have not been decided summarily, particularly when neither the ownership nor title or possession of the respondents in the land in dispute was established. The notice Annexure P-3 was absolutely fallacious as the land in dispute was not public premises and rather purchased by the petitioner from its previous owners and as such the proceedings under

Public Premises Act could not have been initiated against him. Otherwise also, highly disputed questions of law and facts were involved, therefore, the respondents allegedly acted without jurisdiction while holding that the petitioner was in unauthorized occupation thereof. The judgments Annexure P-1 and P-2 passed by learned Civil Court had no bearing on the merits of the proceedings initiated under the Public Premises Act by respondent No. 2 against the petitioner.

6. The State of Himachal Pradesh was not arrayed as party in the suit, therefore, the findings recorded by the Civil Court had no bearing on the merits of the present proceedings, which according to the petitioner were required to be determined and disposed of independently. The petitioner who had acquired right, title and interest in the property in dispute, the same could have not been taken away mechanically and in a summary manner.

7. Respondents No. 1 to 3, when put to notice had contested the petitioner's case as set out in the Writ Petition. According to the respondents, since it is the Union of India, the owner of land in dispute, therefore, respondent No. 2 with the assistance of Army jawans had rightly stopped the construction work which was in progress thereon. Since the Civil Court had reserved liberty in favour of the competent authority to initiate eviction proceedings against the petitioner in accordance with law, therefore, the second respondent having been declared the Estate Officer under the Public Premises Act vide notification dated 21.7.1978 Annexure R-1 has, rightly served the petitioner with show-cause-notice and after taking on record his version declared him in unauthorized occupation of the land in dispute. He, as such, was rightly ordered to be evicted therefrom vide order Annexure P-5. The appeal, he preferred before learned appellate Authority, was also dismissed. As per further stand of the respondents, since the Civil Court had declared the Union of India as owner of the suit land, therefore, there was no occasion to respondent No. 2 to have again entered upon any such question qua the title of the land in dispute and as such it is denied that the eviction order has been passed summarily against the petitioner. Rejoinder to the petition has also been filed.

8. The points, which we have culled out from the rival submissions and need consideration are that the land in dispute is public premises within the meaning of provisions contained under the Public Premises Act or not and that the petitioner is not a trespasser and rather the true owner thereof. Then comes the question of competency of the second respondent to act as an Estate Officer under the Public Premises Act and his competency to initiate eviction proceedings with respect to the land in dispute.

9. In order to decide these points, it is first to be seen as to what constitutes *'public premises'* within the meaning of the Public Premises Act. For the sake of convenience, we reproduce here the definition of *'public premises'* as find mention under Section 2(e) of the Public Premises Act. The same reads as follows:

> "2 [(e) "***public premises***" means— (1) any premises belonging to, or taken on lease or requisitioned by, or on behalf of the Central Government, and includes any such premises which have been placed by that Government, whether before or after the commencement of the Public Premises (Eviction of Unauthorised Occupants) Amendment Act, 1980 (61 of 1980) under the control of the Secretariat of either House of Parliament for providing residential accommodation to any member of the staff of that Secretariat.
>
> ....
> ...."

10. Now, what the word "*premises*" under the Act means, we are reproducing here the provisions contained under Section 2(c) of the Public Premises Act as follows:

> "2(c) "***premises***" means any land or any building or part of a building and includes,— (i) the garden, grounds and outhouses, if any, appertaining to such building or part of a building, and (ii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof."

11. Therefore, *'public premises'* includes the building/structure and also includes land belonging to Central Government. In the case in hand, the subject matter of dispute is land. While the petitioner claims the land in dispute belonging to him, at the same time, it is the case of the respondents that it is the Nahan Military Station owner thereof. The petitioner claims his title over the land through the previous owners, who according to him were inducted as non-occupancy tenants by the State Government thereon and on conferment of proprietary rights under the provisions of H.P. Tenancy and Land Reforms Act, 1972 have acquired title therein. He has acquired the land by way of sale deed from its previous owners. Learned Civil Judge (Jr. Divn.), Nahan, while deciding Civil Suit No. 77-1 of 2008 and taking note of the entries in the Jamabandi for the year 1951-52, no doubt has held that it is the State Government which was the owner of the land in question whereas the same was in the possession of the Cantonment (Mehakama Cantonment) and one Najir Khan was recorded as tenant under the Cantonment. The entries qua the tenancy of Najir Khan were carried forward in the Jamabandi for the year 1959-60. This land was shown in the ownership of the State Government, however, in possession of the Municipal Committee and Najir Khan was shown as tenant under the Municipal Committee. Then again in the Jamabandi for the year 1963-64, this land was recorded in the ownership of the State of Himachal Pradesh and shown in possession of Cantonment and in the cultivative possession of said Najir Khan. The same entries were repeated in the Jamabandi for the year 1968-69 and also in 1973-74. On coming into force the H.P. Tenancy and Land Reforms Act, 1972, the proprietary rights over the land in dispute came to be conferred upon Sher Khan etc. who had succeeded Najir Khan aforesaid. However, by way of 1987 amendment, the following proviso was added to Section 104 of the H.P. Tenancy and Land Reforms Act, 1972:

> "Provided that nothing contained in this Section shall apply to such land which is either owned by or is vested in Govt. under any law, whether before or after the commencement of this Act and is leased out to any person."

12. Therefore, when the land continuously remained recorded in the ownership of the State Government, the proprietary rights in respect of the same could have not been conferred upon Sher Khan etc. When the proprietary rights could have not been conferred upon the persons, through whom the petitioner is claiming his right, title and interest in the land in dispute, his claim that he has acquired the same through registered sale deed is highly untenable. The petitioner, therefore, cannot be said to have any right, title or interest in the land in dispute. The entries qua the possession thereof being shown in revenue record in favour of second respondent whereas in the ownership of the State Government, the same for all intents and purposes, is public premises in terms of provisions contained under the Act.

13. Now, if coming to the second limb of arguments addressed on behalf of the petitioner, it would not be improper for us to hold that the petitioner is a trespasser into the land in dispute. As per the **Black's Law Dictionary (10th Edition),** a trespasser is a person who wrongfully enter on the property of others. Since the persons through whom the petitioner has claimed right in the land in dispute were not legally entitled to conferment of proprietary rights under the provisions of H.P. Tenancy and Land Reforms Act, 1972 upon them, therefore, they could have not been termed as owners thereof. They were also not competent to sell the land in question to the petitioner.

14. Interestingly enough, amendment to Section 104 of the H.P. Tenancy and Land Reforms Act, 1972, as noticed supra, is not prospective but retrospective in nature, as has been discussed in detail by learned Civil Judge (Jr. Divn.), Nahan in judgment Annexure P-1. As a matter of fact, this judgment considers, discuss and decide the status of the land in dispute, the question of its ownership and the status of the petitioner as a trespasser being in unauthorized possession thereof, with the help of oral as well as documentary evidence. The Civil Court, as such, has dealt with all these questions after holding full trial between the parties on both sides and affording them due opportunity of being heard. The judgment Annexure P-1 even has been upheld in appeal by learned District Judge Sirmaur District at Nahan vide judgment dated 4.6.2012 Annexure P-2. The petitioner has not opted for challenging the judgment and decree

passed by learned District Judge any further by way of filing second appeal in this Court meaning thereby that the findings recorded by the Civil Court qua the State Government was owner of the land in dispute whereas the second respondent Shamsherpur Chhawani, Nahan in possession thereof have attained finality. True it is that actual possession in view of the judgment and decree passed by the Civil Court was that of the petitioner and it is for this reason the liberty was granted to the respondents to initiate ejectment proceedings against him as per law.

15. It is not the case of either party that the land in dispute is situated in Cantonment area or that Nahan Cantonment area has been set up, however, a military station i.e. headquarter of Ist Batallion Parachute Regiment (SF) is situated at Nahan. The Station Commander thereof is the second respondent. The property, as such, is public premises for all intents and purposes. It lies ill in the mouth of the petitioner to claim that the second respondent had no jurisdiction to initiate eviction proceedings against him for the reason that vide notification Annexure R-1 to the reply filed on behalf of the respondents, the Station Commanders of all Cantonment and military stations were appointed as Estate Officers, hence respondent No. 2 is competent to initiate eviction proceedings against the petitioner. No doubt, show-cause notice Annexure P-3 issued by the second respondent for ejectment of the petitioner from the land in dispute has been contested vide reply Annexure P-4 thereto filed on behalf of the petitioner, however, on such grounds not legally admissible and rather already gone into in detail and adjudicated by the Civil Court with the help of cogent and reliable evidence. As a matter of fact, when the objections raised to the reply to the show-cause-notice were already considered and rejected by the Civil Court, there was no occasion to the Estate Officer i.e. second respondent to have sit over the judgment of the Civil Court and opened the Pandora box by resorting to reconsider such question afresh in the proceedings under Section 4 of the Public Premises Act which to our mind is summary in nature and not otherwise as argued on behalf of the petitioner.

16. The main thrust laid on behalf of the petitioner is that the second respondent irrespective of judgment and decree passed by the Civil Court was required to have independently gone into all questions such as the land in dispute was public premises or not and that the petitioner has no right, title or interest therein and rather is unauthorized occupant thereof, however, in our considered opinion, the Estate Officer could not have sit over the findings recorded by the Civil Court on all these questions which have even been accepted by the petitioner also because it is for this reason, he has not assailed the same any further in this Court by way of filing second appeal. Learned counsel representing the petitioner, therefore, has failed to persuade us to take a view of the matter contrary to the one which has been taken by the second respondent and also by the appellate Authority i.e. Addl. District Judge, Sirmaur District at Nahan who has decided the appeal preferred by the petitioner under Section 9 of the Public Premises Act vide judgment Annexure P-7. It is seen that the judgment Annexure P-7 is well considered and well reasoned, hence calls for no interference in this writ petition.

17. There is no denying to the legal principles that in eviction proceedings where the person in occupation of the government land raises bonafide dispute involving question of title and his right and interest therein, the proceedings cannot be decided summarily as settled by the Apex Court in ***State of Rajasthan vs. Padmavati Devi & ors., 1995 Supp. (2) SCC 290*** and in ***Government of Andhra Pradesh vs. Thummala Krishna Rao and another, (1982) 2 SCC 134.*** However, distinguishable on facts for the reason that in the case in hand, the Civil Court after holding full trial has authoritatively held that the petitioner is not owner of the land in dispute and as such, there is no question of claiming his right, title or interest therein. The findings so recorded have attained finality, therefore, the second respondent while placing reliance on the judgment and decree passed by the Civil Court has rightly concluded that the petitioner is not owner of the land in dispute and rather a trespasser. The only option in such a situation was to have passed an order of his ejectment, therefore, the order Annexure P-3 passed by the second respondent which even has been confirmed by the appellate Authority vide judgment Annexure P-7 cannot be said to be illegal or suffering from any material irregularities.

The ratio of the judgment of Kerala High Court in ***Metro Studio vs. Canara Bank, 2003(2) RCR 664*** is also not attracted in the given facts and circumstances of this case.

18. In view of what has been said hereinabove, this Writ Petition is without any merits and the same is accordingly dismissed. Pending application(s), if any, shall stand dismissed.

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

CWP No. 2322 of 2016 with
CWP No. 2371 of 2016
Reserved on: March 29, 2017
Decided on: April 12, 2017

1. CWP No. 2322 of 2016
M/s P K Construction Co and another ....Petitioners
Versus
The Shimla Municipal Corporation and others .Respondents
2. CWP No. 2371 of 2016
M/s ESS & ESS Joint Venture and another ....Petitioners
Versus
The Shimla Municipal Corporation and others .Respondents

Constitution of India, 1950- Article 226- Respondents invited expression of interest for construction, operation/maintenance and running of parking complexes in Shimla under Public Private Partnership Mode (PPP) – petitioners submitted the expressions of interest which were accepted – sanction for construction of complex was accorded subject to conditions - a dispute arose, which was referred to Arbitrator who commenced proceedings – separate writ petitions were filed by the petitioners – held that the matter was referred to the sole arbitrator in accordance with the request for proposal – the arbitrator was bound to proceed in accordance with law and to pronounce the award within stipulated time – reference was made prior to the amendment in Arbitration and Conciliation Act and will not apply to the pending arbitral proceedings – writ petition is not maintainable and proceedings in accordance with Arbitration and Conciliation Act have to be taken regarding the arbitration matters- the High Court does not have the power to intervene in the proceedings/orders passed by Arbitral Tribunal – petition dismissed.(Para-15 to 51)

Cases referred:
Shailesh Dhairyawan v. Mohan Balkrishna Lulla, (2016) 3 SCC 619
Huawei Technologies Co. Ltd. v. Sterlite Technologies Ltd. (2016) 1 SCC 721.
Shailesh Dhairyawan v. Mohan Balkrishna Lulla, (2016) 3 SCC 619
Ramesh Chandra Sankla v. Vikram Cement, (2008) 14 SCC 58
Estralla Rubber v. Dass Estate (P) Ltd., (2001) 8 SCC 97
Shalini Shyam Shetty v. Rajendra Shankar Patil, (2010) 8 SCC 329
Radhey Shyam v. Chhabi Nath, (2015) 5 SCC 423
Harbanslal Sahnia v. Indian Oil Corpn. Ltd., (2003) 2 SCC 107
Lalitkumar V. Sanghavi v. Dharamdas V. Sanghavi, (2014) 7 SCC 255
SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618
Union of India v. M/s Ambica Construction, AIR 2016 SC 1441

M/s CNG Trading Company Pvt. Ltd. Versus H.P. State Electricity Board Ltd., 2017(1) Him L.R. (DB) 423

For the petitioners : Mr. Bharat Thakur, Advocate (in both the petitions).

For the respondents : Mr. Hamender Chandel, Advocate, for respondent No.1 (in both the petitions).
Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for the respondent-State (in both the petitions).

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Since common questions of law and facts are involved, both the petitions were clubbed and are being disposed of by this common judgment.

2. The writ petitions, though, have been filed by different entities but arise out of same and similar dispute and same reliefs have been sought. The main reliefs, common in both the petitions, are reproduced below:

"1. Record may be called for from respondent No 3.

2. The petition be kindly heard finally & decided in the light of Section 28(3) read with S 29B(3) of the Arbitration & Conciliation Act, the Ground para & the statement of claim including subsequent MAs on record.

3. Exemplary/compensatory cost may be awarded to the petitioners qua respondent No.1.

4. Interest may be kindly allowed in terms of Section 31(7) of the Arbitration & Conciliation Act."

3. Since dispute in both the petitions is same and similar, for the sake of brevity, facts of CWP No. 2322 of 2016 are being discussed.

4. Respondents, i.e. Department of Urban Development and H.P. Infrastructure Development Board (in short, 'HPIDB') invited Expression of Interest (in short, 'EOI') from interested national/international independent legal entities/ joint ventures/ consortia for construction, operation/maintenance and running of parking complexes in Shimla city under Public Private Partnership mode (in short, 'PPP mode') vide Annexure P-1. Procedure was also laid down for submission of EOI therein. Petitioners in CWP No. 2322 of 2016 and CWP No. 2371 of 2016 submitted EOI for construction of parking complexes at Chotta Shimla and near Lift, respectively, as is evident from Annexure P-2 (in both the petitions). The EOI was accepted in both the cases, vide Annexure P-2 itself. Petitioners were required to pay Annual Concession Fee and further were asked to pay Development Fee and Construction Performance Security. Petitioners have also annexed abstract copy of Request for Proposal (in short, 'RFP')/agreement. Art 4, 'Conditions Precedent', whereof provides that, "*Subject to the express terms to the contrary, limited aspects of the Construction Period (when commenced) and any legitimate rights arising in law, the rights and obligations under this Concession Agreement shall take effect only upon fulfillment of all the Conditions Precedent set out in Articles 4.1 and 4.2 on or before the expiry of a period of 90 (ninety) days from the Proposal Acceptance Date. However, the Concessioning Authority may at any time at its discretion and in writing, waive fully or partially any of the Conditions Precedent of the Concessionaire.*"

5. In case of dispute, Art 27.3 of RFP, provides for arbitration or adjudication, which reads as under:

"27.3 Arbitration or Adjudication

a. In the event that the parties are unable to resolve the Dispute through Direct Discussion under Article 27.2, the parties shall submit the Dispute for arbitration in accordance with the Arbitration & Conciliation Act, 1996. The arbitration proceedings shall be conducted by the "Secretary, Law, GoHP" as the Sole Arbitrator (the "Sole Arbitrator").

b. The Sole Arbitrator shall make a reasoned award and any award made pursuant to this Article 27.3 shall be final and binding on the Parties as from the date on which it is made and the Concessionaire and the Concessioning Authority agree to undertake to carry out the award without delay.

d. The cost incurred on the process of Arbitration including inter alia the fees of the arbitral tribunal and the cost of the proceedings shall be borne by the Parties in equal proportions. Each Party shall bear its own legal fees incurred as a result of any Dispute under this Article 27."

6. Sanction for the construction of parking complex was accorded by respondent No.1, vide Annexure P-4, dated 9.12.2011, on various conditions, one of which was that the petitioners shall dump the debris with the permission of respondent No.1. Respondent No.1 also issued compliance certificate indicating fulfillment of conditions by the Concessioning Authority and Concessionaire. On 26.9.2014, issue regarding completion of parking complexes at various places, including one near Lift and another at Chhota Shimla was also taken up in a meeting under the chairmanship of Hon'ble the Chief Minister, wherein petitioners aired the problems being faced by them regarding handing over of site. On 7.10.2014, petitioners submitted drawings of revised proposals. Vide Annexure P-8 dated 28.10.2014, Er. Amar Singh Chauhan (Independent Engineer) was asked to examine the proposal, who submitted his recommendations on 29.10.2014. Vide Annexure P-10, letter dated 5.3.2015, respondent No.1 intimated the petitioners that the construction period was over and petitioners were asked to make the parking operational. Thereafter, petitioners were asked to complete the construction work as per approved drawings and provisions of Concession Agreement dated 11.5.2015.

7. On receipt of above communication, the petitioners invoked dispute redressal process, by sending legal notices to respondent No.1 by alleging misrepresentation, fraud, undue influence, coercion and mistake of law etc. Petitioners raised issues regarding undue charge of fees, revision of project etc. and demanded that construction period be not deemed to have commenced as yet and other various issues were raised.

8. On receipt of notice from the petitioners, respondent No.1, referred the dispute to the Sole Arbitrator i.e. respondent No.3 and requested him to conduct proceedings as per Article 27.3 of the Concession Agreement dated 15.7.2015. Petitioners filed petition before the Arbitrator, to which reply was filed by respondent No. 1. Petitioners filed rejoinder to the same. Petitioners also filed miscellaneous application for completing the arbitration process within specified time schedule.

9. The petitioners approached this Court by way of present petitions, which were clubbed together and listed on various dates, for ascertaining the maintainability of the same and jurisdiction of this Court. Keeping in view the reliefs prayed for in the present petition, learned counsel representing the petitioners was repeatedly asked to justify the maintainability as well as jurisdiction of this Court. At the very outset, it may be noticed that since this Court was prima facie of the view that present petitions are not maintainable, in their present form, suggestion was made to the learned counsel representing the petitioners that in case petitioners agree, direction can be issued to the learned Arbitrator to conclude the arbitration proceedings within a stipulated time. However, the fact remains that the learned counsel representing the petitioners remained adamant on getting the matter decided on merits and insisted that the controversy at hand may be decided by this Court, on the basis of material already adduced on record by the respective parties before the Arbitrator, while exercising powers under Articles 226 and 227 of the

Constitution of India. Apart from making oral submissions, which would be referred to herein below, petitioners also filed written arguments as well as response to the query of this Court, on the point of jurisdiction. But a bare perusal of written submissions, which have been taken on record, suggests that these are mere repetitions of oral submissions having been made by the learned counsel representing the petitioners.

10. The petitioners filed written submissions reiterating that the matter be adjudicated by this Court, as arbitration proceedings have become infructuous since the same were not conducted by the sole Arbitrator within stipulated time, despite request of the petitioners. Learned counsel representing the petitioners, prays that the matter be decided on 'as-is-where-is' stage, since they have lost faith in the Sole Arbitrator.

11. Learned counsel representing petitioners vehemently argued that respondent No.3, i.e. Arbitrator has failed to make final awards pursuant to the references made to him, arbitration proceedings stand automatically terminated in terms of Section 29B(4) of the Arbitration & Conciliation Act, 1996 (hereafter, 'Act') and as such same is required to be decided by this Court in light of Section 28(3) read with Section 29B (3) of the Act.

12. Learned counsel for the petitioners further contended that since pleadings as well as evidence in support thereof were submitted in due course of time, respondent No.3 i.e. Arbitrator was required to make the requisite award within the period as provided under Section 29A. As per the petitioners, reference was made to the Arbitrator on 15.7.2015 and as such he was required to pass award on or before the expiry of twelve months i.e. 20.7.2016. Learned counsel for the petitioners specifically invited the attention of this Court to the communication dated 10.6.2015, whereby petitioners, in terms of Article 27 of the Agreement inter se parties, invoked dispute resolution process. Learned counsel for the petitioners further contended that vide Annexure P-13, i.e. communication dated 15.7.2015, Municipal Commissioner, Shimla, who happened to be second party, in terms of agreement inter se parties, sent a communication to Secretary (Law) to the Government of Himachal Pradesh, who is the named Arbitrator in the agreement as per Article 27.3 of the Agreement, to conduct arbitration proceedings. While referring to the aforesaid communication dated 15.7.2015, learned counsel representing the petitioners, stated that the Arbitrator is deemed to have entered upon reference on 15.7.2015, because, as per explanation provided under Section 29A of the Act, Arbitral Tribunal shall be deemed to have entered upon reference on the date, on which Arbitrator received notice, in writing, of his appointment. Learned counsel for the petitioners also invited attention of this Court to various documents annexed with the petition to demonstrate that the pleadings were filed within stipulated time, but, despite that, no steps, whatsoever, were taken by the learned Arbitrator to pass award within stipulated period, as such, mandate of the Arbitrator stands terminated, because, admittedly, at no point of time, time was either extended as provided under Section 29A (3) of the Act, with the consent of the parties, or, thereafter, by a Court, in terms of Section 29A (4) of the Act. To substantiate aforesaid argument, with regard to repeated requests for completion of arbitration proceedings, on or before the stipulated period i.e. 20.7.2016, attention was invited to Annexure P-21 i.e. Misc. Application having been moved by the petitioners praying therein that the arbitration proceedings may be concluded within specified time schedule. However, it is another matter that the respondent-Municipal Corporation, while filing reply to the aforesaid application, disputed that undue delay is being caused by the Arbitrator in dealing with the matter and claimed that procedure is going on as per law. In the aforesaid background, learned counsel for the petitioners submitted that since Arbitrator has failed to pass award within stipulated period as prescribed under Section 29A of the Act, instant matter is required to be decided by this Court exercising powers under Articles 226 and 227 of the Constitution of India, in light of the provisions contained in Section 28(3) read with Section 29B(3) of the Act, because statement of claim as well as reply /counter claim filed by the opposite party including Misc. Application, moved before Arbitrator from time to time, are on record. While concluding his arguments, learned counsel representing the petitioners, stated that the High Court's power to issue prerogative writs of certiorari, mandamus or prohibition to any person, authority or quasi judicial tribunal under Article 226 falls under its original jurisdiction, whereas

power under Article 227 is both, administrative and of judicial superintendence over all subordinate courts and tribunals, and as such powers under Articles 226 and 227 are discretionary, equitable and are required to be exercised in larger interests of justice. He further contended that the very purpose of empowering High Courts with powers under Articles 226 and 227, is to advance justice and to uproot injustice, rather than thwarting justice itself and no man should be subjected to injustice by violation of law. Learned counsel for the petitioners further contended that under Article 226, High Court can take cognizance of entire facts and circumstances and may pass appropriate orders to do complete and substantial justice to promote equity, honesty and fair play, because, as per the law laid down by the Apex Court, High Court must interfere where subordinate tribunal or authority or officer acts without jurisdiction, acts in excess of jurisdiction, violates natural justice, refuses to exercise jurisdiction as vested by law, where there is error apparent on the face of record, or where such act, omission, error or excess has resulted in manifest injustice. While seeking adjudication of claim, which was originally filed before the Arbitrator, learned counsel representing the petitioners submitted that Sections 11 and 15 of the Act are not applicable in as much as neither the appointment nor substitution of Arbitrator is involved, rather it is a simple case of deemed termination of mandate of the Arbitrator by application of Section 29A of the Act and as such, petitioners are entitled to invoke Constitutional remedy, because, petitioners' fundamental right under Articles 14, 19(g) and right of tangible/intangible property under Article 300A is violated by respondents No. 1 and 2, and respondent No.3 has failed/ refused to make arbitral award. In support of his aforesaid contention, learned counsel representing the petitioners placed reliance upon following case law:

1. **(1996) 5 SCC 54 Shangrila Food Products Ltd.** v. **LIC**
2. **(2001) 8 SCC 97, Estralla Rubber** v. **Dass Estate (P) Ltd.**
3. **(2002) 1 SCC 100, Roshan Deen** v. **Preeti Lal**
4. **(2008) 14 SCC 58, Ramesh Chandra Sankla** v. **Vikram Cement**
5. **(2010) 8 SCC 329, Shalini Shyam Shetty** v. **Rajendra Shankar Patil**
6. **(2015) 5 SCC 423, Radhey Shyam** v. **Chhabi Nath**
7. **(2003) 2 SCC 107, Harbanslal Sahnia** v. **Indian Oil Corpn. Ltd.**
8. **(2011) 5 SCC 697, Union of India** v. **Tantia Construction (P) Ltd.**

13. Mr. Hamender Chandel, learned counsel representing respondent No. 1 (Municipal Corporation), refuted aforesaid contentions having been made by the learned counsel representing the petitioners and stated that present petitions are wholly misconceived and deserve to be rejected. Mr. Chandel, further contended that instant petitions are sheer abuse of process of law by the petitioners, because, by filing the instant petitions, they are trying to get out of the arbitration proceedings, which are still in progress. Mr. Chandel, further contended that if, for the sake of arguments, contentions, with regard to automatic termination of award, in terms of Section 29A of the Act, as projected by the learned counsel representing the petitioners, are accepted, even then, present petitions are not maintainable, because, this Court can not be asked to decide claims and counter-claims, having been filed by the respective parties in arbitration proceedings. Mr. Chandel, further contended that the only fall-out of the non-compliance of Section 29A, wherein time frame has been fixed, would be termination of mandate of Arbitrator but, in that eventuality, remedy available to the petitioners is to approach appropriate court of law under Sections 11 and 15 of the Act, and not this Court under Articles 226 and 227 of the Constitution of India. Mr. Chandel, while concluding his arguments also stated that in no eventuality, dispute inter se parties, pursuant to Concession Agreement, can be resolved /adjudicated by this Court, while exercising powers under Articles 226 and 227 of the Constitution of India and law cited by the learned counsel representing the petitioners, is not applicable to the present petitions, as such, same deserve to be dismissed. In support of his aforesaid claim, he also placed reliance upon judgments passed by Apex Court in **Shailesh Dhairyawan** v. **Mohan Balkrishna Lulla** reported in (2016) 3 SCC 619 and in **Huawei Technologies Co. Ltd.** v. **Sterlite Technologies Ltd.** reported in (2016) 1 SCC 721.

14. We have heard the learned counsel representing the parties and gone through the record.

15. Perusal of the documents available on record certainly suggests that pursuant to dispute between the parties, matter was referred to the Arbitral Tribunal (Secretary Law to the Government of H.P.), in terms of Article 27.3 of the Agreement inter se parties, on 15.7.2015. Similarly, perusal of agreement placed on record, suggests that as per Article 27.1 of the Agreement, any dispute/difference or controversy of whatever nature regarding the validity, interpretation, implementation of rights and obligations arising out of, or in relation or howsoever under or in relation to Concession Agreement between the parties, shall be subject to dispute resolution procedure, as provided under Article 27. Similarly, Article 27.3.a suggests that, if parties are unable to resolve the dispute, through direct discussion as provided under Article 27.2, they shall submit dispute for arbitration, in accordance with Arbitration & Conciliation Act, 1996, before the Sole Arbitrator i.e. Secretary Law, Government of H.P. It would be profitable to reproduce aforesaid Article:

> "27.1 Dispute Resolution
>
> Any dispute, difference or controversy of whatever nature regarding the validity, interpretation, implementation or the rights and obligations arising out of, or in relation to, or howsoever arising under or in relation to this Concession Agreement between the parties, and so notified by either Party to the other Party (the "Dispute") shall be subject to the dispute resolution procedure set out in Article 27. It is specially clarified that in case of any ambiguity regarding the Works, the practices existing at the time of submission of proposal as per Good Industry Practice would prevail.
>
> *"27.3 Arbitration or Adjudication*
>
> *a. In the event that the parties are unable to resolve the Dispute through Direct Discussion under Article 27.2, the parties shall submit the Dispute for arbitration in accordance with the Arbitration & Conciliation Act, 1996. The arbitration proceedings shall be conducted by the "Secretary, Law, GoHP" as the Sole Arbitrator (the "Sole Arbitrator")."*

16. Bare perusal of dispute resolution process as provided under Article 27, clearly suggests that dispute, if any, between the parties, is to be decided by the Sole Arbitrator namely Secretary Law, but, admittedly, this Court sees no provision/Rule providing therein for filling up the vacancy, if any, caused due to recusal by the Arbitrator or due to termination of mandate of the Arbitrator before passing of final award. Perusal of communication dated 15.7.2015 clearly suggests that respondent No.1 (Municipal Corporation), on the request having been made by the petitioners, referred the matter to the Sole Arbitrator for arbitration under Article 27.3 of the Agreement and requested him to fix suitable date and venue to conduct arbitration proceedings. At this stage, it may be relevant to reproduce Section 29A of the Arbitration & Conciliation Act, 1996:

> "29A. Time Limit for arbitral award.-- (1) The award shall be made within a period of twelve months from the date the arbitral tribunal enters upon the reference.
>
> Explanation.—For the purpose of this sub-section, an arbitral tribunal shall be deemed to have entered upon the reference on the date on which the arbitrator or all the arbitrators, as the case may be, have received notice, in writing, of their appointment.
>
> (2) If the award is made within a period of six months from the date the arbitral tribunal enters upon the reference, the arbitral tribunal shall be entitled to receive such amount of additional fees as the parties may agree.
>
> (3) The parties may, by consent, extend the period specified in sub-section (1) for making award for a further period not exceeding six months.

(4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period:

Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.

(5) The extension of period referred to in sub-section (4) may be on the application of any of the parties and may be granted only for sufficient cause and on such terms and conditions as may be imposed by the Court.

(6) While extending the period referred to in sub-section (4), it shall be open to the Court to substitute one or all of the arbitrators and if one or all of the arbitrators are substituted, the arbitral proceedings shall continue from the stage already reached and on the basis of the evidence and material already on record, and the arbitrator(s) appointed under this section shall be deemed to have received the said evidence and material.

(7) In the event of arbitrator(s) being appointed under this section, the arbitral tribunal thus reconstituted shall be deemed to be in continuation of the previously appointed arbitral tribunal.

(8) It shall be open to the Court to impose actual or exemplary costs upon any of the parties under this section.

(9) An application filed under sub-section (5) shall be disposed of by the Court as expeditiously as possible and endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party."

17. Perusal of explanation to Section 29 A suggests that the arbitral tribunal would be deemed to have entered upon reference, on the date, on which arbitrator or all the arbitrators, as the case may be, receive notice, in writing, of their appointment. Hence, after perusal of communication dated 15.7.2015, it can be inferred that the Sole Arbitrator, in the instant case, entered upon reference on 15.7.2015, and as such, he was required to pass Award within stipulated period i.e. twelve months, as prescribed under Section 29A. However, it is another matter that time, as referred above, could be enlarged, either with the consent of the parties, or with the intervention of the Court, on the request of respective parties. But, in the instant case, there is nothing on record, suggestive of the fact that aforesaid time was ever extended, either with the consent of the parties in terms of Section 29A(3) or by a court of law under Section 29A(4) or Section 29A(5) of the Act.

18. Before adverting to the claim of the petitioners, with regard to determination of their claim by this Court invoking powers under Articles 226 and 227 of the Constitution of India, it may be noticed that aforesaid Sections 29A and 29B of the Act were inserted by Arbitration & Conciliation (Amendment) Act, 2015 (hereafter, 'amending Act, 2015'), which admittedly came into operation on 23.10.2015. It would be profitable to refer to Sections 1 and 2 of the amending Act, 2015:

"THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015

NO. 3 OF 2016

[31st December, 2015.]

An Act to amend the Arbitration and Conciliation Act, 1996.

BE it enacted by Parliament in the Sixty-sixth Year of the Republic of India as follows:—

1. Short title and commencement. --(1) This Act may be called the Arbitration and Conciliation (Amendment) Act, 2015.

(2) It shall be deemed to have come into force on the 23rd October, 2015.

2. Amendment of Section 2.--In the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act), in section 2,—

(I) in sub-section (1),—

(A) for clause (e), the following clause shall be substituted, namely:—

'(e) "Court" means—

(i) in the case of an arbitration other than international commercial arbitration, the principal Civil Court of original Short title and commencement. jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

(ii) in the case of international commercial arbitration, the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, and in other cases, a High Court having jurisdiction to hear appeals from decrees of courts subordinate to that High Court;';

(B) in clause (f), in sub-clause (iii), the words "a company or" shall be omitted;

(II) in sub-section (2), the following proviso shall be inserted, namely:—

"Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognised under the provisions of Part II of this Act.""

19. If, claim with regard to automatic termination of mandate of Arbitrator, as is being projected by the learned counsel representing the petitioners, is examined and analyzed, it is revealed that reference to the Arbitrator was made on 15.7.2015 i.e. admittedly before the date of coming into operation newly inserted Sections 29A and 29B, wherein, for the first time, stipulation with regard to passing of award within stipulated time was made. Section 1 (2) of the amending Act, 2015, specifically provides that it shall be deemed to have come into force on 23.10.2015, meaning thereby that provisions as contained under Sections 29A and 29B would come into operation only after 23.10.2015 and time frame, as prescribed in the aforesaid Sections, would not be applicable to a case, where reference was made prior to aforesaid amendment. Since, in the instant case, reference to the Arbitrator was made on 15.7.2015, it seems that newly inserted Sections 29A and 29B have no application qua the dispute pending before Sole Arbitrator, who admittedly, entered upon reference on 15.7.2015.

20. It is well settled law that amendment, if any, is always prospective, unless specifically provided that it shall be effective retrospectively.

21. At this stage, it may be apt to reproduce Section 26 of the amending Act, 2015, as under:

"26. Act not to apply to pending arbitral proceedings. –nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of

> section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

22. Careful perusal of aforesaid Section 26 clearly suggests that provisions contained in amending Act, 2015, whereby Sections 29A and 29B, came to be inserted, would not apply to the arbitral proceedings commenced before the date of commencement of the amended Act, save and except, where parties otherwise agree. This Act would apply in relation to arbitration proceedings commenced on or after date of commencement of this Act.

23. Close scrutiny of aforesaid provisions of law as contained in Section 26 of the amending Act, 2015, leaves no doubt in the mind of this Court that newly inserted Sections 29A and 29B are not applicable in the present case, where admittedly, arbitration proceedings had commenced on 15.7.2015 i.e. prior to promulgation of amending Act, 2015. Section 21 of the principal Act, is reproduced herein below:

> "21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

24. Section 21 specifically provides that arbitral proceedings in respect of a particular dispute commence from the date on which a request for that dispute to be referred to arbitration is received by the respondent. In the instant case, petitioners, vide communication dated 10.6.2015 (Annexure P-12), invoked dispute resolution process in terms of Article 27 of the Concession Agreement inter se parties. On receipt of aforesaid notice, respondent No.1 sent a communication to the sole arbitrator i.e. Secretary Law, Government of H.P., in terms of Article 27.3 of Concession Agreement.

25. Careful examination of Annexure P-13, i.e. communication dated 15.7.2015, suggests that arbitrator entered upon reference on 15.7.2015 i.e. before 23.10.2015, when amending Act, 2015 came into operation.

26. Hence, this Court has no hesitation to conclude that newly inserted Sections 29A and 29B have no application in the present arbitration proceedings, which admittedly commenced on 15.7.2015. Otherwise also, as per Section 21, reproduced herein above, arbitration proceedings in respect of a particular dispute commence from the date on which request is received by the respondent from the claimant for referring the same to arbitration. In this case, request for referring the dispute to the arbitrator was received on 10.6.2015 i.e. approximately four months prior to the date of coming into operation of the amending Act, 2015.

27. Section 26 of the amending Act, 2015 clearly suggests that no provision of the amended Act would apply to those arbitral proceedings, which had commenced in accordance with provisions of Section 21 of principal Act, before commencement of amending Act, unless otherwise agreed upon by the parties.

28. In the instant case, neither letter dated 10.6.2015 nor letter dated 15.7.2015, whereby dispute was raised and thereafter request was sent to the arbitrator for adjudication, respectively, suggests that parties had agreed to be governed by the provisions of amending Act, 2015, meaning thereby arbitral proceedings, in the instant case, were to be governed by the provisions of principal Act, without looking into the amendments made in the amending Act, 2015. Hence, in view of discussion made herein above, this Court is of view that newly inserted Sections 29A and 29B, have no application and as such it can not be said that since Arbitrator failed to pass award within specified time of twelve months, mandate of Arbitrator stands terminated automatically.

29. This Court examined the matter from yet another angle. If it is presumed that arbitral proceedings were to be governed in terms of provisions contained in the amending Act, 2015, even then, present petitions do not appear to be maintainable, for the reasons stated herein below.

30. True it is, that Section 29A prescribes time limit of twelve months for the arbitral tribunal to decide and pass award after entering into reference, but careful perusal of Section 29A(3) suggests that parties may, by consent, extend period specified under sub-section (1) for making award for further period, not exceeding six months. Sections 29A(4) and 29A(5) suggest that if award is not made within period specified under sub-section (1) or extended period as per sub-section (3), mandate of arbitrator shall terminate unless court extends period on the application of any of the parties. Section 29A(5) clearly suggests that competent court may, on the application having been filed by any of the parties, extend period, subject to certain terms and conditions, as may be imposed by the Court. Similarly, Section 29A (6) suggests that, while extending period referred to in sub-section (4), it shall be open to the court to substitute one or all of the Arbitrators and in the event of substitution, arbitral proceedings shall continue from stage already reached and on the basis of the evidence and material already on record. Section 29A, if is read in its entirety, it contains complete mechanism to deal with situation, which may arise after termination of mandate of Arbitrator, on account of delay in passing award. At the first instance, time can be extended by Arbitrator himself, not exceeding six months, with the consent of the parties and, and thereafter, any party can move application for extension of time to the competent court of law, which may, while considering prayer for extension of time, substitute Arbitrator. Interestingly, in the instant case, there is nothing on record suggestive of the fact that either of the parties ever consented for enlargement of time in terms of Section 29A(3). Similarly, there is nothing on record that any of the parties moved appropriate application before competent court for enlargement of time as well as substitution of Arbitrator, whose mandate allegedly stood terminated because of non-compliance of Section 29A, whereby he was supposed to pass award within a period of twelve months from the date of entering upon reference.

31. After carefully examining Section 29A, as has been discussed herein above, this Court sees no force in the arguments having been made by the learned counsel representing the parties that since mandate of Arbitrator has terminated due to violation of Section 29A, dispute, as was pending before the Arbitrator, is required to be adjudicated by this Court, while exercising powers under Articles 226 and 227 of the Constitution of India, in light of Section 28(3) read with Section 29B(3) of the Act. Careful perusal of Sections 28 and 29 of the Act clearly suggests that these provisions relate to rules applicable to substance of dispute as well as decision making by the panel of arbitrators. Sections 28 and 29B are reproduced herein below:

> "28. Rules applicable to substance of dispute.—(1) Where the place of arbitration is situate in India,—
>
> > (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;
> >
> > (b) in international commercial arbitration,—
> >
> > > (i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;
> > >
> > > (ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;
> > >
> > > (iii) failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.
>
> (2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

[(3) While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction.]

29B. Fast track procedure.—(1) Notwithstanding anything contained in this Act, the parties to an arbitration agreement, may, at any stage either before or at the time of appointment of the arbitral tribunal, agree in writing to have their dispute resolved by fast track procedure specified in sub-section (3).

(2) The parties to the arbitration agreement, while agreeing for resolution of dispute by fast track procedure, may agree that the arbitral tribunal shall consist of a sole arbitrator who shall be chosen by the parties.

(3) The arbitral tribunal shall follow the following procedure while conducting arbitration proceedings under sub-section (1):—

(a) the arbitral tribunal shall decide the dispute on the basis of written pleadings, documents and submissions filed by the parties without any oral hearing;

(b) the arbitral tribunal shall have power to call for any further information or clarification from the parties in addition to the pleadings and documents filed by them;

(c) an oral hearing may be held only, if, all the parties make a request or if the arbitral tribunal considers it necessary to have oral hearing for clarifying certain issues;

(d) the arbitral tribunal may dispense with any technical formalities, if an oral hearing is held, and adopt such procedure as deemed appropriate for expeditious disposal of the case.

(4) The award under this section shall be made within a period of six months from the date the arbitral tribunal enters upon the reference.

(5) If the award is not made within the period specified in sub- section (4), the provisions of sub-sections (3) to (9) of section 29A shall apply to the proceedings.

(6) The fees payable to the arbitrator and the manner of payment of the fees shall be such as may be agreed between the arbitrator and the parties.]"

32. Aforesaid provisions of law, nowhere provide that High Court, while exercising powers under Articles 226 and 227 of the Constitution of India can decide the dispute, which has been subject matter of arbitration proceedings under Section 28(3) and 29B(3) of the Act, because provisions contained in sections referred herein above, are with regard to procedure to be followed by arbitral tribunal, while conducting arbitration proceedings.

33. Though, this Court, in view of detailed discussion made herein above, is of the view that mandate of Arbitrator has not been terminated as claimed by the petitioners in the present petitions, because arbitral proceedings, in the instant case, were to be covered by unamended Act/principal Act and not by amending Act, 2015. Otherwise also, as emerges from close scrutiny of Sections 29A and 29B of the Act, remedy, if any, after termination of mandate of arbitrator, is/was under Arbitration and Conciliation Act, 1996, and not by way of instant petitions under Articles 226 and 227.

34. At the cost of repetition, it may be stated that even if plea of petitioners is accepted that mandate of arbitrator had expired automatically in terms of Section 29A (4) since he failed to pass award within a period of twelve months, from the date of entering upon reference, petitioners herein were required to move appropriate application in the competent court of law, as prescribed under sub-sections 29A (4), 29A(5) and 29A(6) of the Act, seeking therein enlargement of time as well as substitution of sole Arbitrator as named in the concession agreement. Apart from Section 29A, as discussed above, petitioners, in the event of termination of

mandate of Arbitrator, could resort to Section 15 of the Arbitration and Conciliation Act, 1996. Section 15 of the Act reads as under:

> "15. Termination of mandate and substitution of arbitrator.—(1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—
>
> (a) where he withdraws from office for any reason; or
>
> (b) by or pursuant to agreement of the parties.
>
> (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
>
> (3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.
>
> (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal."

35. Aforesaid provision of law clearly suggests that where mandate of Arbitrator terminates, a substitute Arbitrator is be appointed according to Rules, which are applicable to the appointment of Arbitrator being replaced. Since, in the instant case, as clearly emerges from the Agreement, there is no provision with regard to filling up of vacancy caused due to termination of mandate of Arbitrator appointed pursuant to agreement, petitioners could always resort to provisions contained in Section 11 of the Arbitration and Conciliation Act, which is reproduced herein below:

> "11 Appointment of arbitrators. —
>
> (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
>
> (2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
>
> (3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
>
> (4) If the appointment procedure in sub-section (3) applies and—
>
> (a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
>
> (b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
>
> (5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.
>
> (6) Where, under an appointment procedure agreed upon by the parties,—
>
> (a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.

(6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to—

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(9) In the case of appointment of sole or third arbitrator in an international commercial arbitration, the Chief Justice of India or the person or institution designated by him may appoint an arbitrator of a nationality other than the nationalities of the parties where the parties belong to different nationalities.

(10) The Chief Justice may make such scheme as he may deem appropriate for dealing with matters entrusted by sub-section (4) or sub-section (5) or sub-section (6) to him.

(11) Where more than one request has been made under sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made under the relevant sub-section shall alone be competent to decide on the request.

(12) (a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice'' in those sub-sections shall be construed as a reference to the "Chief Justice of India''.

(b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal Civil Court referred to in clause (e) of sub-section (1) of section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court.

(13) An application made under this section for appointment of an arbitrator or arbitrators shall be disposed of by the Supreme Court or the High Court or the person or institution designated by such Court, as the case may be, as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party.

(14) For the purpose of determination of the fees of the arbitral tribunal and the manner of its payment to the arbitral tribunal, the High Court may frame such rules as may be necessary, after taking into consideration the rates specified in the Fourth Schedule.

Explanation.—For the removal of doubts, it is hereby clarified that this sub-section shall not apply to international commercial arbitration and in arbitration (other than international commercial arbitration) in case where parties have agreed for determination of fees as per the rules of an arbitral institution.)"

36. Provisions contained in aforesaid section clearly suggest that parties are free to agree to a procedure for appointment of Arbitrator or Arbitrators and in case parties fail to appoint an Arbitrator in terms of agreement, entered between them, request can be made by either of parties, to competent court of law, be it Supreme Court or High Court, for appointing Arbitrator. Section 11 (5) specifically deals with appointment of sole Arbitrator named in the agreement. It suggests that if parties fail to appoint sole Arbitrator as named in the agreement, within stipulated time, request can be made by either of the parties, to competent court of law for appointment of Arbitrator.

37. At this stage, it would be relevant to refer to law laid down by Apex Court, in **Shailesh Dhairyawan** v. **Mohan Balkrishna Lulla** reported in (2016) 3 SCC 619, as under:

"19. The scheme of Section 8 of the 1940 Act and the scheme of Section 15(2) of the 1996 Act now needs to be appreciated. Under Section 8(1)(b) read with Section 8(2) if a situation arises in which an arbitrator refuses to act, any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in a fresh appointment, and if such appointment is not made within 15 clear days after service of notice, the Court steps in to appoint such fresh arbitrator who, by a deeming fiction, is to act as if he has been appointed by the consent of all parties. This can only be done where the arbitration agreement does not show that it was intended that the vacancy caused be not supplied. However, under Section 15(2), where the mandate of an arbitrator terminates, a substitute arbitrator "shall" be appointed. Had Section 15(2) ended there, it would be clear that in accordance with the object sought to be achieved by the Arbitration and Conciliation Act, 1996 in all cases and for whatever reason the mandate of an arbitrator terminates, a substitute arbitrator is mandatorily to be appointed. This Court, however, in the judgments noticed above, has interpreted the latter part of the Section as including a reference to the arbitration agreement or arbitration clause which would then be "the rules" applicable to the appointment of the arbitrator being replaced. It is in this manner that the scheme of the repealed Section 8 is resurrected while construing Section 15(2). The arbitration agreement between the parties has now to be seen, and it is for this reason that unless it is clear that an arbitration agreement on the facts of a particular case excludes either expressly or by necessary implication the substitution of an arbitrator, whether named or otherwise, such a substitution must take place. In fact, sub-sections (3) and (4) of Section 15 also throw considerable light on the correct construction of sub- section (2). Under sub-section (3), when an arbitrator is replaced, any hearings previously held by the replaced arbitrator may or may not be repeated at the discretion of the newly

appointed Tribunal, unless parties have agreed otherwise. Equally, orders or rulings of the earlier arbitral Tribunal are not to be invalid only because there has been a change in the composition of the earlier Tribunal, subject, of course, to a contrary agreement by parties. This also indicates that the object of speedy resolution of disputes by arbitration would best be sub-served by a substitute arbitrator continuing at the point at which the earlier arbitrator has left off."

38. Aforesaid exposition of law, as laid down by Apex Court clearly suggests that, if a situation arises in which Arbitrator refuses to act, any party may serve the other parties or the Arbitrators, as the case may be, with a written notice to concur in a fresh appointment, and if such appointment is not made within 15 days after service of notice, the Court steps in to appoint such fresh Arbitrator who, by a deeming fiction, is to act as if he has been appointed by the consent of all parties. This can only be done where the arbitration agreement does not show that it was intended that the vacancy caused be not supplied. Apex Court has further concluded that Section 15(2) specifically provides for substitution of arbitrator, whether named or otherwise, meaning thereby substitution must take place in the event of termination of mandate of award but, definitely, that can be attained within frame work of provisions contained under the Act and, certainly, not by resorting to powers as contained under Articles 226 and 227 of the Constitution of India.

39. This Court, after bestowing thoughtful consideration to the material available on record as well as provisions contained in the Arbitration and Conciliation Act, 1996, is of the view that the petitioners have a specific remedy under the Act to get Sole Arbitrator substituted, after termination of his mandate. Learned counsel appearing for the petitioners, during arguments, pressed into service law as referred to herein above, to substantiate his plea, that this Court has power under Articles 226 and 227 of the Constitution of India to decide the controversy at hand in these proceedings, after looking into claims and counter-claims of the parties. But after careful examination of law cited by the learned counsel for the parties, we are afraid that the same can be made applicable to the facts and circumstances of the present case. Needless to say that, High Court, while exercising powers under Article 226, has a prerogative of issuing writs to any person, authority or quasi-judicial authority, under its original jurisdiction, whereas power under Article 227 is more of administrative and judicial superintendence over all subordinate courts and tribunals. True it is that constitutional powers vested in High Courts under Articles 226 and 227 can not be fettered by any alternative remedy, as has been laid down by Apex Court, in the judgments in cases referred herein above by the learned counsel for the petitioners. But in the facts and circumstances, where petitioners have already subjected themselves to arbitration proceedings, in terms of agreement, and which are still pending before the arbitral tribunal, as has been discussed in detail, this Court has no power to interfere in the same, while exercising powers under Articles 226 and 227 of the Constitution of India.

40. No doubt, High Court, while exercising powers under Articles 226 and 227 of the Constitution of India, having regard to entire facts and circumstances and, keeping in mind, principles of equity, may pass appropriate orders to do complete and substantial justice and to promote honesty and fair play, but, certainly, can not use this power to thwart proceedings, which are underway, that too under statute i.e. Arbitration & Conciliation Act.

41. Similarly, this Court sees no dispute with the principles of law that arbitration clause is not a bar to invoke writ jurisdiction when injustice is caused and rule of law is violated. But, in the instant case, as has been stated above, petitioners have already availed alternative remedy available to them in terms of agreement, as such, present petitions filed under Articles 226 and 227, can not be allowed to be used to undo proceedings already underway before the Arbitrator under Arbitration and Conciliation Act. Apex Court, while discussing scope of Articles 226 and 227, has repeatedly held that powers under Articles 226 and 227 are to advance justice and not to thwart it. Apex Court has specifically laid down that, even where justice is by-product of erroneous interpretation of law, High Court ought not to wipe out such justice in the name of

correcting the error of law. (**Ramesh Chandra Sankla** v. **Vikram Cement** reported in (2008) 14 SCC 58)

42. Similarly, Apex Court in **Estralla Rubber** v. **Dass Estate (P) Ltd.** reported in (2001) 8 SCC 97 has held that power under Articles 226 and 227 of the Constitution of India does not confer an unlimited prerogative upon High Court to correct all wrong decisions or to prevent hardships caused thereby. Power under Article 227 can be exercised to interfere with orders of lower courts and tribunals only in cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where, in the absence of intervention by the High Court, grave injustice would remain unchecked and uncorrected.

43. Apex Court in **Shalini Shyam Shetty** v. **Rajendra Shankar Patil**, reported in (2010) 8 SCC 329, has held that High Court, while exercising powers under Article 226 can interfere if there is violation of statutory duty on the part of some statutory authority or any infraction of statute or it can be shown that a private individual is acting in collusion with a statutory authority.

44. But, in the facts and circumstances of the present case, neither there is any document available on record, suggestive of the fact that learned Arbitrator violated some statutory duties, nor the learned counsel representing the petitioners was able to point out any infraction of statute. Moreover, since, this Court has come to conclusion that provisions contained in Sections 29A and 29B(3)can not be made applicable to the arbitral proceedings commenced before promulgation of amending Act, 2015, there was no time limit to be adhered to by the arbitrator and as such, this Court, sees no violation of statutory duties cast upon the arbitrator under the Arbitration and Conciliation Act.

45. Apex Court in **Radhey Shyam** v. **Chhabi Nath** reported in (2015) 5 SCC 423, has also held that orders of civil court stand on different footing from the orders of authorities or tribunals or courts other than judicial/ civil courts. There are no precedents in India for the High Courts to issue writs to the subordinate courts, thus, judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. Apex Court has held as under:

> "27. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226.
>
> 28. We may also deal with the submission made on behalf of the respondent that the view in Surya Dev Rai stands approved by larger Benches in Shail, Mahendra Saree Emporium and Salem Advocate Bar Assn and on that ground correctness of the said view cannot be gone into by this Bench. In Shail, though reference has been made to Surya Dev Rai, the same is only for the purpose of scope of power under Article 227 as is clear from para 3 of the said judgment. There is no discussion on the issue of maintainability of a petition under Article 226. In Mahendra Saree Emporium, reference to Surya Dev Rai is made in para 9 of the judgment only for the proposition that no subordinate legislation can whittle down the jurisdiction conferred by the Constitution. Similarly, in Salem Bar Assn. in para 40, reference to Surya Dev Rai is for the same purpose. We are, thus, unable to accept the submission of learned counsel for the respondent."

46. Learned counsel for the petitioners specifically laid emphasis on judgment passed by Apex Court in **Harbanslal Sahnia** v. **Indian Oil Corpn. Ltd.** reported in (2003) 2 SCC 107, to suggest that present petitions are maintainable, because inspite of availability of alternative remedy, High Court can still exercise its jurisdiction, but we are not in agreement with the aforesaid submissions of the learned counsel representing the petitioners, because, Apex Court while holding that, in appropriate case, inspite of availability of alternative remedy, High Court may exercise its jurisdiction has also laid down three contingencies, where court can interfere: (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where

there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. Apex Court has held as under:

> "7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged [See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 11. The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

47. In the instant case, none of the contingencies, as have been pointed out by the Apex Court, has arisen, because, neither there is any violation of fundamental right nor there is any violation of principles of natural justice.

48. Similarly, no orders/proceedings, which can be termed without jurisdiction or ultra vires the Act, are challenged before this Court. Apex Court, in case **Lalitkumar V. Sanghavi** v. **Dharamdas V. Sanghavi** reported in (2014) 7 SCC 255 has specifically dealt with issue with regard to powers of High Courts to intervene in the proceedings/orders passed by Arbitral Tribunal. Apex Court, in the aforesaid case, while placing reliance upon law laid down in **SBP & Co.** v. **Patel Engg. Ltd.,** (2005) 8 SCC 618, has held that intervention by High Courts in the proceedings under Articles 226 and 227, with the orders of arbitral tribunal, is not permissible. Apex Court has held as under:

> "8. Within a couple of weeks thereafter, the original applicant died on 7.10.2012. The question is whether the High Court is right in dismissing the application as not maintainable. By the judgment under appeal, the Bombay High Court opined that the remedy of the appellant lies in invoking the jurisdiction of the High Court under Article 226 of the Constitution. In our view, such a view is not in accordance with the law declared by this Court in S.B.P. & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618. The relevant portion of the judgment reads as under:
>
> > "45. It is seen that some High Courts have proceeded on the basis that any order passed by an arbitral tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution of India. We see no warrant for such an approach. Section 37 makes certain orders of the arbitral tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating his grievances against the award including any in-between orders that might have been passed by the arbitral tribunal acting under Section 16 of the Act. The party aggrieved by any order of the arbitral tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The arbitral tribunal is after all, the creature of a contract between the parties, the arbitration agreement, even though if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the arbitral tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of

> the stand adopted by some of the High Courts that any order passed by the arbitral tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution of India. Such an intervention by the High Courts is not permissible."

That need not, however, necessarily mean that the application such as the one on hand is maintainable under Section 11 of the Act.

9. Learned senior counsel for the appellants, Shri Shyam Divan, submitted that if application under Section 11 is also held not maintainable, the appellants would be left remediless while their grievance subsists. On the other hand, learned senior counsel for the respondents Shri C.U. Singh submitted that the appellant's only remedy is to approach the arbitral tribunal seeking a recall of its decision to terminate the arbitration proceedings.

10. Chapter III of the Act deals with the appointment, challenge to the appointment and termination of the mandate and substitution of the arbitrator etc.

10.1 Section 11 provides for the various modes of appointment of an arbitrator for the adjudication of the disputes which the parties agree to have resolved by arbitration. Broadly speaking, arbitrators could be appointed either by the agreement between the parties or by making an application to the Chief Justice of the High Court or the Chief Justice of India, as the case may be, as specified under Section 11 of the Act.

10.2 Section 12(3) provides for a challenge to the appointment of an arbitrator on two grounds. They are –

> (a) "that circumstances exist" which "give rise to justifiable doubts as to" the "independence or impartiality" of the arbitrator;
>
> (b) that the arbitrator does not "possess the qualification agreed to by the parties".

10.3 Section 14 declares that "the mandate of an arbitrator shall terminate" in the circumstances specified therein. They are-

> "14. Failure or impossibility to act.—(1) The mandate of an arbitrator shall terminate if—
>
>> (a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
>>
>> (b) he withdraws from his office or the parties agree to the termination of the mandate."
>>
>> (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate."

Section 14(2) provides that if there is any controversy regarding the termination of the mandate of the arbitrator on any of the grounds referred to in the clause (a) then an application may be made to the Court – "to decide on the termination of the mandate".

11. Section 32 of the Act on the other hand deals with the termination of arbitral proceedings.[1] From the language of Section 32, it can be seen that arbitral proceedings get terminated either in the making of the final arbitral award or by an order of the arbitral tribunal under sub-Section 2. Sub-section (2) provides that the arbitral tribunal shall issue an order for the termination of the

arbitral proceedings in the three contingencies mentioned in sub-clauses (a) to (c) thereof.

12. On the facts of the present case, the applicability of sub-clauses (a) and (b) of Section 32(2) is clearly ruled out and we are of the opinion that the order dated 29th October, 2007 by which the Tribunal terminated the arbitral proceedings could only fall within the scope of Section 32, sub-Section (2), sub-clause (c) i.e. the continuation of the proceedings has become impossible. By virtue of Section 32(3), on the termination of the arbitral proceedings, the mandate of the arbitral tribunal also comes to an end. Having regard to the scheme of the Act and more particularly on a cumulative reading of Section 32 and Section 14, the question whether the mandate of the arbitrator stood legally terminated or not can be examined by the court "as provided under Section 14(2)".

13. The expression "Court" is a defined expression under Section 2(1)(e) which reads as follows:-

> "2. Section 2(1)(e) "Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject- matter of the arbitration if the same had been the subject- matter of a suit, but does not- include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;"

14. Therefore, we are of the opinion, the apprehension of the appellant that they would be left remediless is without basis in law."

49. Recently, Apex Court, in case **Union of India** v. **M/s Ambica Construction** reported in AIR 2016 SC 1441, has specifically held that Arbitrator is not a Court, but outcome of an agreement. It is held as under:

> "6. "Court" has been defined in section 2(c) of the Act to mean a civil court having jurisdiction to decide the questions forming the subject- matter of the reference. Section 41 of the Act is extracted hereunder:
>
> "41. Procedure and powers of Court. – Subject to the provisions of this Act and of rules made thereunder :
>
> (a) The provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court, and to all appeals, under this Act, and
>
> (b) The Court shall have, for the purpose of, and in relation to arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to any proceedings before the Court:
>
> Provided that nothing in CI. (b) shall be taken to prejudice any power which may be vested in an Arbitrator or umpire for making orders with respect to any of such matters."
>
> The court can exercise the power specified in Second Schedule of the Act. However, Arbitrator is not a court. Arbitrator is the outcome of agreement. He decides the disputes as per the agreement entered into between the parties. Arbitration is an alternative forum for resolution of disputes but an Arbitrator ipso facto does not enjoy or possess all the powers conferred on the courts of law."

50. Division Bench of this Court relying upon judgment having been passed by Apex Court has also held in case **M/s CNG Trading Company Pvt. Ltd.** Versus **H.P. State Electricity Board Ltd.** reported in 2017(1) Him L.R. (DB) 423, that intervention of High Court in the proceedings under Articles 226 and 227, with the orders made by the arbitral tribunal is not permissible.

51. Consequently, in view of detailed discussion as well as law discussed herein above, this Court sees no occasion to interfere in the matter, while exercising powers under Articles 226 and 227 of the Constitution of India. Though, this Court is of the view, for the reasons stated above, that Sections 29A and 29B of the amending Act, 2015, are not applicable to the present arbitral proceedings since the proceedings had commenced before promulgation of the amending Act, 2015. But, even otherwise, there is self contained mechanism under Sections 29A and 29B to deal with the situation, which may arise after termination of the mandate of the arbitrator. Section 15 of the Act, 1996 also provides procedure to deal with a situation, which may arise after termination of mandate of the arbitrator and, as such, this Court sees no reason to interfere in the matter or to decide the dispute in the present petitions, as prayed for by the petitioners.

52. The writ petitions are dismissed being devoid of merits. Pending applications, if any, are also disposed of.

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

Sauju and ors. ……Petitioners.

Versus

Gulab Singh & ors. ……Respondents.

Rev. Petition No. 110 of 2016.
Decided on: 12.4.2017.

Code of Civil Procedure, 1908- Section 114- An application for seeking permission to produce evidence was filed which escaped the notice of the Court- it was contended that additional evidence was necessary for adjudication of the dispute pending between the parties – the appeal could not have been decided without deciding the application – hence, it was prayed that order be reviewed and the appeal be decided afresh- held that jurisdiction to review an order or judgment should be exercised sparingly - a party cannot seek review of judgment on merits- review is permissible on the discovery of new evidence or when there is some error or mistake apparent on record – the dismissal of appeal without considering the application under Order 41 Rule 27 is an error apparent on the face of record – petition allowed – the judgment recalled and matter posted for hearing on merits.(Para-4 to 7)

For the petitioners: Mr. J.L.Kashyap, Advocate.
For the respondents: Mr. Ramakant Sharma, Sr. Advocate with Mr. Basant Thakur, Advocate for respondents No. 1, 3 and 5.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Heard.

2. This petition has been filed with a prayer to review the judgment dated 5.6.2015 passed by this Court in RSA No. 181 of 2002 whereby the appeal filed by the review petitioner has been dismissed.

3. The grounds, on which the judgment in question has been sought to be reviewed, in a nut shell, are that an application under Order 41 Rule 27 CPC filed by the review petitioner (appellants in the main appeal) for seeking permission to produce in evidence certain documents has escaped the notice of this Court while hearing arguments in the appeal and deciding the same vide judgment sought to be reviewed. Also that the additional evidence sought to be produced by the review petitioner is essentially required to prove that the entries in revenue records showing deceased Matha, the predecessor-in-interest of the respondents-defendants in the suit in joint possession of the suit land are without any basis being not made on the basis of order of competent authority. The appeal, according to the review petitioner could have not been decided without taking into consideration the said application.

4. It is well settled at this stage that the jurisdiction to review an order or judgment should be exercised cautiously and sparingly. It should be exercised when substantial cause of miscarriage of justice is made out. A party cannot seek review of a judgment on merits or on the plea that the judgment is dehors to the pleadings and evidence available on record. Review is permissible firstly when there is discovery of new evidence, secondly there is some mistake or error apparent on the face of the record and thirdly for any other sufficient reason having nexus with other grounds enumerated under the rules. A review is by no means an appeal in disguise whereby an erroneous decision is re-heard and corrected but lies only for patent error. The power to review cannot be exercised on the ground that the decision is erroneous on merits. An error apparent on the face of the record must be such an error which strike one on mere perusal of the record and would not require any long drawn process of reasoning on points where there may be conceivably two possible opinions. An order, procedural or substantive, if reviewed, the party in whose favour the same is decided is entitled to a hearing in the main matter.

5. Now, if the controversy is seen in the light of the above legal principles, the present is a case where an error is apparent on the face of the record because while considering the main matter i.e. RSA No. 181 of 2002, an application under Order 41 Rule 27 CPC registered as CMP No. 193 of 2012 had escaped the notice of this Court and could not be taken up for consideration therewith. However, the fault did not lie with the Court and rather attributed to the review petitioners because on the day of hearing of the appeal, neither they nor learned counsel representing them opted for putting appearance. The appeal as such was considered in their absence and decided on merits. Anyhow, the dismissal of the appeal without taking into consideration an application under Order 41 Rule 27 CPC filed by the review petitioners certainly tantamount to an error apparent on the face of the record. The present, as such, is a fit case where on acceptance of this petition, the judgment passed in RSA No. 181 of 2002 on 5.6.2015 deserves to be recalled and the appeal heard on merits along with the application as aforesaid.

This petition, as such, is allowed. Consequently, the judgment dated 5.6.2015 passed by this Court in RSA No. 181 of 2002 is recalled. The appeal shall stand revived for fresh hearing along with the application under Order 41 Rule 27 CPC on merits. This petition is accordingly disposed of.

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

Singho Ram and others ....Petitioners

Versus

Balbir Singh and others ....Respondents.

CMPMO No. 125 of 2017

Decided on: 12th April, 2017

Code of Civil Procedure, 1908- Section 151- The evidence of the defendants was ordered to be closed but certified copies of judgment and decree passed in previous suit were received in evidence – it was contended that the document could not have been received without recalling the

order- held that the certified copies of the judgment and decree are per se admissible- permission was sought to produce the documents, which was granted – therefore, no illegality was committed by the exhibition of the documents- petition dismissed. (Para-3 to 5)

For the petitioners: Mr. Ajay Sharma, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Heard.

2. Order dated 7.03.2017 passed in an application under Section 151 of the Code of Civil Procedure (Civil Suit No. 164/2006) by learned Civil Judge(Junior Division), Jawali, District Kangra, H.P., is under challenge in this petition.

3. The legality and validity of the impugned order has been questioned on the grounds *inter-alia* that when the evidence of the defendants-respondents was ordered to be closed, the documents i.e. certified copy of judgment and decree Ext. D-1 and Ext. D-2 could have not been received in evidence without recalling the order, whereby the evidence of the respondents-defendants was ordered to be closed.

4. This Court is not in agreement with the submissions so made for the reasons firstly, that the documents viz. certified copies of the judgment and decree passed by the Civil Court in the previously instituted suit between the same parties are otherwise per-se admissible in evidence and in terms of Section 79 of the Indian Evidence Act, the presumption of truth is attached thereto and secondly that the same being under challenge in this Court in a Regular Second Appeal, no prejudice of serious nature, is likely to be caused to the petitioners-plaintiffs.

5. The provisions contained under Rule 1A(3) of Order VIII C.P.C. extends a right in favour of the defendants to produce a document which ought to have been produced along with the written statement at a later stage, subject to the permission of the Court ceased of the matter. Such permission was sought by the respondents-defendants by filing an application, of course, under Section 151 of the Code of Civil Procedure and not under Rule 1A(3) of Order VIII. Permission so sought by them has been granted by the trial Court after affording the petitioners-plaintiffs an opportunity of being heard. Merely that the application has not been filed under the correct provision of law i.e. Rule 1A(3) of Order VIII cannot be taken to defeat the right of the respondents-defendants to produce the documents in question in evidence at a later stage. Being so, there is no merit in this petition and the same as such is dismissed. Pending application(s), if any, shall also stand disposed of.

An authenticated copy of this judgment be sent to learned trial Court for being taken on record.

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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
Gorkha alias Vijay Kumar … Respondent

Cr. Appeal No. 200 of 2015
Reserved on: 28.02.2017
Date of decision: 12.04.2017

Indian Penal Code, 1860- Section 363, 366, 376(2) and 506(1)- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989-** Section 3(2)(v)-**Protection of Children from Sexual Offences Act,, 2012**- Section 6-Prosecutrix belongs to scheduled caste- accused used to harass her on the way to school- one day the accused took her to the upper storey of his sweet shop and raped her under threat – the accused took one photograph of her and used to abuse her by threatening to show the photograph – the accused and another boy came to the house of the prosecutrix and threatened the prosecutrix and her sister - they raised alarm on which people gathered- the accused was tried and convicted by the Trial Court for the commission of offence punishable under Section 363- the accused was acquitted of the commission of remaining offences- aggrieved from the acquittal, the State filed the present appeal- held that there are inconsistencies in the statement of the prosecutrix and her mother regarding the incident, which were not explained – the prosecution case became suspect due to these discrepancies – no explanation was provided for the delay in lodging the FIR – sister of the prosecutrix was not examined and no explanation was provided for the same – the Trial Court had taken a reasonable view while acquitting the accused – appeal dismissed.(Para-8 to 20)

For the appellant: Mr. V.S. Chauhan, Addl. Advocate General, Mr.Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.

For the respondent: Mr. Devender K. Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, State has challenged the judgment passed by the Court of learned Special Court Una, in SCST Case No. 6-VII/2013 decided on 07.01.2015, vide which, learned Court below while convicting the respondent/accused for commission of offence punishable under Section 363 of Indian Penal Code, has acquitted him for commission of offences punishable under Section 6 of Protection of Children from Sexual Offences Act, Sections 366, 376(2), 506(I) of Indian Penal Code and Section 3(2) (v) of SCST Act.

2. The case of the prosecution in brief was that on 18.10.2013, victim (PW-1), whose age was 14 years, lodged a complaint Ext. PW1/A at Police Station, Haroli, in which it was mentioned that she belongs to Scheduled Caste community and was a student of 9th class in Government G.S.S.S. Bathu, District Una, Himachal Pradesh. As per the victim, accused Ajay Kumar used to harass her on her way to School. According to the prosecutrix, on 24.07.2013, at around 1:00 p.m., when she was going to her house from the Bazaar, accused took her to the upper storey of a sweet shop under threat and he raped her. She raised hue and cry, but accused gave her beatings and threatened that in case she disclosed the incident to anyone, then he would kill her and her brother as well as her father. She further stated that accused had clicked one photograph of her. Further, as per the victim, whenever she went to the school, the accused used to make her sit with him and he used to physically abuse her. On 03.10.2013, accused came to her house and when he found her alone in the house, he took her to the same room at Tahliwal and raped her twice and threatened her that she would have to come whenever he call her, otherwise he would show her photograph as well as recordings to the boys. It was further the case of the victim that the accused used to threaten her by proclaiming that she being Harijan by caste, cannot cause any harm to him. Further, according to the victim, on 15.10.2013 at around 4.00 P.M., when she and her sister were alone at their house, accused alongwith one boy, namely, Sham Lal came there and threatened her, upon which she and her sister raised alarm. On this, public gathered there. However, in the meanwhile Sham Lal fled away, whereas accused was apprehended by the villagers. She also reported to the police that she apprehended danger to her life from the accused as the accused had threatened her and blackmailed her on the phone. Victim had narrated all these facts to her mother and she had gone to Police Station alongwith her parents and Pradhan Kanwar Krishan Rana. Further, as

per the prosecution on the basis of the said complaint FIR Ext. PW18/A was registered at Police Station Haroli and victim was got medically examined. Investigation was carried out and accused was arrested and was also got medically examined. Statement of the victim was also recorded under Section 164 Cr. P.C. before learned JMIC(1), Una. The mobile phone as well as motorcycle was also taken in possession. Investigation revealed that the accused had destroyed the recordings of the voice of the victim. Birth certificate of the victim Ext. PW9/A demonstrates that her date of birth was 22.06.2000.

3. After completion of the investigation, challan was presented in the Court and as a prima facie case was found against the accused, accordingly, he was charged for commission of offences punishable under Section 6 of Protection of Children from Sexual Offences Act, 2012, hereinafter referred to as POCSO Act and Sections 366, 376(2), 506(I) of Indian Penal Code and Section 3(2) of SCST Act , to which he pleaded not guilty and claimed trial.

4. Learned trial Court on the basis of evidence produced on record by the prosecution, convicted the accused for commission of offence punishable under Section 363 of Indian Penal Code. However, insofar as the remaining charges framed against the accused were concerned, learned trial Court concluded that the guilt of the accused was not proved for commission of offences punishable under Section 6 of Protection of Children from Sexual Offences Act, Sections 366, 376(2), 506(I) of Indian Penal Code and Section 3(2) of SCST Act. Accordingly, learned trial Court acquitted the accused as far as the commission of said offences was concerned.

5. Feeling aggrieved by the acquittal of the accused for commission of offences punishable under Section 6 of Protection of Children from Sexual Offences Act, Sections 366, 376(2), 506(I) of Indian Penal Code and Section 3(2) of SCST Act, State has filed this appeal.

6. 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.

7. In order to prove its case, the prosecution in all examined 20 witnesses.

8. We will refer to the statements of relevant witnesses in order to examine as to whether the findings of acquittal returned by learned trial Court in favour of the accused are borne out from the records or the same are perverse.

9. Prosecutrix entered the witness box as PW-1 and she deposed that her date of birth was 22.06.2000 and on 8th April, 2013, she had taken admission in 9th class in G.S.S. School, Bathu. This witness further deposed that the accused used to meet her on her way to the School. She further stated that the accused compelled her to have friendship with him and on 24.07.2013, while she was returning from Gurplah Bazaar at around 1:00 p.m., he asked her to accompany him and threatened her that in case she does not accompany him, then he will kill her father and brother. She further deposed that she accompanied the accused to Tahliwal on motorcycle, where accused took her to a sweet shop and thereafter raped her. Prosecutrix further deposed that accused gave her beatings and threatened her not to disclose the incident to anyone. She further stated that on 03.10.2013 also, while she was alone in her house, accused came there and under threats, she again accompanied him to the same shop, where the accused again raped her. She also stated that accused had gifted her a cell phone and she used to talk with the accused on the said cell phone, which was later on taken back from her by the accused. Prosecutrix further deposed that on 15.10.2013 at about 4 p.m., accused came with a friend Sham Lal to her house, when her parents were working in the field and she was alone in her house with her elder sister Nisha Devi. She further deposed that the accused started molesting her, whereas Sham Lal started fondling her sister. She further deposed that she and her sister raised hue and cry, on which villagers gathered on the spot. Though friend of the accused absconded from the spot, however, accused was caught by the villagers and thereafter her parents also came to the house. She further stated that the accused was let off in the evening by the villagers. She further stated that on 18.10.2013, she narrated the entire incident to her mother and she did not disclose it earlier out of fear of the accused. She further stated that her

mother disclosed the said incident on the same day to her father and thereafter her parents and Ex-Pradhan took her and her sister to Police Station, Haroli, where she scribed an application, which was handed over to the SHO concerned. In her cross-exaination, she was confronted with her application Ex. PW1/A, wherein it was not mentioned by her that the accused had given her a cell phone. She was also confronted with her statement Ex. PW1/C, wherein it was not mentioned that on 24.07.2013, Gorkha had taken her on a bike to Tahliwal. She was again confronted with her statement Ex. PW1/A and Ex. PW1/C, in neither of which it was mentioned that on 15.10.2013, accused Gorkha had teased her. She admitted it to be correct that on 15.10.2013, Ex-Pradhan K.K. Rana and many other villagers had gathered at their house. She stated that her grand father was also present there. She admitted it to be correct that police reached their house and had directed both the parties to come to the Police Station on 16.10.2013. She further deposed that they did not go to the Police Station on 16.10.2013 and that police again visited their house on 16.10.2013 and 17.10.2013. She admitted it to be correct that she had not disclosed about the incident of accused having committed bad act with her to the police up to 17.10.2013. She stated that she had got recorded in Ex. PW1/C that she had told her mother about the incident on 18.10.2013. She was again confronted with her statement Ex. PW1/C, wherein it was not so recorded. She also admitted it to be correct that before 18.10.2013, she had not disclosed the incident to anyone including her sister Nisha Devi. She also admitted it to be correct that before reaching Police Station on 18.10.2013, they had not disclosed anything regarding the bad act to K.K. Rana. She further stated in her cross-examination that averments made qua Raj in Ex. PW1/A were wrongly written by her and she denied the suggestion she had friendship with Raj Kumar and at the instance of her father and K.K., she had let off Raj Kumar and substituted the accused. In her cross-examination, she further admitted it to be correct that she had not disclosed the alleged incidents on 24th July and 3rd October, 2013 to her mother, as was recorded in her statement under Section 164 of the Code of Criminal Procedure before the Magistrate.

10. Mother of the prosecutrix Nirmla Devi entered the witness box as PW-2 and she deposed that on 15.10.2013, she and her husband were working in the fields and her daughters were at the house. Neighbours raised hue and cry and when they reached their house, one Sham Lal ran away when he saw them but accused Ajay alias Gorkha remained in house. She further deposed that accused told her that accused told her that he was having relations with her daughter. She further stated that on 18.10.2013, prosecutrix told her that in the month of July, Gorakha had taken her to a shop in Tahliwal and committed wrong act with her. She also stated that prosecutrix told her that accused did wrong act with her at the same place even in the month of October. She further stated that she narrated these facts to her husband and thereafter they went to Pradhan K.K. Thereafter, her daughters were taken to Police Station, Haroli and they lodged the complaints. In her cross-examination, she stated that on 15.10.2013, K.K. and Kukki Pradhan had come to their house in the evening and she admitted it to be correct that police officials from Police Post Bathri had also come to their house. She also deposed that her daughters had attended their schools normally till October, 2013. She also admitted it to be correct that till 15th October, no such incident was narrated to her by her daughters nor she had lodged any complaint either to the Police or Pradhan of Gram Panchayat. She denied the suggestion that her husband and his companions were thrashed by the accused alongwith Sham Lal and other persons.

11. Father of the prosecutrix, Surjit Singh entered the witness box as PW-3 and he stated that on 15.10.2013 he alongwith his wife were in the fields and at around 04.15 P.M., they heard some noise from their house and they found accused Sham Lal and Gorakh in their house and thereafter accused Sham Lal ran away. He also stated that there was a motorcycle parked outside his house. He also stated that on inquiry, it was revealed that accused Gorakh was known to his daughters. He further stated that his daughters Nisha and Meena did not disclose to him anything on that day. He further deposed that on 18.10.2013, Meena divulged about the bad act committed with her by Gorakh. He further stated that then he went to K.K. Rana Ex-Pradhan and thereafter to Haroli Police Station alongwith his daughters. In his cross-

examination, he deposed that only 2-3 persons of his village had gathered at his house before they reached there from the field. He further stated that no police official had visited their house on 15th. He admitted it to be correct that K.K. Rana, Kukku Pradhan and 5-7 persons of their village had come to their house on that day. He stated that Sham Lal had run away in his presence. He also deposed that after making certain inquiries and calling the police, they let off Gorakh. He further stated that the police and villagers remained at the house for about 20 minutes. He also stated that accused Sham Lal was running a clinic in their village. He also admitted it to be correct that police visited their house on 16.10.2013 and 17.10.2013 and that no complaint was made to the police during those days. He also admitted it to be correct that whatever he was deposing was on the basis of information disclosed to him by his wife and he had not verified the facts from his daughter Nisha.

12. Kanwar Krishan Rana entered the witness box as PW-6 and he deposed that on 18.10.2013, Surjit Singh came to his house and told him that accused Sham Lal had committed rape with his daughter Meena after threatening her. He further deposed that thereafter he alongwith Surjit Singh and his wife and their daughters went to Police Station Haroli, where daughters of Surjit Singh lodged complaint with the police. In his cross-examination, he admitted it to be correct that on 15.10.2013, he went to the house of Surjit where members and Pradhan of Gram Panchayat Bathu were already there. He also stated that police was called on that day by the Pradhan. He admitted it to be correct that after making inquiries from Ajay Kumar alias Gorakh, he was let off by the police. He also admitted it to be correct that from 15th to 18th October he had no talk with Meena regarding the incident.

13. Shri Avtar Chand entered the witness box as PW-7 and he stated that he was running a sweet shop at Tahliwal. However, he denied that accused had ever visited his shop alongwith any girl. He was declared as a hostile witness. In his cross-examination by the learned Public Prosecutor, he denied that accused Gorakh had come to his shop with a girl on 3-4 occasions. He also denied that police had come to the shop on 19.10.2013 and that the victim had identified the room of upper storey of the shop. He stated that accused was his co-villager and belonged to his caste, but he also stated that the accused was not related to him.

14. PW-8 Rajinder Singh deposed that on 15.10.2013, he heard some noise at around 04.00 P.M. coming from the house of Surjit Singh. When he went there, he found accused Gorakh present in the house and Sham Lal ran away in his presence. In his cross-examination, he deposed that Surjit and his wife were at their house when he went there. He admitted it to be correct that K.K. Rana, Kukki and his wife had also reached at the spot and Gorakh was let off after verifying the facts by Surjit Singh and police.

15. Even without referring to the other prosecution witnesses, the testimonies of the above stated six witnesses raise a few pertinent questions which the prosecution has not been able to answer. There are glaring inconsistencies in the statements of prosecutrix PW-1 and her mother PW-2 about the occurrence of the alleged incident which have not been satisfactorily explained by the prosecution. Whereas, PW-1 has deposed in the Court that on 15.10.2013, accused had come to her house at 04.00 P.M. with Sham Lal and had started teasing her and molested her and thereafter when she and her sister started crying and raised hue and cry, people assembled on the spot and Sham Lal absconded, whereas Gorakh was nabbed, however, when we peruse the testimony of PW-2, she has deposed in the Court that when on hearing certain noise in their house, she and her husband rushed to their house from the field and when Sham Lal saw them, he ran away, however, accused Gorakha stayed in their house itself. This contradiction in the statement of the prosecutrix and her mother has not been satisfactorily explained by the State. In fact, in our considered view, this contradiction creates a grave suspicion on the veracity of the case of the prosecution per se especially keeping in view the fact that it has categorically come in the testimony of the prosecutrix that before 15.10.2013, she had not disclosed the factum of her being allegedly sexually abused by the accused to her mother. Besides this, despite the fact that the alleged incident took place on 15.10.2013, there is no cogent explanation given by the prosecution as to why no complaint was lodged with the police

from 15.10.2013 to 18.10.2013. It is also a matter of record that Gorakh who was apprehended at the spot was let off by the father of the prosecutrix after making some inquiries. It has also come on record that on 15th itself police had visited the house of the prosecutrix and left after 15-20 minutes. It is also a matter of record as is evident from the statement of PW-3 Surjit Singh that the police had visited their house on 16.10.2013 as well as on 17.10.2013. PW-2 and PW-3 have admitted that no complaints were lodged between 15.10.2013 to 18.10.2013. Why was accused Gorakh let off by the father of the prosecutrix on 15.10.2013, has not been cogently explained by the prosecution. Why no complaint was lodged between 15.10.2013 to 18.10.2013 despite the police having visited the house of the prosecutrix on 15.10.2013 as well as 16.10.2013 and 17.10.2013, has also not been cogently explained by the prosecution. Why Nisha, sister of the prosecutrix has not been examined, has not been satisfactorily explained by the prosecutrix. Why the prosecutrix has given a contrary version in Court as compared to her mother, has not been satisfactorily explained by the prosecution. As per the prosecution, the prosecutrix was sexually assaulted by the accused initially in the month of July, 2013 and thereafter in the month of October, 2013, but the said incidents were not disclosed by her allegedly because of trauma.

16. In our considered view, trauma and threats are to be gathered from the facts of the case and prosecution has not been able to demonstrate as to what was the trauma that the proseuctrix was suffering in her house, which prevented her from disclosing all these facts to her mother because it is not the case of the prosecution that the prosecutrix was not putting up her with her parents either in the either in the month of July, 2013 or October, 2013. The case of the accused teasing the prosecutrix is also falsified from the fact that the alleged incident of teasing is not so recorded in Ex. PW1/A and Ex. PW1/C. This demonstrates that the prosecutrix has made improvements in her statement. Cross-examination of the prosecutrix further demonstrates that there are lot of contradictions in her statement recorded under Section 164 Cr.P.C. and her statement recorded as PW-1. Besides this, there are major contradictions in the statements of the mother and father of the prosecutrix also. PW-2 mother of the prosecutrix has stated that K.K. and Kukki Pradhan had not come to their house on the evening of 15.06.2013, whereas PW-3 father of the prosecutrix has deposed that they had come to their house on the evening of 15.06.2013. PW-2 has admitted the suggestion that police officials from Bathri Police Post had come to their house on 15.06.2013, whereas PW-3 has stated that no police had come to their house on 15.06.2013. However, PW-3 in the same breath thereafter stated that one accused Gorakh was let off after sometime after certain inquiries were made and police was called. These are also major contradictions in the testimonies of material prosecution witnesses which contradictions have not been satisfactorily explained by the State.

17. Therefore, in our considered view, the acused cannot be convicted for commission of offence punishable under Section 6 of Protection of Children from Sexual Offences Act on the basis of the said uncogent, unreliable and untrustworthy evidence led by the prosecution. Learned trial Court has in detail gone into all these aspects of the matter and thereafter has concluded that the prosecution as not able to prove its case beyond reasonable doubt against the accused under Section 6 of Protection of Children from Sexual Offences Act. In our considered view, the findings so returned by learned trial Court are duly borne out from the records of the case and the same do not call for any interference.

18. Similarly, the findings returned by learned trial Court while acquitted the accused for commission of offence under Section 3(2)(V) of SC & ST (Prevention of Atrocities) Act, also do not warrant any interference as the prosecution has not been able to demonstrate commission of said offence by the accused and learned trial Court after appreciating the material placed on record by the prosecution has rightly acquitted the accused for commission of offence under Section 3(2)(V) of SC & ST (Prevention of Atrocities) Act.

19. In our considered view, the testimony of prosecutrix as well as that of her mother and father do not inspire confidence. These statements are not trustworthy so as to be

made the basis to convict the accused. No material is available on record from which it can be inferred that the accused has committed an offence punishable under Section 3(2)(v) of SC & ST (Prevention of Atrocities) Act or Section 6 of Protection of Children from Sexual Offences Act.

20. Besides this, a perusal of the judgment of learned trial Court demonstrates that the view formed by it on the basis of the material on record is a possible and plausible view. It cannot be said that the conclusion arrived at by learned trial Court is either not borne out from the records of the same or the same is perverse. Learned trial Court has discussed the entire evidence on record and after a minute scrutiny of the same, it has returned the findings of acquittal in favour of the accused. In our considered view also, the prosecution has not been able to prove its case against the accused. The story putforth by the prosecution apparently is false and does not inspire any confidence. The statement of the prosecutrix also does not inspire any confidence. Therefore, while concurring with the findings returned by learned trial Court, we dismiss this appeal being devoid of any merit. Bail bonds, if any, furnished by the accused are discharged.

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

State of Himachal Pradesh .....Petitioner
Versus
Roop Lal ....Respondent.

Cr. Appeal No. 696 of 2008
Decided on : 12/04/2017

Indian Penal Code, 1860- Section 279, 337 and 338-Accused was driving a truck in a rash and negligent manner and hit the car causing hurt to the occupants of the car- the accused was tried and acquitted by the Trial Court- held in appeal that the injured has supported the prosecution version – his testimony was not shaken in cross-examination- no mechanical defect was found in the vehicle- the Trial Court had not properly appreciated the evidence- appeal allowed and judgment of Trial Court set aside- accused convicted of the commission of offences punishable under Sections 279, 337 and 338 of I.P.C. (Para-9 to 12)

For the petitioner:	Mr. R.S.Thakur, Addl. Advocate General. Mr. T.S.Chauhan, counsel, for the complainant.
For the Respondent:	Mr. Naresh Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgement of acquittal recorded by the learned Judicial Magistrate 1st Class, Court No. VI, Shimla, H.P. whereby he pronounced an order of acquittal upon the accused qua the offences allegedly committed by him.

2. The brief facts of the case are that on 21.10.2004 at about 3.00 p.m near Nauti Khad, Mashobra, accused Roop Lal was driving a Truck bearing No. PB-08A-6675 on public highway in a rash or negligent manner so as to endanger to the human life and personal safety of the others, due to which accused dashed the said truck against Alto Car bearing No. HP-62-0960 and also due to his rash or negligent act of driving caused simple as well as grievous hurt to the informant/Rajinder Chauhan as well as B.C.Chauhan and Bimla Chauhan. In this regard, the informant had intimated the police on which the police went to the spot and prepared the spot map and recorded the statement of witnesses under Section 161 Cr.P.C. and after completing all

codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused, challan was prepared and filed in the Court.

3. A notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 337 & 338 of the IPC to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 14 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He did not choose to lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal upon the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. The learned counsel appearing for the respondent 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. It stands espoused by the prosecution qua in sequel to the offending truck standing negligently driven by the accused/respondent, negligence whereof stands canvassed by it, to stand aroused by the factum of the accused/respondent proceeding to negotiate a curve from the inappropriate portion of the road, the ill-fated collision occurring inter se car bearing No. HP-62-0960 vis-à-vis truck bearing No. PB-08A-6675. In sequel to the collision which occurred inter se the truck driven by the accused bearing No. PB-08A-6675 vis.a.vis car bearing No. HP-62-0960, the informant Rajinder Chauhan besides B.S.Chauhan and Vimla Chauhan, suffered injuries on their respective persons injuries whereof stand depicted in the respective MLS prepared vis.a.vis them, MLCs whereof stand comprised in Ext.PW-12/A, Ext.PW-12/B and Ext.PW-12/C.

10. The injured/victims in their respective depositions comprised in their respective examinations in chief, echoed versions qua the ill-fated collision, in befitting corroboration qua the unfoldments in respect thereto embodied in the apposite F.I.R, borne on Ext. PW-14/B, besides they deposed with consistency vis-à-vis their respective previous statements recorded in writing. Consequently, their respective testifications are bereft of any stain of any inter se contradictions occurring in their respective examinations in chief vis.a.vis their respective cross-examinations, whereupon credibility qua their respective testified versions qua the occurrence stood enjoined to be imputed by the learned trial Court also with their deposing a version qua the occurrence with utmost intra se corroboration besides their respective testifications qua the occurrence remaining un-shattered during the exacting ordeal of a rigorous cross-examination, whereto they subjected to, by the learned defence counsel also thereupon their respective testifications acquire an enhanced virtue of credibility. However, the learned trial Court proceeded to dis-impute credence vis-à-vis their respective testifications despite theirs being injured/victims in the relevant collision, collision whereof occurred inter se the offending truck and the relevant car whereon they stood borne. The reason(s) as propounded by the learned trial Court to disimpute credence qua the testifications of the aforesaid injured/victims, ensued from the factum qua the spot map brone on Ext.PW-14/A, at mark 'A" thereof, echoing qua broken

pieces of glass(es) of both the vehicles standing scattered thereat, whereas theirs remaining uncollected by the Investigating Officer despite theirs constituting the best link evidence, qua the site of occurrence, hence warranting erection of an inference qua thereupon the charge framed upon the accused standing jettisoned. However, the aforesaid reason propounded by the learned trial Court for pronouncing an order of acquittal upon the accused, is extremely shaky, significantly when PW-14 who prepared site plan embodied in Ext.PW-14/A has in his testification made visible underscorings therein qua its preparation occurring at the site of occurrence besides thereat the posture/position of the relevant vehicle remaining undisturbed, thereupon implicit reliance was imputable thereon, unless suggestions stood purveyed qua him, marking the factum qua his contriving its preparation. However, the aforesaid suggestion(s) remained unpurveyed to him by the learned defence counsel while holding him to cross-examination, wherefrom an inference stands engendered, qua the reflection(s) occurring therein being bereft of any vice of doctoring, hence warranting imputation of credence thereon. The learned counsel for the appellant contends qua the vigour of the depictions occurring in site plan, suffering enfeeblement, arising from the factum of PW-2 Munish Kumar though deposing in his examination in chief qua its preparation occurring in his presence yet his while standing subjected to cross-examination, contradicting the aforesaid factum, thereupon an inference ensuing, qua the preparation of site plan borne in Ext.PW-14/A being amenable to a derivative qua its standing fabricated also thereupon the depictions held therewithin not warranting any imputation of credence thereon. However, the aforesaid contention reared before this Court by the learned counsel for the accused, is wholly unworthwhile, as the Investigating Officer concerned, while standing subjected to cross-examination by the learned defence counsel, has denied suggestions put to him thereat, qua his preparing site plan in the house of Munish Kumar besides has denied suggestion(s) put to him qua both Munish Kumar and Dharam Dass recording their presence at the time contemporaneous qua the ill fated collision occurring thereat, thereupon with no apposite suggestions standing put to him for corroborating the testification occurring in the cross-examination of PW-2 qua site plan held in Ext.PW-14/A standing fabricated by the Investigating Officer concerned, fabrication whereof stands ascribed qua him qua his not proceeding to take the appropriate measurement(s) at the relevant sight of occurrence rather his contriving its preparation at the house of the nephew of Munish Kumar, thereupon omission of the aforesaid suggestion to the Investigating Officer concerned rather constrains an inference qua the echoings made by PW-2 in his cross-examination qua site plan standing prepared in the house of his nephew hence not acquiring any tenacity, conspicuously, also when the apposite suggestion put to the Investigating Officer by the learned defence counsel, marks, the factum qua the latter preparing the site plan at the house of PW-2 and not at the house of the nephew of PW-2, thereupon also it appears qua the aforesaid communication occurring in the cross-examination of PW-2 wherein he belies his earlier deposition existing in his cross-examination qua site plan standing prepared in his presence, not in its entirety holding any vigour, its articulation by him being perfunctory. Contrarily, the effect of the aforesaid contradistinct suggestions put to PW-2 and PW-14 qua the place whereat Ext.PW-14/A stood prepared, is per se theirs marking the factum qua the defence contriving the aforereferred espousal, rendering hence the echoings held therewithin to concomitantly hold no tenacity.

11. The testimony of the complainant besides of the victim(s) qua the relevant occurrence when warrants imputation of credence thereupon, also thereupon the factum of non-collection of broken pieces of glass(es) by the Investigating Officer from the relevant sight of occurrence is construable to be insignificant, importantly when the reflections occurring in site plan stand concluded hereinabove, to hold vigour, whereupon the testification(s) of PW-1 and PW-2 even if they make bespeakings therein, at purported variance vis.a.vis. the deposition(s) of the complainant/injured/victims are hence also unworthwhile, significantly when the prosecution did not lead them into the witness box to render an eye witness account qua the relevant occurrence rather it led them into the witness box, in proof of the relevant memos, theirs being signatories thereof.

12. Be that as it may, with both the vehicles, standing concluded by the mechanical expert concerned to be road worthy besides pliable whereupon hence with both the vehicles driven by the accused and by the complainant, not suffering from any mechanical defect, hence enjoined the accused to manoeuvre the offending truck on its appropriate portion of the curve, rather than for reasons aforesaid, his negligently manoeuvring it, to the inappropriate side of the road. Consequently, this court is constrained to conclude qua the learned trial Magistrate omitting to appreciate the aforesaid best pieces of evidence, emphatically pronouncing upon the guilt of the accused/respondent. In aftermath, reinforcingly, it can be formidably concluded, qua the findings returned by the learned trial Court meriting interference. In summa, the verdict recorded by the learned trial Magistrate suffers from a gross infirmity as well as a perversity of non appraisal of the relevant and germane evidence whereupon this Court is constrained to reverse the findings of acquittal pronounced upon the accused. The appeal is accepted. The impugned judgement is quashed and set-aside. The accused is convicted for offences punishable under Sections 279, 337 & 338 of the IPC. The accused be produced before this Court on 26th April, 2017 for his thereon being heard on the quantum of sentence.

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

Surjit Singh .....Petitioner.
Versus
Harmohinder Singh & others. ....Respondents.

Civil Revision No. 107 of 2012
Judgment reserved on 29.3.2017
Decided on : 12.4.2017

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment of the objection was filed, which was dismissed- subsequently, the objection was also dismissed by the Trial Court- aggrieved from the order, present revision has been filed- held that the order passed in the application had merged in the final order- if the order on application was wrong, it would affect the final order as well–revision allowed.(Para-3 to 7)

For the Petitioner: Mr. Neeraj Gupta, Advocate.
For the Respondents: Mr. Shyam Singh Chauhan vice counsel.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant petition stands directed against the impugned order, recorded by the learned Civil Judge (Senior Division) Una, District Una, H.P. upon the objections constituted therebefore by the JD, whereupon he resisted the execution of the conclusively recorded decree of mandatory injunction whereupon the projections raised by the JD upon khasra No. 4464/2903/1, projections whereof stands denoted by letters shown in red and yellow circles in the site plan stood hence ordered to be demolished, whereupon he hence dismissed the apposite objections reared therebefore. Initially, the judgment debtor resisted the execution, by the learned executing Court, of the apposite decree put to execution therebefore by his rearing objections therebefore, objections, whereof, however thereat did not hold therewithin any unfoldment qua the judgment debtor suo motu voluntarily begetting compliance with the decree of mandatory injunction aforesaid, comprised in his removing the unauthorisedly raised projection/construction upon khasra No. 4464/2903/1. However, the aforesaid compliance made by the JD with the decree put to execution before the learned executing Court, stood

subsequently espoused by him, espousal whereof stood embedded in an application constituted therebefore under the provisions of Order 6 Rule 17 CPC, whereon also the learned executing Court pronounced an order dismissing it. The order rendered by the learned Executing Court upon the application constituted therebefore by the JD under the provisions of Order 6 Rule 17 CPC, stood pronounced thereon, on 1.5.2012, whereas the learned Executing Court proceeded to subsequently on 18.8.2012 dismiss the objections constituted therebefore by the judgment debtor.

2. The learned counsel appearing for the petitioner herein, has hereat constituted an onslaught qua the legality of the orders pronounced by the learned Executing Court upon the application constituted therebefore by the judgment debtor under the provisions of Order 6 Rule 17 CPC, however, he in prompt sequel to the orders standing pronounced thereupon, by the learned Executing Court, visibly omitted to make an apposite motion herebefore for hence seeking their reversal. Obviously, he waited for the pronouncement of a verdict by the learned Executing Court, upon his earlier therewith instituted objections qua the executability of the execution petition, objections whereof did not hold therewithin any averment qua the judgment debtor suo moto meteing compliance with the mandate of the conclusively recorded concurrent decree(s) of mandatory injunction, pronounced upon him, by the civil courts concerned, whereupon the failure or omission of the judgment debtor, to promptly, on rendition of an apposite verdict upon his application constituted under the provisions of Order 6 Rule 17 CPC before the learned Executing Court, hence may estop him to assail it herebefore nor he nowat stand vested with any leverage, to while assailing the orders recorded subsequent thereto upon his objections by the learned Executing Court, to also assail the verdict recorded, by it, upon his application constituted therebefore under the provisions of order 6 Rule 17 CPC. Though, an apposite facilitation or statutory leverage stands bestowed upon a party to the lis, aggrieved, by any pronouncement made by the learned trial Court or the learned first Appellate Court upon any motion constituted therebefore during the pendency of a civil suit before it or during the pendency of an appeal before the learned First Appellate Court, to dehors his not making a prompt challenge thereto herebefore, to within the grounds of appeal held in a Regular Second Appeal constituted herebefore against the verdicts recorded by the courts below to also assail the pronouncements respectively recorded by the learned trial Court and by the learned first Appellate Court upon application(s) respectively constituted therebefore during the pendency of the apposite civil suit or during the pendency of an appeal thereat, ensual whereof, of the aforesaid statutory leverage(s) vis-à-vis the aggrieved litigant, significantly accrues from the mandate held in the provisions of Section 105 of the Code of Civil Procedure, provisions whereof stand extracted hereinafter.

> "105. Other orders.- (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of the original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.
>
> (2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand [***] from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

3. The bestowing of the aforesaid statutory leverage upon an aggrieved from an adverse pronouncement recorded upon him qua application(s) instituted before the civil Court concerned or upon applications constituted before the appellate Court, hence visibly ensue qua him on his preferring a second appeal before this Court, whereas with the petitioner herein, invoking the revisional jurisdiction of this Court, thereupon he may stand estopped to assail the decision recorded by the learned executing Court upon his application constituted therebefore under the provisions of Order 6 Rule 17 CPC. However, the baulking of the aforesaid endeavour of the revisionist, would be unjust besides would be for the reason(s) ascribed hereinafter hence judicially inexpedient.

4. The doctrine of merger holds its sway besides clout inter se the orders recorded by the learned executing Court upon the apposite objections of the JD constituted therebefore, objections whereof stood instituted therebefore earlier qua his constituting therebefore an application under the provisions of Order 6 Rule 17 CPC, sway whereof remains intact, despite the learned executing Court making its apposite pronouncement upon the application constituted therebefore under Order 6 Rule 17 CPC prior to its making its pronouncement upon the earlier therebefore therewith with reared objections by the JD qua the executability of the decree put to the execution therebefore, by the decree holder, command of doctrine whereof hereat, stands aroused by the factum qua the apposite endeavour or the assay of JD/petitioner stemming from his aspiration, to thereupon facilitate the learned executing Court to hence proceed to order for the appointment of a local commissioner, for discerning, the truthfulness of the objections strived by the JD to hence with the leave of the Court hence reared therein, significantly when they therewithin hold echoings qua the JD hence suo moto begetting compliance vis-à-vis the mandate of the concurrent conclusive decree(s) of mandatory injunction pronounced upon him, whereas the learned executing Court, has apparently blunted the aforesaid endeavour, though ensuring success thereof, may have enabled the learned executing Court, to, proceed to record an order qua hence the decree of mandatory injunction standing hence satisfactorily executed besides would forestall issuance of coercive process upon the JD/petitioner herein for enforcement of the apposite decree, issuance whereof would prejudice the rights of the JD also may prove to be an unyielding exercise. Consequently, for forestalling eruption of the eventualities aforesaid, it was rather befitting for the learned executing Court to record an affirmative pronouncement upon the application constituted therebefore by the JD under the provisions of Order 6 Rule 17 CPC.

5. In summa, the ouster by the learned executing Court, of the aforesaid endeavour of the JD, for hence facilitating it, to pronounce an order vis-à-vis him qua his thereupon suo motu satisfactorily begetting full satisfaction of the decree put therebefore to execution, rather its proceeding to without the aforesaid apposite averment in respect thereto standing permitted to be incorporated in the objections initially put forth by the JD before the learned executing Court, hence dismiss the apposite objections, has unfailingly prejudiced the rights of the judgment debtor/petitioner herein, whereupon, he, despite his not prior to his nowat challenging along with the order pronounced upon his initial objections, make a prompt challenge upon the verdict recorded upon his application constituted before the learned executing Court under the provisions of Order 6 Rule 17 CPC, hence holds a leverage to assail, it, alongwith his assailing the orders rendered upon his objections, conspicuously, when both the orders aforesaid are closely blended also when the orders previously recorded by the learned trial Court upon the application constituted therebefore under the provisions of Order 6 Rule 17 CPC impinge upon the validity of the subsequently recorded orders by it upon his objections reared therebefore. Tritely also with theirs standing inextricably entwined thereupon with the doctrine of merger holding its fullest sway upon both the orders aforerstated, thereupon, despite no communication(s) occurring within the provisions of Section 115 of the CPC qua the petitioner holding the apposite statutory leverage, to, along with the orders pronounced by the learned executing Court upon his objections also assail the previous order recorded by it upon his application constituted therebefore under the provisions of Order 6 Rule 17 CPC, yet he hence holds a right to cast a composite challenge qua it under the extant civil revision. Moreover, he also holds a right to hereat make a composite challenge with respect to the validity of both the orders, significantly when the aspiration of the JD to incorporate with the leave of the Court, the apposite objections holding unveilings qua his suo moto begetting compliance with the concurrent conclusive decree(s) of mandatory injunction, decree whereof stood put to execution before the learned Executing court, ouster of assays whereof, when impinge upon hence the learned executing Court precluding itself to record an order qua the apposite decree put to execution therebefore standing satisfactorily executed, for recording of an order whereof, it stood constrained to prior thereto order for appointment of a local commissioner for discerning truths thereof, whereupon the issuance of an unwanted coercive process for enforcing the apposite decree, would stand rendered unnecessary. In aftermath with both the orders standing closely blended also when the invalidity of the earlier order may ultimately render the subsequent order to also suffer

invalidation, thereupon the JD holds the right, to, along with his assailing the subsequently recorded pronouncement made by the learned executing Court upon his objections, to, also constitute an apposite challenge qua the previous order recorded, by it, upon his application constituted therebefore under the provisions of Order 6 Rule 17 CPC, dehors no explicit statutory right qua it occurring within the domain of Section 115 of the CPC. The conferment of the aforesaid leverage vis-à-vis the petitioner herein, emanates on this court expanding, in coagulation with the play hereat of the doctrine of merger, for thereupon achieving judicial expediency, the connotation borne by the coinage “case decided” occurring in Section 115 of the CPC, doctrine whereof for reasons aforestated holds its fullest sway hereat, qua its holding a signification in ‘plurality’ than in ‘singularity’, whereupon both orders are amenable to a challenge herebefore under a composite petition.

6. Nowat, with this Court holding qua the petitioner holding the apposite just and tenable right to assail both the orders recorded by the learned Executing Court, one upon his application constituted therebefore under the provisions of Order 6 Rule 17 CPC, holding therewithin his objection other than the objections reared earlier thereat therebefore, thereafter the tenacity of the espousal reared herebefore of the learned counsel for the petitioner herein qua the orders recorded therein, by the learned Executing Court suffering from a vice of illegality stands enjoined to be determined. The learned executing Court had declined relief to the JD upon the aforestated application constituted therebefore under provisions of Order 6 Rule 17 CPC, merely on anvil qua thereupon the JD merely for prejudicing the rights of the decree holder hence introducing new cause(s) of action. However, the aforesaid reason(s) propounded by learned Executing Court for hence declining relief to him upon his application constituted therebefore under the provisions of Order 6 Rule 17 CPC is per-se flimsy, significantly when he had neither introduced nor contrived, to change or alter the structure of his pleadings held in his written statement, endeavor whereof of the JD would tantamount to his entailing the learned Executing Court to impermissibly go behind the decree nor obviously when he did not concert for any de-novo fresh trial of the suit rather apparently was facilitating the learned executing Court, to, without its ordering for issuance of coercive process, for enforcement of the decree of mandatory injunction pronounced upon him, to by appointing of a Local Commissioner hence discern the veracity of the relevant factum probandum, whereas, the learned executing Court by dismissing the aforesaid application, has frustrated the aforesaid compliant endeavour of the JD qua hence apposite decree standing satisfied, whereupon injustice stands perpetuated upon him. Consequently, the orders recorded upon the application constituted therebefore by the JD under the provisions of Order 6 Rule 17 CPC are quashed thereupon the revision petition stands allowed.

7. Be that as it may, the ground as espoused in the instant petition qua the apposite execution petition instituted before the learned Executing Court, by the decree holder, standing instituted therebefore, beyond the period prescribed for its preferment therebefore, hence its standing barred by limitation, grounds whereof stands canvassed to arouse from the factum qua whereas, the learned trial Court pronouncing its apposite verdict on 21.3.1994 whereas, the execution petition standing preferred belatedly on 30.11.2011 before the learned executing Court, hence, its preferment therefore occurring beyond the statutorily prescribed period of three years, thereupon, it stood barred by limitation. However, the aforesaid espousal is meritless. A perusal of order(s) recorded by the learned First Appellate Court on 22.4.1994 unveil qua it staying the execution and operation of the decree impugned thereat. Also this Court on 28.8.1998, while standing seized of a RSA preferred herebefore by the aggrieved defendants likewise stayed the execution of the concurrently recorded decrees of mandatory injunction by both the learned courts below, thereupon with the fiat of the judicial verdicts aforesaid standing suspended, thereupon the decree of the learned trial Court stood hence rendered unexecutable, whereas with the decree holder instituting the apposite petition for execution of the apposite decree within three years since this Court deciding RSA No. 388 of 1998 thereupon, its preferment was within the statutorily prescribed period of limitation. Consequently, the aforesaid espousal stands discountenanced.

In view of the above, the instant petition is accepted. The impugned order recorded by the learned Executing Court upon the application of the JD constituted under the provisions of Order 6 Rule 17 CPC is quashed and set aside as also the orders pronounced upon his objections are also quashed and set aside. The parties are directed to appear before the learned Executing Court on 11.5.2017 whereafter the learned Executing Court shall proceed to decide the aforesaid amended objections of the JD Record be sent back forthwith.

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

CWP No. 169 of 2003 alongwith
CWPs No. 319 and 336 of 2003
Reserved on: 30.03.2017
Date of decision: 12.04.2017

1. CWP No. 169 of 2003
Union of India ... Petitioner
Versus
M/S Krishna Coal Company ...Respondent

2. CWP No. 319 of 2003
Union of India .... Petitioner
Versus
M/S Graphite Coal Co. ... Respondent

3. CWP No. 336 of 2003
Union of India ... Petitioner
Versus
M/S Punjab Coal Company ... Respondent

Public Premises (Eviction of Unauthorized Occupants) Act, 1971- Section 4 and 9- Various eviction petitionswere filed by Union of India seeking eviction and recovery of damages on account of unauthorized use and occupation of railway land situated in Shimla- the petitions were partially allowed and the appeals were dismissed- aggrieved from the order, writ petitions were filed- held that the respondents are in possession prior to the commencement of the Public Premises Act –the provision of the Act cannot be made applicable to them – the eviction petition were not maintainable – liberty granted to the petitioners to proceed against the respondents in accordance with the law.(Para-15 to 22)

Case referred:
Suhas H. Pophale Vs. Oriental Insurance Company Ltd. and its Estate Officer (2014) 4 Supreme Court Cases 657

CWP No. 169 of 2003 alongwith
CWP Nos. 319 and 336 of 2003

For the petitioner(s): Mr. J.L. Kahsyap, Advocate, (in all the petitions).
For the respondent(s): Mr. B.C. Negi, Senior Advocate with Mr. Pranay Partap Singh, Advocate and Mr. Suneet Goel, Ms. Meera Devi and Mr. Angrez Kapoor, Advocates, for the respective respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

These three writ petitions are being disposed of by a common judgment as legal issue involved in all of them is the same, that is, maintainability of a eviction petition filed under the provisions of Public Premises Act qua those occupants who are in occupation of premises prior to 16.09.1958 i.e. prior to the Public Premises Act becoming applicable.

2. All these writ petitions have been filed by Union of India against the judgments passed by Appellate Authority in appeals under Section 9 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, vide which, Appellate Court has dismissed the appeals filed by the present petitioners against the judgments/orders of Estate Officer, who had closed the proceedings initiated under Section 4 of the said Act, for eviction on the basis of statement as was made before it by the present petitioners.

3. In CWP No. 169 of 2003 titled Union of India Vs. M/S Krishna Coal Company, in an application filed under Sections 4 and 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, on behalf of Union of India, for eviction and recovery of damages on account of unauthorized use and occupation of Railway land situated in Shimla, Estate Officer, Northern Railway, Ambala Cantt., in Case No. 31-W/PPEA/UMB, directed the respondent therein i.e. M/S Krishna Coal Company, to pay Rs.35678.50 as arrears of licence fee including 10% as token damages for the period from 01/03/1986 to 31/12/1991 and thereafter pay Rs.5563.49 per annum as licence fee and it also directed the respondent to execute a fresh agreement to this effect which was to be renewed every three years.

4. In appeal, this order was sustained by the Appellate Authority vide decision dated 06.09.2002.

5. In CWP No. 319 of 2003 titled Union of India Vs. M/S Graphite Coal Company, in an application filed under Sections 4 and 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, on behalf of Union of India, for eviction and recovery of damages on account of unauthorized use and occupation of Railway land situated in Shimla, Estate Officer, Northern Railway, Ambala Cantt., in Case No. 29-W/PPEA/UMB, directed the respondent therein i.e. M/S Graphite Coal Company, to pay Rs.34533.27 as arrears of licence fee including 10% as token damages for the period from 01/03/1986 to 31/12/1991 and thereafter pay Rs.5385.51 per annum as licence fee and it also directed the respondent to execute a fresh agreement to this effect which was to be renewed every three years.

6. In appeal, this order was sustained by the Appellate Authority vide decision dated 06.09.2002.

7. In CWP No. 336 of 2003 titled Union of India Vs. M/S Punjab Coal Company, in an application filed under Sections 4 and 7 of the Public Premises (Eviction of Unauthorized Occupants) Act, 1971, on behalf of Union of India, for eviction and recovery of damages on account of unauthorized use and occupation of Railway land situated in Shimla, Estate Officer, Northern Railway, Ambala Cantt., in Case No. 26-W/PPEA/UMB, directed the respondent therein i.e. M/S Punjab Coal Company, to pay Rs.26979/- as arrears of licence fee including 10% as token damages for the period from 01/08/1986 to 31/12/1991 and thereafter pay Rs.4530.77 per annum as licence fee and it also directed the respondent to execute a fresh agreement to this effect which was to be renewed every three years.

8. In appeal, this order was sustained by the Appellate Authority vide decision dated 06.09.2002.

9. When these cases were taken up for hearing on 17.03.2017, Mr. B.C. Negi, learned Senior Cousnel appearing for respondent No. 1 in CWP No. 319 of 2003, submitted that before this Court ventures to adjudicate on the merits of the matter, there is another issue which has to be decided by this Court which pertains not only to maintainability of present writ

petitions but also with regard to maintainability of the proceedings initiated against the respondents under the Public Premises Act from which these writ petitions arise. The contention of Mr. Negi is that as admittedly all the private respondents in these cases were in possession of the properties subject matter of the writ petitions, before the Public Premises Act came into force/became applicable w.e.f. 16.09.1958, no proceedings against them could have been initiated under the 1971 Act. In support of his contention, learned counsel for the respondent has relied upon the following judgment:-

SUHAS H. POPHALE Vs. ORIENTAL INSURANCE COMPANY LIMITED AND ITS ESTATE OFFICER*, *(2014) 4 SUPREME COURT CASES 657.

10. On the basis of above submissions of Mr. Negi, on 17.03.2017, this Court passed the following order:-

> "When these cases were taken up for arguments today, Mr. B.C. Negi learned Senior Counsel appearing for respondent No.1 has drawn the attention of this Court towards the judgment of Hon'ble Supreme Court in **Suhas H. Pophale Vs. Oriental Insurance Company Ltd. and its Estate Officer** (2014) 4 Supreme Court Cases 657, and **M/s Band Box Private Limited Vs. Estate Officer, Punjab and Sind Bank and another**, 2014 (2) Shim. LC 1097, in which the Hon'ble Supreme Court has held that in cases where an occupant was in possession of premises before coming into force of Public Premises Act, the provisions of the Act shall not be applicable. Learned counsel for the respondents submitted that taking into consideration the fact that in the present cases licences were created in favour of the respondents well before coming into force of the Public Premises Act, therefore, the proceedings initiated against them under the Public Premises Act *per se* were illegal and thus not maintainable. Faced with this situation, Mr. Kashyap learned counsel for the petitioner prays that he may be granted some time to have appropriate instructions in these cases. List on **30.3.2017**, as prayed for."

11. Arguments were heard on 30.03.2017 and after hearing learned counsel for the parties, judgment was reserved on the issue of maintainability of the proceedings as well as writ petitions in view of the judgment of the Hon'ble Supreme Court in *Suhas H. Pophale* (supra).

12. Learned counsel for the respondents have submitted that in these three writ petitions private respondents in fact are in possession of the premises in their capacities as licencees much before the Public Premises Act (Eviction of Unauthorized Occupants) Act, 1971, hereinafter referred to as the 1971 Act, came into force in the year 1971 and rather are in possession of the said land even before the above mentioned Act became applicable w.e.f. 16.09.1958. Mr. B.C. Negi, learned Senior Counsel, who has made leading arguments on behalf of the private respondents, has submitted that as the private respondents in all these three cases were in possession of the land, subject matter of the applications filed under the Public Premises Act, much before 16.09.1958 in their capacities as licencees, no eviction proceedings could have been initiated against them under the provisions of the 1971 Act. Mr. Negi has argued that as the 1971 Act was applicable w.e.f. 16.09.1958, this Act can be applied prospectively to these premises which were public premises as on 16.09.1958 and eviction petitions can be filed only against those persons who entered into occupation of the said public premises after 16.09.1958. In other words, Mr. Negi submitted that 1971 Act has no retrospective effect and the provisions of the same cannot be invoked to effect those occupants who were in occupation of the said premises prior to 16.09.1958.

13. On the other hand, Mr. J.L. Kashyap, learned counsel appearing for Union of India had submitted that the private respondents cannot be allowed to raise this objection about the maintainability of the eviction petitions filed under the Public Premises Act, 1971 at this stage. Accordingly, Mr. Kashyap argued that the proceedings under the Public Premises Act were initiated against the private respondents more than 30 years ago and at this belated stage, private respondents cannot be permitted to come up with this plea to frustrate the claim

of the petitioners. It has further been argued by Mr. Kashyap that even otherwise this Court cannot go into this issue as all these three petitions stand remanded back by the Hon'ble Division Bench in LPA No. 43 of 2008 and other connected matters and as now there is a "Reference" to be answered by this Court as has been sent by the Division Bench in LPA, therefore, this Court has to answer that Reference only and it cannot adjudicate on any other issue. Mr. Kashyap has further argued that the judgment referred above has no applicability in the facts of this case and he reiterated that in fact this Court is precluded from considering this issue as the matter has been remanded back to it by way of Reference by the Hon'ble Division Bench in LPA No. 43 of 2008 and other connected matters.

14. I have heard learned counsel for the parties.

15. The factum of the private respondents being in occupation of the land subject matter of the writ petitions much before coming into force of the 1971 Act and even before 16.09.1958 i.e. the day from which the said Act was deemed to have come into force is not disputed, therefore, the moot issue which is to be answered by this Court as to whether the eviction petition under the 1971 Act could have been filed against the private respondents?

16. The Public Premises Act (Eviction of Unauthorized Occupants) Act, 1971 was enacted by the Parliament to provide for the eviction of unauthorized occupants from public premises and for certain incidental matters. As per sub-section (3) of Section 1, the said Act was deemed to have come into force on 16.09.1958, except Sections 11, 19 and 20, which came into force i.e. w.e.f. 23.08.1971. Public premises have been defined in Section 2(e) of the Act. This Act in fact repealed after the Public Premises (Eviction of Unauthorized Occupants) Act, 1958.

17. In ***Suhas H. Pophale Vs. Oriental Insurance Company Ltd.*** (supra), Hon'ble Supreme Court has, inter alia, held that for any premises to become public premises, the relevant day will be 16.09.1958 or which ever is later date on which day the premises concerned become public premises. Hon'ble Supreme Court has further held in this case that as far as the eviction of unauthorized occupation from public premises is concerned undoubtedly it is covered under the Public Premises Act but it is so covered from 16.09.1958 or from the later date when premises concerned become public premises.

18. In my considered view, it is evident from the said decision of the Hon'ble Supreme Court that an occupant of a public premises who occupies the same before 16.09.1958 is not covered under the Public Premises Act. In other words, the provisions of Public Premises Act cannot be invoked to evict such occupant who is in occupation of premises before 16.09.1958. This Court is not oblivious to the fact that in the above mentioned case the Hon'ble Supreme Court was dealing with the applicability of Public Premises Act vis-a-vis the State Rent Act but the fact still remains that the law as has been declared by the Hon'ble Supreme Court in the said judgment is to the effect that an occupant of public premises before 16.09.1958 cannot be evicted for unauthorized occupation of public premises under the Public Premises Act.

19. In this background, when we come to the facts of the present three writ petitions, it has not been disputed that the private respondents therein were in possession of the public premises before 16.09.1958, therefore, in my considered view, as per the law declared by the Hon'ble Supreme Court in *Suhas H. Pophale's case* supra, the eviction proceedings against the said private respondents could not have been initiated under the provisions of the 1971 Act. Thus, the proceedings so initiated against them are *non est* and adjudication upon the same by the Estate Officer as well as by the Appellate Authority are also, therefore, without jurisdiction. Held accordingly. However, it is clarified that it is not as if the petitioner - Union of India has no remedy to evict private respondents. The petitioner is at liberty to proceed against them in accordance with law by availing those remedies which otherwise are available to it for eviction of the said private respondents.

20. As far as other contentions raised by Mr. Kashyap are concerned, a perusal of the judgment passed by Hon'ble Division Bench of this Court in LPA No. 43 of 2008 and other

connected matters, decided on 26.11.2014, demonstrates that vide said judgment Hon'ble Division Bench was pleased to allow the appeals so filed and while setting aside the judgment passed by learned Single Judge, the cases were remanded back to the writ Court for decision afresh. The judgment passed by the Hon'ble Division Bench in LPA No. 43 of 2008 and other connected matters, has no where sent back any "Reference" to be decided by the writ Court. The contention of Mr. Kashyap that the judgment of the Hon'ble Supreme Court referred to above has no applicability in the facts of this case, is also without merit because I have already discussed that the said judgment lays down very clearly and categorically that eviction proceedings under the 1971 Act cannot be filed against the occupants of public premises who were in possession of the same before 16.09.1958. As far as the submission of Mr. Kashyap that this Court should not go into the said issue at such a belated stage as the private respondents have not raised this issue earlier, in my considered view, this plea also sans merit because there cannot be any estoppel against illegality and as the eviction proceedings which were initiated by the present petitioners against the private respondents under the provisions of the 1971 Act were *non est* being not maintainable at all, this Court cannot be precluded from going into this issue at this stage on the pretext that the private respondents are estopped from raising this plea. This Court reiterates that there cannot be any estoppel against illegality.

21. Accordingly, these writ petitions are disposed of by holding that as the private respondents are in occupation of the public premises before coming into force of the Public Premises Act, which is deemed to have come into force w.e.f. 16.09.1958, therefore, proceedings could not have been initiated against them under the Public Premises Act, 1971 for the purpose of their evictions and the orders on the said eviction petitions passed both by the Estate Officer as well as Appellate Officer are without jurisdiction and *non est*. The orders so passed by both the said authorities are neither binding on the petitioners nor on the private respondents. The petitioners are at liberty to otherwise proceed against the private respondents for possession of their land in accordance with law.

22. With said directions, these writ petitions are disposed of. No order as to costs. Miscellaneous Applications pending, if any, also stand disposed of.

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

Yangain Singh ....Petitioner.
Versus
Vijay Kumar ... Respondent.

Cr.R. No. 341 of 2016.
Reserved on: 30.03.2017.
Decided on: 12.04.2017.

Negotiable Instruments Act, 1881- Section 138- Accused and his mother approached the complainant offering to sell their land- an agreement was executed and an amount of Rs.1 lac was paid as earnest money – it was found subsequently that there was some litigation pertaining to the land and the agreement was cancelled – the accused subsequently obtained an amount of Rs.10,000/- as loan and issued a cheque for Rs.1,10,000/- - the cheque was dishonoured- the amount was not paid despite notice – hence, the complaint was filed before the Magistrate who convicted and sentenced the accused – an appeal was preferred, which was allowed on the ground that the accused was unrepresented on the date of examination and the proceedings were not proper – the matter was remanded to the Trial Court for fresh adjudication- held in revision that no application was filed for deferring the cross examination of the complainant and his witnesses- no grievance was raised that accused was prejudiced by the absence of his counsel –

no prayer was made to appoint a counsel as amicus curiae, which means that accused was satisfied with the proceedings– revision allowed and order of Appellate Court set aside.

(Para-9 to 23)

For the petitioner : Mr. P.S Goverdhan, Advocate.
For the respondents : Mr. Anirudh Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way this revision petition, the petitioner has challenged the judgment passed by the Court learned Sessions Judge, Solan, in Criminal Appeal No. 4-S/10 of 2016, dated 01.10.2016, vide which learned Appellate Court while allowing the appeal filed by the present respondent has remitted the case back to learned trial Court for decision afresh after setting aside the judgment passed by the Court of learned Judicial Magistrate 1st Class, Kandaghat, in case number 234 of 2015, dated 30.12.2015, whereby learned trial Court in a complaint filed under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'NI Act') by the present petitioner had convicted the present respondent for commission of offence punishable under Section 138 of the NI Act and had sentenced him to undergo simple imprisonment for one month and also to pay compensation to the tune of Rs. 2,20,000/- to the complainant.

2. Brief facts necessary for the adjudication of the present case are that a complaint under Section 138 of the NI Act was filed by the present petitioner (hereinafter referred to as 'complainant) against the present respondent (hereinafter referred to as 'accused') on the allegations that accused and his mother had approached the complainant to sell their land situated in mauza Nagar Sihauna and an agreement to sell the said land was entered into between the parties, in lieu of which, the accused and his mother received an amount of Rs. 1,00,000/- from the complainant as earnest money. Further as per the complainant, as subsequently the land was not found suitable by the complainant as it was discovered that there was dispute with regard to the said land with other co-sharers and litigations were also going on between the parties, the said agreement to sell was cancelled by both the parties with their mutual consent. As the earnest money was not readily available with the accused, accordingly, he promised to repay the earnest money to the complainant within six months. Further as per the complainant on 05.05.2012, accused approached him and requested him to advance him Rs. 10,000/- more on the pretext to discharge some debt and promised to repay the whole amount including Rs. 1,00,000/- received earlier as well as Rs. 10,000/- whenever the complainant demanded. As per the complainant he paid Rs. 10,000/- also to the accused on 05.05.2012 and thereafter, in order to repay the said debt/liability, accused issued a post dated cheque bearing No. 048242, dated 29.10.2012 for an amount of Rs. 1,10,000/- in favour of the complainant drawn at Baghat Urban Co-operative Bank Ltd. Solan, HP. As per complainant when said cheque was presented for valuable encashment, the same was returned by the bank concerned vide memo No. 6976, dated 18.12.2012 with endorsement "Insufficient Funds". As per complainant, on 09.01.2013, he served a legal notice of demand upon the accused through his counsel by way of Registered AD, which was duly served upon the accused on 10.01.2013. However, even after the service of said notice, the accused failed to pay the cheque amount to him. In these circumstances the complainant approached the Court by filing a complaint under Section 138 of the NI Act against the accused.

3. As the learned trial Court found a prima facie case against the accused, notice of accusation was accordingly put to him, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the complainant entered the witness box himself and also examined four other witnesses. Thereafter statement of accused was recorded under Section 313 of Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C').

5. On the basis of evidence led by the parties, learned trial Court held that it stood established on record that accused had issued cheque bearing No. 048242, dated 29.10.2012, for an amount of Rs. 1,10,000/- in lieu of earnest money he had received from the complainant regarding sale of land and also in lieu of Rs. 10,000/- which he had borrowed from the complainant, which on presentation in the bank for encashment was dishonoured due to "Insufficient Funds" in the account of accused. Learned trial Court held that it was not disputed by the accused in his statement recorded under Section 313 of Cr.P.C that he had issued a cheque to the complainant which was dishonoured on its being presented to the bank concerned. On these bases, it was concluded by learned trial Court that accused had committed an offence punishable under Section 138 of the NI Act and accordingly, it convicted the accused for commission of said offence and imposed sentence upon him.

6. In appeal, the judgment so passed by learned trial Court has been set aside by the learned Appellate Court on the grounds that the statements of complainant and other complainant's witnesses were recorded by learned trial Court on 17.09.2013 and records demonstrate that on that date only the accused appeared in person in the Court and he was not accompanied by his Counsel and on these bases, learned Appellate Court observed as under.

> *"Though the aforesaid witnesses have been cross-examined but it appears that such cross-examination in the absence of the learned defence counsel have been conducted by the court itself on behalf of the accused. Accordingly on the basis of the record of the learned Court below it is clear that no opportunity whatsoever to cross-examine the complainant and other witnesses examined by him was afforded to the accused as his counsel was not present in the Court at that time and as such the statements of the complainant and his witnesses are proved to have been recorded in the absence of learned defence counsel. Thus by examination of the complainant and his witnesses by the learned court below in the absence of learned defence counsel, great prejudice has been caused to the accused."*

Learned Appellate Court further held that as defence counsel was not present in the Court at the time of examination of complainant and other complainant witnesses it was the mandatory duty of learned trial Court to either adjourn the case for cross examination or have had appointed some other counsel to cross examine the witnesses. Learned Appellate Court further held that it cannot possibly be denied that cross examination of a witness in a criminal case is very vital, important and valuable right of an accused, and therefore, great prejudice has been caused to the accused by not affording him an opportunity to cross-examine the complainant and other witnesses. Learned Appellate Court also held that record demonstrates that it is not as if the statements of complainant and other witnesses were recorded by learned trial Court in the absence of learned defence counsel but even statement of accused under Section 313 of Cr.P.C was also recorded in the absence of learned defence counsel, however, the proper course for the learned Court below was to adjourn the case and by not doing so, a serious prejudice has been caused to the accused. Learned Appellate Court further held that in this background, the statement of accused recorded under Section 313 of Cr.P.C should not have been made basis for recording conviction and imposing sentence upon the accused. Learned Appellate Court thus allowed the appeal so filed by the accused and remitted the case back by setting aside the judgment passed by the learned trial Court for adjudication afresh.

7. Feeling aggrieved by the judgment so passed by the learned Appellate Court, the complainant has filed the present revision petition.

8. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by the learned Courts below.

9. Learned Appellate Court has primarily set aside the judgment passed by the learned trial Court on two counts which are (a) that learned trial Court erred in not adjourning the case while recording the statement of complainant and other complainant witnesses as

defence counsel was not present and (b) that learned trial Court erred in not adjourning the case while recording the statement of accused under Section 313 of Cr.P.C as learned defence counsel was not present.

10. Records of learned trial Court demonstrate that when the case was listed on 16.05.2013, on the said date, complainant was present in the Court in person whereas accused was present with Mr. Naresh Kumar, Advocate. On the said date, notice of accusation was put to the accused to which he pleaded not guilty and claimed trial. Learned trial Court fixed the matter for the examination of complainant's witnesses on 09.07.2013.

11. On 09.07.2013, the complainant as well as the accused were present with their respective counsel and on the said date, the accused had in fact prayed before learned trial Court that he may be granted some time to make good the payment of cheque amount and his prayer was accepted by learned trial Court and case was fixed for 12.08.2013 to enable the parties to arrive at some out of Court settlement.

12. On 12.08.2013, following order was passed by learned trial Court.

> *"C.W. Bahadur Singh is present. But at the request of the accused ad his learned counsel they seeks time to amicably settled the matter with the complainant. List on 17.09.2013. If settlement is not arrived between the parties, the complainant will adduce his entire evidence on the next date of hearing."*

13. On 17.09.2013, learned counsel for the complainant was present and the accused was present in person. On the said date, statements of CW1 Puran Dutt, CW2 Y.S. Thakur, CW3 Bhagwan Dass, CW4 Ashok Thakur and CW5 Bahadur Singh were recorded. Records further demonstrate that all these five witnesses were cross examined by the accused. It is relevant to take note of the fact that statements of these five witnesses were recorded on 17.09.2013 and the case was finally decided by learned trial Court on 30.09.2015 and there is no application etc. on record filed by the accused to the effect that on 17.09.2013 either he had made any request that the cross examination of complainant's witnesses be deferred as his counsel was not present or that in fact cross examination of complainant witnesses was not conducted by him but it was conducted by the Presiding Officer of learned trial Court. In other words, no grievance whatsoever was raised by the accused before any forum that he had been prejudiced on account of his counsel not being present in the Court on 17.09.2013 when C.Ws were recorded.

14. Now incidentally, on 17.09.2013, learned trial Court fixed the case for recording the statement of accused under Section 313 of Cr.P.C for 17.10.2013. Records demonstrates that on 17.10.2013 though the complainant was present with his counsel, the accused was not present in the Court and in these circumstances, learned trial Court passed the following order.

> *"The case is listed for statement of accused under Section 313 Cr.P.C. but neither the accused nor his Ld. Counsel has appeared. Hence, the bail bonds furnished by the accused are cancelled and forfeited to the State of H.P. Let the accused be summoned by way of N.B.W. returnable for 26.11.2013 on filing of P.F within 10 days. Proceedings under Section 446 of Cr.P.C be initiated against the accused and his surety."*

15. Thereafter on 26.11.2013, learned trial Court passed the following order.

> *"NBW issued against the accused has been received back unserved with the report that the accused had gone to Halwara. Therefore, let the accused be summoned by way of non-bailable warrants returnable for 17.01.2014 on filing PF within ten days. The bail bonds furnished by the accused are cancelled and forfeited to the State of H.P. Let proceedings under Section 446 Cr.P.C. be also initiated the accused and his surety. Notice be also issued to the surety of the accused on the aforesaid date."*

16. Records demonstrate that non-bailable warrants issued to the accused were ultimately served upon him on 08.09.2015, on which date, learned trial Court passed the following order.

> *"Today accused produced before this Court as NBW were issued against him. Applicant/accused has moved application under Section 437 of Cr.P.C. for releasing him on bail stating therein that applicant/accused could not appear before the Court due to his ill health. It is further averred that non-appearance of accused person was neither intentional not deliberate and he is ready to furnish surety and personal bonds.*
>
> *Heard. Record perused.*
>
> *Since the accused is ready to furnish personal and surety bonds, mere suspicion that he can jump bail against is not sufficient for curtailing personal liberty of the accused when he is resident of Distt. Solan, no useful purpose would be served by curtailing the personal liberty of the applicant/accused. Moreover, he is ready and willing to abide by the terms imposed by this Court while releasing him on bail. No doubt accused had not filed any documentary evidence to support his case but it is generally accepted that bail is the Rule and jail is an exception and considering this, I am of the opinion that at this stage, there is no sufficient ground for curtailing the personal liberty of the accused, hence, bail application of the accused is allowed subject to the conditions:*
>
> *(1) That he will furnish personal bond in the sum of Rs. 50,000/- alongwith one surety in the like amount to the satisfaction of this court.*
>
> *(2) That the accused shall attend the court on each and ever date of hearing.*
>
> *Requisite bonds furnished, attested and accepted by me. The present application stands disposed off. It be registered. Papers after due completion be tagged with main case file for record. List the case for recording of statement of accused under Section 313 of Cr.P.C for 10.09.2015."*

17. On the said date i.e. on 08.09.2015, accused was being represented by Mr. Bharat Sharma, Advocate. This fact is mentioned because earlier, one Mr. Naresh Kumar, Advocate used to appear on behalf of the accused. Be that as it may, on 08.09.2015, the case was ordered to be listed for recording the statement of accused under Section 313 of Cr.P.C on 10.09.2015. On 10.09.2015, also the accused was present in person only and records demonstrate that on the said date, his statement under Section 313 of Cr.P.C was recorded. There is no material on record from which it can be inferred that the accused in any manner was aggrieved by the factum of his counsel not being alongwith him on 10.09.2015 when his statement under Section 313 of Cr.P.C was recorded or that on 10.09.2015 he made any such request to the effect that recording of his statement under Section 313 of Cr.P.C be deferred as his counsel was not present but his request was turned down by learned trial Court.

18. Another important fact which requires consideration at this stage is that Presiding Officers who were holding the Court on 17.09.2013 when C.Ws were examined and cross-examined by the accused in person and on 10.09.2015, when the statement of accused was recorded under Section 313 of Cr.P.C, on which date, accused was present in the Court in person, were not the same.

19. Records further demonstrate that on 09.10.2015, Proxy counsel were present both for complainant as well as for accused. On 11.12.2015, accused appeared in the Court alongwith Mr. Bharat Sharma, Advocate and thereafter on 23.12.2015 he appeared alongwith Mr. Jagdish Chand Advocate. On 23.12.2015 on a request on behalf of the accused, time was granted for hearing by treating the case to be part heard, as a request was made on behalf of the accused that original counsel was not present as his wife was undergoing treatment and was admitted in the Hospital.

20. The above narrated facts clearly and categorically demonstrate that neither on 17.09.2013 nor on 10.09.2015, any request was made by the accused that either the recording of statements of complainant's witnesses or recording of his statement under Section 313 of Cr.P.C be deferred as defence counsel was not available. Records further demonstrate that accused voluntarily cross examined complainant witnesses on 07.09.2013, which otherwise was his right because no Court can force the accused not to pursue his case himself before the Court and to represent himself through a counsel only.

21. As I have already mentioned above that there is nothing on record from which it can be inferred that any grievance was raised by the accused of any prejudice having been caused to him either on 17.09.2013 or on 10.09.2015 on the count that on the said dates, defence counsel was not present with him. The proceedings further demonstrate that the accused has often changed counsel and on most of the dates he appeared before the Court in person and further he in between failed to appear before the Court and his presence was obtained only by way of issuance of non-bailable warrants.

22. In this background, in my considered view, learned Appellate Court has erred in setting aside the judgment passed by the learned trial Court by holding that the accused was materially prejudiced on account of his not being accompanied by a defence counsel on 17.09.2013 when complainant's witnesses were examined and thereafter on 10.09.2015 when his statement under Section 313 of Cr.P.C was recorded. While arriving at the said conclusion, learned Appellate Court has erred in not appreciating that neither on the said dates, there was any request made on behalf of accused for adjournment of the case on the ground that his counsel was not present or otherwise, nor any request was made for appointment of any legal aid counsel. The finding returned by learned Appellate Court that cross examination of witnesses in fact was conducted by Presiding Officer, in my considered view, is perverse as the same is not borne out from the records of the case. Records demonstrate that complainant witnesses were cross examined by the accused and presumption of truth is attached to records. Inference to the contrary drawn by learned Appellate Court in the absence of any cogent material on record, in my considered view, is not sustainable in the eyes of law. The findings returned by learned Appellate Court that it was the duty of learned trial Court either to have had adjourned the case or to have had appointed some amicus curiae also has no merit. This is for the reason that in the absence of any prayer having been made on behalf of the accused for the adjournment of the case, it is not the duty of any Court, leave aside learned trial Court in the present case, to have had adjourned the case on its own. Similarly, as I have already observed that no Court can stop any individual from pursuing his case before the Court himself. An amicus can not be forced upon a litigant by the Court. An amicus can be appointed to assist the Court and for a litigant if either the litigant makes a prayer in this regard or the Court comes to the conclusion that in the facts and circumstance of the case, it will be in the interest of justice to appoint an amicus curiae to assist the Court. Further keeping in view the fact that accused was of and on either appearing with counsel or appearing in person it was not even otherwise a case where the accused was to be accorded legal assistance by the Court. All these important aspects of the matter, in my considered view, have not been appreciated by learned Appellate Court while setting aside the judgment passed by the learned trial Court whereby learned trial Court had convicted the accused for commission of offence punishable under Section 138 of the NI Act.

23. Accordingly, in view of findings returned above, this revision petition is allowed and the judgment passed by learned Appellate is set aside and the case is remanded back to the learned Appellate Court to adjudicate the appeal on merit. Parties through their counsel are directed to appear before the learned trial Court on 24th April, 2017. It is made clear that this Court has not expressed any opinion on the merits of the case and learned Appellate Court shall proceed with the matter strictly as per the merits of the case and shall not in any manner be influenced by any observation made by this Court in the present petition. Revision petition is disposed of accordingly. Pending miscellaneous application(s), if any, also stand disposed of.

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

Chandermani ... Appellant

Versus

Mia Ditta and others ... Respondents

RSA No. 286 of 2008
Reserved on: 15.03.2017
Date of decision: 13.04.2017

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that suit land is ancestral and coparcenary property of the parties – sale deeds executed in respect of the same are illegal, null and void and not binding on the rights of the parties – the suit was decreed by the Trial Court- an appeal was filed, which was partly allowed- aggrieved from the judgment, present appeal has been filed – held that the suit land was proved to be ancestral – the land was alienated without any legal necessity – the Courts had rightly appreciated the evidence- appeal dismissed. (Para- 14 to 19)

Cases referred:

Gajjan Ram Vs. Hira Singh and others, 1991 SLJ 994

Rani and another Vs. Smt. Santa Bala Debnath and others, 1970 (3) Supreme Court Cases 722

For the appellant: Mr. Sanjeev Kuthiala, Advocate.

For the respondents: Mr. G.R. Palsra, Advocate, for respondents No. 1 to 3.
None for respondents No. 4 to 7.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned District Judge, Mandi, in Civil Appeal No. 53 of 2005 dated 01.06.2006, vide which, learned Appellate Court partially modified the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Chachiot at Gohar, District Mandi, in Civil Suit No. 312 of 2000 dated 31.03.2005, whereby learned trial Court had decreed the suit of the plaintiffs to the extent that the suit land was held to be joint Hindu family and coparcenary property of the plaintiffs and the sale deeds dated 22.08.2000 qua the suit land by Sawaru in favour of defendants No. 1 and 2 were held to be wrong, null and void and the plaintiffs alongwith defendant No. 4 were held to be joint owner in possession of the suit land.

2. Brief facts necessary for adjudication of the present appeal are that respondents/plaintiffs, hereinafter referred to as the plaintiffs, filed a suit for declaration with confirmation of joint possession as well as for injunction on the ground that the land comprised in Khewat/Khatauni No. 87/132, bearing Khasra Nos. 585, 601, 605, 615, 645, 647, 651, Kitas 7, measuring 11-18-17 bighas and ½ share of land comprised in Khewat/Khatauni No. 88/133, Khasra Nos. 592, 674, Kitas 2, measuring 0-10-19 bigha, situated at Mouja Kandi, Tehsil Chachiot, District Mandi, H.P., was recorded in the ownership and possession of defendant No. 3 as per revenue record for the year 1996-97 and said entry which reflected defendant No. 3 as exclusive owner in possession of the suit land was wrong, null and void. As per the plaintiffs, land comprised in Khewat/Khatauni No. 56min/107, bearing Khasra Nos. 1107 and 1112, measuring 2-19-5 bighas and ½ share of the land comprised in Khewat/ Khatauni No. 115/228, bearing Khasra Nos. 1110 and 1117 measuring 0-14-19 bighas, situated at Mouja Sarua, Tehsil Chachiot, District Mandi, H.P., was also recorded in the ownership and possession of defendant No. 2 as per jamabandi for the year 1989-90 and the said entries were also wrong,

null and void. As per the plaintiffs, parties to the suit were Hindu by religion and the suit property as mentioned in Para-1(a) of the plaint was joint Hindu coparcenary property of plaintiffs, defendants No. 3 and 4. Plaintiffs and defendant No. 4 were real brothers, whereas defendant No. 3 was their father. The suit land was joint Hindu family coparcenary property of plaintiffs and defendants No. 3 and 4 as the same had been inherited from common ancestor late Dayalu and all the coparceners had acquired right in this property by virtue of their birth. It was further the case of the plaintiffs that the land described in Para-1(b) of the plaint was also joint Hindu family coparcenary property as previously it was in the tenancy of late Dayalu, father of Sawaru, defendant No. 3 and later on it came in the hands of defendant No. 3 as well as other members of the family but Sawaru never exercised his independent dominion over the same and the same was thrown in joint nucleus of the coparceners and the land was enjoyed by all the coparceners commonly by treating it as joint Hindu family property. It was further the case of the plaintiffs that Sawaru (defendant No. 3) was 90 years old, rustic villager, who on account of his old age could not analyze his good and bad and defendants No. 1 and 2, who were sons of defendant No. 4, in connivance with defendant No. 4 and one Sobha Ram got manipulated sale deeds qua Khasra Nos. 585, 601, 615 and 651 measuring 7-11-12 bighas out of the land described in Para-1(a) of the plaint and ½ share of Khasra Nos. 1107 and 1112 measuring 2-19-5 bighas as described in Para-1(b) of the plaint from defendant No. 3 by taking the benefit of wrong revenue entries, on 22.08.2000 which sale deeds were wrong, null and void and not binding on the plaintiffs. As per the plaintiffs, sale deeds were also wrong, null and void on the ground that defendant No. 3 was having no right, title and interest to sell this property nor there was any legal necessity for which the alleged sale deeds were executed. It was on these basis that the suit was filed by the plaintiffs praying for the following reliefs:-

> "(i) It be declared that the land described in paras No. 1a and 1b of the plaint is Joint Hindu Family coparcenery property of the plaintiffs, and defendant Nos. 3 and 4;
>
> (ii) The sale deeds executed by Shri Swaru defendant No. 3 in favour of the defendant Nos. 1 and 2 on 22.8.2000 qua the joint suit land as described above, be also declared wrong, null and void, and joint possession of the plaintiffs and defendant Nos. 3 and 4 be confirmed over the same.
>
> (iii) As a consequential relief, the defendants be restrained from dispossessing the plaintiffs from the suit land in any manner whatsoever.
>
> (iv) Any other relief to which the plaintiffs are found entitled to, the same may kindly be granted to the plaintiffs against the defendants and justice be done.
>
> (v) Cost of the suit be also awarded."

3. The suit was contested by the defendants, who in their written statement denied the factum of the suit property being joint Hindu family coparcanary property of the plaintiffs. According to the defendants, plaintiffs did not constitute joint Hindu family with the defendants. The case put up by the defendants was that the property was not inherited from common ancestor, Dayalu as alleged and the plaintiffs had not acquired any interest in the suit land by virtue of birth. As per defendants, suit land described in Para-1(a) of the plaint was self acquired property of defendant No. 3 who had acquired the same with his own money and the suit property as described in Para-1(b) of the plaint was in possession of defendant No. 3 as tenant and later on, he was conferred the proprietary rights over the same. It was further mentioned in the written statement that the sale deeds were not manipulated by the defendants in connivance with Sobha Ram as alleged. It was also mentioned in the written statement that the plaintiffs in fact never considered defendant No. 3 as their father and they never looked after him and they had refused to manage day-to-day living of defendant No. 3 and said defendant was residing separately from the plaintiffs for the last many years and in order to meet his bonafide requirements he had incurred debts from different persons and amount was required by defendant No. 3 for his day-to-day expenses in order to keep him alive.

4. On the basis of the pleadings of the parties, learned trial Court framed the following issues:-

1. Whether the suit land (described in para no. 1a and ib of the plaint) is joint Hindu family, Coparcenary property of the plaintiffs and defendant no. 3 and 4 as alleged? ... OPP

2. Whether the sale deed executed by Sh. Sawaroo defendant no. 3 in favour of defendant no. 1 and 2 on 22.8.2000 qua the joint suit land is wrong, null and void? ... OPP

3. Whether the suit of the plaintiff is bad for non-joinder of necessary parties? ... OPD

4. Whether the suit of the plaintiff is bad for the purpose of court fee and jurisdiction as alleged? ... OPD

5. Whether the plaintiff has no cause of action to file the present suit? ... OPD

6. Whether the defendant no. 1 and 2 are bonafide purchaser for the consideration of the suit property as alleged? ... OPD (1 and 2)

7. Whether the defendant no. 3 has sold the suit land to defendant no. 1 and 2 for legal necessity as alleged? ... OPD

8. Relief.

5. On the basis of the evidence which was led by the respective parties before learned trial Court, the following findings were returned to the issues so framed by it:-

Issue No. 1: Yes.
Issue No. 2: Yes.
Issue No. 3: No.
Issue No. 4: No.
Issue No. 5: No.
Issue No. 6: No.
Issue No. 7: No.
Issue No. 8: The suit is decreed as per operative part of the judgment.

6. Accordingly, learned trial Court decreed the suit so filed by the plaintiffs by holding that the suit land was joint Hindu family and coparcenary property of the plaintiffs and defendants and sale deeds dated 22.08.2000 executed qua the suit land by defendant No. 3 in favour of defendants No. 1 and 2 were wrong, null and void and plaintiffs alongwith defendant No. 4 were joint owner in possession over the suit land. While arriving at the said findings, it was held by learned trial Court that it stood proved that the suit land described in Para-1(a) and Para-1(b) of the plaint was joint Hindu coparcenary property of the plaintiffs, defendant No. 4 and Sawaru (Defendant No. 3). Learned trial Court held that Ext. PA jamabandi for the year 1996-97 reflected that the suit land mentioned in Para-1(a) of the plaint was ancestral land as the same was inherited by the father of the plaintiffs and defendant No. 4 from Dayalu and Dayalu had inherited the same from Chhabar. Learned trial Court thus held that this demonstrated that the plaintiffs had inherited the land mentioned in Para-1(a) from their great grand father Chhabar. It further held that jamabandi for the year 1989-90 Ext. PF reflected that the suit land mentioned in Para-1(b) of the plaint was coming in the ownership and possession of Sawaru qua half share from his father Dayalu and Dayalu had inherited the same from Chhabar which fact also established that the suit land mentioned in Para-1(b) of the plaint was joint Hindu family property. Learned trial Court after discussing oral as well as documentary evidence led by the parties, held that DW-5 Khaku Ram had admitted that he alongwith his brothers and sisters was brought up by his father Sawaru, they lived together and their marriages were also solemnized by their father Sawaru. Learned trial Court also held that DW-5

admitted that the marriage of his elder brother was solemnized by his father and they used to cultivate the suit land jointly. On these basis it was held by learned trial Court that statement of DW-5 demonstrated that the plaintiffs alongwith defendant No. 4 were members of joint Hindu family consisting of plaintiffs, defendant No. 4 and their father Sawaru. Learned trial Court further held that in fact defendant No. 4 who entered the witness box as DW-5 had admitted that he alongwith his brothers and sisters were brought up together and further there was nothing in his statement from which it could be inferred that the suit land was in fact self acquired property of Swaru. On these basis, it was held by learned trial Court that from the statements of defendant No. 1 Khem Chand, who entered the witness box as DW-3 and defendant No. 4 who entered the witness box as DW-5, it could not be established that the plaintiffs were not members of joint Hindu family or that the suit land was self acquired property of Sawaru. Thus, on the basis of documentary evidence Ext. PA jamabandi for the year 1996-97 and Ext. PF jamabandi for the year 1989-90, it was concluded by learned trial Court that the suit land in fact was ancestral and was inherited by Sawaru from his predecessor-in-interest. Learned trial Court accordingly held that the evidence oral as well as documentary produced on record by the plaintiffs demonstrated that the suit land was joint Hindu coparcneary property of the plaintiffs, defendants and Sawaru. Learned trial Court also concluded that defendants No. 1 and 2 were not bonafide purchasers for consideration of the suit land and Sawaru had sold the suit land to defendants No. 1 and 2 without legal necessity and, therefore, the sale deeds were held wrong, null and void.

7. The judgment and decree so passed by learned trial Court was challenged by defendants Khem Chand and Chandermani.

8. In appeal, learned Appellate Court held that whether the suit property as mentioned in Para-1(a) and 1(b) of the plaint was ancestral or coparcenary in nature being inherited by defendant No. 3 from his father or ancestors, the onus to prove the same was heavily upon the plaintiffs. Learned Appellate Court further held that Misal Haqiat for the year 1996-97 Ext. PA clearly demonstrated that Sawaru was owner in possession of Khasra Nos. 585 (469 old), 601 (465 old), 605 (462 old), 615 (507 and 508 old), 645 (522 min old), 647 (521 old) and 651 (504 old), kitas 7 measuring 11-18-17 bighas. It further held that jamabandi for the year 1990-91 Ext. PB which was a pre consolidation jamabandi demonstrated that defendant No. 3 was having joint khata with other tenure holders and in the said jamabandi old Khasra Nos. 469, 465, 462, 507, 508, 522 min, 521 and 504 alongwith other Khasra Nos. were mentioned and the suit land was recorded in the name of Sawaru, Dahlu sons of Dayalu. Learned Appellate Court further held that mutation No. 60 Ext. PD demonstrated that after the death of Dayalu, common ancestor of the parties, his estate was inherited by Daya Ram, Sawaru and Dahlu in equal shares. Learned Appellate Court further held that Daya Ram was grandson of late Dayalu and his father Bhagu pre deceased Dayalu. Learned Appellate Court further held that the land mentioned in Ext. PD pertained to the estate of Dayalu in Muhal Jaggas, new name of which was Muhal Kandi and mutation Ext. PE pertained to Muhal Jugas and vide mutation No. 62 dated 21.03.1955 the estate of Dayalu was shown to be inherited by his grandson Daya Ram son of Bhagu and his son Sawaru and Dahlu in equal shares and Dayalu died on 20.09.1953 before the enforcement of Hindu Succession Act. Learned Appellate Court also held that defendant Khaku while appearing as DW-5 admitted in his cross-examination that after the death of Dayalu his entire estate was inherited by his sons in equal shares. On these basis it was held by learned Appellate Court that it stood duly proved that the suit land in Muhal Kandi (old Juggas) was inherited by the sons of Dayalu in equal shares and learned Appellate Court thus held that the suit land mentioned in Para-1(a) of the plaint was ancestral in nature as was evident from the documentary evidence on record as well as the admission of the defendant.

9. Learned Appellate Court further held in Para-39 of the judgment as under:-

> "The law is very clear, any property which is inherited by a person from his father, grandfather and great grandfather is ancestral/ coparcenary

property in the hand of his son, grand sons and great grandson. Resultantly, the suit land mentioned in para 1-a of the plaint is ancestral or coparcenary property in the hand of defendant No. 3 Sawaru who inherited the same from his father Dayalu."

10. It was further held by learned Appellate Court that there was no specific evidence on record to suggest that defendant No. 3 had any bonafide need to effect sale deeds Ext. DA and Ext. DB in favour of his grandsons defendants No. 1 and 2. Learned Appellate Court also held that recitals of sale deeds Ext. PA and Ext. DB demonstrated that it was mentioned therein that Swaru was to discharge debts as a result of which the sale deeds were required to be made. Learned Appellate Court held that there was no legal necessity requiring the execution of sale deeds. Learned Appellate Court in fact held that broadly speaking the term, legal necessity, includes all those acts which are necessary for the members of the family and the same did not mean actual compulsion but it meant pressure on the estate which in law may be regarded as serious and sufficient. It was thus concluded by learned Appellate Court that it had come in evidence that during life time of Dayalu his sons used to remain jointly with him and even at the time of his death, there was a joint family and simply because presently plaintiffs were living separately or were having their separate houses, the same would not put an end to the joint nature of the suit land. On these basis, it was held by learned Appellate Court that the findings rendered by learned trial Judge to the effect that there was no legal necessity to effect the sale deed did not call for any interference. Learned Appellate Court thus held that the defendants had failed to prove that the sale deeds Exts. DA and DB were effected for legal necessity. As far as suit land described in Para-1(b) of the paint is concerned, it was held by learned Appellate Court that the same was not strictly speaking ancestral or coparcenary property. While arriving at the said conclusion it was held by learned Appellate Court that there was ample evidence on record to suggest that the said parcel of land was under the tenancy of Dayalu previously and later on the tenancy rights were inherited by his sons including defendant No. 3, who became owner of portion of land. Learned Appellate Court held that plaintiffs in Para-3 of the plaint had specifically stated that the said parcel of land was previously under the tenancy of late Dayalu, father of defendant No. 3 Sawaru and subsequently, it came in the hands of defendant No. 3 and other family members. Learned Appellate Court held by relying upon a judgment of this Court in ***Gajjan Ram Vs. Hira Singh and others***, ***1991 SLJ 994***, that the tenant who has become owner of the land under the tenancy law is absolute owner of such property and the same shall be deemed to be his self acquired property and not ancestral property. Learned Appellate Court thus held that after the conferment of proprietary rights the property ceases to be ancestral and same would be presumed to be self acquired property of such tenant who has become owner now. Learned Appellate Court thus went on to hold that the said land mentioned in Para-1(b) of the plaint was self acquired property of Sawaru and alienation of the same cannot not be impeached under the Hindu law.

11. Accordingly, the appeal was partially allowed by learned Appellate Court in the following terms:-

"As a sequel to my findings on point No. 1 above, the appeal filed by the appellants is party accepted. The judgment and decree under appeal are modified. Consequently a declaratory decree to the effect that the suit land described in para 1-a of the plaint is joint Hindu family property/ancestral property is passed in favour of the plaintiffs and the sale deed Ext. DA dated 22.8.2000 qua the said suit land by defendant No. 3 in favour of defendants No. 1 and 2 is held to be legally null and void and not binding on the plaintiffs. However, as discussed above, the suit land mentioned in para 1-b of the plaint is held to be self acquired property of defendant No. 3 Sawaru and as such, the sale deed Ex. DB in respect of the suit land is held to be legally valid and the findings of the trial Court in respect of this parcel of the suit land is hereby set aside."

12. Though the findings returned by learned Appellate Court qua the suit land described in Para-1(b) of the plaint have not been assailed by the plaintiffs, however, the findings returned by learned Appellate Court qua the suit land described in Para-1(a) of the plaint have been challenged by defendant No. 2 Chandermani by way of this appeal.

13. This appeal was admitted on 09.07.2008 on the following substantial questions of law:

> "1. Whether the courts below have misread and mis-appreciated oral and documentary evidence, especially Ex. PA to Ex. PJ, Ex. DA and statements of PW1, DW2 to DW5 and findings as such on this count are bad in law?
>
> 2. Whether discharge of debt and medical treatment by the Karta and Manager of the joint HUF property can be construed to be legal necessity for said Karta to sell the coparcenary property and whether such sale on account of legal necessity is a valid sale?
>
> 3. Whether recitals in the registered sale deed regarding discharge of debt and to meet medical treatment expenses is sufficient to prove legal necessity and are admissible in evidence to be used for corroborative purpose along with other evidence to raise the inference against the party seeking to set aside the registered sale deed?"

14. As all the substantial questions of law are interlinked, therefore, I will be dealing with them together. There are concurrent findings returned by both the learned Courts below to the effect that the suit property described in Para-1(a) of the plaint was ancestral and coparcenary property of the plaintiffs and defendant No. 4 alongiwth their father.

15. Ext. PB is jamabandi for the year 1990-91, a perusal of which demonstrates that in the said jamabandi against the suit land described in Para-1(a) of the plaint Sawaru alongwith Dahlu son of Dayalu are reflected as co-sharers alongwith other co-sharers. While arriving at the conclusion that the property mentioned in Para-1(a) of the plaint is ancestral property, learned Courts below had taken into consideration the fact that mutation No. 60 Ext. PD demonstrated that after the death of Dayalu, his estate was inherited by Daya Ram, Sawaru and Dahlu in equal shares. Learned Courts below also held that Daya Ram was grandson of late Dayalu and his father Bhagu had in fact pre deceased Dayalu. Learned Courts below also held that pedigree table on mutation No. 60 Ext. PD demonstrated that Dayalu son of Chhabar had three sons i.e. Dahlu, Sawaru and Bhagu. There is a specific finding returned by learned Appellate that land mentioned in Ext. PD pertained to the estate of Dayalu in Muhal Jaggas and the new name of the said Muhal was Muhal Kandi and that land entered in mutation Ext. PD pertained to Khata No. 9 and as per jamabandi for the year 1954-55 Ext. PC, this land was the same which was shown to be mutated in the name of legal heirs of Dayalu. Learned Appellate Court also specifically held that mutation Ext. PE which pertained to Muhal Jaggas demonstrated that vide mutation No. 62 dated 21.03.1955, the estate of Dayalu was shown to be inherited by his grandson Daya Ram son of Bhagu and his sons Sawaru and Dahalu in equal shares. In my considered view, the above findings are duly borne out from the records of the case and the same cannot be said to be a result of either misappreciation or misreading of the documentary evidence. The findings returned by learned Courts below to the effect that in his cross-examination it was admitted by defendant Khaku that after the death of Dayalu his entire estate was inherited by his three sons in equal shares, also duly borne out from the records especially the statement of Khaku, who deposed in the Court as DW-5.

16. Ext. DA is a copy of sale deed dated 22.08.2000. A perusal of the same demonstrates that it was mentioned the therein that the vendor was selling the land to the vendees because of his "Gharelu Jarurat". Now what was the bonafide need for defendant No. 3 in fact to have had executed the sale deed Ext. DA or for that matter Ext. DB in favour of defendants No. 1 and 2, has not been satisfactorily explained by the defendants. While disbelieving that Sawaru had any legal necessity to do away with the said ancestral property,

learned Courts below have returned specific findings that there was no mention of any legal necessity requiring the execution of sale deed in the said exhibits. These findings arrived at by learned Courts below in my considered view also cannot be said to be a result of misreading and misappreciation of evidence on record including the two sale deeds. There is no mention in these sale deeds as to what was the legal necessity which was so compelling in nature that the same necessitated defendant No. 3 Sawaru Karta of the HUF to alienate the coparcenary property. Not only this, this Court also cannot lose sight of the fact that vendees in the present sale deeds are none else but the grand sons of Sawaru.

17. The Hon'ble Supreme Court in ***Smt. Rani and another Vs. Smt. Santa Bala Debnath and others***, ***1970 (3) Supreme Court Cases 722***, has held that recitals in a deed of legal necessity do not by themselves prove legal necessity and though the recitals are admissible in evidence their value varies according to the circumstances in which the transaction was entered into.

18. Even otherwise it is settled proposition of law that the fact that the sale supported by legal necessity is not by itself sufficient to hold that the sale was valid and it is necessary to prove that it was also a prudent transaction.

19. Coming to the facts of this case, defendant No. 3 has miserably failed to prove that the sales were effected by way of legal necessity. In fact, it is borne out from the records of the case itself that the sale deeds were executed by defendant No. 3 in favour of none else but his own grandsons. This strengthens the case of the plaintiffs that this entire exercise was taken by defendant No. 3 to defeat the cause of plaintiffs and other co-sharers. Not only this, there is no material on record from which it can be inferred that defendant No. 3 had in fact besides there being a legal necessity to effectuate sale deeds Exts. DA and DB also undertook these sale transactions in a prudent manner. Nothing has been placed on record by the defendants to demonstrate that defendant No. 3 Sawaru had either incurred debt so as to pay his medical expenses or that he was actually admitted in any hospital and had undergone medical treatment and in the said process he had incurred debt. Incidentally, a perusal of the sale deeds also demonstrate that there is no such recital in them in this regard nor the defendants have been able to establish this fact by placing any cogent evidence on record. Therefore, I reiterate, as has been held by both learned Courts below, that the defendants miserably failed to prove that defendant No. 3 had executed sale deeds in favour of defendants No. 1 and 2 by way of legal necessity. Substantial questions of law are answered accordingly.

20. In view of my discussion held above, I do not find any infirmity with the findings returned by both learned Courts below to the effect that the suit land described in Para-1(a) of the plaint was ancestral and coparcenary property of the plaintiff alongwith defendant No. 4 and their father. Thus, as there is no merit in the present appeal, the same is accordingly dismissed. No order as to costs. Miscellaneous applications pending, if any, also stand disposed of. Interim order, if any, also stands disposed of.

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

Karam Chand ....Petitioner.
Versus
The State of Himachal Pradesh ... Respondent.

Cr.R. No. 03 of 2008.
Reserved on: 05.04.2017.
Decided on: 13.04.2017.

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a Maruti van in a rash and negligent manner and hit P who died at the spot – the accused was tried and convicted by the Trial Court- an appeal was filed which was also dismissed – held in appeal that the prosecution version was proved by PW-1 - PW-4 and PW-5 did not support the prosecution version – however, none of the witnesses had identified the accused – owners said that he had employed three persons as drivers and the possibility of some other person driving the vehicle at the time of accident cannot be ruled out- it was not proved that rashness and negligence of the accused had caused the accident- revision allowed- accused acquitted.(Para-9 to 16)

Case referred:

Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123

For the petitioner. : Mr. Anoop Chitkara, Advocate.

For the respondent : Ms. Parul Negi, Dy. A.G.

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 Additional Sessions Judge, Presiding Officer, Fast Track Court, Kangra at Dharamshala, in Criminal Appeal No. 46-P/05/03, dated 18.08.2007, vide which learned Appellate Court, while dismissing the appeal so filed by the present petitioner, has upheld the judgment passed by the Court of learned Judicial Magistrate 1st Class, Court No. (II), Palampur, in Criminal Case RBT No. 101-II/2000, dated 11.06.2003 whereby learned trial Court had convicted the present petitioner for commission of offences punishable under Sections 279 and 304-A of Indian Penal Code (hereinafter referred to as 'IPC') and sentenced him to undergo simple imprisonment for 6 months and to pay a fine of Rs. 1000/- under Section 279 of IPC and to undergo simple imprisonment for two years and to pay fine of Rs. 2,000/- under Section 304-A of IPC. All the sentences were ordered to run concurrently.

2. The case of the prosecution in brief was that on 20.11.1999, at about 1:00 p.m., accused Karam Chand was driving Maruti Van bearing registration No. HP-02-4231 on a public way which vehicle was being driven by him in a rash and negligent manner, as a result of which, said vehicle struck against Premi Devi (deceased) near Bari, who was using the road as a pedestrian. As a result Smt. Premi Devi died on the spot. On information so provided by Shri Gandhi Ram at Police Post Bhavarna, Rapat No. 12, dated 20.11.1999 was entered in daily diary. Thereafter Head Constable Baldev Singh visited the spot and recorded the statement of Shri Sarwan Kumar i.e. son of the deceased under Section 154 of Cr.P.C. On the basis of statement of Sarwan Kumar, FIR was registered. During the course of investigation, site plan was prepared and Maruti Van involved in the accident was taken into possession alongwith documents and driving licence of accused. Postmortem of dead body of Premi Devi was got conducted at Civil Hospital, Palampur. Photographs of the site were taken. Vehicle in question was got mechanically examined and report of mechanic was also obtained by the Investigating Officer. Statements of witnesses were also recorded in the course of investigation by the Investigating Officer. After the completion of investigation, challan was filed in the court and notice of accusation was put to the accused for commission of offences punishable under Sections 279 and 304-A of IPC, to which he pleaded not guilty and claimed trial.

3. Learned trial Court vide its judgment dated 11.06.2003 held that the prosecution evidence on record proved beyond all reasonable doubt that accused was driving the Maruti Van bearing registration No. HP-02-4231 in a rash and negligent manner on 20.11.1999 on a public highway and the same hit pedestrian Premi Devi who died on account said accident when the vehicle reached near Bari on the fateful day. Learned trial Court convicted the accused for

commission of offences punishable under Sections 279 and 304-A of IPC. While arriving at the said conclusion, it was held by the learned trial Court that the accident was witnessed by PW1 Sarwan Kumar who was walking alongwith Premi Devi at the relevant time, who specifically disclosed the number of the vehicle as HP-02-4231 which was coming from the side of Daroh in excessive speed and hit his mother and caused her death. Learned trial Court however took note of the fact that this witness had deposed that Van was being driven by its driver in a negligent manner but he did not recognize driver of the same as driver had fled away from the spot and he later on came to know that driver of the offending Van was Karam Chand. Learned trial Court held that the deposition of PW1 was natural and reliable and his version was further corroborated by information which was received in the Police Station, which was duly incorporated in the daily diary after the occurrence of the accident on 20.11.1999 Ext. PA. Learned trial Court also held that factum of accident having occurred with the offending Van whereby death of Premi Devi was caused was not disputed on the date of occurrence. Learned trial Court further held that in fact defence of the accused was that he was not driving the Van in question on the relevant day whereas owner of the offending Van PW6 Balkrishan had proved the factum of driving of offending Van by the accused on the relevant date and that the accident thus stood proved to have taken place with the same Van and there was no circumstance to implicate the accused falsely. Learned trial Court held that factum of PW6 having deposed that he had deployed three drivers, namely, Ram Swaroop, Karam Chand and Prittam Chand was of no assistance to accused as PW6 had categorically stated that it was the accused who was driving the offending Van on the relevant day. Learned trial Court also held that PW3 Mehar Singh had also clearly deposed that when owner of the offending Van PW6 Bal Krishan reached the spot, he disclosed that driver of the vehicle was the accused. Learned trial Court took note of the fact that this narration of PW3 was not controverted in the course of his cross examination. On these bases, it was held by the learned trial Court that the statements of PW3 and PW6 categorically proved that the Van in issue with which the accident was caused was being driven at the relevant time and place by the accused. It further held that conduct of the accused of absconding from the spot after stopping the offending vehicle further proved the factum of his being rash and negligent while driving the offending vehicle which hit deceased Premi Devi and caused her death. On these bases, learned trial Court held that prosecution had proved its case against the accused beyond reasonable doubt and convicted and sentenced the accused for commission of offences punishable under Sections 279 and 304-A of IPC.

4. In appeal, the findings so returned by the learned trial Court were upheld by the learned Appellate Court. While upholding the judgment of conviction passed by the learned trial Court it was held by learned Appellate Court that as far as identity of the driver was concerned, as per the prosecution, the vehicle in issue was being plied by the accused, however, the defence of the accused was that it was not being driven by him but by someone else. Learned Appellate Court held that statement of PW6 Bal Krishan demonstrated that accused was the driver of the offending vehicle on 20.11.1999 who had taken a passenger to Thural. Learned Appellate Court also held that no doubt PW6 had stated that he had deployed three drivers but it was not suggested to him by the defence that at the time of accident accused was not the driver and someone else was driving the vehicle. Learned Appellate Court also held that in fact no suggestion was given to PW6 by the defence that on that particular day accused was not the driver on the offending vehicle neither accused had taken the passenger to Thural. Learned Appellate Court also held that PW3 had stated that after the occurrence of accident when PW6 reached the spot, he disclosed that driver of the vehicle was accused Karam Chand. Learned Appellate Court held that no suggestion was put to this witness that owner had not disclosed to the police that it was the accused, who was driving the offending vehicle on the day of occurrence. On these bases, it was held by learned Appellate Court that the prosecution had duly established the identity of the accused as the person who was driving the offending vehicle on the fateful day. Learned Appellate Court affirmed the findings returned by learned trial Court to the effect that accident was in fact caused by rash and negligent driving on the part of the accused.

5. Feeling aggrieved by the judgment so passed by the learned Courts below, the petitioner filed this revision petition.

6. Mr. Anoop Chitkara, learned Counsel appearing for the petitioner has argued that the judgments of conviction passed against the present petitioner by both the learned Courts below convicting the accused for commission of offences punishable under Sections 279 and 304-A of IPC are perverse as both the learned Courts below have erred in not appreciating that the prosecution was not able to link the accused as driver of the vehicle with which the accident had taken place. Mr. Chitkara strenuously argued that judgments of conviction passed by both the learned Courts below are based on conjectures and surmises and both the learned Courts below erred in not appreciating that prosecution was not able to establish beyond reasonable doubt that in fact it was the accused who was driving the vehicle on the fateful day at the fateful time when the unfortunate accident took place. On these counts alone, Mr. Chitkara submitted that judgments of conviction passed by the learned Courts below against the accused are liable to be set aside.

7. Ms. Parul Negi, learned Deputy Advocate General, on the other hand, argued that there is no merit in the contentions of learned counsel for the petitioner because both the learned Courts below have returned findings to the effect that the prosecution had established on record that it was the accused who was driving the offending vehicle at the time when the unfortunate accident took place and immediately after the occurrence of the accident, the accused ran away from the spot. Learned Deputy Advocate General further argued that the factum of offending vehicle being driven by the accused at the relevant date, time and place stood proved from the testimony of PW6 i.e. owner of the vehicle in issue and there was no reason to disbelieve testimony of this witness and of PW3. Accordingly, she urged that as both the learned Courts below had held that it stood proved on record that it was the accused who was driving the offending vehicle at the relevant date time and place, the findings so returned by learned Courts below did not warrant any interference. On these bases, it was urged by Ms. Negi that as there was no merit in the revision petitioner, the same be dismissed.

8. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments passed by both the learned Courts below.

9. Before proceeding in the matter, it is relevant to take note of what is the scope of revisional jurisdiction of this Court. It is settled law that the scope of revisional jurisdiction of this Court does not extend to re-appreciation of evidence. It has been held by the Hon'ble Supreme Court that the High Court in exercise of its revisional power can interfere only if the findings of the Court whose decision is sought to be revised is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously. It has been held by Hon'ble Supreme Court in ***Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123***, that unmerited and 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.

10. Keeping in view the arguments raised in the present petition by the learned counsel for the petitioner, the sole point of adjudication in this revision petition is to ascertain as to whether it stood established by the prosecution from the evidence which was placed on record that it was the accused who was driving the offending vehicle when the unfortunate accident took place or not.

11. A perusal of record of the case demonstrate that PW1 Sarwan Kumar, son of the deceased has deposed in the Court that on 20.11.1999 at around 1:00 p.m., he and his mother were walking on the road when one Van bearing registration No. HP-02-4231 came in a very fast speed from behind and hit his mother and dragged her and his mother died on account of said impact. This witness deposed that the accident took place on account of rash and negligent

driving of the driver of the vehicle. This witness deposed that he did not know that the name of person who was driving the said Van was Karam Chand. In his cross examination, he admitted that he did not know the driver but self stated that in fact driver had ran away from the spot. PW3 Mehar Singh deposed in the Court that on 20.11.1999 he had gone to the house of Ravi Kant and there he came to know that mother of Sarwan was injured in an accident and thereafter when he went to the spot, he saw Premi Devi lying dead on the road and one Van was there on the road. He further deposed that Sarwan and many other persons were there at the spot whereas the driver of the Van had ran away from the spot. He further deposed that owner of the Van came on the spot and he disclosed that name of driver of the Van was Karam Chand. In his cross examination, he admitted that he did not know Karam Chand and that he had reached the spot after 15 minutes of the accident.

12. PW4 Gandhi who was an eye-witness to the accident, as per prosecution, did not support the case of the prosecution. Similarly PW5 Susheel Kumar who as per prosecution was another eyewitness turned hostile and did not support the case of prosecution.

13. PW6 Bal Krishan, owner of the Van in question deposed in the Court that he was the owner of the Maruti Van bearing registration No. HP-02-4231 and he had deployed Karam Chand as driver on the said vehicle. He further deposed that he had gone to the spot after the accident took place but the driver had run away from the spot. In his cross examination, he stated that he was not aware as to how many drivers he had deployed, however, he stated that Ram Swaroop, Karam Chand and Prittam Chand were deployed by him as drivers on Van in issue. He denied that at the time of occurrence of the accident, the accused was not the driver of offending Van.

14. Now, a close scrutiny of the testimony of PW1, PW3 and PW6 demonstrates that none of them have either seen or stated that it was accused and the accused only who was driving the offending vehicle at the time when accident took place. The eye witnesses have not supported the case of the prosecution. The conclusion qua accused being driver of the offending vehicle at the time when accident took place has been arrived at by learned trial Court on the basis of testimony of the owner of the vehicle i.e. PW6 Bal Krishan, who deposed that accused was engaged by him as driver of the Van in issue on the day when the unfortunate accident took place and PW3 who deposed that after the unfortunate accident had taken place, when owner of the vehicle reached the spot, he (owner) disclosed that the driver engaged on the said vehicle was the accused. However the fact of the matter still remains that neither PW1 deposed in the Court that it was the accused who was driving the offending vehicle when the unfortunate accident took place nor the testimony of PW3 or PW6 proves this vital fact that at the time when the accident took place, it was the accused who was at the wheels of the offending vehicle. Simply because accused was engaged as the driver of the offending vehicle, this fact ipso facto cannot be the substitute for express proof of the fact that vehicle in fact was being driven by the accused at the time when the accident took place. In my considered view, this very important aspect of the matter has been ignored by both the learned Courts below. Learned trial Court as well as learned Appellate Court erred in not appreciating that engagement of accused by the owner of the offending vehicle as its driver was not itself a proof of the fact that it was the accused and accused only who was driving the vehicle at the time when the accident took place. It is settled law of the land that more serious a crime, more stringent the punishment, more stringent is the onus on the prosecution to prove its case. In my considered view, in the present case, the prosecution was not able to prove beyond reasonable doubt that at the time of unfortunate accident in which one precious human life was lost, it was the accused, who was on the wheels of the offending vehicle. It has come in the statement of owner of the offending vehicle that accused was engaged as a driver on the said vehicle and he was taking one passenger to Thural but the prosecution did not examine the passenger who could have been the best witness to prove the fact that it was the accused or someone else who was driving the vehicle on the fateful day. In fact, there is nothing on record placed by the prosecution from which it can be deciphered that when the unfortunate accident took place, it was the accused who was driving the vehicle. Prosecution has miserably failed to prove this fact beyond reasonable doubt. No doubt, PW6 has

stated that it was the accused who was engaged by him on the fateful day to drive the offending vehicle but fact of the matter remains that no one has deposed in the Court that it was the accused who was driving the vehicle when the accident took place. In this background, when the defence of the accused was that he was not driving the vehicle at the time when the accident took place, onus was heavily upon the prosecution to have had proved this point beyond reasonable doubt, which prosecution has failed to prove.

15. Therefore, in view of discussion held above, in my considered opinion, the findings returned by both the learned Courts below to the effect that prosecution was able to prove beyond reasonable doubt that it was accused on the wheels of the offending vehicle when the unfortunate accident took place, are perverse findings. Said findings are not borne out from the records of the case. There is not even an iota of evidence on record from which it can be inferred that it was the accused who was driving the vehicle when the unfortunate accident took place.

16. Accordingly, in view of the above discussion, this revision petition is allowed and the judgment of conviction passed by the Court of learned Judicial Magistrate 1st Class, Court No. 2, Palampur, in Criminal Case RBT No. 101-II/2000, dated 11.06.2003 as well as judgment passed by learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala, in Criminal Appeal No. 46-P/05/03, dated 18.08.2007 are set aside and the petitioner is acquitted of offences punishable under Sections 279 and 304-A of IPC. Fine amount, if any, deposited by the petitioner be returned to him in accordance with law. The criminal revision petition is disposed of accordingly. Pending miscellaneous 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 AJAY MOHAN GOEL, J.

Smt. Roma Sharma ….Appellant.
Versus
Sameer Beg and another ….Respondents.

Cr. Appeal No.: 237 of 2015.
Reserved On : 28.03.2017.
Decided on: 13.04.2017.

Indian Penal Code, 1860- Section 376- Prosecutrix left the house at 9:30 A.M. on the pretext that her result was to be declared on internet – she returned at 1:30- P.M. but did not disclose the reason for late arrival – Subsequently, she told that accused had taken her to hotel during day time and had raped her – the accused was tried and acquitted by the Trial Court- held in appeal that prosecutrix did not support the prosecution version – the testimonies of the parents were not satisfactory – the prosecutrix was more than 16 years of age at the time of incident – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.

(Para-8 to 17)

For the appellant : Mr. P.S. Chandel, Advocate.
For the respondents : None for respondent No. 1.
Mr. Punit Rajta, Dy. Advocate General for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, complainant has challenged the judgment passed by the Court of learned Sessions Judge, Bilaspur, in Sessions Trial No. 7 of 2012, dated 05.04.2013,

vide which, learned Trial Court acquitted the present respondent No. 1 (hereinafter referred to as 'accused') for commission of offence punishable under Section 376 of Indian Penal Code (in short 'IPC').

2. The case of the prosecution in brief was that on 07.06.2012, complainant Smt. Roma Sharma (PW1), who is the mother of the prosecutrix (name withheld), lodged a complaint in Police Station Sadar, Bilaspur Ext. PW1/A to the effect that on 05.06.2012, her elder daughter (prosecutrix), who was a student of class (X) in Government Senior Secondary School, Bilaspur left their house at 9:30 a.m. on the pretext that her result was to be declared on internet and when she (prosecutrix) returned home at around 1:30 p.m., PW1 asked her as to why she had come so late, but the prosecutrix did not answer anything and went straightway in her room. Further as per prosecution, on 07.06.2012, prosecutrix told PW1 her that she had friendship with one Sameer Beg, who had taken her to Dholra Hotel on 05.06.2012 during day time and had raped her.

3. On the basis of said complaint, FIR Ext. PW10/A was registered against the accused. In the course of investigation, prosecutrix was got medically examined, accused was arrested and he was also medically examined. Father of the prosecutrix produced photocopy of middle standard examination of the prosecutrix Ext. PW12/A which was taken into possession vide memo Ext. PW4/A. Prosecutrix lead the police to Dholra Hotel and she identified the room where accused raped her. Investigating Officer prepared site plan of the same. Further as per prosecution, during his custody accused made a statement Ext. PW5/A, on the basis of which he got identified the place where he had taken the prosecutrix on 05.06.2012. Birth certificate of the prosecutrix Ext. PW7/A was also obtained alongwith a copy of parivar register Ext. PW7/B. Report of SFSL alongwith opinion of the Doctor was also obtained.

4. After the 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 Sections 376 of IPC, to which he pleaded not guilty and claimed trial.

5. Learned trial Court on the basis of evidence produced before it by the prosecution acquitted the accused by giving him benefit of doubt. While arriving at the said conclusion it was held by learned trial Court that prosecution had failed to prove its case against the accused beyond reasonable doubt. It was held by learned trial Court that the material witness of the prosecution i.e. the prosecutrix had turned hostile and had not supported the case of the prosecution. Learned trial Court took note of the fact that it is not as if the evidence of the hostile witness is liable to be rejected in totality and part of the statement which favours the prosecution can be relied upon. However, it went on to hold that a scrutiny of statement of the prosecutrix demonstrated that she had not supported the case of the prosecution and nothing favourable could be extracted by the prosecution during her lengthy cross examination. Learned trial Court held that in her examination-in-chief, the prosecutrix had categorically deposed that accused had not met her on 05.06.2012 at Champa Park and had not done anything wrong with her. Learned trial Court held that prosecutrix had categorically denied that accused had forcibly raped her and she also denied that she had narrated any such incident to her mother and that Doctor had taken her consent before taking her signatures on the MLC. Learned trial Court held that rather the prosecutrix had stated that she was having friendship with the accused for the last two and half years and both of them used to talk with each other on telephone quite often. Learned trial Court thus held that in view of the categorical stand taken by the prosecutrix that accused never committed rape with her on 05.06.2012, it could not be said that accused had physically molested/raped the prosecutrix on 05.06.2012. Learned trial Court also took note of the fact that PW3, owner of the Dholra Guest House had also not supported the case of the prosecution. It further held that even the testimony of complainant PW1 i.e. the mother of the prosecutrix did not inspire confidence and moreover the statement of PW1 (mother of the prosecutrix) as well as of PW4 i.e. father of the prosecutrix were based on hear say evidence and as such, same was not admissible in law. On these bases, learned trial Court held that from the perusal of entire material placed on record by the prosecution it could not be said that accused Sameer Beg had

committed rape on prosecutrix on 05.06.2012 and by giving the benefit of doubt it acquitted the accused.

6. Feeling aggrieved by the judgment so passed by learned trial Court, the complainant has filed this appeal.

7. We have heard the learned counsel for the complainant as well as learned Deputy Advocate General appearing for respondent No. 2. We have also gone through the records of the case as well as the judgment passed by learned trial Court.

8. Before proceeding further, it is relevant to mention that against the judgment of acquittal so passed by the learned trial Court in favour of accused, no appeal has been preferred by the State.

9. In order to appreciate as to whether the findings of acquittal returned in favour of accused by learned trial Court are based on evidence adduced on record or are perverse, we have minutely gone through the records of the case.

10. Learned trial Court has primarily returned the finding of acquittal in favour of accused by holding that prosecutrix had not supported the case of the prosecution and she had denied that she was raped by the accused on 05.06.2012 as was the case against the accused put forth by the prosecution. A perusal of the statement of the prosecutrix, who entered the witness box as PW2, demonstrates that she stated on oath that she knew the accused since August, 2010 and that accused used to drive Van of Radhey Govind School, Bilaspur and used to collect children from village Chandpur and adjoining areas and said Van used to pass through the house of the prosecutrix. Prosecutrix further deposed on oath that she used to take lift in the aforesaid Van at times for coming to School and accused used to drop her at her school. She further stated that they used to talk with each other on mobile phone. She further deposed that on 05.06.2012, her father had left her at school as her result was to be declared on the internet. She further deposed that she left her house at 9:30 a.m. for going to Bilaspur and alighted from bus at Champa Park and enquired about the result from a nearby shop and came to know that her result was not declared. She further deposed that thereafter she went to Laxmi Narayan Mandir and from there she went to Gurdwara market where she purchased some articles and thereafter she came back to her house and reached there at 1:30 p.m. She further deposed that on reaching her house, her mother enquired her about the result and she told that her result was not declared as yet. She further deposed that except this, she had not disclosed anything else to her mother. She further deposed that she had not met the accused at Champa Park on 05.06.2012 and accused had not done anything wrong with her. As she was declared hostile, she was subjected to lengthy cross examination by learned Public Prosecutor. In her cross examination, she denied that during the course of investigation any statement of her was recorded by the police. She also denied that on the fateful day when she reached home, she straightway went to her room and locked herself and at about 4:00 p.m. “Mama” of her mother came to their house and asked her to open the door and only thereafter she opened the door. Though in her cross examination she did not deny that fact that she accompanied her parents to the police station for the purpose of lodging FIR and that she was subjected to medical examination but she stated that she was forcibly taken to police station by her father and was also forced to undergo medical examination. She denied that her medical examination was conducted by Doctor with her consent. In her cross examination by learned defence counsel, she admitted that on 05.06.2012 accused never met her nor he committed rape on her. She also stated that her date of birth was 11.11.1996 and in the school records it was wrongly recorded as 11.03.1997. She also stated that her parents had planted a false case against the accused in connivance with the police.

11. Now in this background, when we examine statements of complainant PW1 Smt. Roma Sharma and PW4 Shri Krishan Kumar, mother and father of the prosecutrix respectively, we find that their testimonies do not inspire confidence. As per PW1, on 05.06.2012, at around 9:30 a.m. prosecutrix had left home for Bilaspur on the pretext that her result was to be declared on the internet and when she came back home at 1:30 p.m. she was perplexed and under fear

and when she asked the reason of her coming late, the prosecutrix without disclosing anything to her straightway went to her room and bolted the door from inside and did not open the door for about 6-7 hours despite her repeated requests. This witness thereafter deposed that she called her "Mama" Shri Mast Ram telephonically and on his pursuation, the prosecutrix opened the door. This witness further deposed that prosecutrix did not disclose anything to her on that day and it was on 07.06.2012 that prosecutrix disclosed to her that she was having friendship with accused and on 05.06.2012 accused had met her at Champa Park and took her to a Hotel at Dholra where after taking lunch accused took her in a room of the hotel and committed rape with her (prosecutrix). This witness thereafter deposed that she narrated the entire incident to her husband and she alongwith her husband and prosecutrix went to police station Sadar, Bilaspur and filed the complaint. In her cross examination, she stated that her husband had reached their house at 3:30 p.m. on 05.06.2012 and requested the prosecutrix to open the door but she did not open the door even at his request. She further deposed in her cross examination that she had disclosed to the police that prosecutrix had told her that accused met her at Champa Park and took her to Dhaulra Hotel in an Auto Three Wheeler for lunch and after taking lunch accused took prosecutrix in a room of said Hotel, but she was confronted with complaint Ext. PW1/A wherein it was not so recorded. She also stated in her cross examination that result of the prosecutrix was declared on 06.06.2012 and they came to know about result on 07.06.2012 in which prosecutrix had failed. She denied the suggestion that as a result of the prosecutrix failing in the examination they got infuriated and had lodged a false complaint against the accused. She further stated that FIR was not signed by her and it was her husband who lodged the FIR.

12. PW4 Shri Krishan Kumar, father of the prosecutrix, deposed that on 05.06.2012 when he reached their house at 3:30 p.m., his wife told him that prosecutrix had returned home at 1:30 p.m. and had bolted herself in a room and was not opening the same. This witness further deposed that thereafter his wife rang her "Mama" Shri Mast Ram and informed him that prosecutrix had bolted the room from inside and was not opening the door despite repeated requests, pursuant to which, "Mama" of his wife reached their house at about 4:30 p.m. and on pursuation of "Mama" of his wife, prosecutrix opened the door. It has further come in the testimony of this witness that on 07.06.2012 when he was present in the school, his wife telephonically informed him that prosecutrix had disclosed to her that she was having friendship with accused and on 05.06.2012, accused had taken prosecutrix to Dholra Hotel where he sexually molested her.

13. In our considered view, both mother and father of the prosecutrix are interested witnesses and the statement of prosecutrix is very categoric to the effect that a false case was lodged against the accused on the behest of her parents. In these circumstances, especially keeping in view the fact that prosecutrix herself did not support the case of the prosecution, statements of PW1 and PW4 cannot solely be made basis for convicting the accused. Incidentally, in the present case, as has also been taken note of by learned trial Court, PW3 Shri Dharmender Singh has also not supported the case of the prosecution. He has denied that prosecutrix had visited said Guest House/Hotel alongwith the accused on 05.06.2012 as is the very case put forth by the prosecution.

14. From what has been discussed above by us it is apparent and evident that the prosecutrix in the present case has not supported the case of the prosecution at all. It has come in the cross examination of the prosecutrix that her date of birth was 11.11.1996 and not 11.03.1997 and as such, on the date of occurrence, she was more than 16 years. Be that as it may, the fact of the matter still remains that the prosecutrix has denied the factum of accused having met her on 05.06.2012 or having had sexually molested her on that date. As we have already held above that the statements of PW1 and PW4, mother and father of the prosecutrix respectively are neither trustworthy nor inspire confidence. It has come on record that prosecutrix and accused were known to each other and factum of her friendship with accused has in fact been categorically stated by the prosecutrix in her deposition in the Court. She admitted the suggestion of the defence that a false case was put up by her parents against the accused in connivance with the police. In this background when the prosecutrix herself has

denied that any offence, as was alleged against accused, was committed against her by the accused and the statements of PW1 and PW4 are not worth inspiring any confidence, it cannot be said that the judgment of acquittal passed by learned trial Court in favour of accused either suffers from any illegality or perversity.

15. We also concur with the finding of the learned trial Court that the material on record is not sufficient to show that prosecution had proved its case against the beyond reasonable doubt. Medical evidence on record also does not further the case of the prosecution especially in view of the fact that prosecution has failed to prove that on 05.06.2012 accused had taken the prosecutrix to Dholra Hotel and had committed rape on her there.

16. Besides this, we have also carefully gone through the judgment passed by the learned trial Court and a perusal of the judgment passed by learned trial Court demonstrates that the entire evidence produced on record by the prosecution had been minutely taken into consideration by the learned trial Court and after a careful consideration of the same, learned trial Court had returned the finding of acquittal in favour of accused.

17. Therefore, while concurring with the findings of acquittal returned by learned trial Court, we dismiss the present appeal being devoid of any merit, so also pending miscellaneous application(s), if any.

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

State of Himachal Pradesh ....Petitioner
Versus
Prakash Chand ....Respondent

Cr. Revision No. 380 of 2015
Decided on: April 17, 2017

Indian Forest Act, 1927- Section 52-A- The vehicle of the respondent was seized for transporting the forest produce – an application for release of vehicle was filed before Authorized Officer-cum-Divisional Forest Officer, which was rejected- a revision was filed before Additional Sessions Judge, which was converted into an appeal and the order of Authorized Officer was set aside – aggrieved from the order, present revision has been filed- held that no report of seizure was made to the Authorized Officer – a challan was filed before the Magistrate who had jurisdiction to release the vehicle – order of release can be passed by a Court which had taken cognizance of the charge sheet- however, in the peculiar facts and circumstances of the case, the order of Authorized Officer upheld.(Para- 8 to 12)

Case referred:

State of Kerala versus Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452

For the petitioner: Mr. P.M. Negi, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General.
For the respondent: Mr. Divya Raj Singh, Proxy Counsel for Mr. Maan Singh, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under Sections 397 and 401 read with Section 482 CrPC is directed against judgment dated 1.4.2015 passed by learned Additional

Sessions Judge, Kullu, HP in Criminal Revision No. 33 of 2014, whereby order dated 6.8.2014 passed by the Authorized Officer-cum-Divisional Forest Officer, Kullu in Case No. 7/2014 titled Prakash Chand versus State of Himachal Pradesh, has been set aside and vehicle in question i.e. Jeep No. HP-66-3614 alongwith documents and keys has been ordered to be released in favour of the respondent-owner.

2. Briefly stated facts as emerge from record are that respondent-owner vide application dated 1.8.2014, made a prayer before Authorized Officer-cum-Divisional Forest Officer, Kullu for release of vehicle /Jeep No. HP-66-3614 on *Sapurdari* bond, which was impounded by the police in FIR No. 157/2014 dated 18.5.2014 under Sections 41 and 42 of the Indian Forest Act, 1927 and under Section 379 IPC. However, the fact remains that the Authorized Officer-cum-Divisional Forest Officer, Kullu rejected aforesaid application having been preferred by the respondent namely Prakash Chand. Learned Authorized Officer, while dismissing application for release having been made on behalf of the respondent-owner concluded that in the instant case, vehicle in question was seized by the police on 185.2014 in FIR No. 157/2014 and no report of seizure has been made to him under Section 52(3) of the Indian Forest Act nor seized property has been produced before him under the Act, as such, he is not empowered to exercise jurisdiction as conferred upon him under Section 52A of the Indian Forest Act.

3. Respondent, being aggrieved and dissatisfied with the order dated 6.8.2014, passed by the learned Authorized Officer-cum-Divisional Forest Officer, Kullu preferred a criminal revision before Additional Sessions Judge, Kullu, which came to be registered as Cr. Revision No. 33/2014. Subsequently, aforesaid criminal revision having been filed by the respondent was treated as criminal appeal, as emerges from the judgment passed by the learned Additional Sessions Judge. Learned Additional Sessions Judge, Kullu, while accepting the aforesaid appeal having been filed by the respondent quashed order dated 6.8.2014 passed by Authorized Officer-cum-Divisional Forest Officer, Kullu in case No. 7/2014 and ordered release of vehicle in question alongwith documents and keys, in favour of the respondent namely Prakash Chand, being registered owner of the vehicle in question, on furnishing *Sapurdari* bond to the tune of `5.00 Lakh, with one guarantee in the like amount, to the satisfaction of the learned Chief Judicial Magistrate, Kullu.

4. Being aggrieved and dissatisfied with the impugned judgment having been passed by the learned Additional Sessions Judge, Kullu, petitioner-State preferred instant petition under Sections 397/401 read with Section 482 CrPC, praying therein for quashing and setting aside impugned judgment dated 1.4.2015 passed by the learned Additional Sessions Judge.

5. Mr. P.M. Negi, Additional Advocate General, duly assisted by Mr. Ramesh Thakur, Deputy Advocate General, vehemently argued that impugned judgment dated 1.4.2015 passed by the learned Additional Sessions Judge, Kullu is not sustainable in the eye of law and as such deserves to be set aside. Mr. Negi, while referring to the impugned judgment passed by Additional Sessions Judge, Kullu, strenuously argued that the appellate Court has exceeded its jurisdiction because it had no occasion whatsoever, to give interim custody of vehicle in question in favour of respondent/owner because learned Additional Sessions Judge had no power /jurisdiction to pass any order of release of vehicle under the Indian Forest Act, rather, power, if any, was with the Authorized Officer-cum-Divisional Forest Officer, Kullu, who could release vehicle in terms of Section 52A of the Indian Forest Act. Mr. Negi, while referring to the order dated 6.8.2014, passed by Authorized Officer-cum-Divisional Forest Officer, Kullu, contended that there is no illegality or infirmity in the order passed by the learned Authorized Officer because since vehicle involved in the incident was never produced before the said Authorized Officer as required under Section 52A of the Indian Forest Act and as such there was no occasion for him to release vehicle as prayed for by the respondent/owner. Mr. Negi further contended that otherwise also, proper remedy for the respondent was to move an application for release of vehicle before Judicial Magistrate, before whom police had filed challan in FIR No. 157/2014 dated

18.5.2014 and by no stretch of imagination, Additional Sessions Judge had power to order release of vehicle in favour of the respondent/owner of the vehicle.

6. Mr. Divya Raj Singh, learned counsel representing the respondent, supported the judgment passed by Additional Sessions Judge. Learned counsel representing the respondent vehemently argued that there is no illegality or infirmity in the judgment passed by the learned Additional Sessions Judge and as such revision petition filed by the State deserves to be dismissed.

7. Mr. Divya Raj Singh, also reminded this Court of its limited jurisdiction under Section 397 as far as re-appreciation of evidence is concerned. Learned counsel 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."

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

8. Perusal of order dated 6.8.2014 suggests that vehicle bearing registration No. HP-66-3614 was impounded by the Police in FIR No. 157/2014 dated 18.5.2014, under Sections 41 and 42 of the Indian Forest Act and Section 379 IPC. Respondent-owner moved an application bearing No. 7/2014 under Section 52A of the Indian Forest Act, before the Authorized Officer-cum-Divisional Forest Officer, Kullu, Forest Division Kullu, for interim release of the vehicle in question on *Sapurdari* bond. However, aforesaid application was rejected by the Authorized Officer-cum-Divisional Forest Officer on the ground that since neither the report of seizure was made to him under Section 52 (3) of the Indian Forest Act nor seized property was produced before him under the Act ibid, as such, he was not empowered to exercise jurisdiction as conferred upon him under Section 52A of the Act ibid.

9. This Court, after perusing order passed by the Authorized Officer-cum-Divisional Forest Officer, sees no illegality or infirmity in the order passed by the Authorized Officer-cum-Divisional Forest Officer on the application having been filed by the respondent-owner for interim release because, admittedly, at the time of moving of application, no report of seizure was made to him as envisaged under Section 52(3) of the Act ibid, by the police, which registered FIR No. 157/2014 dated 18.5.2014 under Sections 41 and 42 of the Act ibid.

10. In the instant case, as emerges from record, police registered aforesaid case against respondent-owner of the vehicle under Sections 41 and 42 of the Indian Forest Act and after completion of investigation, presented challan in the competent court of law and as such application, if any, for interim release of the vehicle on *Sapurdari* could be made by the respondent before judicial magistrate, before whom *Challan* was presented by the police after registration of FIR. Had the Department registered case, if any, against respondent under Section 52A, owner was expected to move an application for release of vehicle before that authority under Section 52A of the Act but since no vehicle was ever produced before Authorized Officer under Section 52(3) of the Act, no order for interim release could be passed by Authorized Officer-cum-

Divisional Forest Officer, exercising powers under Section 52A of the Act ibid. Hence, in view of above, this Court sees no illegality or infirmity in the order passed by the Authorized Officer-cum-Divisional Forest Officer on the application having been filed by the respondent-owner. However, after carefully examining order having been passed by the Authorized Officer-cum-Divisional Forest Officer, as well as pleadings available on record, this Court is of the view that at the time of dismissing application having been filed by the respondent-owner of vehicle, Authorized Officer-cum-Divisional Forest Officer could direct applicant to move application for interim release of vehicle before judicial magistrate, before whom, *Challan* was presented by the police, after registration of the case. But, interestingly, in the instant case, respondent-owner being aggrieved and dissatisfied with rejection of his application, preferred a criminal appeal/revision before the Additional Sessions Judge, who, ultimately accepted the appeal/revision and ordered release of vehicle in favour of the owner. This Court sees substantial force in the arguments having been made by Mr. P.M. Negi, Additional Advocate General, that there is no jurisdiction vested in Sessions Judge/ Additional Sessions Judge to order interim release of vehicle involved in a case, because order, if any, could be passed only by court, which had taken cognizance of the chargesheet filed by the police pursuant to FIR registered. But, in the instant case, since application filed under Section 52A of the Act ibid was rejected by Authorized Officer-cum-Divisional Forest Officer, remedy, if any, against dismissal of same was to file criminal appeal before Sessions Judge, and as such, respondent/owner rightly approached the Sessions Judge/Additional Sessions Judge, against rejection of his application. But, as has been observed above, application, if any for release of vehicle could have been made by the respondent/owner before in the Court, before whom, police had presented *Challan* in the case.

11. In normal circumstances, taking note of the averments contained in the application as well as order having been passed by Authorized Officer-cum-Divisional Forest Officer, under the Indian Forest Act, learned Sessions Judge, ought to have sent this case to judicial magistrate before whom, *Challan* was presented but in the instant case, learned Sessions Judge, proceeded to decide the application for interim release of vehicle in question.

12. Though, this Court is in agreement with the submissions having been made by Mr. P.M. Negi, Additional Advocate General, that learned Additional Sessions Judge, had no power to order release of vehicle but in the peculiar facts and circumstances of the case, wherein learned Additional Sessions Judge while adjudicating legality of order dated 6.8.2014 passed by Authorized Officer-cum-Divisional Forest Officer, Kullu ordered release of vehicle on *Sapurdari*, sees no reason to interfere at this stage.

13. However, it is made clear that observations, if any, made in the judgment passed by the learned Additional Sessions Judge while allowing application for release of vehicle in question, shall have no bearing on the merits of the case, which is admittedly pending before Judicial Magistrate. It is further clarified that impugned judgment/order passed by the learned Additional Sessions Judge, shall not be considered to be a precedent, as the same has been passed in peculiar facts and circumstances of the case.

14. In view of the above, the present petition is disposed of along with pending applications, if any.

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

Tara Chand and others ………Appellants

Versus

Madan Lal ……….Respondent

RSA No. 155 of 2005
Reserved on: April 3, 2017
Decided on: April 17, 2017

Specific Relief Act, 1963- Section 20- Plaintiff entered into an agreement with the defendant for the sale of land for a total consideration of Rs.44,000/- - an amount of Rs.30,000/- was paid as part payment- the defendant failed to execute the sale deed in favour of the plaintiff – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that there was no requirement of obtaining prior permission from TCP – plaintiff had presented himself before sub-registrar and had issued a legal notice for the execution of the sale deed – sub-registrar had directed the parties to appear before him on the next day and the plaintiff failed to appear before the sub-registrar - the Courts had wrongly held that plaintiff was ready and willing to perform his part of the agreement – appeal allowed- judgments and decree passed by the Court set aside and suit of the plaintiff dismissed. (Para-14 to 33)

Cases referred:

Rahul Bhargava v. Vinod Kohli reported in 2008 (1) Shim. LC 385

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

Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161

For the appellants Mr. Ajay Sharma, Advocate.
For the respondent: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant Regular Second Appeal under Section 100 of the Civil Procedure Code has been filed against judgment and decree dated 28.1.2005, passed by the learned Additional District Judge, Fast Track Court, Una in Civil Appeal No. 220/2K RBT No. 194/94/00, affirming judgment and decree dated 9.11.2000 passed in Civil Suit No. 224/1994 by Sub Judge(II), Una, whereby suit filed by respondent-plaintiff (hereafter, 'plaintiff') for possession by specific performance of agreement came to be decreed.

2. Briefly stated facts as emerge from record are that the plaintiff filed a suit for specific performance of agreements dated 31.5.1993 and 31.4.1994, seeking therein direction to the appellants-defendants (hereafter, 'defendants'), to execute and get the sale deed registered, of land measuring 0-00-73 hectares comprised in Khewat No. 169 min, Khatauni No. 246 min, bearing Khasra Nos. 881/2 (0-00-20), 882/2 (0-00-20) and 885/1 (0-00-33), as per Aks *Tatima* attached with the plaint, entered in Bandobast for the year 1987-88, situate in Village Jhalera, Tehsil and District Una, Himachal Pradesh on receipt of remaining sale consideration of Rs.14,000/-. Apart from aforesaid prayer, plaintiff, in the alternative, also prayed for recovery of Rs.44,000/-. Plaintiff averred in the plaint that on 31.5.1993, original defendant namely Atra entered into an agreement with him for the sale of land as detailed herein above (hereafter, 'suit land') for total consideration of Rs.44,000/-. As per the plaintiff, parties executed agreement to sell on 31.5.1993 and on the same day a sum of Rs.30,000/- was paid to the defendant by the plaintiff as part payment qua sale consideration. Plaintiff further claimed that steps for sale by way of *Tatima* and permission from Town and Country Planning, Una were to be taken by the defendant. However, defendant expressed his inability to execute and get the sale deed registered on 30.4.1994, since he failed to get necessary permission from the Town and Country Planning Department, accordingly, on 30.4.1994, defendant extended date of performance of agreement till 31.8.1994 and the same was reduced into writing on the back of the agreement, whereby defendant agreed to execute registered sale deed in favour of the plaintiff on or before 31.8.1994. Plaintiff further alleged that he was ready and willing to perform his part of agreement to execute sale deed for consideration of Rs.14,000/- and in this regard, he requested defendant time and again to perform his part of agreement and also got issued a legal notice dated 2.9.1994, requesting him to execute sale deed in his favour. But since defendant

failed to do the needful, he was compelled to file the suit seeking direction to the defendant to get sale deed registered in terms of agreements dated 31.5.1993 and 30.4.1994.

3. Defendant, by way of written statement admitted execution of agreement dated 31.5.1993 as well as receipt of amount of Rs.30,000/- as part payment of sale consideration. However, defendant stated that he had agreed to execute sale deed on 30.4.1994, after receipt of remaining amount of Rs. 14,000/-, however defendant alleged that though he was always ready and willing to execute the sale deed in terms of agreement but denied that he could not complete codal formalities as required under agreement and further denied that date of execution of sale deed was extended till 31.8.1994 at his instance, rather, he alleged that time was extended at the instance of plaintiff as he had no money to pay balance sale price. However, the written statement suggests that defendant admitted the writing as contained on the backside of the agreement. Defendant further alleged that codal formality of obtaining permission from Department was to be completed by the plaintiff and since he failed to complete the codal formalities, sale deed could not be executed within stipulated time. Defendant also admitted factum of receipt of notice allegedly got issued by the plaintiff and claimed that he was ready and willing to get sale deed registered in his favour and as such both the parties approached court of Sub Registrar, Una, wherein plaintiff showed his reluctance for the execution of sale deed. Defendant further claimed that Sub Registrar refused to extend the date further. At the instance of plaintiff, Sub Registrar gave time till 17.9.1994 for making balance payment and to get the sale deed executed but on 17.9.1994, plaintiff never turned up in the office of Sub Registrar for the aforesaid purpose. In the aforesaid background, defendant prayed for dismissal of the suit of the plaintiff. Plaintiff, by way of replication, reasserted his claim as set up in the plaint and denied the contents of written statement, contrary to the plaint.

4. Learned trial Court, on the basis of pleadings of the parties, framed following issues:

> "1. Whether the plaintiff is entitled for decree of specific performance , on the basis of alleged agreements? OPP
>
> 2. Whether the plaintiff is entitled for recovery of Rs.44,000/-, if issue No.1 is proved against the plaintiff? OPP
>
> 3. Relief."

5. Subsequently, learned trial Court, vide judgment and decree dated 9.11.2000, decreed the suit of the plaintiff for specific performance of contract with direction to the plaintiff to deposit balance amount of Rs.14,000/- within two months from the date of judgment, failing which suit of the plaintiff shall stand dismissed. Learned trial Court further held that in case plaintiff deposits aforesaid amount within two months, on or before 8.1.2000, defendant shall execute sale deed within two months i.e. on or before 8.3.2001, in terms of agreement Ext. P1, qua the suit land. Learned trial Court, further ordered that in case, defendant failed to execute sale deed on 8.3.2001, plaintiff shall be at liberty to approach the Court and Reader of the Court shall get sale deed registered and cost of registration and stamp papers, etc. shall be borne by the plaintiff.

6. Defendant, feeling aggrieved by the aforesaid judgment and decree, preferred an appeal under Section 96 CPC before the Additional District Judge, Fast Track Court, Una, which came to be registered as Civil Appeal No. 220/2K RBT No. 194/04/00. However, the fact remains that the aforesaid appeal was dismissed by the first appellate Court vide judgment and decree dated 28.1.2005. Hence, this Regular Second Appeal.

7. The Regular Second Appeal was admitted by this Court on 3.8.2004 on the following substantial question of law:

> "Whether without there being permission from the Town & Country Planning Authorities, the decree for specific performance of agreement could not have been passed by the two courts below?

8. Before adverting to the merits of the case, it may be noticed that during proceedings of the case, wherein learned counsel representing the defendant while inviting attention of this Court to the evidence be it ocular or documentary, adduced on record by the parties, more particularly, Ext. D1, DW-1/A, DW-1/B and DW-1/C, stated that the defendant was ready and willing to perform his part of agreement in terms of Ext. P1 and Ext. P3, whereby parties had agreed to get the sale deed executed in terms of Ext. P1, as such, findings contrary to the same returned by the learned Courts below are wrong, perverse and deserve to be set aside. Further, the perusal of Page-6 of the instant appeal, clearly suggests that defendants had specifically proposed, substantial question of law No.2, "whether courts below misread and misappreciated oral and documentary evidence of defendants more especially documents Ex.DW-1/A, DW-1/B and Ex. DW-1/C thereby vitiating the impugned judgments and decrees?" However, the fact remains that this Court admitted the present appeal on some other substantial question of law, reproduced herein above.

9. After hearing the submissions having been made by the learned counsel representing the plaintiff, which would be taken note of herein below, as well as evidence available on record, this Court is of the view that additional substantial question of law, which otherwise was proposed by the defendant at the time of filing of the appeal, is required to be framed, for the proper adjudication of the matter at hand. It would be relevant to reproduce herein below provisions of Section 100 CPC:

> "100. Second Appeal.-- (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.
>
> (2) An appeal may lie under this section from an appellate decree passed ex parte.
>
> (3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.
>
> (4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.
>
> (5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question : Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.]
>
> [100A. No further appeal in certain cases? Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order or such single Judge in such appeal or from any decree passed in such appeal.]"

10. Section 101 CPC specifically bars second appeal except on the ground mentioned in Section 100 CPC. Hence, this Court, after careful examination of submissions having been made by the learned counsel representing the plaintiff, deems it fit to frame following additional substantial question of law, with the consent of the parties:

> "Whether courts below misread and misappreciated oral and documentary evidence of defendants more especially documents Ex.DW-1/A, DW-1/B and Ex. DW-1/C thereby vitiating the impugned judgments and decrees?"

11. Mr. Ajay Sharma, learned counsel representing the defendants vehemently argued that the impugned judgments passed by the learned 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 deserve to be set aside. Mr. Sharma, while referring to the impugned judgments passed by courts below strenuously argued that both the Courts below have erred in appreciating provisions of law applicable as well as pleadings of parties and especially evidence adduced by them on record in its right perspective, as a result of which erroneous findings have come on record to the detriment of the defendants/original defendant, who successfully proved on record that he was ready and willing to perform his part for execution of agreement Ext. P1. Mr. Sharma, further contended that both the courts below have fallen in grave error while passing judgments and decrees because execution of sale deed, in law is prohibited without there being permission from Town and Country Planning authorities. He further stated that since permission from TCP was to be procured by the plaintiff himself, there was no occasion for the defendant to get the sale deed executed till the receipt of permission from TCP Department. Mr. Sharma, while specifically inviting attention of this Court to Exts. DW-1/A, DW-1/B and DW-1/C strenuously argued that defendant successfully proved on record that despite there being extension of time for execution of sale deed, plaintiff could not arrange for the balance sale consideration. In this regard, he specifically invited attention of this Court to the statement of DW-1 Sohan Lal, registration clerk of the Sub Registrar, Una, who stated that parties were present on 16.9.1994, but they were called upon to come on 17.9.1994, with the remaining sale consideration payable to the defendant, but since plaintiff failed to turn up, no sale deed could be registered. Mr. Sharma further contended that the courts below failed to appreciate the original record brought by Sohan Lal from the office of Sub Registrar, who successfully proved on record Exts. DW-1/A and DW-1/B. But, interestingly, courts below brushed aside aforesaid documents without giving any reason and wrongly came to the conclusion that documents as referred above could not be seen in evidence and as such judgment being totally contrary to the documentary evidence available on record deserves to be set aside. While concluding his arguments, Mr. Sharma contended that it is well settled law that in a suit for specific performance, court is required to see the readiness and willingness of the party to execute his/her part qua the agreement, if any, entered into between the parties. Mr. Sharma, while referring to the document Ext. DW-1/A forcefully contended that the defendant successfully proved on record that he was ever ready and willing to perform his part, because he came present before the Sub Registrar, Una, pursuant to notice dated 2.9.1994, Ext. P4, whereby plaintiff had called upon defendant to execute sale deed on 16.9.1994 by presenting himself before Sub Registrar, Una at 10.00 AM.

12. Mr. Neeraj Gupta, learned counsel representing the plaintiff supported the judgments and decrees passed by the Courts below. While referring to the impugned judgments and decrees passed by the Courts below, Mr. Gupta strenuously argued that there is no illegality or infirmity in the same, rather they are based upon correct appreciation of evidence adduced on record by the respective parties and as such there is no occasion, whatsoever for this Court to interfere in the findings of fact and law recorded by the Courts below. While refuting aforesaid contentions having been made by the learned counsel for the defendant, Mr. Gupta, vehemently argued that the learned Courts below rightly concluded after perusing Exts. DW-1/A, DW-1/B and DW-1/C, that nothing could be inferred from these documents that defendant was ready and willing to get the sale deed executed in terms of agreement to sell, Ext. P1 and as such there is no illegality or infirmity in the impugned judgments passed by the learned Courts below and same deserve to be upheld. Mr. Gupta, while specifically placing reliance upon judgment passed by this Court in **Rahul Bhargava v. Vinod Kohli** reported in 2008 (1) Shim. LC 385 and judgment passed by Coordinate Bench in Civil Suit No. 27 of 2001 titled **Lt. Col. S.J. Chaudhri** v. **Mr. Raj Kumar Brijendra Singh (deceased) through his Legal Representatives** decided on 26.9.2008, contended that condition, if any, with regard to obtaining permission from TCP before execution of sale deed pursuant to agreement to sell entered into between the parties, can not be held to be impediment, if any, in the execution of sale deed. Mr. Gupta further contended that for filing suit for specific performance, on the basis of agreement, no permission, if any, is/was required from TCP, rather, it is only after suit is decreed, such permission may be required at the time of registration of sale deed, on the basis of specific performance of decree. While concluding his arguments, Mr. Gupta forcefully contended that there is no misappreciation and misconstruction

of documentary evidence adduced on record by the defendant, rather both the courts below have dealt with each and every aspect of the matter meticulously and there is no scope of interference, especially in view of concurrent findings of fact recorded by the learned Courts below. Mr. Gupta further contended that this Court has a very limited jurisdiction to re-appreciate evidence while exercising powers under Section 100 CPC when both the learned Courts below have returned concurrent findings of fact and law. He placed reliance upon judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**

13. I have heard the learned counsel representing the parties and gone through the record carefully.

14. While hearing arguments having been advanced by the learned counsel representing the parties, this Court had an occasion to peruse pleadings as well as evidence led on record by respective parties, perusal whereof certainly suggests that the learned Courts below failed to appreciate the evidence, be it ocular or documentary, led on record by the defendant in right perspective, as a result of which, great prejudice has been caused to the defendant, who, while placing reliance upon Ext. DW-1/A, successfully proved on record that pursuant to receipt of legal notice, Ext. P4, he had come present before Sub Registrar on 16.9.1994 for getting sale deed executed in terms of Ext. P1. Pleadings as well as evidence available on record clearly suggest that vide Ext. P1, parties had entered into agreement to sell the suit land for a total consideration of Rs.44,000/-. It is also not disputed that an amount of Rs.30,000/- was received by the defendant at the time of execution of agreement, Ext. P1 dated 31.5.1993, whereas remaining amount of Rs.14,000/- was to be received by the defendant at the time of execution of sale deed. Similarly, there is no dispute with regard to extension of time with the consent of parties till 31.8.1994 as emerges from perusal of document Ext. P1 as well as Ext. P3.

15. True, it is, that perusal of Ext. P3 i.e. endorsement made on the backside of agreement to sell i.e. Ext. P1, suggests that sale deed could not be executed strictly in terms of time as stipulated in agreement to sell dated 31.5.1993, for want of permission from TCP. Though there is mention with regard to permission to be taken prior to execution of sale deed but admittedly there is nothing to suggest that permission as referred above was required to be specifically obtained by the defendant and not by the plaintiff as claimed by the learned counsel representing the plaintiff. This Court carefully perused Ext. P1 i.e. agreement to sell entered into between the parties, which nowhere suggests that condition, if any, with regard to permission to be obtained by defendant before execution of sale deed was incorporated in the agreement, rather there was condition that defendant shall be liable and bound to get the sale deed executed on or before 30.4.1994, failing which, he shall be liable to refund Rs.60,000/- i.e. double the amount as already received by him at the time of execution of agreement Ext. P1. Perusal of Ext. P3 i.e. so called supplementary agreement entered into between the parties after expiry of period as contained in original agreement dated 31.5.1993, though suggests that prior permission of TCP was condition precedent for execution of sale deed on or before 31.8.1994, in terms of agreement Ext. P1 but original agreement Ext. P1 did not contain such condition.

16. Record further reveals that the defendant while getting time extended admitted that he was bound to get the sale deed executed before 30.4.1994 but since there was no permission from TCP, he was unable to do the needful. However, while agreeing to get sale deed executed in terms of Ext. P1, on or before 31.8.1994, defendant nowhere agreed that he shall be responsible for getting prior permission of TCP prior to execution of sale deed as referred herein above. Plaintiff filed the suit for possession by specific performance of agreements dated 31.5.1993 and 30.4.1994 seeking direction to the defendant to get the sale deed executed of the suit land on receipt of remaining sale consideration or, in the alternative, for refund of Rs.44,000/-. Aforesaid suit was strictly based upon agreements dated 31.5.1993 and 30.4.1994, Ext. P1 and Ext. P3, perusal whereof nowhere suggests that prior permission of TCP was condition precedent for executing sale deed in terms of Ext. P1 dated 31.5.1993, as such, this Court sees no force in the contentions raised by the learned counsel representing the defendant that no sale deed could be executed within stipulated period for want of prior permission from

TCP department. Bare perusal of the contents/averments contained in agreement dated 31.5.1993 Ext. P1 and agreement dated 30.4.1994 Ext. P3, clearly suggest that defendant was under obligation to get the sale deed executed on or before 30.4.1994 and thereafter on or before 31.8.1994. Otherwise also, question of obtaining permission, if any, would have arisen at the time of execution of sale deed on the basis of decree for specific performance because, admittedly, there is no bar to file suit for specific performance on the ground of prior permission, if any, to be obtained by either of the parties.

17. Hence, this Court is fully in agreement with the arguments having been advanced by learned counsel representing the plaintiff that plaintiff was entitled to file suit for execution of agreement Ext. P1 merely on the basis of agreement to sell and mandate of same could not be allowed to be defeated on the ground of non-availability of prior permission of TCP, which is/was nowhere condition precedent for execution of sale deed Ext. P1.

18. If a party seeking specific performance of agreement successfully proves on record that he is/was ready and willing to perform his part of agreement, he/she would be entitled to decree of specific performance and plea of not having the required permission of TCP can not be termed to be a bar in a sale transaction, which admittedly flows from agreement to sell entered into between the parties. In this regard, reliance is placed on **Rahul Bhargava v. Vinod Kohli** reported in 2008 (1) Shim. LC 385, wherein it is held as under:

> "14. There is another aspect of the case, for filing a suit for specific performance on the basis of agreement, no permission is required, under Section 118 of the Act. It is only if the suit is decreed such permission may be required at the time of registration of the sale deed on the basis of specific performance decree. In Manzoor Ahmed Magray vs. Ghulam Hassan Aram and others (1999) 7 SCC 703, the Hon'ble Apex Court has held as follows:-
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> > "It is to be stated that the appellant has neither raised the said contention in the written statement nor during the trial. However, in the appeal, the appellant sought to raise the contention that the specific performance qua the suit land cannot be granted as the transfer or alienation of the suit property is prohibited under the provisions of the J&K Agrarian Reforms Act, 1972, the J&K Agrarian Reforms Act, 1976 and the J&K Prohibition on Conservation of Lands and Alienation of Orchards Act, 1975. The Court declined to entertain the plea on the ground that it was raised almost 24 years after the filing of the suit by the plaintiff and the same, if permitted to be raised, would prejudice the rights of the plaintiff. Even considering that the said plea is a pure question of law, in our view, it is without any substance. The definition under Section 2(4) of the J&K Agrarian Reforms Act, 1972 specifically excludes "land" which was an orchard on the first day of September 1971. Sub-section (5) of Section 2 defines "orchard" to mean a compact area of land having fruit trees grown thereon or devoted to cultivation of fruit trees in such number that the main use to which the land is put is growing of fruits or fruit trees. In the present case, agreement to sell was executed on 14.7.1971 in respect of an orchard land. Therefore, the said Act was not applicable to the land in dispute. Similar provisions are there in the Agrarian Reforms Act, 1976 which gives the definition of the word "land" under Section 2(9) and definition ofthe word "orchard" under Section 2(10). From the said definition, it is apparent that orchard is excluded from the operation of the Agrarian Reforms Act.
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> Learned counsel for the appellant, however, further referred to Section 3 of the J&K Prohibition on Conversion of Land and Alienation of Orchards Act, 1975 which is as under:-

'3. Prohibition on conversion of land and alienation of orchards.- (1) Notwithstanding anything contained in any other law for the time being in force----

(a) no person shall alienate an orchard except with the previous permission of the Revenue Minister or such officer as may be authorized by him in this behalf;

Provided that alienation of orchards to the extent of four kanals only in favour of one or more persons for residential purposes shall not need any permission.

(b) …. …. ….

Considering the aforesaid section, it is apparent that prohibition on transfer of orchards is not absolute and the question of obtaining previous permission as contemplated under Section 3(1)(a) would arise at the time of execution of the sale deed on the basis of decree for specific performance. Section 3 does not bar the maintainability of the suit and permission can be obtained by filing proper application after the decree is passed. Therefore, it cannot be stated that decree for specific performance is not required to be passed. Further, under Section 3 of the J&K Prohibition on Conservation of Land and Alienation of Orchards Act, 1975, prohibition on transfer is limited. Firstly, the proviso makes it clear that alienation of orchards to the extent of four kanals only in favour of one or more persons for residential purposes will not require any permission. Secondly, for more than four kanals of land, previous permission of the Revenue Minister or such officer as may be authorized by him in this behalf is required to be obtained.Dealing with similar contention, this Court in Bai Dosabai v. Mathurdas Govinddas [1980 (3) SCC 545] observed that even if the Act prohibits alienation of land, if the decree is passed in favour of the plaintiff, it is required to be moulded suitably."

15. On the point of alienation/ transfer of land after permission Section 3 of J&K Act noticed above and Section 118 of the Act in substance are similar. There is no absolute prohibition, under Section 118 of the Act on transfer of land to non-agriculturist and transfer can be made in favour of non-agriculturist with permission of Government under Section 118 of the Act. This question at the most will arise at the time of execution of sale deed on the basis of decree for specific performance. Section 118 of the Act does not bar the maintainability of the suit for specific performance and injunction on the basis of agreement. The respondent No.1 had earlier obtained permission from the State Government for purchasing the property vide permission Ex. PW 3/A.

19. Reliance is also placed upon judgment passed by Coordinate Bench in Civil Suit No. 27 of 2001 titled **Lt. Col. S.J. Chaudhri** v. **Mr. Raj Kumar Brijendra Singh (deceased) through his Legal Representatives** decided on 26.9.2008, wherein it has been held as under:

"I cannot agree with this submission made by learned counsel for the defendant. Clause 3 of

Ex. Ex.PW-1/A reads:

" The Buyer on receipt of the acknowledgment of the balance amount will be put in physical possession of the entire land under reference which has been defined in the Aks Tatima attached along with the Jamabandi. The Seller will simultaneously execute the sale deed and all other documents in favour of the Buyer or unto his order and submit the sale deed for registration and transfer of the said property to the buyer's name by 30th October, 1993. The seller shall get

all clearances and approvals required for the sale and transfer of the said property by that date from relevant authorities."

This clause specifically requires the seller to get all clearances and approvals qua the sale and transfer of the property from the relevant authorities. This submission, therefore, cannot be accepted. Even otherwise in law, passing of a decree for specific performance is not prohibited.

In Mrs. Chandnee Widya Vati Madden v. Dr.C.L.Katial and others, AIR 1964 SC 978, the Supreme Court held:

> " 4. The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned, they had agreed to bind themselves by the terms of the document executed between them. Under that document it was for the defendant-vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform their part of the contract, and that it was the defendant who willfully refused to perform her part of the contract, and that time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction."

In Ajit Prashad Jain v. N.K.Widhani and others , AIR 1990 Delhi 42, the High Court of Delhi dealing with the question as to whether in the absence of permission under Urban Land (Ceiling & Regulation) Act, a decree for specific performance could be passed. The Court held:

> " The permission from Land and Development Office is not a condition precedent for grant of decree for specific performance. In Mrs. Chandnee Widya Vati Madden v. Dr. C.L.Katial, (1964) 2 SCR 495: (AIR 1965 SC 978) the Supreme Court confirmed the decision of the Punjab High Court holding that if the Chief Commissioner ultimately refused to grant the sanction to the sale the plaintiff may not be able to enforce the decree for specific performance of the contract but that was no bar to the court passing a decree for that relief. The same is the position in the present case. If after grant of the decree of specific performance of the contract the Land and Development Office refuses to grant permission for sale the decree holder may not be in a position to enforce the decree but it cannot be held that such a permission is a condition precedent for passing a decree for specific performance of the contract…."

In Anjali Das v. Bidyut Sarkar , AIR 1992 Calcutta 47, the High Court of Calcutta on a similar objection to the grant of relief ruled:

> "40. On behalf of the respondent No.1 the decision of the Privy Council reported in AIR 1947 PC 182 : 52 Cal. WN 472 (Dalsukh Versus Guarantee Life Employment Insurance Company) has been referred to. In that case when the plaintiff entered into contract for sale with the defendant subject to approval of the Court and when the approval of the Court was not granted the Privy Council has held that it was a contingent contract and the approval not having been obtained the specific performance of the contract cannot be granted by the Court.

41. We are of the view that facts of that case are different. In this case the Cooperative Society has not yet refused the permission and the contract has not been unenforceable.

42. On the contrary the Supreme Court in Nathumal v. Phulchand, AIR 1970 SC 546, has relied upon the Privy Council decision of (Motilal v. Nanhelal) reported in AIR 1930 PC 287. In that case the contract for transfer of rip land was subject to approval of the Revenue Officer under the provision of Control Provinces Tenancy Act, 1920. The Privy Council has held that there was an implied covenant on the part of the vendor to do all things necessary to effect the transfer which would include an application to the Revenue Officer for such permission and when no such permission was obtained the Court can direct the defendant to obtain such permission and execute a conveyance on receipt of such sanction.

43. On behalf of the appellant the Delhi High Court decision in AIR 1990 Delhi 224 has been referred to in which on the approval being given by Co-operative Society the Court granted decree for specific performance of contract for sale of a number of Co-operative Society. This has been referred to in order to demonstrate that the contract for sale of a flat of a Co-operative Society can be transferred subject to Society's approval.

44. In view of the above legal position we are of the view that the contract in this case is enforceable and when the appellant has already applied for such approval and also filed an application for membership we can grant the decree and direct the respondent No.1 and respondent No.2 to execute sale deed in respect of the flat in suit on the respondent No.2 considering the application for membership of the appellant and the prayer for transfer of the flat in accordance with law and in terms of the bye-laws."

In K.Raheja Construction Ltd. v. Alliance Ministries and others , AIR 1995 SC 1768, holding that a decree for specific performance will be subject to grant of permission as contemplated by law, the Court held:

> "4. It is seen that the permission for alienation is not a condition precedent to file the suit for specific performance. The decree of specific performance will always be subject to the condition to the grant of the permission by the competent authority. The petitioners having expressly admitted that the respondents have refused to abide by the terms of the contract, they should have asked for the relief for specific performance in the original suit itself. Having allowed the period of seven years elapsed from the date of filing of the suit, and the period of limitation being three years under Article 54 of the Schedule to the Limitation Act, 1963, any amendment on the grounds set out, would defeat the valuable right of limitation accrued to the respondent."

In Raghunath Rai and another v. Jageshwar Prashad Sharma and another , AIR 1999 Delhi 383, the Court held that merely because permission from the authorities is not obtained does not deprive the plaintiff of his right to pray for a decree of specific performance. The precedent on the point need not be multiplied any further.

In these circumstances, the objection raised by learned counsel for the defendant needs to be rejected. This issue is therefore, decided in favour of the plaintiff and against the defendant."

20. In view of the discussion made herein above as well as law discussed, this Court has no hesitation to conclude that decree for specific performance of agreement could have been passed by the Courts below without there being any permission from TCP, especially when permission from TCP was not a condition precedent for getting sale deed executed in terms of Ext. P-1. The substantial question of law is answered accordingly.

21. This Court, solely with a view to explore answer to additional substantial question of law framed at the time of hearing, carefully examined, Ext. P4, Ext. D1, Ext. DW-1/A and Ext. DW-1/C as well as Ext. P1. Perusal of Ext. P4 clearly suggests that the plaintiff by way of legal notice called upon the defendant to get the sale deed executed in terms of agreement to sell Ext. PA, on or before 16.9.1994 by presenting himself before the Sub Registrar, Una, failing which, he reserved liberty to himself to file suit for specific performance of agreement for execution of sale deed. Perusal of Ext. P1 also suggests that plaintiff namely Madan Lal presented himself before the Sub Registrar, Una, on 16.9.1994 and submitted written application stating therein that he got legal notice dated 2.9.1994 served upon the defendant advising him to come present before Sub Registrar on 16.9.1994 for execution of sale deed in terms of agreements dated 31.5.1993 and 30.4.1994. Similarly, perusal of Ext. DW-1/A, clearly suggests that on 16.9.1994, defendant had come present before the Sub Registrar and moved an application for marking his presence. Careful perusal of application Ext. DW-1/A, clearly suggests that defendant after having received legal notice dated 2.9.1994, from the counsel of the plaintiff, had come present in the court of Sub Registrar, Una for execution of sale deed in terms of agreement dated 31.5.1993 and 30.4.1994. Careful perusal of Ext. DW-1/C proves on record that the parties to the lis presented themselves before the Sub Registrar Una on 16.9.1994, on which date, they were directed to remain present on 17.9.1994. Order dated 17.9.1994 passed by Sub Registrar suggests that while adjourning case to 17.9.1994, parties were directed to complete the transaction. However, it emerges from the perusal of order dated 17.9.1994 that the plaintiff failed to turn up on 17.9.1994, despite there being order from Sub Registrar, Una.

22. This Court carefully examined the findings returned by the court below juxtaposing the same with the documentary evidence as discussed herein above. DW-1 Sohan Lal, Registration Clerk, specifically stated before the learned trial Court that photocopies of applications dated 16.9.1994 and 17.9.1994 are correct as per record brought on that day and same are Exts. DW-1/A and DW-1/B, respectively. It has also come in his statement that on 16.9.1994, on the backside of the application, order was passed by Sub Registrar that, "*..Both are directed to come tomorrow i.e. 17.9.94 for executing a General Power of Attorney.*" In his cross-examination, he also admitted that the plaintiff namely Madan Lal also moved an application dated 16.9.1994, Ext. PA. He also stated that copies of notice Ext. P4 as well as agreement Ext. P1 were also tagged with the application. He also stated that defendant was not present when application was moved by Madan Lal on 16.9.1994, however, he feigned ignorance about the fact whether Power of Attorney was executed by Attra or not. After careful examination of the documents referred herein above, as well as statement of DW-1 Sohan Lal, this Court sees substantial force in the arguments having been advanced by Mr. Ajay Sharma, learned counsel representing the defendants that the courts below misappreciated and misconstrued the evidence led on record by the defendant suggestive of the fact that on 16.9.1994, he was ready and willing to perform his part in terms of agreements dated 31.5.1993 and 30.4.1994.

23. Perusal of Exts. DW-1/A and DW-1/C clearly proves on record that the defendant pursuant to legal notice dated 30.4.1994, Ext. P4, had come present before Sub Registrar to get the sale deed executed in terms of agreement to sell dated 31.5.1993 and 30.4.1994. It clearly emerges from Ext. DW-1/C that both the parties had come present on 16.9.1994 but since the payment of balance sale consideration was to be made, parties were directed to come present on 17.9.1994. Order recorded by the Sub Registrar on 17.9.1994 Ext. DW-1/C clearly proves on record that plaintiff failed to appear on 17.9.1994 meaning thereby, he failed to perform his part pursuant to agreement Ext. P1, whereby he was under obligation to pay remaining amount of Rs.14,000/- to the defendant as balance sale consideration.

24. Impugned judgment passed by the first appellate Court appears to be totally based upon misappreciation of evidence as discussed hereinabove. Defendant, while placing reliance upon documentary evidence as analyzed hereinabove, successfully proved that he was ready and willing to get the sale deed executed but, admittedly, on 17.9.1994, plaintiff failed to turn up before the Sub Registrar.

25. It is not understood how first appellate Court could observe that Sub Registrar directed parties to get Power of Attorney executed by Attar Chand. Similarly, it is not understood, on what basis first appellate Court came to the conclusion that Ext. DW-1/C i.e. order passed by Sub Registrar is nonest and could not be relied upon because, this was not the certified copy of original. Once, learned trial Court below had an occasion to peruse the original record admittedly brought by DW-1 Sohan Lal, Registration Clerk, office of Deputy Commissioner, Una, findings returned by the Courts below can not be accepted that no reliance could be placed upon order dated 17.9.1994, Ext. DW-1/C. This Court, finds it really difficult to accept the findings returned by the Courts below that since there is no mention, if any, with regard to applications Ext. DW-1/A and Ext. PA, having been moved by the defendant and plaintiff in the order Ext. DW-1/C, no reliance can be placed upon same because admittedly original record was produced before the Court below.

26. True it is, that there is no specific mention with regard to filing of aforesaid applications having been made by the parties before Sub Registrar but, order Ext. DW-1/C clearly suggests that parties had come present before Sub Registrar on 16.9.1994 and they were directed to come present on 17.9.1994, for making balance payment. Order, admittedly made on the back side of the Ext. DW-1/A, i.e. application having been made by the defendant, was required to be construed/appreciated by the Court below in the context of averments made in the application, Ext. DW-1/A, especially prayer made in the same. As has been held above that there was no requirement, if any, of prior permission of TCP, as far as execution of sale deed in terms of Ext. P1 is concerned and as such finding returned by the trial Court that application Ext. DW-1/A moved by the defendant Attar Chand, before Tehsildar-Sub Registrar, Una on 16.9.1994 did not disclose whether he was equipped with permission of TCP is/was totally uncalled for and that aspect of the matter was not required to be looked into by the Court below, while examining prayer of the plaintiff for specific performance of agreements admittedly entered into between the parties on 31.5.1993 and 30.4.1994, respectively.

27. This Court, after carefully examining the documents as referred above, sees no reason to differ with the submissions having been made by the learned counsel representing the defendant that the defendant successfully proved on record that he was ready and willing to perform his part in terms of agreement entered inter se parties, Ext. P1. It clearly emerges from the record that defendant, sequel to legal notice issued by plaintiff presented himself before the Sub Registrar, Una, for execution of sale deed in terms of Ext. P1 but plaintiff, who was also present before Sub Registrar on 16.9.1994 failed to turn up on 17.9.1994 with balance payment, meaning thereby that it was plaintiff, who failed to perform his part in terms of agreement as referred above.

28. Hence, this Court has no hesitation to conclude that the learned Courts below misconstrued and mis-appreciated the evidence led on record by the defendant and as such findings contrary to the documentary evidence as discussed above, are liable to be set aside.

29. Additional substantial question of law, framed above, is answered accordingly.

30. Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others*, (2015)4 SCC 264,** has held as under:

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

shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)

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

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

"35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)

"24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is

no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same." ***(pp.174-175)***

33. In the case at hand, learned Courts below have ignored/ mis-appreciated the evidence led on record by the defendant and have also drawn wrong inferences from the proven facts, as has been discussed in the earlier part of this judgment. Hence, this Court sees reason to interfere in the matter and set aside the judgments and decrees, which are apparently perverse.

34. Accordingly, the present appeal is allowed. Judgments and decrees passed by both the Courts below are set aside. Suit of the plaintiff is dismissed. Pending applications, if any, are disposed of. Interim orders, if any, are vacated.

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

Jog Raj …Appellant
Versus
State of Himachal Pradesh …Respondent

Criminal Appeal No. 490 of 2016
Judgment reserved on : 27.03.2017.
Date of Decision : April 18 , 2017

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3 kg 600 grams charas- the accused was tried and convicted by the Trial Court- held in appeal that testimonies of eye witnesses are corroborating each other –the prosecution version cannot be doubted due to the fact that witnesses have turned hostile – the accused has to establish his innocence under Section 35 of N.D.P.S. Act, which he hasfailed to do- link evidence is complete- the prosecution has proved the guilt of the accused beyond reasonable doubt and the accused was rightly convicted- appeal dismissed. (Para- 5 to 15)

Case referred:

Ramesh Harijan vs. State of Uttar Pradesh, (2012) 5 SCC

For the appellant	:	Mr. Anoop Chitkara, Advocate, for the appellant.
For the respondent	:	Mr. V. S. Chauhan, Additional Advocate General with Mr. Vikram Thakur, Deputy Advocate General for the respondent/State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Trial Court found the prosecution case of recovery of 3 k.g. & 600 grams of charas, from the conscious and exclusive possession of accused Jog Raj, to have been proven through the testimonies of police officials namely HC Soni Ram (PW-3), HC Ashok Kumar (PW-6) and SI Arjun Singh (PW-8), despite independent witnesses Sumit Kumar (PW-1) and Sandeep Vyas (PW-2) not having supported its case.

2. In relation to FIR No. 34/2013, dated 29.10.2013, registered at Police Station State CID Bharari, Shimla, accused was charged for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act). In terms of the impugned judgment, he stands convicted and sentenced to serve imprisonment as also pay fine.

3. The incident relates back to 29.10.2013, when police received a secret information about the accused carrying the contraband substance. Such information, so received by PW-8, was communicated to the superior officer, through PW-3. By associating independent witnesses PW-1 and PW-2, the Investigating Officer PW-8, in the presence of PW-6, intercepted the accused at *Ghughar-Tanda Pakhdandi,* Tehsil Palampur, District Kangra and recovered the contraband substance. Ruka (Ext. PW-8/C), so carried by PW-6, led to the registration of F.I.R. (Ext.PW-9/A) by Inspector Varinder Chauhan (PW-9). With the completion of proceedings on the spot, the contraband substance was kept in the *maalkhana* and sent through HC Sahi Ram (PW-7) for chemical analysis. Report of the chemical analyst (Ext.PW-8/H) was obtained and taken on record. Also information was sent to the superior officer, through HHC Manoj Kumar (PW-4) so received by HHC Ravinder Kumar (PW-5). This, in effect, is the prosecution case.

4. Having heard learned counsel for the parties as also perused the record, this Court is in full agreement with the decision of conviction and sentence so passed by the trial Court.

5. SI Arjun Singh (PW-8), the Investigating Officer, has testified in Court that on 29.10.2013, during the course of his patrol duty at bus stand Palampur, at about 5.00 p.m., he received a secret information that one Jog Raj resident of Paddar, District Mandi, who is wearing a pink shirt and blue jeans is proceeding towards *Ghughar-Tanda Pakhdandi* from bye-pass road Palampur. In the black coloured bag so carried by him there may be charas. Such information (Ext. PW-5/B) was immediately sent to the Deputy Superintendent of Police, North Zone Dharamshala through HC Soni Kumar (PW-3). A raiding party was constituted and Sumit Kumar (PW-1) and Sandeep Vyas (PW-2) were associated as independent witnesses. Upon reaching the *Ghughar-Tanda* Road, police apprehended the accused, who was walking on foot. The particulars so disclosed of the suspect, matched with the information received by the police. Hence he was informed of his statutory rights. The accused offered to be searched by the police party on the spot. Accordingly, memo (Ext. PW-8/A) was prepared. From the bag, so carried by him, charas in the shape of sticks was recovered, which, when weighed, was found to be 3 k.g. and 600 grams. The contraband substance so recovered was kept inside the bag itself, which was sealed with six seal impressions of seal-E, impression whereof was also taken on a separate piece of cloth. NCB form (Ext. PW-8/J), in triplicate, was filled up and ruka (Ext. PW-8/C) sent through PW-6, who sent it by FAX, receipt whereof is Ext.PW-6/A. With the completion of proceedings on the spot, accused was arrested and the contraband substance sent through PW-6 itself to be deposited with the S.H.O., Police Station Bharari, Shimla. Special report (Ext. PW-5/C) was prepared and sent to the Dy. Superintendent of Police, CID Northern Range Dharamshala and report (Ext.PW-8/H) of the State Forensic Science Laboratory, Junga also obtained and taken on record.

6. Now when one peruses the cross examination part of his testimony, one finds him to have fully withstood the same and his deposition to be clear and consistent without any contradiction. The witness is totally trustworthy and his version fully inspiring in confidence. His credit remains unimpeachable. Simply because he did not record the statement of SHO, Police Station CID Bharari, under Section 161 Cr.PC, itself would not vitiate the trial. What is required to be seen is as to whether genesis of the prosecution case, of recovery of the contraband substance from the conscious possession of the accused is inspiring in confidence or not. On the question of prior information, the accused having been searched and recovery of the contraband substance at *Ghughar-Tanda* road, is concerned, this witness is clear. Significantly his version to the effect that he constituted a raiding party by associating independent witnesses goes unrebutted. It is in this context, we examine the testimonies of these persons, who admit their signatures on document i.e. recovery memo (Ext. PW-1/A).

7. In *Ramesh Harijan vs. State of Uttar Pradesh,* (2012) 5 SCC 777 the Court held that seizure/recovery witnesses though turning hostile, but admitting their signatures/thumb impressions on recovery memo, could be relied upon by prosecution and that:

> "23. It is a settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as

hostile and cross examine him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide: Bhagwan Singh v. The State of Haryana, AIR 1976 SC 202; Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170; Syad Akbar v. State of Karnataka, AIR 1979 SC 1848; and Khujji @ Surendra Tiwari v. State of Madhya Pradesh, AIR 1991 SC 1853).

24. In State of U.P. v. Ramesh Prasad Misra & Anr., AIR 1996 SC 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Balu Sonba Shinde v. State of Maharashtra, (2002) 7 SCC 543; Gagan Kanojia & Anr. v. State of Punjab, (2006) 13 SCC 516; Radha Mohan Singh @ Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951; Sarvesh Narain Shukla v. Daroga Singh & Ors., AIR 2008 SC 320; and Subbu Singh v. State by Public Prosecutor, (2009) 6 SCC 462. Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence. (See also: C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; and Himanshu @ Chintu v. State (NCT of Delhi), (2011) 2 SCC 36)" **[Emphasis supplied]**

8. Now in the instant case, independent witnesses Sumit Kumar (PW-1) and Sandeep Vyas (PW-2) admit their signatures on the memos and the parcel of charas. For the same, the only explanation forthcoming is that they were asked to do so by the police, which they did at the police station. But then why would they do so? They were not under threat, coercion or intimidation. In fact, that they signed the document on the spot, at the time of recovery of the contraband substance, stands fully established not only by SI Arjun Singh (PW-8) but as is evident from the testimony of PW-6, it is clear that even he alongwith these persons was member of the raiding party. All proceedings took place in their presence. Report (Ext. PW-5/B), so prepared under Section 42(2) of the Act, does record the factum of formation of a raiding party comprising of these independent witnesses. Thus notwithstanding the fact that they did try not to support the prosecution, it cannot be said that through their testimonies, two views, entitling the accused to a benefit of doubt, with regard to recovery have emerged. Even otherwise, independently, this Court is of the considered view that prosecution case of recovery of the contraband substance from the conscious possession of the accused stands fully established through the testimonies of police officials.

9. In this backdrop, the onus, statutory in nature, so contained in Section 35 of the Act, heavily lied upon the accused to establish his innocence, as is so claimed by him in his statement so recorded under the provisions of Section 313 Cr. P.C. At this juncture, it be also observed that though initially accused had expressed his desire to lead evidence but subsequently, for reasons best known to him, chose not to do so.

10. From the report (Ext. PW-8/H) it is evidently clear that the contraband substance is charas. In any case, there is no serious dispute about the recovered stuff to be a contraband substance.

11. What further needs to be examined is as to whether it remained in safe custody and was tampered with or not. On this issue also there is no doubt in the mind of the Court. SI Arjun Singh (PW-8) sent the case property through HC Ashok Kumar (PW-6), who deposited it with MHC Parkash Chand (PW-10). Proper entry in the maalkhana register (Ext. PW-10/A) was made and on 31.10.2013, HC Sahi Ram (PW-7) took the same and deposited it at State Forensic Science Laboratory, Junga. Now all these witnesses, in no uncertain terms, have clearly deposed that till and so long the case property remained with them, it was not tampered with. Proper

entry indicating the movement thereof, was made in the relevant registers and all other relevant documents prepared. Even by way of corroborative evidence, one finds the information to have been furnished to the appropriate authority, both prior and subsequent to the recovery of the contraband substance, which fact, is evident from the testimonies of HC Soni Ram (PW-3), HHC Manoj Kumar (PW-4), HHC Ravinder Kumar (PW-5), HC Ashok Kumar (PW-6) and SI Arjun Singh (PW-8).

12. Hence cumulatively examined, it cannot be said that the Court below erred in completely and correctly appreciating the testimonies of the prosecution witnesses and holding the accused guilty of the charged offence. Even on the question of sentence, also it cannot be said that Court below erred or that it failed to judiciously exercise the discretion so vested in it.

The ocular version as also the documentary evidence clearly establishes complicity of the convict in the alleged crime. The testimonies of prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable**.**

13. Hence, in our considered view, prosecution has been able to discharge the burden of proving the recovery of the contraband substance from the conscious possession of the accused, beyond reasonable doubt. It cannot be said that the trial Court erred in correctly and completely appreciating the testimonies of the prosecution witnesses.

14. 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 complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner. Hence, the appeal is dismissed. Records of the Court below be immediately sent back.

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

Ravinder Kumar ....Petitioner.
Versus
State of H.P. ....Respondent.

Cr. Revision No. 228 of 2011
Date of Decision: 18.04.2017

Indian Penal Code, 1860- Section 279- Accused was driving a tanker with a high speed in a rash and negligent manner – the accused was tried and acquitted by the Trial Court – an appeal was filed, which was dismissed- held in revision that there are contradictions regarding the vehicle being driven by the witnesses – this fact was ignored by the Courts – revision allowed – orders of the Courts set aside.(Para-9 to 13)

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

For the petitioner: Mr. S.D Gill, Advocate.
For the respondent: Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(oral)*

The instant criminal revision petition filed under Sections 397 and 401 of the Cr.PC, is directed against the judgment dated 3.11.2011, passed by the learned Sessions Judge,

Shimla in Cr. Appeal No. 99-S/10 of 2011, affirming the judgment dated 24.9.2011, passed by the learned Judicial Magistrate, Ist Class, Court No. (1), Shimla, in case No. 86/2 of 2009, whereby the present petitioner accused has been convicted and sentenced under Section 279 IPC to undergo simple imprisonment for fifteen days and to pay fine of Rs. 1,000/- and in default of payment of fine, the accused to further undergo imprisonment of seven days.

2. Briefly stated facts as emerge from the record are that complainant namely Ravi Chauhan (PW4) in his statement recorded under Section 154 of the Cr.PC stated that on 28.10.2009, when he was on his way from Kachi Ghati to Dhali via bye pass, in his car bearing No. HP-10-9800, a Tanker bearing No. HR-37C-1195, came from the opposite side in high speed. The complainant further stated that at that relevant time, accused had been driving the tanker in question in rash and negligent manner, as a result of which the tanker struck against the Car being driven by the complainant. The Complainant further reported to the police that, he with a view to save himself took his vehicle to the extreme left/upper side of the high way, as a result of which, vehicle turned upside down. On the basis of aforesaid statement Ext. PW3/B, police registered formal FIR against the petitioner accused under Section 279 IPC. After completion of the investigation, SHO Police Station Shimla, presented the challan/report under Section 173 Cr.PC before the competent Court of law.

3. Learned Judicial Magistrate, Ist Class, Shimla, taking cognizance of the aforesaid report having been filed by the police put notice of accusation to the accused to which he pleaded not guilty and claimed trial. However, fact remains that learned trial Court on the basis of material adduced on record by the prosecution held the petitioner guilty of having committed offence punishable under Section 279 of the IPC and accordingly, sentenced him as per description already given supra.

4. Being aggrieved and dis-satisfied with the aforesaid judgment of conviction recorded by the learned trial Court, present petitioner preferred an appeal under Section 374(3) of the Cr.PC in the Court of learned Sessions Judge, Shimla. However, fact remains that the learned Sessions Judge, dismissed the aforesaid appeal, as a result of which, judgment of conviction recorded by the court below came to be upheld. In the aforesaid background, present petitioner approached this Court by way of instant proceedings seeking his acquittal after setting aside the judgment of conviction recorded by the court below.

5. Mr. S.D. Gill, Advocate, representing the petitioner vehemently argued that the impugned judgments of conviction recorded by the courts below are not sustainable in the eye of law as the same are not based upon the correct appreciation of material made available on record and as such, same deserve to be quashed and set-aside. While referring to the impugned judgments passed by the courts below, Mr. Gill strenuously argued that the evidence led on record by the prosecution has been not read in its right perspective by the courts below, as a result of which erroneous findings have come on record to the detriment of the petitioner accused, who is admittedly an innocent person. With a view to substantiate his aforesaid argument, Mr. Gill, invited attention of this Court to the statement of PW4 (complainant) to demonstrate that both the courts below have erred in concluding that at that relevant time, vehicle in question was being driven rashly and negligently by the petitioner-accused. Mr. Gill specifically invited attention of this Court to the deposition made by PW4 i.e. the complainant before the Court below, wherein he stated that at that relevant time, he was driving Maruti Van bearing No. HP-10-9800, whereas perusal of record, especially, photographs Ext.PW-6/A to G/D, placed on record by the prosecution suggests that accident, if any, occurred at that relevant time was of Santro Car bearing No. HP 10-9800. Mr. Gill while placing reliance upon the aforesaid statement of the complainant forcefully contended that since very identity of the vehicle involved in the accident is/was in dispute, there was no occasion for the courts below to record conviction against the petitioner accused. In the aforesaid, background, Mr. Gill prayed that the present petitioner be acquitted after setting aside the judgment of conviction recorded by the courts below.

6. Per contra, Mr. Ramesh Thakur, learned Deputy Advocate General, representing the respondent-State supported the impugned judgment passed by the courts below. He vehemently argued that bare perusal of the impugned judgment suggests that entire evidence led on record by the prosecution has been read in its right perspective by the courts below and there is no scope of interference, whatsoever, of this Court, especially, in view of the concurrent findings of fact and law recorded by the courts below. However, the learned Deputy Advocate General was unable to refute the aforesaid contention having been made by Mr. Gill, learned counsel for the petitioner that no conviction could be recorded by the court below on the basis of statement of the complainant, who categorically stated that he was driving Maruti Van at that relevant time.

7. Mr. Thakur, further contended that 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, he placed reliance upon judgment passed by Hon'ble Apex Court in cas*e* ***State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

8. I have heard learned counsel for the parties as well carefully gone through the 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. This Court solely with a view to ascertain the genuineness and correctness of the arguments having been advanced by Mr. S.D. Gill, learned counsel for the petitioner carefully perused the statement of the complainant PW4, perusal whereof clearly suggests that he stated before the Court that at that relevant time, he was driving Maruti Van bearing No. HP-10-9800. Though in his statement made before the Court below, he stated that at around 11:30 when he was driving towards Dhalli from Kachi Ghati, one local bus was standing on the turn. He further stated that as he turned the vehicle on the curve, a tanker came from opposite side and struck against his vehicle, as a result of which, vehicle turned turtled. Similarly, though PW4 has stated that at that relevant time, accident occurred due to rash driving of the driver of Tanker but interestingly, there is no mention, if any, with regard to the particulars of tanker with whom alleged accident occurred. Careful perusal of cross examination conducted on this material witness i.e. complainant, clearly suggests that at that relevant time, the complainant was driving a Maruti van not Santro Car. It has specifically come in his cross-examination that after 45

minutes of accident, police had come on the spot and he had handed over papers of Maruti Van to the police. It has also come in his statement that his vehicle struck against the wall as a result of which, the vehicle turned turtled. The complainant specifically admitted in his cross examination that he had given correct particulars of his vehicle to the police.

11. If the statement given by PW4 is read in its entirety, it clearly suggests that at that relevant time, the complainant was driving Marti Van and not Santro Car, as has been projected by the prosecution. True, it is that there is ample material adduced on record by the prosecution suggestive of the fact that on 28.10.2009, accident took place involving vehicle bearing No. HP-10-9800 as well as tanker bearing No. HR-37-C-1195. Perusal of photographs (Ext.PW6/A to Ext.PW6/D) further corroborates the version put forth by the prosecution that the accident occurred on 28.10.2009, wherein two vehicles referred above were involved. But this Court sees substantial force in the argument having been made by the learned counsel representing the petitioner-accused that no reliance, if any, could be placed by the courts below on the other evidence be it ocular or documentary led on record by the prosecution, especially, in the teeth of specific statement given by the complainant that at that relevant time, he was driving Maruti Van. Prosecution, by way of ample evidence adduced on record made an endeavor to prove on record that on 28.10.2009, a tanker bearing No. HR-37C-1195, struck against the Santro Car bearing No. HP 10-9800 being driven by the complainant (PW4) but version put forth by the prosecution is in total contradiction of statement of (PW4) the complainant, who at that relevant time was driving the ill-fated vehicle. Perusal of cross examination conducted on PW4 clearly suggests that defence was able to prove on record that Santro Car bearing No. HP-10-9800 was not being driven at that relevant time by the complainant and same was not involved in the accident. Since the complainant himself has stated before the Court below that he was driving Maruti Van bearing HP-10-9800, no reliance, if any, could be placed by the courts below while holding petitioner-accused guilty of having committed offence under Section 279 of the IPC, on the evidence led on record by the prosecution suggestive of the fact that the Tanker in question struck against the Santro Car. Otherwise, entire evidence adduced on record by the prosecution is with regard to accident of Santro Car not Maruti Van. When complainant has stated that Tanker struck against his Car i.e. Maruti Van, how reliance could be placed on photographs, which suggest that tanker struck against Santro Car. Both the Courts below without analyzing categorical statement of PW4 i.e. the complainant, brushed aside the argument of learned counsel representing the petitioner accused that there is material contradiction in the statement of material PWs 1 and 4 and moreover, their versions cannot be accepted since they are related to each other. Careful perusal of statement of PW1 and PW4 certainly suggest that there is contradiction in the statement of both the witnesses, which by no stretch of imagination can be termed to be minor contradictions, rather if statement of PW4 is read in its entirety, it changes the entire complexion of the entire prosecution case.

12. This Court after carefully examining the record especially the statement of PW4 sees substantial force in the argument of learned counsel representing the petitioner accused that when very identity of vehicle involved in the accident was in dispute/under suspicion, no conviction, if any, could be recorded against the petitioner accused. It appears that both the courts have failed to appreciate the evidence of material prosecution witness PW4, who was allegedly involved in the accident at that relevant time because he nowhere stated that at the time of accident, he was driving Santro Car and as such, this Court deems it fit to quash and set aside the impugned judgment of conviction recorded by the courts below which are admittedly perverse.

13. Consequently, in view of the detailed discussed made herein above impugned judgment of conviction recorded by the courts below is quashed and set-aside and the present petitioner-accused is acquitted of the charge framed against him under Section 279 of the IPC. Bail bonds are discharged. Interim order, if any, vacated. Pending application(s), if any, also stands disposed of.

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

Reeta Devi …Petitioner
Versus
State of Himachal Pradesh & others …Respondents

CWP No. 1878 of 2015
Judgment Reserved on :14.03.2017
Date of Decision: 18.04.2017

Constitution of India, 1950- Article 226- Petitioner applied for an appointment as anganwari worker – petitioner was declared selected while respondent No.4 was kept in the waiting list – respondent No.4 preferred objection before Competent Authority – a writ petition was filed, in which a direction was issued to decide the representation of respondent No.4 within two months – Deputy Commissioner set aside the appointment of the petitioner on the ground that marks were not awarded properly – aggrieved from the order, present writ petition has been filed- held that the reasoning of the Deputy Commissioner on the basis of broad guidelines is not sustainable as no guidelines were brought to the notice of the Court – there is no practice or law to bind interview committee to award certain minimum percentage of marks in an interview- the Court will not sit in appeal over the assessment of an individual candidate- writ petition allowed- order of the Deputy Commissioner set aside.(Para-19 to 24)

Cases referred:

Durga Devi and another versus State of H.P. and others, (1997) 4 SCC 575
Pawan Kumar Thakur Versus Dr. Y.S. Parmar University and others, (2011) 2 SLC 124
Ajay Hasia and others Versus Khalid Mujib Sehravardi and others, (1981) 1 SCC 722
Mehmood Alam Tariq and others Versus State of Rajasthan and others, (1988) 3 SCC 241
Lila Dhar Versus State of Rajasthan and others, (1981) 4 SCC 159

For the petitioner	:	Ms. B.S. Chauhan, Senior Advocate, with Mr. Munish Thakur, Advocate.
For the respondents	:	Mr. Pankaj Negi, Deputy Advocate. General, for respondents No. 1 to 3.
	:	Mr. Ashwani K. Sharma-II, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

In the instant petition, order dated 26.02.2015, (Annexure P-3) passed by Deputy Commissioner, Hamirpur is under challenge vide which appointment of petitioner as Anganwari worker at Anganwari Centre Himmer, District Hamirpur (here-in-after referred to as the 'Centre') has been set aside in appeal, filed by respondent No. 4, under Scheme/Guidelines for Engagement of Anganwari Workers/Helpers (here-in-after referred to as 'the Scheme').

2. In the Scheme notified on 05.10.2009, (Annexure-PA), minimum qualification for appointment of Anganwari worker was Matric or equivalent and distribution of marks under Rule 7 was also provided on the basis of said qualification. However, vide Notification dated 19th June, 2010 (placed on record during hearing), eligibility criteria and distribution of marks was amended by respondent-State. By substituting Rule 4 of the Scheme, 10+2 or equivalent was made as minimum educational qualification for Anganwari workers and substituted Rule 7 provided distribution of marks as under:

"7. Marks

Selection shall be based on merit out of the total marks of 25. Marks will be awarded as follows:-

1. <u>Anganwari Workers</u>

A) Maximum 13 Marks for educational qualification will be given in the following manner

i) Percentage of Marks in 10+2 divided by 10 subject to the maximum of 10 marks.

ii) Candidates who possess higher educational qualification will be given 3 additional marks as follow:-

Graduates=Additional Two marks for Graduation.

Post Graduates & above =Additional 3 marks (2+1) Two for, Graduation and one additional mark for post graduation and above.

B) Maximum 2 marks for experience to be given as under:-

C) 2 marks for disabled women having 40% and above disability subject to the condition that the type of disability is not such as to hamper the discharge of her job responsibility.

D) 2 marks for SC/ST/OBC candidates.

E) 2 marks for State Home/Balika Ashram Inmates/Orphans/ Widows/Destitues and Divorcees.

F) 4 marks for personal interview.

Total 25 marks

3. Petitioner and respondent No. 4 alongwith others, applied for appointment as Anganwari worker in the Centre, appeared in interview held on 28.02.2011 conducted by Selection Committee constituted under Rule-3 of the Scheme.

4. Out of four candidates, one Ranjna Kumari did not appear in the interview whereas another Neelma Kumari was found ineligible for want of requisite academic qualifications. Petitioner was declared selected securing 6.97 marks aggregate after interview whereas respondent No. 4 was kept in waiting list with 6.7 marks as evident from result sheet Annexure P-1 to the petition.

5. On 14.03.2011, respondent No. 4, preferring an appeal/objection before the competent authority under the Scheme challenged appointment of petitioner. In the said appeal, Sub Divisional Officer (Civil) Bhoranj made an inquiry through CDPO, Tauni Devi who found that respondent No. 4 was aggrieved by awarding lesser marks to her in the interview, whereas, as per Committee marks were awarded as per performance of the individual and guidelines and rules framed by the Department. Thereafter, respondent No. 4 preferred CWP No. 6178/2014 in this Court which was disposed of with direction to Deputy Commissioner, Hamirpur (respondent No. 2) to consider and decide representation of respondent No. 4 within two months of receipt of certified copy, in accordance with law by affording due opportunity of hearing/representation to her by assigning reasons in its decision and communicating the said decision to her. It was also clarified that decision in writ petition was not in favour of respondent No. 4 and respondent No. 4 was also granted liberty to place additional material if any, on record.

6. Deputy Commissioner, Hamirpur vide impugned order (Annexure P-3) set aside appointment of petitioner on the ground that out of four marks, respondent No. 4 was awarded only 1 mark which came to be 25% of total 4 marks provided for interview in the Scheme, whereas petitioner was awarded 3 marks (75%) in the said interview despite the fact that respondent No. 4 was having 18% higher marks than petitioner in 10+2 examination. Deputy Commissioner further observed as under:-

"Interestingly, there are broad guidelines that no candidate is to be given less than 40% or more than 80% in an interview until unless there are exceptional circumstances. Thus, it appears that the petitioner who has the best academic record had worst the possible interview. If we go by norms of her having got 1.6 marks (40%), she would still appear as the overall topper. The academic achievement gap of the petitioner and respondent is too big to reconcile the difference in interview marks. This is further corroborated by the fact that even a person who was unqualified was felt to be good enough for 50% interview marks".

7. On the basis of aforesaid observations, Deputy Commissioner held that there appeared a deliberate attempt to tilt the advantage in favour of petitioner and, thus, set aside selection of petitioner with direction to conduct fresh interview to the post and liberty, to all eligible candidates including petitioner and respondent No. 4 or any other persons who had appeared in the interview for the post of Anganwari worker, was also granted to participate in process. Hence present petition.

8. Respondents No. 1 to 3 filed joint reply to the petition in which they reiterated the events, quoted reasons preferred by Deputy Commissioner to set aside the appointment of petitioner but without commenting upon justification of impugned decision and without placing on record any material in support of the same. With rejoinder filed by petitioner to the reply of respondents No. 1 to 3, copy of unamended Scheme notified vide Notification dated 05.10.2009 was also placed on record. During hearing of the case, learned Deputy Advocate General placed a copy of Notification dated 19th June, 2010 on record vide which amended provision of the Scheme were substituted as referred supra. Respondent No. 4 has not preferred to file any reply.

9. Learned counsel for petitioner submits that impugned order is based on surmises, conjectures and without any legitimate basis as there are no broad guidelines either on record or otherwise, as referred by Deputy Commissioner in impugned decision quoting that no candidate is to be given less than 40% or more than 80% marks in an interview except for exceptional circumstances. It is also contended that Deputy Commissioner, while hearing the appeal as provided in the Scheme, exceeded his jurisdiction by sitting over evaluation carried out in interview by Selection Committee and has reassessed the merit on the basis of academic qualification despite the fact that performance of a candidate in an interview may not always be proportionately equally good as to marks obtained in academic qualification. It is urged that there is no illegality, irregularity and perversity committed by the Selection Committee in awarding marks to petitioner in interview and that selection of petitioner to the post of Anganwari worker on the basis of overall merit is in accordance with law.

10. Learned counsel for petitioner has relied upon pronouncement of Hon'ble Supreme Court in case 'Durga Devi and another versus State of H.P. and others, reported in **(1997) 4 SCC 575** in which it has been held as under:-

"3. It is needless to emphasise that it is not the function of the Court to hear appeals over the decisions of the Selection Committees and to scrutinize the relative merits of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the Constitution of the Committee or its procedure vitiating the selection, or proved mala fides, affecting the selection etc. It is not disputed that in the present case the University had constituted the Committee in due compliance with the relevant status. The Committee consisted of experts and it selected the candidates after going through all the relevant material before it. In sitting in appeal over the selection so made and in setting it aside on the ground of the so called comparative merits of the candidates as assessed by the Court, the High Court went wrong and exceeded its jurisdiction.

4. In the instant case, as would be seen from the perusal of the impugned order, the selection of the appellants has been quashed by the Tribunal by itself scrutinizing the comparative merits of the candidates and fitness for the post as if the Tribunal was sitting as an appellate authority over the Selection Committee. The selection of the candidates was not quashed on any other ground. The Tribunal fell in error in arrogating to itself the power to judge the comparative merits of the candidates and consider the fitness and suitability for appointment. That was the function of Selection Committee. The observations of this Court in Dalpat Abasaheb Solunke case are squarely attracted to the facts of the present case. The order of the Tribunal under the circumstances cannot be sustained. The appeal succeeds and is allowed. The impugned order dated 10-12-1992 is quashed and the matter is remitted to the Tribunal for a fresh disposal on other points in accordance with the law after hearing the parties".

11. Learned counsel for petitioner has also relied upon judgment passed by this Court in case Pawan Kumar Thakur Versus Dr. Y.S. Parmar University and others, reported in **(2011) 2 SLC 124** in which marks awarded in interview were also questioned. As per ratio of this judgment marks can be questioned by alleging malafide against the Selection Committee, but for that Selection Committee is, necessarily, to be added as party whereas in present case in its appeal before Deputy Commissioner, respondent No. 1 had neither alleged malafide nor arrayed Selection Committee or its members as respondent.

12. Relying upon another judgment of this Court passed in Amar Nath Rana Versus State of Himachal Pradesh and connected matter, reported in **(2012) 3 Him. L.R. 1557**, it is submitted on behalf of petitioner that selection only on the basis of marks of viva-voce is also permissible under law whereas in present case only 4 marks out of 25 marks have been awarded which are 16% of total marks, available with the Selection Committee to be awarded in interview.

13. Learned Deputy Advocate General has reiterated its stand taken in reply and has justified impugned order. However, despite numerous adjournments, neither Deputy Advocate General nor respondent No. 4 was able to place on record any document/guidelines as referred by Deputy Commissioner in impugned order, providing that no candidate is to be given less than 40% and more than 80% in an interview except in exceptional circumstances.

14. Learned counsel for respondent submits that 4 marks provided for viva voce in the Scheme are unconstitutional and impermissible under law as it comes to be 16% which is higher than 15% of total marks and in numerous pronouncement of the Courts, 15% of total marks is the maximum limit which can be provided to the Selection Committee for interview. In support of his contention learned counsel has relied upon pronouncement of Constitutional Bench of Hon'ble Supreme Court in case Ajay Hasia and others Versus Khalid Mujib Sehravardi and others, reported in **(1981) 1 SCC 722**. It was a case pertaining to admission in Regional Engineering College to the first semester of the B.E. course in which it was held as under:

"We are of the view that, under the existing circumstances, allocation of more than 15 per cent of the total marks for the oral interview would be arbitrary and unseasonable and would be liable to be struck down as constitutionally invalid".

15. It is contended on behalf of respondent No. 4 that in view of ratio of Law laid down by the Apex Court in Ajay Hasia's case supra, provision of 4 marks in viva voce out of total 25 marks is arbitrary and illegal being contrary to law of Land. He further submitted that even if it is considered to be permissible under law then also, awarding 1 mark only to respondent No. 4 is an illegal act of Selection Committee as prescribed minimum pass marks in all examinations are 33% and 1 mark out of 4 marks comes to be 25% whereas minimum pass marks must be awarded in an interview to a candidate, more particularly for the reason that petitioner who was having lesser merit in 10+2 examination was awarded 3 marks which comes to be 75% of maximum marks of interview. He also submitted that Selection Committee awarded 1 mark only to respondent No.4 but 2 marks to one Neelam Kumari who was even not having

requisite qualifications and was not eligible for the post. As per him all these facts reflect malafide and arbitrariness on the part of Selection Committee.

16. Learned counsel for respondent has submitted that challenge of respondent is also against abuse of power by Selection Committee which has vitiated its power to select and thus selection of petitioner has rightly been set aside by Deputy Commissioner. Reliance has been placed upon case titled as Mehmood Alam Tariq and others Versus State of Rajasthan and others, reported in **(1988) 3 SCC 241** in which it has been held as under:-

> *"24. It is important to keep in mind that in his case the results of the viva-voce examination are not assailed on grounds of mala fides or bias etc. The challenge to the results of the viva-voce is purely as a consequence and incident of the challenge to the vires of the rule. It is also necessary to reiterate that a mere possibility of abuse of a provision, does not, by itself, justify its invalidation. The validity of a provision must be tested with reference to its operation and efficacy in the generality of cases and not by the freaks or exceptions that its application might in some rare cases possibly produce. The affairs of Government cannot be conducted on principles of distrust. If the selectors had acted mala fide or with oblique motives, there are, administrative law remedies to secure reliefs against such abuse of powers. Abuse vitiates any power".*

17. In rebuttal, leaned counsel for petitioner has relied upon pronouncement of the Apex Court in case Lila Dhar Versus State of Rajasthan and others, reported in **(1981) 4 SCC 159** in which Hon'ble SCC has held as under:-

> *"6. Thus, the written examination assesses the man's intellect and the interview test the man himself and "the twain shall meet" for a proper selection. If both written examination and interview test are to be essential features of proper selection, the question may arise as to the weight to be attached respectively to them. In the case of admission to a college, for instance, where the candidate's personality is yet to develop and it is too early to identify the personal qualities for which greater importance may have to be attached in later life, greater weight has per force to be given to performance in the written examination. The importance to be attached to the interview test must be minimal. That was what was decided by this Court in Periakaruppan v. State of Tamil Nadu, Ajay Hasia etc. v. Khalid Mujib Sehravardi & ors. etc., (supra) and other cases. On the other hand, in the case of services to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way, subject to basic and essential academic and professional requirements being satisfied. To subject such persons to a written examination may yield unfruitful and negative results, apart from its being an act or cruelty to those persons. There are, of course, many services to which recruitment is made from younger candidates whose personalities are on the threshold of development and who show signs of great promise, and the discerning may in an interview test, catch a glimpse of the future personality. In the case of such services, where sound selection must combine academic ability with personality promise, some weight has to be given, though not much too great weight, to the interview test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service to service according to the requirements of the service. the minimum qualifications prescribed, the age group from which the selection is to be made, the body to which the task of holding the interview test is proposed to be entrusted and a host of other factors. It is a matter for determination by experts. It is a matter for research. It is not for Courts to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives. The Kothari Committee also suggested that in view of the obvious importance of the subject, it may be examined in detail by the Research Unit of the Union of Public Service Commission.*

9…….Both the cases cited before us Periakaruppan's case and Ajay Hasia's case were cases of admission to colleges. We have already pointed out that the provision for marks for interview test need not and cannot be the same for admission to colleges and entry into public services………….

……Nor do we think that the Court intended any wide construction of their observation. As already observed by us the weight to be given to the interview test should depend on the requirement of the service to which recruitment is made, the source material available for recruitment, the composition of the interview Board and several like factors……………".

18. Though, in arguments, learned counsel for respondent No. 4 has argued malafide and arbitrariness against Selection Committee but from perusal of material on record, including impugned order, it does not appear that such grounds were ever taken by respondent No. 4 challenging the appointment of petitioner. On confronting with such a situation, learned counsel for respondent No. 4 submitted that these grounds were taken in appeal preferred by respondent No. 4 before Deputy Commissioner, however, copy of the said appeal was never placed on record by respondent No. 4 and he has even not chosen to file a separate reply placing its independent stand on the record. There is no material available on record indicating that malafide was ever urged against Selection Committee. Even it is presumed that it was a ground in appeal before Deputy Commissioner, the same is of no consequence for, so evident from memo of parties of impugned order, failure of respondent No.4 in arraying Selection Committee as its members respondents in his appeal.

19. Reasoning of Deputy Commissioner on the basis of broad guidelines is also not sustainable as no such broad guidelines referred in impugned order, were brought in the notice of Court providing that no interview Committee had to award less than 40% or more than 80% marks to a candidate in an interview except in exceptional circumstances.

20. Ratio of law laid down in cases for Admission to Educational Institutions cannot be made applicable to the cases of employment. Concept of awarding passing marks i.e. 33% marks to a candidate, urged on behalf of respondent No. 4, is also without basis because no such bench mark for qualifying in interview was prescribed in present case. Also 33% marks are not always passing marks in examination(s). In some cases passing marks are even 50%. There is no practice or law, so as to binding interview committee, to award certain minimum percentage of marks in an interview. Therefore, contention raised by learned counsel for respondent No. 4 that respondent No. 4 was entitled for atleast 1.6 marks in interview is not tenable.

21. So far as grant of 2 marks to the candidate not having requisite academic qualification is concerned, the same cannot be basis to conclude that marks in interview were awarded arbitrarily as marks in interview are awarded on the basis of performance in the interview and not on the basis of academic marks/qualifications. Normally, a person having higher academic marks/qualification may perform better in interview than a candidate having lesser academic qualifications but vice versa is also not impossible. There is no law or presumption that performance in an interview will always be proportionate to academic marks or qualification. Allegations of nepotism and favouritism against Selection Committee in their absence are not permissible under law. In the present case Rule-7 provides various heads of distribution of marks to the candidates in which Selection Committee is not having any discretion. Out of 25% only 4 marks are in the hands of Selection Committee which cannot be considered as excessive as claimed by respondent No. 4.

22. Learned counsel for respondent No. 4 has also relied upon judgment of Coordinate Bench of this country passed in CWP No. 1796 of 2015 titled as Santosh Versus State of Himachal Pradesh and others wherein appointment of a candidate was set aside on the ground that despite having better academic record lesser marks in interview were awarded to a candidate. What weighed to the court, in this case, is evident from following paras of the judgment:-

"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".

23. In my opinion, judgment mentioned supra, is not applicable to the facts and circumstances of the present case. In the said case, there was over writing, cutting in record for increasing and decreasing marks already awarded to candidates in order to favour a particular candidate. Even in the said judgment it has been observed as under:-

"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 a malgam of favouritism and nepotism and uphold the same".

24. Writ Court is not a supervisory authority for reevaluating performance of candidate in viva voce/interview. Mere allegations of favourtism and nepotism in absence of any substantive material on record and also for want of pleadings in this regard, are not sustainable.

25. Thus, in my considered view, the stand taken by the respondent No. 4 is not tenable in the eyes of law whereas the petitioner has made out a case for interference by this Court. In view of above discussion petition is allowed and impugned order dated 26.02.2015 (Annexure P-3) is quashed and set aside. Pending application(s), if any, also stand disposed of. No order as to costs.

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

Umed Singh …Appellant.
Versus
State of H.P. …Respondent.

Cr. Appeal No. 499 of 2016
Judgment reserved on: 27.03.2017
Date of Decision: April 18 , 2017

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.460 kg. of charas- the accused was tried and convicted by the Trial Court- held in appeal that police officials supported the prosecution version – the fact that independent witness had turned hostile is not sufficient to doubt the prosecution version- minor contradictions will also not make the prosecution case

suspect – the plea of alibi was not established –link evidence was proved – the Trial Court had rightly appreciated the evidence – appeal dismissed. (Para-4 to 14)

For the Appellant:	Mr. Anoop Chitkara, Advocate, for the appellant.
For the Respondent:	Mr. V.S. Chauhan, Addl. AG., with Mr.Vikram Thakur, Dy. AG., for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In relation to FIR No.96/2015, dated 17.04.2015, registered at Police Station Sadar, District Kullu, H.P., accused stands convicted for having committed an offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act). He is to undergo rigorous imprisonment for a period of ten years and pay fine of ` 1 lac and in default thereof further undergo rigorous imprisonment for a period of two years.

2. Trial Court found the prosecution to have established its case of having recovered 1 kg 460 grams of charas from the conscious possession of the accused. It was on 17.04.2015, that the police party recovered it from a place known as Bhurji (Malana road), Kullu, District Kullu, H.P.

3. Through the testimonies of C. Nitish Kumar (PW.1), Ashok Kumar (PW.2) and HC Deepak Kumar (PW-12), prosecution establishes recovery of the contraband substance. Through the testimonies of Nitish Kumar and SI Jitender Kumar (PW.8), prosecution wants to establish that Rukka (PW.1/D) was carried to the Police Station and same day FIR (Ex.PW.8/A) was registered. Through the testimonies of SI Jitender Kumar and HC Gajender Pal (PW.3), prosecution wants to establish that the case property so recovered was resealed at the Police Station and deposited in the Malkhana. Further C. Sunil Mahant (PW.6), carried the same to the Forensic Science Laboratory, Junga, where it was examined and report (Ex.PX) brought back. Through the testimonies of C. Ajay Sharma (PW.11) and HC Deepak Kumar, prosecution wants to establish that information about the incident came to be passed on to the superior officer.

4. Significantly, in the instant case, prosecution did associate an independent person as a witness while carrying out search and seizure operations. In this regard, the said person, namely, Ashok Kumar (PW.2) has fully supported the prosecution.

5. Trial Court has succinctly dealt with the issue of minor contradictions and inconsistencies in the testimonies of the aforesaid witnesses, they being trivial in nature. Before this Court, much emphasis is laid on the fact that Ashok Kumar stands introduced by the police, only to falsely implicate the accused. Also no endeavour was made by the police to associate any respectable person of the locality, while carrying out search and seizure operations.

6. At this juncture, one may only observe the defence and the *alibi* taken by the accused, which in his own words is reproduced as under:-

"Q.35:-	Why this case is made against you?
Ans:-	False case has been made against me. Police party has recovered the charas from one Bal Krishan and said Bal Krishan has not been interrogated by the police.
Q.36:-	Why the witnesses have deposed against you?
Ans:-	All the witnesses were influenced by the police, so they have deposed against me.
Q.37:-	Do you want to say anything else?

Ans:- I am innocent. I have been falsely implicated in this case. On that day, I was coming back from Malana with my family after Mandir Darshan."

7. Noticeably no evidence in defence was led by the accused. Who is this Bal Krishan has also not been disclosed by him. Also neither he nor his family members protested against his illegal detention at any point in time. As required by law, accused was produced before the Magistrate, when also no such grievance was made. Why would police influence the witnesses or falsely implicate the accused, remains undisclosed. The defence remains improbablized.

8. Be that as it may, independent of the defence taken by the accused, this Court is obliged in law, to appreciate the evidence led by the prosecution, leading to his conviction and ascertain as to whether the findings returned are borne out from the record or not.

9. HC Deepak Kumar (PW.12), who also conducted the investigation, states that on 17.04.2015, while on duty, at a place near Bhurji (Malana road) they saw the accused come from Malana. Noticing the police party, accused got perplexed and as such, he was asked to disclose his particulars, which he did. Suspecting that he may be carrying some illegal article in his bag, he was asked to wait, for the reason that police wanted to search him in the presence of an independent witness. Since the place was secluded being a jungle and there was no possibility of associating anyone nearby, police waited, when, in the meanwhile, one taxi bearing No.HP-01K-2460, came from Malana side. On signal, the driver stopped and disclosed his identity as Ashok Kumar (PW.2). By associating him, police searched the bag from which one parcel wrapped in a Khakhee coloured cello-tape was recovered. When opened, police found soft sticky stuff, which appeared to be cannabis. Accordingly police took the same into possession vide Memo (PW.1/B), after it was sealed with six seals of impression 'D'. Sample seal was handed over to Ashok Kumar. Also photographs (Ex.PW.12/A-1 to Ex.PW.12/A-20) were taken recording the search and seizure operations. He categorically records presence of other police officials, including C. Nitish Kumar (PW.1), who took the Rukka (Ex.PW.1/D) to the Police Station, which led to the registration of FIR (Ex.PW.8/A). NCB forms (Ex.PW.3/A) were also filled up on the spot. The accused was arrested and at the Police Station, case property entrusted to SI Jitender Kumar (PW.8) for the purposes of resealing. Also special report (Ex.PW.11/A) sent to the superior authority. This person has also testified the case property produced in the Court to be the one which was sent for chemical analysis and report thereof, taken on record. This witness has totally withstood the test of cross-examination. Accused has failed to impeach his credit or in any manner render his testimony to be doubtful. He has explained the reason for not associating the driver of the vehicle, in which the police party had travelled. He is categorical that proceedings were almost complete. Significantly, the issue of presence of police party and the accused on the spot; accused having been searched; contraband substance recovered from him; and conduct of the proceedings on the spot, remain established on record, beyond reasonable doubt, through his testimony, thus making the statutory presumption so contained under Section 35 of the Act applicable in the instant case.

10. Not only that, on material facts, we find testimonies of C. Nitish Kumar (PW.1) and Ashok Kumar (PW.2) to be fully corroborating the version of the Investigating Officer. Even they have withstood the test of cross-examination and their testimonies remain un-shattered. Significantly, Ashok Kumar is an independent witness. Very rarely one finds an independent witness to have supported the prosecution and that too in a case of recovery of a psychotropic substance. This witness is categorical that the contraband substance came to be recovered from the conscious possession of the accused in his presence. He is certain that seals were affixed on the spot and that papers were prepared in his presence, to which he himself is a signatory. He has no reason to falsely implicate the accused. His presence on the spot stands reasonably explained. He is a taxi driver and was passing through the area at the relevant point in time.

11. SI Jitender Kumar (PW.8) is categorical of having received the case property from the Investigating Officer HC Deepak Kumar (PW.12), which he resealed and entrusted to MHC Gajender Pal (PW.3). He also registered the FIR. Factum of resealing remains uncontroverted on

record. He does admit that NCB form was not in a sealed parcel, but then it would not make any difference. It is not that it was tampered with.

12. One finds MHC Gajender Pal (PW.3) to have entrusted the case property to C. Sunil Mahant (PW.6), who deposited it at the concerned Laboratory. All the witnesses have affirmatively deposed that till and so long the case property remained with them, it was not tampered with. Report of the FSL (Ex.PX) evidences the factum of recovered stuff to be a psychotropic substance i.e. charas. Also police took adequate precaution of notifying the superior officer which fact is evident from the testimonies of C. Ajay Sharma (PW.11) and C. Deepak Kumar (PW.12).

13. Hence, cumulatively affirmed, it cannot be said that the Court below erred in completely and correctly appreciating the testimonies of the prosecution witnesses and holding the accused guilty of the charged offence. Even on the question of sentence, also it cannot be said that Court below erred or that it failed to judiciously exercise the discretion so vested in it.

14. The ocular version as also the documentary evidence clearly establishes complicity of the convict in the alleged crime. The testimonies of prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable**.**

15. Hence in our considered view, prosecution has been able to discharge burden of proving the recovery of the contraband substance from the conscious possession of the accused, beyond reasonable doubt. It cannot be said that, while delivering judgment dated 08.09.2016 by Special Judge-II, Kullu, H.P., in Sessions Trial No.39 of 2015, titled as *State of Himachal Pradesh Versus Umed Singh,* the Court erred in correctly and completely appreciating the testimonies of the prosecution witnesses.

16. 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 complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner. Hence, the appeal is dismissed.

Records of the Court below be immediately sent back.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, JUDGE

Commissioner of Income Tax, Shimla …Appellant

Versus

M/s H.P. State Co-operative Bank Ltd., Shimla …Respondent

ITA No. 14 of 2012
Reserved on: April 6, 2017
Decided on: April 19, 2017

Income Tax Act, 1961- Section 260-A- Respondent is an assessee and a credit institution within the meaning of Section 2(5A) of the Interest Tax Act, 1974- assessee failed to furnish the return within the stipulated period- a notice was issued on which return was filed – an assessment order was passed raising tax demand – Commissioner of Income Tax set aside the assessment - an appeal was filed which was dismissed as infructuous – however, penalty was imposed upon the assessee by the Deputy Commissioner of Income Tax – an appeal was filed and the penalty was modified – separate appeals were filed against this order- the Appellate Authority cancelled the order of penalty – aggrieved from the order, an appeal was filed before the High Court – the matter

was remanded to Assessing Authority, who imposed the fresh penalty- appeal was preferred against this order, which was dismissed – further appeal was allowed – aggrieved from the order of Appellate Authority, the present appeal has been filed- held that penalty can be imposed against assessee in case the Assessing Officer comes to a definite conclusion that assessee had concealed particulars of chargeable interest or had furnished inaccurate particulars of such interest- the return was accepted in its entirety – advance tax was paid by the assessee before the closure of Financial year – return was delayed on account of non-availability of return form - there was no concealment on the part of the assesse- assesse had furnished complete particulars of income in the profit and loss account – the Tribunal had passed the order rightly- appeal dismissed.(Para-15 to 24)

Cases referred:

Commr. of Inc.-Tax v. Angidi Chettiar, (1962) 44 I.T.R. 739
K.C. Builders v. Asstt. C.I.T. (S.C.), (2004) 265 I.T.R. 562
CIT v. Bacardi Martini India Ltd. (Delhi), (2007) 288 ITR 585 (Delhi)

For the appellant : Ms. Vandana Kuthiala, Advocate.
For the respondent : Mr. Vishal Mohan and Mr. Sanjay Prashar, Advocates.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

This appeal under Section 260-A of the Income-Tax Act, 1961 has been filed thereby laying challenge to order dated 21.6.2011, passed by the Income Tax Appellate Tribunal Chandigarh Bench 'A', Chandigarh (in short, 'Tribunal'), in setting aside order of Commissioner Income Tax (Appeals).

2. Briefly stated the facts necessary for the adjudication of the present appeal are that the H.P. State Co-operative Bank Ltd. (hereafter, 'assessee') is a credit institution within the meaning of Section 2(5A) of the Interest-Tax Act, 1974 and as such it was under obligation to furnish the return of chargeable interest for the relevant year under Section 7(1) of the Interest-Tax Act, 1974, before 31.12.1992. Under sub-section (3) of Section 7, the assessee could furnish its return of chargeable interest before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier. However, the fact remains that assessee failed to furnish return within stipulated period as prescribed under Section 7 of the Act ibid. Assessing Officer issued notice under Section 10 of the Interest-Tax Act, 1974, upon the assessee on 12.9.1995. Assessee, in response to notice as referred above, filed return of interest tax on 19.2.1996 declaring therein chargeable interest of Rs.7,18,86,395/-. Assessing Officer passed assessment order under Section 8 (2) on 26.2.1998 determining therein chargeable interest amounting to Rs. 15,21,18,010/- and raised tax demand of Rs. 93,89,057/-. Vide rectification order under Section 17, he further demanded Rs.1,54,162. Perusal of Annexure P-3 placed on record by the appellant suggests that the Commissioner Income Tax, Shimla, vide order dated 1.3.2000 passed under Section 19 of the Interest-Tax Act, 1974, set aside aforesaid order of assessment having been passed by the Assessing Officer under Section 8 (2) of the Interest-Tax Act, 1974, holding same to be erroneous and prejudicial to the interests of revenue and, accordingly, directed him to make fresh assessment after affording opportunity of hearing to the assessee.

3. Being aggrieved and dissatisfied with the aforesaid order, Assessee preferred an appeal before Commissioner Income Tax (Appeals), Shimla: Panchkula, which came to be registered as Appeal No. IT/4/97-98/SML. However, the same was dismissed as infructuous, by the Commissioner Income Tax (Appeals), vide order dated 2.8.2000, on the ground that Commissioner Income Tax, Shimla has already set aside assessment directing the Assessing Officer to complete fresh assessment, points of objection as raised in the appeal, no longer

survive. It further emerges from the record that the assessee Bank did not contest the chargeable interest assessed by the Assessing Officer. Perusal of Annexure P-6 suggests that during the pendency of the aforesaid assessment proceedings, proceedings under Section 13 of the Interest-Tax Act, 1974, were also initiated by the Department for levying penalty upon the assessee Bank and, accordingly, vide order dated 29.8.2002, penalty of Rs. 1,49,67,486/- i.e. penalty equal to three times the interest sought to be evaded, was imposed by the Dy. Commissioner of Income Tax, Circle Shimla.

4. Being aggrieved with the penalty having been imposed by the Assessing Officer under Section 13 of the Interest-Tax Act, 1974, assessee Bank preferred an appeal before Commissioner Income Tax (Appeals), Shimla. However, the fact remains that the learned Commissioner Income Tax (Appeals) upheld the penalty imposed by the authority concerned but held that the penalty of 300% is harsh upon the assessee, accordingly, modified penalty to 100% of tax evaded.

5. Being further aggrieved and dissatisfied with the aforesaid order passed by the learned Commissioner Income Tax (Appeals), both the parties filed appeals bearing Intt. Tax Apl. No. 3/Chandi/2003 (A.Y. 1992-93) and Intt. Tax Apl. No. 4/Chandi/2003 (A.Y. 1992-93), before the Tribunal below. Perusal of Annexure P-8, placed on record, suggests that both the appeals were heard together by the Tribunal and Tribunal, while allowing appeal of the assessee, held as under:

> "*When we compare the provisions of Section 13 of the Interest-Tax Act, 1974 and Explanation 3 to Section 271(1)(c), it is observed that there is no such provision under the Interest-Tax Act, 1974 corresponding to Explanation 3 to Section 271(1)(c).*"

6. It is seen that there is no such provision under the Interest-Tax Act, 1974 corresponding to Explanation 3 to 271(1)(c) of the Income-Tax Act, 1961 and as such basis adopted for imposition of penalty by revenue authority is not in accordance with provisions of Interest-Tax Act, 1974 and, accordingly, cancelled the same.

7. Appellant being aggrieved and dissatisfied with the aforesaid order having been passed by the Tribunal, preferred an appeal under Section 260-A of the Income-Tax Act, 1961 before this Court, wherein following question of law was formulated:

> "Whether absence of proviso in section 13 of the Interest tax Act, 1974 corresponding to explanation 3 to section 271(1)(c) of the Income-Tax Act, 1961, could render the case ineligible for penalty u/s 13 of the Interest tax Act even on the differential amount of tax sought to evaded i.e. the difference of tax sought to evaded on chargeable interest assessed by the A.O. and chargeable returned by the assessee?"

8. This Court taking note of the fact that the Tribunal only took into consideration Section 271 (1)(c) while holding that there is no basis for imposition of penalty under Section 13, and ignored other grounds, which were taken into consideration by the Assessing Officer, remanded matter to the Assessing Officer to determine the question as to whether assessee was liable to pay penalty and if so, to what extent, strictly in consonance with the provisions of Section 13 of the Interest-Tax Act, 1974, totally being uninfluenced by the provisions of Section 271(1)(c) of the Income-Tax Act, 1961.

9. Subsequent to passing of aforesaid order by this Court, Assessing Officer passed fresh penalty order (Annexure P-9 dated 28.5.2010) under Section 13 of the Interest-Tax Act, 1974, levying therein 100% penalty of the amount of Rs. 49,89,162, i.e. tax sought to be evaded.

10. Assessee being aggrieved with the aforesaid imposition of penalty vide order dated 28.5.2010, preferred an appeal before Commissioner Income Tax (Appeals), who vide order dated 30.11.2010 in Appeal No. IT/119/2010-11/Sml, dismissed the appeal of the assessee and as such assessee was compelled to prefer an appeal before the Tribunal below. Learned Tribunal

below, while allowing appeal of the assessee held that penalty under Section 13 of the Interest-Tax Act, 1974 is/was leviable, where assessee had concealed its interest chargeable to tax or furnished inaccurate particulars of tax chargeable. Learned Tribunal below, taking note of the fact that interest became chargeable only pursuant to Board's Instructions No. 1923 dated 14.3.1995, that too for the period from October, 1991 to 31.3.1992 and that the assessee had declared total interest levied by it in its profit and loss account, held that there was no merit in the levying of penalty under Interest-Tax Act, 1974 and accordingly set aside the order of Assessing Officer, levying penalty. In the aforesaid background, appellant has approached this Court, by way of instant appeal.

11. The appeal was admitted on following substantial question of law, on 21.5.2012:

> "i) Whether the finding of the Ld. ITAT to the effect that the assessee has neither concealed the particulars of interest nor furnished inaccurate particulars of interest is perverse even though the assessee had not disclosed or furnished such interest until escapement of the interest was detected by the department?
>
> ii) Whether on the facts and circumstances of the case the ITAT is correct in deleting penalty on the grounds that the interest become chargeable to tax only after Board's inst. No. 1923 dated 14.3.1995 and hence non disclosure of such interest in assessment years prior to this date could not be termed as concealment or furnishing inaccurate particulars, even though the assessee had filed his return after the date?"

12. Ms. Vandana Kuthiala, learned counsel representing the appellant vehemently argued that impugned order dated 21.6.2011 (Annexure P-A) having been passed by the Tribunal below is not sustainable as the same is not based upon correct appreciation of evidence adduced on record by the respective parties as well as provisions of law applicable in the instant case. Ms. Kuthiala, strenuously argued that the Tribunal while holding that there is no merit in levying of penalty under Section 13 of the Interest-Tax Act, 1974, has failed to consider the fact that the interest on securities, interest on head office investment account and interest on loan to primary agriculture cooperative societies was chargeable interest under Interest-Tax Act, 1974. She further stated that Board's Instructions No. 1923 dated 14.3.1995 were clarificatory in nature and no benefit, if any, could be available pursuant to aforesaid instructions to the assessee before he filed return of interest tax, that too pursuant to the notice under Section 10 of the Interest-Tax Act, 1974. Learned counsel representing the appellant forcefully contended that the learned Tribunal below failed to take note of the fact that return of chargeable interest was not filed voluntarily but was filed in response to notice under Section 10 of the Interest-Tax Act, 1974 and there was difference in the chargeable interest of the assessee and interest as assessed by the Assessing Officer. To substantiate her aforesaid arguments, learned counsel representing the appellant invited attention of this Court to assessment order (Annexure P-9) having been passed by the Assessing Officer under Section 13 of the Interest-Tax Act, 1974, to demonstrate that the assessee had concealed interest chargeable to tax and had furnished inaccurate particulars to the tune of Rs. 16,63,05,388/- and as such penalty was rightly imposed upon the assessee at the rate of 100% of the interest sought to be evaded.

13. Mr. Vishal Mohan, learned counsel representing the respondent, supported the impugned order passed by the learned Tribunal and stated that there is no illegality or infirmity in the same, as such, there is no scope of interference. While specifically referring to the questions of law referred to herein above, Mr. Mohan strenuously argued that the learned Tribunal below has returned specific findings of fact that assessee neither concealed particulars of interest nor furnished inaccurate particulars of interest, that too on the basis of record made available to it by the Department, during the proceedings of the appeal, as such, same can not be gone into by this Court especially in the present proceedings. Mr. Mohan, further contended that bare perusal of orders passed by Assessing Officer clearly suggests that penalty has been levied on entire amount of interest assessed to tax as 16.63 Crore, ignoring the fact that advance tax amounting to Rs. 23,50,000/- was paid by the assessee, prior to initiation of aforesaid

proceedings. While specifically inviting attention of this Court to the impugned order passed by the learned Tribunal below, Mr. Mohan, contended that it is undisputed before the authority concerned that since no return form was available, return was delayed but the fact remains that advance tax as referred to above, was paid by the assessee. Learned counsel representing the respondent further contended that bare perusal of order passed by the Assessing Officer clearly suggests that initially interest on securities totaling to Rs. 3.74 Crores was not subjected to tax but the same was included lateron pursuant to order passed under Section 19 of the Interest-Tax Act, 1974. Learned counsel representing the respondent strenuously argued that penalty, if any, under Section 13 of the Act could be levied against the assessee, had he concealed particulars of chargeable interest or furnished inaccurate particulars of such interest. Mr. Vishal Mohan, further contended that provisions of Section 271 (1)(c) of the Income Tax Act, 1961, could also not be made applicable in the case of assessee, which lays down presumption against the assessee, in case of non-filing of return within particular time. In this regard, he invited attention of this Court to para-10 of the impugned order, to demonstrate that provisions of Section 271(1)(c) of Income-Tax Act, 1961, which lay down presumption against assessee in non-filing of return within particular time, are not applicable to the interest tax proceedings. While concluding his arguments, learned counsel representing the respondent contended that there is nothing on record suggestive of the fact that assessee concealed particulars of interest or furnished inaccurate particulars of interests, rather record clearly suggests that assessee had declared total interest received by it in its profit and loss account. Learned counsel representing the respondent further contended that assessee had furnished return of chargeable interest for the financial year 1991-92 relating to assessment year 1992-93 and had declared chargeable interest of Rs. 7.18 Crores. In the aforesaid background, he prayed for dismissal of the appeal.

14. We have heard the learned counsel representing the parties and gone through the record.

15. While exploring answer to the questions of law reproduced herein above, as well as submissions made by the learned counsel representing the parties, this Court had an occasion to peruse material adduced on record by the appellant- department as well as impugned order having been passed by the learned Tribunal below, perusal whereof certainly suggest that there is no dispute, if any, with regard to chargeable interest assessed by the Assessing Officer, which was determined by Assessing Officer on 5.2.2002 by way of revised assessment order (Annexure P-5), whereby assessee was held liable to pay chargeable interest at Rs. 16,63,05,388/- as against interest of Rs. 7,18,86,385/-. Dispute, if any, inter se parties is with regard to imposition of penalty under Section 13 of Interest-Tax Act, 1974, whereby, initially penalty of Rs. 1,49,67,486 i.e. three times of the interest tax sought to be evaded, came to be imposed by the Assessing Officer, however, quantum of same was reduced to Rs. 49,89,162/- i.e. 100% of tax, sought to be evaded, by the Commissioner Income Tax (Appeals), vide order dated 20.8.2003.

16. This Court, while allowing ITA No. 33 of 2006, having been preferred by appellant department, has already held that Section 271 (1)(c) of the Income-Tax Act, 1961 can not be taken into consideration while imposing penalty under Section 13 of the Interest-Tax Act, 1974. This Court has further held that though Section 21 of the Interest-Tax Act, 1974 makes certain provisions of Income-Tax Act, 1961 applicable to proceedings under Interest-Tax Act, 1974 but Section 271 is not included therein, as such, this Court came to conclusion that provisions contained in Section 271(1)(c) were wrongly invoked by the Assessing Officer and Commissioner Income Tax while imposing penalty under Section 13 of the Interest-Tax Act, 1974 against respondent Bank. However, the fact remains that this Court in the aforesaid appeal, while holding that provisions contained in Section 271 (1)(c) of Income-Tax Act, 1961 are not applicable to proceedings under Interest-Tax Act, 1974, categorically held that Section 13 of the Act provides for imposition of penalty in case assessee conceals particulars of chargeable interests or furnishes inaccurate particulars of such interest. After careful examination of judgment passed by this Court in ITA No. 33 of 2006, dated 28.10.2009, there can not be any dispute that penalty, if any, under Section 13 of the Interest-Tax Act, 1974 could be imposed against assessee in case

Assessing Officer comes to definite conclusion that assessee concealed particulars of chargeable interest or furnished inaccurate particulars of such interest.

17. Careful perusal of impugned order having been passed clearly suggests that learned Tribunal below had an occasion to go through the complete record pertaining to the proceedings of the imposition of penalty under Section 13 of the Interest-Tax Act, 1974, against the respondent. Paras 16 and 17 of the impugned order passed by learned Tribunal below clearly suggest that before passing impugned order, it carefully examined/ analyzed order passed by Assessing Officer imposing therein penalty under Section 13 of the Interest-Tax Act, 1974. It clearly emerges from the impugned order, which is admittedly based upon record of the appellant that assessee had furnished return of chargeable interest for the financial year 1991-92 relating to assessment year 1992-93 and declared chargeable interest at Rs. 7.18 Crores, which was accepted in its entirety. It is also not disputed that assessee had paid advance tax of Rs. 23,50,000/- against aforesaid income before closure of financial year i.e. Rs. 1,10,000/- on 7.2.1992 and Rs. 12,50,000/- on 16.3.1992. Similarly, there is no dispute that return of chargeable interest as referred above was not filed within stipulated time by assessee, rather same was filed pursuant to issuance of notice of re-assessment issued by Assessing Officer under Section 10 of the Interest-Tax Act, 1974. Similarly, it clearly emerges from record that further additional amount of tax on securities and head office investment account was ordered by the Commissioner Income Tax, while exercising powers under Section 19 of the Interest-Tax Act, 1974, pursuant to Board's instructions No. 1923 dated 14.3.1995

18. Similarly, it emerges from the order of Assessing Officer itself that assessee in its profit and loss account had declared interest received as Rs. 39.98 Crores, which was duly considered by the Assessing Officer and details relating to interest on approved securities i.e. chargeable for the period of six months i.e. from 1.10.1991 to 31.3.1992 was duly assessed as income of the assessee. At this stage, it would be profitable to refer to Section 13 of the Interest-Tax Act, 1974, which is reproduced below:

> "Penalty for concealment of chargeable interest
>
> 13. If the Assessing Officer or the Commissioner (Appeals) in the course of any proceeding under this Act, is satisfied that any person has concealed the particulars of chargeable interest or has furnished inaccurate particulars of such interest, he may direct that such person shall pay by way of penalty, in addition to any interest-tax payable by him, a sum which shall not be less than, but shall not exceed three times, the amount of interest-tax sought to be evaded by reason of the concealment of particulars of his chargeable interest or the furnishing of inaccurate particulars of such chargeable interest."

19. True it is that provisions contained in Section 13 of Interest-Tax Act, 1974 clearly suggest that penalty is leviable on the assessee where he/she has concealed its interest chargeable to tax or furnished inaccurate particulars of interest chargeable to income tax. It clearly emerges from the record that assessee had furnished return of chargeable interest for the financial year 1991-92 relating to assessment year 1992-93. At the cost of repetition, it may be taken note at this stage that assessee had also paid advance tax of Rs. 23,50,000/-, against aforesaid income before closure of the financial year. It also emerges from the record that return was delayed on account of non-availability of return form. Averments with regard to non-availability of return form with the department at relevant time, has been nowhere disputed by the representative of the department, who conducted case before learned Tribunal below.

20. Their lordships of the Supreme Court in **Commr. of Inc.-Tax** v. **Angidi Chettiar** reported in (1962) 44 I.T.R. 739 have held as under:

> "The penalty provisions under section 28 would therefore in the event of the default contemplated by clause (a), (b) or (c) be applicable in the course of assessment of a registered firm. If a registered firm is exposed to liability of paying penalty, by committing any of the defaults contemplated by clause (a), (b)

or (c) by virtue of section 44, notwithstanding the dissolution of the firm the assessment proceedings are liable to be continued against the registered firm, as if it has not been dissolved.

Counsel contended that in any event, penalty for the assessment year 1949-50 could not be imposed upon the assessee firm because there was no evidence that the Income-Tax Officer was satisfied in the court of any assessment proceedings under the Income-Tax Act that the firm had concealed the particulars of its income or had deliberately furnished inaccurate particulars of the income. The power to impose penalty under section 28 depends upon the satisfaction of the Income-Tax Officer in the course of proceedings under the Act; it cannot be exercised if he is not satisfied about the existence of conditions specified in clauses (a), (b) or (c) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income-Tax Officer before the completion of the assessment proceedings by the Income-Tax Officer. Satisfaction before conclusion of the proceeding under the Act, and not the issue of a notice or initiation of any step for imposing penalty is a condition for the exercise of the jurisdiction. There is no evidence on the record that the Income-Tax Officer was not satisfied in the course of the assessment proceedings that the firm had concealed its income. The assessment order is dated the 10th November, 1951, and there is an endorsement at the foot of the assessment order by the Income-Tax Officer that action under S. 28 had been taken for concealment of income indicating clearly that the Income-Tax Officer was satisfied in the course of the assessment proceedings that the firm had concealed its income.

In our view, the High Court was in error in holding that penalty could not be imposed under section 28 (1) (c) upon the firm Messrs. S. V. Veerappan Chettiar & Co. after its dissolution."

21. Their lordships of Supreme Court in **K.C. Builders** v. **Asstt. C.I.T. (S.C.)** reported in (2004) 265 I.T.R. 562 have held as under:

"Section 147 of the Act deals with income escaping assessment. Section 148 deals with issue of notice where income has escaped assessment. Section 254 deals with orders of Appellate Tribunal. Section 256 deals with statement of case to the High Court (reference). Section 271 (1)(c) reads as follows:- "Section 271. Failure to furnish returns, comply with notices, concealment of income, etc. (1) If the Assessing Officer or the Commissioner(Appeals) in the course of any proceedings under this Act, is satisfied that any person

(a) ..

(b) .

(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, -

(i) .

(ii)

(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income."

One of the amendments made to the abovementioned provisions is the omission of the word "deliberately" from the expression "deliberately furnished inaccurate particulars of such income". It is implicit in the word "concealed" that there has been a deliberate act on the part of the assessee. The meaning of the word "concealment" as found in Shorter Oxford English Dictionary, 3rd Edition,

Volume I, is as follows:- "In law, the intentional suppression of truth or fact known, to the injury or prejudice of another."

The word "concealment" inherently carried with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if takes out the case from the purview of non-disclosure, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty under Section 271(1) (iii) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income. Where the additions made in the assessment order, on the basis of which penalty for concealment was levied, are deleted, there remains no basis at all for levying the penalty for concealment and, therefore, in such a case no such penalty can survive and the same is liable to be cancelled as in the instant case. Ordinarily, penalty cannot stand if the assessment itself is set aside. Where an order of assessment or reassessment on the basis of which penalty has been levied on the assessee has itself been finally set aside or cancelled by the Tribunal or otherwise, the penalty cannot stand by itself and the same is liable to be cancelled as in the instant case ordered by the Tribunal and later cancellation of penalty by the authorities."

22. Similarly, Division Bench of Delhi High Court in **CIT** v. **Bacardi Martini India Ltd. (Delhi)** reported in (2007) 288 ITR 585 (Delhi) have held as under:

"14. We have heard the counsel for the parties and perused the record. It has been observed by the Supreme Court in K.C. Builders and Anr v. Assistant Commissioner of Income Tax- 2004 ITR Vol. 265 page 562, that concealment inherently carries with it the element of means ria. It is implied in the word 'concealment' that there has been a deliberate act on the part of the assessed. The meaning of word 'concealment' as found in Shorter Oxford Dictionary III Edition, Vol-I is "in law the intentional suppression of truth or fact known, to the injury or prejudice of another". Supreme Court further observed that mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income, unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assess to hide or conceal the income so as to avoid imposition of tax thereon. In order that a penalty under Section 271(1)(iii) may be imposed, it has to be proved that assessed has consciously made the concealment or furnished inaccurate particulars of his income.

15. It is clear from the law laid down by the Supreme court that concealment must be accompanied with the intention of the assessed to evade his tax liability. The assessed in this case had uniformly claimed expenditure against four heads in three assessment years. When the appeal against the order of Assessing Officer before CIT (A) in respect of assessment order 1998-1999 failed the assessed instead of preferring appeal considered it proper not to litigate further as it was running into heavy losses and even if the appeal had been allowed, the assessed would not have paid any tax. The assessed in any case would have remained in heavy losses. The assessed therefore thought it proper not to prefer an appeal and after receipt of order, assessed made an application on 4.2.2003 to correct the income returns of subsequent years in accordance with order of CIT

for the year 1998-1999. The assessed, therefore, filed revised returns deleting the expenses which were disallowed by the CIT (A). In the relevant year assessed had also claimed expenses of Rs. 2 crores paid by the assessed in terms of the agreement entered into by the assessed with the leasing Lesser. The assessed claimed the entire amount of Rs. 2 crores as deduction since the assessed had paid this amount of Rs. 2 Crores to the Lesser. There is no dispute that the assessed had disclosed all particulars. It was only difference of opinion between the assessed and the Assessing Officer and the assessed accepted the opinion of the Assessing Officer instead of preferring an appeal.

16. It is not a case where assessed had not been able to explain any expenditure or had failed to give any details and the Assessing Officer had added the same into the income. In Durga Timber v. CIT 197 ITR Page 63, relied upon by the appellant, during the course of the assessment proceedings the Income Tax Officer had noticed cash credits and investments shown in the books of account and asked the assessed to give explanation. The assessed could not give explanation of entires nor could explain the source of income and admitted that the two amounts be treated as his concealment. Under these circumstances court observed that there was concealment of income and penalty was justified. In the present case assessed had explained all the expenditure and had actually incurred the expenditure but the expenditures were disallowed because of difference of opinion between the assessed and the Assessing Officer. This is not a case where revised return was filed as a result of discovery of some facts by the Assessing Officer or inability of the assessed to explain the expenditure. The revised return was filed because some of the expenditure were disallowed by the CIT (A) appeal for year 1998-99 although the expenditure were not doubted. There are cases where an expenditure is disallowed by the Assessing Officer and it is allowed by the CIT (A). It is again disallowed by the ITAT and in appeal allowed by the High Court and may be disallowed by the Supreme Court. Merely because there is difference of opinion for allowing or disallowing the expenditure between the assessed and Assessing Officer, it cannot be said that assessed had intention to conceal the income. The filing of the revised return excluding some of the disallowed expenditure and claiming expenditure of Rs. 2 crores which was actually spent by the assessed in the relevant assessment year as deduction, does not amount to concealment or furnishing inaccurate particulars. The assessed had given all particulars of expenditure and income and had disclosed all facts to the Assessing Officer. It is not the case of the Assessing Officer or the appellant that in reply to the questionnaire of the Assessing Officer, some new facts were discovered or Assessing Officer had dug out some information which was not furnished by the assessed.

17. We find that appellant's contention of concealment of income by the assessed or furnishing of false particulars by the assessed has no basis. There is no force in the appeal and the appeal deserves to be dismissed and is hereby dismissed. No order as to costs."

23. Similarly, this Court sees substantial force in the arguments having been made by the learned counsel representing the respondent that there was no occasion for the respondent Bank to show interest on securities and interest on head office investment account, because same was made chargeable pursuant to Board's instructions No. 1923 dated 14.3.1995 and that too for the period October, 1991 to 31.3.1992 and as such there is no concealment, if any, on the part of assessee. Learned counsel representing the appellant was unable to dispute that interest on securities and interest on head office investment account was made chargeable pursuant to Board's instructions No. 1923 dated 14.3.1995 and as such, this Court sees no occasion for assessee Bank to declare same in its profit and loss account, wherein it had declared interest of Rs. 39.98 Crores, on approved securities for the period 1.10.1991 to 31.3.1992. Otherwise also,

penalty order dated 28.5.2010 passed under Section 13 of the Interest-Tax Act, 1974, nowhere suggests that appellant was able to prove on record that assessee concealed particulars of interest or furnished inaccurate particulars of interest, rather, careful examination of material available on record clearly suggests that assessee had furnished complete particulars of its income in the profit and loss account and as such, there is no illegality or infirmity in the order passed by learned Tribunal below, whereby it has held that there is no merit in holding assessee liable to pay penalty under Section 13 of the Interest-Tax Act, 1974.

24. Thus, this Court sees no illegality or infirmity in the order passed by learned Tribunal below, whereby it has deleted penalty on the ground that interest became chargeable to tax only after Board's instructions No. 1923 dated 14.3.1995, because, admittedly, interest on securities and interest on head office investment account was made chargeable pursuant to Board's instructions, which could certainly be not made applicable to the assessment made for the period October, 1991 to 31.3.1992.

25. In these circumstances, we answer both the substantial questions of law in favour of the respondent and against the appellant.

26. Accordingly, impugned order is upheld and appeal is dismissed. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Gurbax Singh ...Appellant.
Versus
Kaushalya Devi & Ors. ....Respondents.

RSA No.322 of 2006.
Reserved on : 29.3.2017.
Decided on : 19th April, 2017.

Indian Succession Act, 1925- Section 63- Plaintiffs filed a civil suit pleading that plaintiffs and proforma defendants are owners in possession of the suit land – the Will set up by defendant No.1 is a fake document- the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that the Will was executed on 3.2.1986 and was registered on 5.2.1986 – the witnesses appeared before the Court in the year 2000 after more than 14 years – human memory can fade with the passage of time and due allowance has to be given to this fact – however, the Will was not produced at the time of attestation of mutation – the reason for disinheriting natural heir was not given - beneficiary had taken an active participation in the execution of the Will – scribe of the Will was not examined – attesting witness has not stated that the testator had put his signatures in his presence- the Courts had rightly appreciated the evidence- appeal dismissed.(Para-9 to 12)

For the appellant Mr. Amrinder Singh Rana, Mr. H.S. Rana, and Ms. Ritika, Advocates.
For the respondents : Mr. Rajiv Jiwan and Mr. Prashant Sharma, Advocates, for respondents No.1 & 2.

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 appellant against the judgment and decree, dated 17.4.2006,

passed by the learned District Judge, Bilaspur, District Bilaspur, H.P, in Civil Appeal No.16 of 2001, whereby the learned Appellate Court below has affirmed the judgment and decree passed by learned Sub Judge 1st Class, Bilaspur, District Bilaspur, in Civil Suit No.169/1 of 1997, dated 31.10.2000.

2. Briefly stating facts giving rise to the present appeal are that respondents/plaintiffs (hereinafter referred to as 'plaintiffs') filed a suit for declaration against the appellant/defendant (hereinafter referred to as 'defendant') alleging that plaintiffs and proforma defendants are owner-in-possession of the land comprised in Khasra Nos.328, 342, 364, 409 and 500, Khewat No.160, Khatauni No.183, measuring 14-19 bighas (hereinafter referred to as 'the suit land') situated in Village Behal, Pargana Fatehpur, Sub Tehsil Shri Naina Devi Ji, District Bilaspur, H.P, to the extent of one share each being legal heirs of deceased Ganga Ram. Defendant No.1 has no right, title or interest over the suit land. Plaintiffs and proforma defendants are daughters of Ganga Ram, all are married and residing at the house of their in-laws. Ganga Ram expired on 4.3.1994 and his daughters being Class-I heirs, have succeeded to his entire estate, vide mutation No.1771, dated 5.5.1994. Defendant No.1 being son-in-law of Ganga Ram (deceased), proclaiming that a Will was executed in his favour by his father-in-law and on the basis of said Will, he is interfering in the ownership and possession of the plaintiffs and proforma defendants. Smt. Geeta Devi wife of Ganga Ram, had already expired on 10.5.1991, plaintiffs and proforma defendants No.3 & 4 being daughters, are the legal heirs of Ganga Ram. It is averred that an appeal was preferred against mutation No.1771, before the learned Collector, alleging that a Will has been executed by Ganga Ram in favour of defendant No.1 and Prittam Singh husband of proforma defendant No.1, who had already expired on 30.10.1989, but the learned Collector ordered that Prittam Singh, had inherited one half share of the property of Ganga Ram and his share is to be inherited by his widow, which is wrong and illegal. Ganga Ram had only four daughters and they were taking care and serving Ganga Ram, during his life time. There was no occasion for Ganga Ram, to execute any Will in favour of Pritam Singh and Gurbax Singh and the alleged Will, which was presented before Revenue Officer, after the death of Ganga Ram, is fake document. Ganga Ram during his life time never disclosed the factum of Will to his daughters nor he had any intention to execute any Will and Ganga Ram had all love and affection for his daughters till his death. There was no occasion for him to disinherit the natural heirs. After decision of the learned Collector, defendants are threatening to dispossess the plaintiffs from the suit land.

3. The suit was resisted and contested by defendants by filing their joint written statement alleging that two daughters of Ganga Ram, namely, Sikander Kaur and Sagar Kaur, were married to Prittam Singh and Gurbax Singh and their husbands were looking after Ganga Ram during his life time. The plaintiffs and their husbands never rendered any services or take care of Ganga Ram during his life time. Ganga Ram died on 4.3.1993, during his life time, he had executed a registered Will No.13 dated 5.2.1986 and the mutation of inheritance of Ganga Ram vide mutation No.1771 dated 5.5.1994 was sanctioned and attested by Assistant Collector 1st Grade, Swarghat, ignoring the registered Will. The said mutation was challenged before the learned Collector and the learned Collector, vide its order dated 4.2.1997, accepted the appeal qua share of appellant Gurbax Singh (defendant No.1). The share of Prittam Singh, who had pre-deceased Ganga Ram was given to the plaintiff and defendants No.2 and 3 in equal share, which order was challenged by the plaintiffs before the learned Divisional Commissioner. Ganga Ram, during his life time has executed a valid Will in presence of the witnesses. The learned Collector has wrongly sanctioned the mutation qua share of Pritam Singh in favour of the plaintiffs and proforma defendant No.2. After the marriage of daughters of Ganga Ram, Gurbax Singh and his brother Pritam Singh, was looking after Ganga Ram and his wife and he was happy with their service and executed a Will of his entire property in the name of Gurbax Singh and Prittam Singh (deceased). The plaintiffs have rightly been ignored since they have never served their father during his life time and were not taking care of him and the property in dispute is stated to be in possession of defendant No.1, during life time of Ganga Ram.

4. The learned trial Court framed following issues:

"1. Whether the plaintiffs and proforma defendants are owners-in-possession of the suit land, as alleged ? OPP.

2. Whether the order passed by SDO, Sadar, dated 5.5.1994 and 4.2.1997 are wrong, void and liable to be set aside, as alleged ? OPP.

3. Whether the Will alleged to have been executed by Ganga Ram, is the result of fraud ? If so its effect ? OPP.

4. Whether the plaintiffs are entitled to the relief of possession of the suit land in the alternative, as alleged ? OPP.

5. Whether the suit is not maintainable in the present form ? OPD.

6. Whether this Court has no jurisdiction to entertain the present suit ? OPD.

7. Whether the act and conduct of the plaintiffs are bars them to file the present suit, as alleged ? OPD

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

9. Whether the plaintiffs have no cause of action and locus standi to file the present suit ? OPD.

10. Whether the suit has not been properly valued for the purpose of Court fee and jurisdiction ? OPD.

11. Whether deceased Ganga Ram had executed a registered Will on 5.2.1986 voluntarily and his property is liable to be succeed on the basis of Will, as alleged ? OPD.

12. Whether the defendant No.1 is in possession of the entire suit land on the basis of Will ? If so its effect ? OPD.

13. Relief."

5. The learned trial Court after deciding Issue Nos.1 to 4 in favour of the plaintiffs, Issue Nos.5 to 12 against the defendants, decreed the suit.

6. Feeling aggrieved thereby the plaintiff maintained first appeal before the learned District Judge, Bilaspur, assailing the findings of learned Court below being against the law and without appreciating the evidence and pleading of the parties to its true perspective. However, the learned Appellate Court below affirmed the findings of the learned trial Court and dismissed the appeal. Now, the appellant has maintained the present Regular Second Appeal, which was admitted on the following questions of law :

" 1. Whether the judgment/decree passed by the learned Courts below are the result of mis-reading as well as misinterpretation of oral as well as documentary evidence placed on record especially Ex.D-1, Ex.D-2 and Ex.D-3 ?

2. Whether the learned Courts below are right in rejecting the registered Will No.13 dated 5.2.1986 Ex.DW1/A, which is duly executed by deceased Ganga Ram during his life time ?

3. Whether the learned Courts below are right in passing the judgment and decree of permanent prohibitory injunction in favour of the plaintiffs since there is no issue of permanent prohibitory injunction has been framed ?"

7. Learned counsel appearing on behalf of the appellant has argued that the Will was duly registered and executant died after eight years of the execution of Will. He has further argued that learned lower Appellate Court below has not applied the law correctly with regard to proving of the Will and learned lower Appellate Court below has come to the wrong conclusion, so

in the interest of justice appeal may be allowed. On the other hand, learned counsel appearing on behalf of the respondent has argued that the Will was not proved by the plaintiff, in accordance with law, as the Will was forged document, so the impugned judgment and decree passed by the learned lower Appellate Court below needs no interference.

8. In rebuttal, learned counsel appearing on behalf of the appellant has argued that the Will was registered document and it was duly registered at Swarghat. He has further argued that attesting witnesses and the scribe has duly proved the execution of the Will and there was no suspicious circumstances surrounding the Will.

9. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the entire record in detail.

10. At the very outset, the pedigree table of Ganga Ram, is as under :

PEDIGREE TABLE

Bahadur
|
Pohloo
|
Ganga Ram   Geetto (wife)
|

(Daughters of Ganga Ram)

Kaushlya Devi , plaintiff No.1 w/o Joginder Singh	Surti, plaintiff No.2 w/o Chet Ram	Sikander Kaur, proforma defendant No.2 w/o Gurbaksh Singh	Sagar Kaur, proforma defendant No.3 w/o Preetam Singh died on 30.10.1989.

Meaning thereby Ganga Ram was having only four daughters and no son. He executed a Will in favour of the husbands of his two daughters. These two son-in-laws in favour of whom the alleged Will is executed by Ganga Ram are real brothers. Thus, it is clear that one of the requirement of due execution of the Will is its attestation by two witnesses. Section 68 of Indian Evidence Act speaks as to how a document required by law to be attested can be proved. On combined reading of Section 63 of the Succession At, 1925 with Section 68 of the Evidence Act, it appears that a person propounding the Will has to prove that the Will was duly executed and that can not be done by simply proving the signature of the testator on the Will but must also prove that signature were also made properly as required by clause (c) of Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicion circumstance surrounding to the execution of Will, proof of testamentary capacity and the signature of testator as required by law is sufficient to discharge the onus. However, when there are suspicious circumstances, the onus is always on the propounder to explain them to the satisfaction of the Court before the Court accept the Will as genuine. Where circumstance given rise to doubt, it is for the propounder to satisfy the conscious of the Court. These suspicious circumstances may be as to the genuineness of the signatures of the testator, condition of the testator's mind depositions made in the Will may appear to be un-natural, improvable or unfair in the light of relevant circumstances or there might be every indication in the Will to show or the Will may otherwise indicate that the said deposition may not be the result of testator's free will and mind. In such a case, the Courts would naturally expect that all legitimate suspicious should be completely removed before the document is accepted is the last Will of the testator. The presence of beneficiary is also one of suspicious circumstances. It is well settled law the Will cannot be set aside only because the beneficiary has taken active part of the execution of Will.

The Will Ex.DW1/A was executed on 3.2.1986 and registered on 5.2.1986 and Ganga Ram died on 4.3.1994. Gurbax Singh (defendant No.1) while appearing as DW-2 on 25.9.2000. Similarly, his two other attesting witnesses Ram Singh and Hussan Singh had appeared as DW-3 and DW-4 on 5.10.2000 i.e. after more than 14 years from the execution of Will Ex.DW1/A. DW-1 Onkar Chand Joshi, Registration Clerk, was also examined after 14 years. In such circumstances, it was not expected out of these witnesses that they would have remembered each and every detail in respect of date, time and manner about the execution and registration of Will in question. Their statements have to be appreciated in the light of the fact that human memory can reasonably fail after such a long period. The Will Ex.DW1/A Ganga Ram bequeathed his movable and immovable property in favour of Gurbax Singh (defendant No.1) and Prittam Singh. Smt. Geeto Devi wife of Ganga Ram testator shall be entitled to her maintenance during her life time. Therefore, according to the Will, Gurbax Singh and Prittam Singh were entitled to succeed said Ganga Ram on his death in exclusion of his daughters and wife. But on the death of Ganga Ram in the year 1994, all four daughters of Ganga Ram i.e. plaintiffs and proforma defendants No.2 and 3, have also inherited Ganga Ram in equal share. This shows that Gurbax Singh had not produced the said Will Ex.DW1/A before Revenue Authorities nor sought the attestation of mutation qua the suit land in his favour in exclusion to the daughters of Ganga Ram. It is not disputed that at the time of execution of Will dated 3.2.1986, Smt. Geeto Devi wife of Ganga Ram was alive and his four daughters were very much there. There is no iota of evidence or even suggestion if Ganga Ram had any ill-will or strained relations with his wife Geeto Devi and his four daughters. Ganga Ram had equal love and affection for his daughters and wife, therefore, it does not sound in the analyzing mind why said Ganga Ram had preferred to disinherit his wife and daughters from his property in preference to his two sons-in-law Gurbax Singh and Prittam Singh. Ganga Ram had no male child and had suffered a decree of `8,000/- from the learned Court below and had to pay rupees 6-7 thousands which he borrowed from money lender. Ganga Ram had executed the Will Ex.DW1/A in favour of his sons-in-law, is not convincing because of said fact which has not been mentioned by Gurbax Singh in his statement nor pleaded in the written statement. Gurbax Singh has taken an active part in the execution of the Will, which has confined a substantial benefit to him and the propounder himself has called the attesting witnesses. The propounder is required to remove the doubt by clear and satisfactory evidence. Onkar Chand Joshi, Registration Clerk, while appearing as DW-1, has testified the original Will Ex.DW1/A and has produced the copy of original Will. However, he has deposed that copy of Will is not in his hand and is unable to explain what has been written therein. According to him, the Will was scribed on 3.2.1986, but is unable to tell as to whether this Will was presented before the Sub Registrar. Even the witnesses will not personally know to him and he has not been able to identify the signature of the Sub Registrar over the Will, since he has never worked with him. DW-2 Gurbax Singh has deposed that plaintiffs and proforma defendants are real sisters. Prittam Singh was his real brother and was husband of defendant No.2 and all sisters are married. According to him, Ganga Ram was his father-in-law and was resident of Village Jhajar and had no male issue. He has stated that he alongwith Prittam Singh rendering services to his father-in-law and the plaintiffs were residing at the house of their husbands. The Will Ex.DW1/A was executed in favour of Gurbax Singh and his brother Prittam Singh. Accordingly, the Will was scribed at Bilaspur and got registered the same at Swarghat. After the death of Ganga Ram, his last rites were performed by Gurbax Singh and the suit land is stated to be in possession of Gurbax Singh. In his cross-examination, he has stated that at the time of execution of will, he alongwith Prittam Singh, Ram Singh, Hussan Singh and Ganga Ram, came to Bilaspur and has brought the attesting witnesses to Bilaspur, who belonged to his village. Prittam Singh has identified Ganga Ram and according to Will, half of the property was given to Prittam Singh. It was Gurbax Singh who paid expenses of the Will amounting to `500/-. At the time of registration of Will, both the attesting witnesses were also present and they appeared before the Sub Registrar where the Will was scribed. He has also admitted that the Will Ex.DW1/A was never produced before any Court. He has denied that a forged Will has been executed. At the same point of time, DW-3 Ram Singh attesting witness has admitted that Gurbax Singh and Prittam Singh are from his village. He has further stated that entire expenses of the execution of Will were borne out

by Ganga Ram. He has further stated that Will was presented for registration on second day, but the registration shows that it was presented for registration the third day. Statement of DW-2 also belies that when he says that Ram Singh and Hussan Singh were present alongwith Gurbax Singh, but PWs says that Ram Singh and Hussan Singh were not present nor Gurbax Singh was present at the time of registration of Will. Further, plaintiff Surti Devi, while appearing as PW-1, has stated that Ganga Ram was owner-in-possession of the suit land and after his death, all four sisters have come in possession of the disputed land and mutation has also been sanctioned in their favour. The defendant wanted to take forcible possession on the plea that Ganga Ram had executed a valid Will in his favour. She has further stated that Ganga Ram had equal love and affection for all four sisters and during his life time her father has never executed any document, but the defendant on the basis of forged document wanted to take forcible possession. She has further stated that Prittam Singh one of the beneficiary under the Will had expired 3-4 years prior to the death of Ganga Ram and she has also filed copy of jamabandi Ex.P1 and death certificate Ex.P2 to Ex.P4 of Geeto Devi, Ganga Ram and Prittam Singh. In her cross-examination, she has admitted that Kaushlya Devi, Surti Devi, Sikander Kaur and Sagar Kaur are real sisters and they had no brother. She has denied that Sikander Kaur and Sagar Kaur were residing with her father. She has also denied that the last rites of Ganga Ram were performed by prforma defendants No.2 and 3. However, she has admitted that the mutation was challenged before the Collector. PW-2 Shadi Lal, has reiterated the stand taken by the plaintiff and has deposed that all four sisters are in possession of the suit land according to their share and Ganga Ram had equal love and affection for all his four daughters. In his cross-examination, he has denied that plaintiffs never looked after the suit land and proforma defendants No.2 and 3 are in possession of the suit land. Both the attesting witnesses are from village of Gurbax Singh and who took them from Village Tikkari of Tehsil Nalagarh District Solan to Bilaspur, for the purpose of execution of Will and had paid the expenses for executing the Will, which fact has been admitted by the attesting witnesses Ram Singh that it was Gurbax Singh who brought the witnesses to Bilaspur. It is absolutely necessary that the testator must have signed the Will in presence of the attestator or a testator must have personal acknowledgement of his signature in the presence of the attestator as regards attestation of the Will. Clause (c) Section 63 of the Indian Succession Act, requires that the Will shall be attested by at least two witnesses. The requirement is that each of the attesting witness must have seen the testator signing or affixing his thumb mark in the Will has received from the testator a personal acknowledgement of his signature or thumb mark on the Will. There is also an additional requirement that each of the attesting witness shall also sign the Will in presence of the testator. The scribe of the Will has not been examined by the defendant and one of the attesting witness Ram Singh (DW-3), has only identified the signature of Ganga Ram. He has nowhere stated that the testator Ganga Ram affixed his signature and this witness has appended his signature in presence of the testator. Perusal of the Will shows that only one signature of Ganga Ram was obtained on the Will and not six times. The remaining five signatures on the Will were obtained at the time of registration of the Will, when admittedly this witness was not present. Though he has stated otherwise and the entire expenditure for execution of Will was borne out by Ganga Ram, which is contrary to the statement of Gurbax Singh. Similarly, this witness has nowhere stated that Ganga Ram had signed the Will in the presence of attesting witnesses. In his cross-examination, he has stated that he cannot recognize the signature at point Mark 'X' and Mark 'X-6'. The alleged signatures of Ganga Ram and his statement is further falsified that Ganga Ram was identified by him before the Sub Registrar. Admittedly, Smt. Geeto Devi wife of Ganga Ram and his four daughters i.e. plaintiffs and proforma defendants No.2 and 3, were entitled to succeed the entire property of said Ganga Ram as Class-I heirs in absence of any Will. Smt. Geeto Devi wife of Ganga Ram and his four daughters had also good relations with Ganga Ram and were residing happily with him and his daughters coming to his house frequently and Ganga Ram had equal love and affection for his wife and all daughters but no provision has been made for the daughters in Will Ex.DW1/A. The fact that the witnesses were called by Gurbax Singh son-in-law of Ganga Ram and he had taken an active part in the execution of Will, thereby other daughters of Ganga Ram have been disinherited from succession without any rhyme or reason. Since, it was a strong

suspicious circumstance surrounded in the execution of Will, which remained unexplained coupled with the fact that Gurbax Singh took an active part in the execution of Will Ex.DW1/A in favour of the plaintiff and Prittam Singh, who is his brother clearly shows that the Will is not valid showing actual wish of deceased, therefore, it is not to be acted upon and has been rightly held by the learned Court below not to be a genuine document. Therefore, in the absence of any Will, all four daughters of Ganga Ram, being Class-I heirs are entitled to succeed to the estate of Ganga Ram in equal share. The plaintiffs and proforma defendants No.2 and 3 are held to be owner-in-possession of the suit land in equal share and defendant No.1 Gurbax Singh has no right, title or interest over the suit land. The defendant has been rightly restrained from interfering with the suit land in any manner since the daughters of deceased Ganga Ram i.e. plaintiffs and proforma defendants No.2 and 3 are held to be owners in possession of the suit land. In these circumstances, mutation No.1771 is held to be valid and binding on the parties and the order of learned Collector is held to be void and illegal.

11. From the above discussion, it is clear that the learned Appellate Court below has committed no illegality and infirmity in appreciating the evidence and pleadings of parties are appreciated by the learned Courts below to its true perspective and the documents are interpreted correctly, as per law. So, substantial question of law No.1, is answered holding that learned Courts below has appreciated oral as well as documentary evidence to its true perspective and Ex.D-1 to Ex.D-3 are correctly appreciated. Substantial question of law No.2, is decided accordingly, as the Will could not be proved by the beneficiary, the learned Courts below has rightly rejected the Will and it was not proved on record in accordance with law and on contrary the plaintiff has proved the Will to be a forged document, as the parties are in exclusive possession of their shares on the basis of mutation attested after the death of Ganga Ram in favour of all his four daughters. The learned Courts below have rightly granted the relief of Permanent Prohibitory Injunction in the facts and circumstances of the case. The parties were knowingly their case while leading evidence, so substantial question of law No.3, is decided accordingly holding the findings of the learned Courts below are as per law.

12. With these observations, the appeal of the appellant is without merit and deserves dismissal. 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.

Hitesh Bisht and others ....Petitioners

Versus

State of H.P. ....Respondent

Cr.MMO No. 339 of 2016

Decided on: 19th April, 2017

Code of Criminal Procedure, 1973- Section 169- An FIR was registered for the commission of offences punishable under Sections 419, 420, 467, 468 read with Section 34 of I.P.C – the police filed a cancellation report- notice was issued to the complainant but complainant had died prior to issuance of the notice- notice was issued to general power of attorney- held that a general power of attorney had expired on the death of the complainant and general power of attorney could not have represented the complainant during the proceedings – order set aside.

(Para- 2 to 5)

For the petitioners: Ms. Yogita Dutt Sharma, Advocate.

For the respondent: Mr. Pramod Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

In this petition, an interesting legal question that after the death of complainant, whether her general power of attorney, through whom the complaint was filed, can be associated in pending proceedings to cancel the FIR, has been brought to this Court for consideration and adjudication.

2. Deceased Vidyawati has made an application under Section 156(3) of the Code of Criminal Procedure against the petitioners herein for registration of case under Sections 419, 420, 467, 468 read with Section 34 of the Indian Penal Code against them. On the direction of learned Judicial Magistrate, FIR No. 101/2008 came to be registered against them. The investigation was conducted by the police, however, without any result as nothing tangible could be collected against the accused-petitioners, connecting them with the commission of the offence they allegedly committed. The investigating agency, as such, had filed the cancellation report, Annexure P-1 with the submissions that no case under Sections 419, 420, 467, 468 read with Section 34 of the Indian Penal Code is made out against the accused-petitioners. The FIR, as such, was sought to be cancelled.

3. Notice was issued to the complainant but without any result as she had expired on 13.06.2011 i.e. well before the issuance of same. The death certification is Annexure P-3.

4. Subsequently, learned Judicial Magistrate proceeded to issue notice against the accused-petitioners. They have put in appearance through Sh. Rajesh Sharma, Advocate on 30th August, 2013. The zimini order dated 30.08.2013, Annexure P-5 (Colly.) makes it crystal clear that the death certificate qua the death of Smt. Vidyawati was produced in the Court and the same was taken on record. After that, the cancellation report remained listed from time to time for consideration till 7.7.2014, on which day, instead of considering the cancellation report, resorted to issue notice to the general power of attorney of the complainant. Now her general power of attorney has put in appearance and filed objections to the cancellation report. It is the objections so filed are presently at the stage of consideration before learned trial Court.

5. If not shocking, it is painful to point out that there was no occasion for learned Judicial Magistrate to have issued notice to the general power of attorney of the complainant for the reason that the general power of attorney executed by the deceased complainant had ceased to exist on her death and could have not been acted upon. It is here the trial Court has erred legally and as such an approach on the part of learned trial Court is not at all legally unsustainable. On the death of the complainant and the same disclosed to the trial Court on 30.08.2013, further course in accordance with law should have been resorted to in the matter. The entire proceedings, particularly after 7.7.2014 having taken in the matter are vitiated, hence legally unsustainable for the reason that on the death of complainant, the general power of attorney could have not been associated nor his objections invited or entertained. Therefore, I set aside all the orders passed in the matter by learned trial Magistrate after 7.7.2014 being perverse and relegate the parties to learned trial Magistrate with a direction to learned Magistrate to proceed afresh in the matter in accordance with law from the stage when the factum of death of complainant was disclosed and the death certificate qua her date of death was produced by the petitioners herein. In view of the cancellation report was filed long back in the month of September, 2008, there shall be a direction to learned Magistrate to decide the matter at the earliest preferably within three months from today.

6. The parties through learned counsel representing them are directed to appear in the trial Court on 5th May, 2017. The record of trial Court be sent back forthwith so as to reach there well before the date fixed.

7. With the above observations, this petition is allowed and stands disposed of. Copy ***dasti***.

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

Mukesh Kumar ….Petitioner.
Versus
M/s Ansysco through its MD … Respondent.

CWP No. 1951 of 2012
Decided on: 19.4.2017.

Constitution of India, 1950- Article 226- An application was filed for placing on record the identity card and other documents to show that the status of the petitioner was not of a trainee but of a workman – the Labour Court did not pass any order on the application but non suited the petitioner on the ground that he was unable to prove his status as a workman - held that the Labour Court should have passed an order on the application and should not have non-suited the petitioner without considering his application- writ petition allowed and award of the Labour Court set aside- matter remanded with a direction to decide the same afresh after passing an order on the application. (Para-4 and 5)

For the petitioner. : Mr. V.D. Khidtta, Advocate.
For respondent. : Mr. Dushyant Dadwal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

Heard. The principal grievance which has been raised by Mr. Khidtta learned counsel for the petitioner qua the award under challenge is that the said award is not sustainable in the eyes of law, as the learned Labour Court while passing the said award has failed to appreciate that there was a miscellaneous application filed by the petitioner/workman dated 4.9.2010 along with which certain documents were sought to be placed on record before the learned Labour Court to demonstrate that the engagement of present petitioner with respondent was not as a trainee, but as a workman, however learned Labour Court has neither discussed the application i.e. Annexure P-3 in the impugned award nor any separate order has been passed on the said application and non consideration of the same has caused grave prejudice to the petitioner.

2. Mr. Dadwal learned counsel appearing for the respondent has argued that the petitioner cannot be permitted to take this ground at this stage because neither any plea in this regard has been made in the writ petition nor this fact was urged or argued before the learned Labor Court.

3. I have heard learned counsel for the parties and have also gone through the records of the case well as the award passed by learned Labour Court.

4. A perusal of the record of learned Labour Court demonstrates that there is in fact on record a miscellaneous application dated 4.9.2010 filed under Section 151 of the CPC along with which documents have also been appended by the workman with the prayer that documents appended with the same be taken on record to demonstrate that he was *inter alia* issued identity card by the respondent/employer from which it can be inferred that the status of the present petitioner was not of a trainee but a workman.

5. Be that as it may, the fact of the matter remains that neither there is any order passed on the said application by learned Labour Court as to whether said application was allowed or rejected by it nor the same has been taken into consideration while passing the impugned award by the learned Labour Court. In view of the fact that the present petitioner/workman has been non suited by learned Labour Court solely on the ground that he

has not been able to prove that he was in fact engaged as a workman and further learned Labor Court has agreed with the contention of respondent/employer that the status of present petitioner was only that of a trainee, the documents appended along with the application were of significance as far as the adjudication of the reference before the learned Labour Court was concerned. Further there is no merit in the contention of Mr. Dadwal that the said issue has not been raised in the writ petition because it is evident from the averments made in the writ petition that the petitioner has raised the grievance of learned Labour Court not considering application filed by him before it under Section 151 of the CPC to place on record certain documents to prove his case.

In this view of the matter, the present writ petition is allowed. Impugned award passed by learned Labour Court dated 4.1.2012 in Reference No. 38 of 2007 is quashed and set aside and the matter is remanded back to the learned Labour Court with a direction to decide the same afresh after passing appropriate order on the miscellaneous application so filed under Section 151 of Civil Procedure Code by affording opportunity to rebut the same to the employee. It is clarified that this Court has not made any observation on the merits of the case. The application so filed by petitioner shall be decided by learned Labour Court on its merit and after adjudication on the same, learned Labour Court shall proceed to decide the main reference on the basis of material on record. Parties through their learned counsel are directed to appear before learned Labour Court on 22.5.2017. As the reference petition pertains to the year 2007, this Court hopes and expects that the same shall be decided by learned Labour Court as expeditiously as possible and hopefully before **31.12.2017**.

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

M/s Isotech Electrical & Civil Projects (P) Ltd. and another …Appellants.

Versus

M/s Sturdy Industries Ltd. …Respondent.

OSA No. 5 of 2016

Date of order: 20.04.2017

Code of Civil Procedure, 1908- Order 43 Rule 1(d)- An ex-parte decree was passed against the appellant – they filed an application for setting aside ex-parte decree along with an application for condonation of delay – the application for condonation of delay was dismissed – aggrieved from the order, present appeal was filed – it was contended that appeal is not maintainable- held that an appeal lies against the order dismissing the application for condonation of delay- objection overruled and appeal ordered to be listed for arguments. (Para-3 to 8)

Cases referred:

Union of India versus Nek Ram Sharma, 2004 (1) JKJ 280

Shyam Sunder Sarma versus Pannalal Jaiswal and others, (2005) 1 Supreme Court Cases 436

For the appellants: Mr. R.K. Bawa, Senior Advocate, with Mr. Vijay Chaudhary, Advocate.

For the respondent: Mr. Dushyant Dadwal, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Mr. Dushyant Dadwal, learned counsel for the respondent, argued that the appeal is not maintainable for the reason that vide impugned judgment, limitation petition under

Section 5 of the Limitation Act came to be dismissed, is not appealable as per the mandate of Order XLIII of the Code of Civil Procedure (for short "CPC").

2. The argument, though attractive, is devoid of any force for the following reasons:

3. Appellants were facing a judgment/decree in ex-parte, constraining them to file an application under Order IX Rule 13 CPC alongwith an application for condonation of delay. The learned Single Judge dismissed the limitation petition and consequently, the application under Order IX Rule 13 CPC was also dismissed.

4. The appellants have remedy available with them in terms of Order XLIII Rule 1 (d) CPC.

5. The High Court of Jammu & Kashmir in a case titled as **Union of India versus Nek Ram Sharma,** reported in **2004 (1) JKJ 280,** has laid down the same principle. It is apt to reproduce paras 6 and 11 of the judgment herein:

> *" 6. Now the question that becomes important is where an application has been filed and rejected whether the consequence will be the same or different. Section 5 cannot be read in isolation. It has to be read conjunctively with Section 3. Where application under Section 5 is not filed or where application has been filed and rejected the natural consequence would be the dismissal of appeal or application as provided under Section 3 of the Limitation Act. If the final out-come of the rejection of application under Section 5 is dismissal of application under Order 9 Rule 13 of Code of Civil Procedure and the order of dismissal is appealable under Order 43 CPC, there is no reason why such an order will not become appealable, merely because the Court has only rejected application under Section 5 of the Limitation Act.*
>
> *...............*
>
> *11. After considering the ratio of the judgments referred to above, I am of the opinion that an order rejecting the application under Section 5 of the Limitation Act or for that matter condonation under any other law merges with the order that may be ultimately passed in application or the appeal. The consequence of dismissal of condonation application is rejection of an application or the appeal as the case may be. Therefore, the out-come of such rejection is up-holding an order subject matter of appeal or the application. In the present case, rejection of application for condonation of delay has culminated into rejection application under Order 9 Rule 13 CPC. Admittedly an order rejecting application under Order 9 Rule 12 CPC is appealable under Order 43 (d). Thus, I am of the considered opinion that the order under appeal is appealable under Order 43 (d) Code of Civil Procedure. The appeal is accordingly admitted to hearing."*

6. A three Judge Bench of the Apex Court in the case titled as **Shyam Sunder Sarma versus Pannalal Jaiswal and others,** reported in **(2005) 1 Supreme Court Cases 436,** has dealt with the issue and held as under:

> *"8. The first question to be considered is whether an appeal accompanied by an application for condoning the delay in filing the appeal is an appeal in the eye of law, when the application for condoning the delay in filing the appeal is dismissed and consequently the appeal is dismissed as being time barred by limitation, in view of section 3 of the Limitation Act. There was conflict of views on this question before the high Courts. But the Privy Council in nagendra Nath Dey v. Suresh Chandra Dey held : (AIR p. 167)*
>
> > *"There is no definition of appeal in the Civil procedure Code, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate court, is an appeal within the ordinary acceptation of the*

term and that it is no less an appeal because it is irregular or incompetent."

8.1. These observations were referred to with approval by this Court in Raja Kulkarni v. State of Bombay.

9. The specific question involved, came to be considered by this Court in Mela Ram and Sons v. CIT. This Court held that an appeal presented out of time is an appeal and an order dismissing it as time barred is one passed in an appeal. This court referred to and followed the view taken by the Privy Council and by this Court in the two respective decisions above referred to. This Court quoted with approval the observations of Chagla C. J. in K. K. Porbunderwalla v. CIT (ITA p. 66) to the following effect: (SCR p. 176)

"Although the Appellate Assistant commissioner did not hear the appeal on merits and held that the appeal was barred by limitation his order was under Section 31 and the effect of that order was to confirm the assessment which had been made by the Income- tax Officer."

9.1. In Sheodan Singh v. Daryao Kunwar rendered by four learned judges of this court, one of the questions that arose was whether the dismissal of an appeal from a decree on the ground that the appeal was barred by limitation was a decision in the appeal. This Court held: (SCR pp 308 H-309 B)

"We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits, itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal."

9.2. In Board of Revenue v. Raj Bros. Agencies this Court approved the decision of the Madras High Court which had applied the principle stated in Mela Ram and sons (supra).

10. The question was considered in extenso by a full bench of the Kerala High court in Thambi v. Mathew. Therein, after referring to the relevant decisions on the question it was held that an appeal presented out of time was nevertheless an appeal in the eye of law for all purposes and an order dismissing the appeal was a decree that could be the subject of a second appeal. It was also held that Rule 3-A of Order 41 introduced by Amendment Act 104 of 1976 to the Code, did not in any way affect that principle. An appeal registered under Rule 9 of Order 41 of the Code had to be disposed of according to law and a dismissal of an appeal for the reason of delay in its presentation, after the dismissal of an application for condoning the delay, is in substance and effect a confirmation of the decree appealed against. Thus, the position that emerges on a survey of the authorities is that an appeal filed along with an application for condoning the delay in filing that appeal when dismissed on the refusal to condone the delay is nevertheless a decision in the appeal."

7. A learned Single Judge of this Court in **CMPMO No. 271 of 2015,** titled as **Jyotsna Industrial Training Central versus Delhi Press Prakashan Pvt. Ltd.,** decided on 8th January, 2016, has also laid down the same proposition of law.

8. Having said so, it is held that the appeal is maintainable.

9. The appeal stands already admitted on 28th September, 2016. List for final hearing on **5th July, 2017.**

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWP No.3330 of 2016 a/w CWPs No.21, 322 and 324 of 2017.
Judgment reserved on: 11.04.2017.
Date of decision: 22 April, 2017.

1. CWP No.3330 of 2016.

Himachal Road Transport Corporation and another .....Petitioners.
Versus
Bhupinder Singh and another .....Respondents.

For the Petitioners : Mr.Shrawan Dogra, Senior Advocate with Mr.Sunil Mohan Goel, Advocate, for petitioner No.1.
Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr.J.K.Verma, Deputy Advocate General, for petitioner No.2.
For the Respondents : Mr.B.C.Negi, Senior Advocate with Mr.Balwant Singh Thakur, Advocate.

2. CWP No.21 of 2017.

Himachal Road Transport Corporation and another . ....Petitioners.
Versus
Chiranji Lal and others .....Respondents.

For the Petitioners : Mr.Shrawan Dogra, Senior Advocate with Mr.Sunil Mohan Goel, Advocate.
For the Respondents: Mr.Janesh Mahajan, Advocate, for respondents No.1 to 5, 7 to 9, 12 to 18, 20, 22 to 26 and 28 to 31.
Mr.R.L.Chaudhary, Advocate, for respondent No.19.
Nemo for other respondents.

3. CWP No.322 of 2017.

Himachal Road Transport Corporation and another ....Petitioners.
Versus
Balinder Singh .....Respondent.

For the Petitioners : Mr.Shrawan Dogra, Senior Advocate with Mr.Sunil Mohan Goel, Advocate.
For the Respondent : Ms.Komal Chaudhary, Advocate.

4. CWP No.324 of 2017.

Himachal Road Transport Corporation and another .....Petitioners.
Versus
Rakesh Kumar and others .....Respondents.

For the Petitioners : Mr.Shrawan Dogra, Senior Advocate with Mr.Sunil Mohan Goel, Advocate.
For the Respondents : Mr.Rakesh Kumar Dogra, Advocate.

Case referred:

Shashi Bhushan versus State of Himachal Pradesh and others, I L R 2015 (V) HP 1

Constitution of India, 1950- Article 226- A process for filling 500 temporary posts of Transport Multipurpose Assistantswas initiated – it was contended that notification and rules are in violation of Section 45 of Road Transport Corporation Act, 1950- the applications were allowed and the process was held to be bad – aggrieved from the order, the present writ petition has been filed – held that preliminary objections were raised, which went to the root of the case- the locus standi of the applicants was challenged – no discussion was made regarding the objection- the writ petition allowed, order of the Tribunal set aside and matter remanded to the Tribunal for disposal in accordance with law. (Para- 7 to 9)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and facts arise for consideration, therefore, all these petitions were taken up together and are being disposed of by a common judgment.

2. The respondents are the original applicants, who approached the Himachal Pradesh State Administrative Tribunal (for short "Tribunal") claiming themselves to be aggrieved by the process initiated by the respondents (petitioners herein) for filling up 500 temporary posts of 'Transport Multipurpose Assistants' which posts according to them were that of 'Conductors' and they having been imparted training under the Skilled Development Scheme under the aegis of the State Government, therefore, had a preferential right of appointment.

3. The main ground of challenge before the learned Tribunal was that firstly notification dated 30.08.2014 and thereafter the rules issued thereunder were in contravention of Section 45 of the Road Transport Corporation Act, 1950 (for short "Act") inasmuch as the same have been framed without previous sanction of the State Government and secondly that the rules also contravened the Himachal Road Transport Corporation Class-I, II, III and IV Services (Recruitment, Promotion and Certain Conditions of Service Regulations), 1996 vis-à-vis the posts of conductors and lastly the respondents claimed a preferential right of appointment on the basis of their having undergone the course of 'Passenger Service Delivery Skill Development Training' and on the strength of their having already performed duties as conductors.

4. The petitioners, who were respondents, before the learned Tribunal filed their reply wherein in the preliminary objections/submissions, it had been averred that the Board of Directors in its meeting dated 07.11.2015 had decided to recruit 500 Transport Multipurpose Assistants and 300 drivers and these posts were to be filled up in accordance with the notification issued by it on 30.08.2014 in exercise of powers conferred under Section 45 of the Act. The posts were to be filled up in accordance with the rules known as 'Himachal Road Transport Corporation (Appointment and Condition of Service of Transport Multipurpose Assistant) Rules, 2014'. It was further averred that the respondents had no locus standi to file and maintain the original applications that too after some of them had unsuccessfully participated in the selection process. It was also averred that the original applications were otherwise not maintainable as some of the original applicants had only sought quashing of the notification dated 30.05.2016 without challenging the notification dated 30.08.2014 and rules of recruitment and, therefore, the petitions ought to have been dismissed. Lastly, the petitioners raised an additional plea and questioned the locus standi of the respondents in the original applications on the ground that some of them were total strangers to the selection process as they had not participated in the said process and, therefore, the original applications which were infact in the nature of public interest litigation were not maintainable at their instance before the learned Tribunal.

5. The learned Tribunal allowed all the original applications by concluding that the impugned notification dated 30.08.2014 and the rules framed thereunder lacked previous sanction of the State Government as was mandatorily required under Section 45 of the Act and, therefore, could not be sustained especially in light of the judgment of this Bench in ***CWP***

No.9492 of 2014 titled ***Shashi Bhushan*** *versus* ***State of Himachal Pradesh and others***, decided on 02.09.2015.

6. The petitioners have assailed the judgment passed by the learned Tribunal on the ground that before proceeding to determine the original applications on merits, it was incumbent upon the learned Tribunal to have atleast considered the preliminary objections raised by it, more particularly, when the same went to the root of the case inasmuch as it questioned the very locus standi of the respondents to file the original applications. In addition to that the judgment has also been assailed on merits on number of grounds taken in the memo of petitions. Whereas, learned counsel for the respondents would contend that the issue in question as raised in these petitions is no longer *res integra* in view of the decision rendered by this Bench in ***Shashi Bhushan's case*** (supra).

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

7. It is not in dispute that the petitioners in addition to contesting the original applications on merits had raised certain preliminary objections/submissions which were fundamental in character and went to the root of the case. The petitioners had questioned the very locus standi of the respondents to file and maintain the original applications at the instance of those applicants, who had participated in the selection process, but had failed to make a grade, on the grounds like acquiescence, waiver etc. In addition thereto in cases where the respondents had not even participated in the selection process, the petitioners had specifically questioned their locus standi on the ground that the original applications filed by them were in the nature of public interest litigation in service matters which as per settled law were not maintainable.

8. Adverting to the judgment passed by the learned Tribunal, one would notice that though the preliminary objections raised by the petitioners have been quoted in para-6 thereof, but strangely enough, there is no discussion whatsoever on any one of these preliminary objections. Notably, it is not the case of the respondents herein that the petitioners had not pressed these objections or had given up the same. If that be so, then obviously, it was incumbent upon the learned Tribunal to have first considered these preliminary objections and only after coming to a firm conclusion that the original applications at the instance of the respondents were maintainable could it have proceeded to determine these applications on merits.

9. Therefore, in the given circumstances, the relative merits of the case need not be gone into as the judgment passed by the learned Tribunal cannot be sustained and is accordingly set aside. The matter is remanded back to the learned Tribunal for decision afresh. Since, the matter is with regard to recruitment, it is expected that the learned Tribunal shall proceed to dispose of the original applications as expeditiously as possible and preferably by **31st May, 2017**.

10. However, before parting, it is once again made clear that we have not expressed any opinion on the merits of the case, lest it causes prejudice to any of the parties.

11. Accordingly, the petitions are disposed of in the aforesaid terms, leaving the parties to bear their own costs. All pending applications stand disposed of. The Registry is directed to place a copy of this judgment on the files of connected matters.

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

M.C. Shimla. ….Appellant

Versus

Sh. Mathu Ram and Another. ...Respondents

RSA No. 59 of 2008
Reserved on : 18.4.2017
Date of Decision: 22.4.2017

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for permanent prohibitory injunction for restraining the defendant from taking away timber or any other part of the deodar tree felled from his land – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed and the suit was decreed – held in second appeal that the trees were found to be standing on the land owned by the plaintiff in demarcation- plaintiff had filed an application for permission to fell the trees apprehending danger to his life and property- trees were felled by the defendant - however, this would not give ownership to the defendants - a notification was issued for handing over the trees to the Forest Corporation- however, this notification will apply to the trees owned by the defendant and not to the trees standing on the private land- the Appellate Court had rightly passed the judgment- appeal dismissed.(Para-9 to 22)

Cases referred:

Anvar P.V. Vs. P.K. Basheer and others (2014) 10 SCC 473
Manager, Reserve Bank of India, Bangalore Vs. S. Mani and others (2005) 5 SCC 100
Laxmibai and another versus Bhagwantbuva and others (2013) 4 Supreme Court Cases 97

For the Appellant: Mr.Harminder Chandel, Advocate.
For the Respondents: Mr.Y.P. Sood, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Respondent No. 1 in present appeal (herein after referred to be as plaintiff) has filed a civil suit against appellant Municipal Corporation, Shimla and proforma respondent No. 2 Divisional Forest Officer, Forest Division Shimla (herein after referred to be as defendants/defendants No. 1 and 2) seeking permanent prohibitory injunction restraining defendants from taking away timber or any part of converted from deodar tree felled illegally from his land comprised in Khasra No. 1164 situated in Mauja Khalini Shimla. The suit was dismissed by the trial Court however, in appeal, learned District Judge decreed the suit with costs by passing a decree for permanent prohibitory injunction restraining defendants from removing wood from the suit land either themselves or through their agents.

2. In present appeal, defendant No. 1, Municipal Corporation, Shimla assailed judgment and decree passed by learned District Judge (Forest), Shimla. Appeal was admitted on following substantial questions of law:-

> *"1. Whether after taking over the management of Divisional Forest Office of the Municipal Corporation by the H.P. State Govt. vide Notification dated18.4.2006, the impugned judgment and decree could legally be passed?*
>
> *2. Whether decree for permanent prohibitory injunction can be passed without there being positive finding regarding possession of the suit property?"*

3. Plaintiff is owner in possession of land comprised in Khasra No. 1164 situated in Mauja Khalini, District Shimla, H.P. as recorded in Intkhab Jamabandi Missal Haquit for the year 1999-2000 (Ex. PW-1/A). On 20.12.2000 he submitted an application (Ex. PW-1/B) to defendant No. 2 for felling permission of two dried deodar trees situated in his land which were endangering life and property of plaintiff and others. Defendant No. 2 vide letter dated 3.3.2001 (Ex. PW-1/C), informed plaintiff that trees in question were in forest No. 28 and had been duly marked by the department and plaintiff was directed to get the spot demarcated through revenue officers on any working day to clarify the position on spot. On application of plaintiff for demarcation, PW-2 Krishan Lal Kanungo carried out demarcation on the spot in presence of DW-1 Mela Ram, Deputy Ranger of Municipal Corporation, Shimla and found the trees in question in land comprised in Khasra No. 1164, owned and possessed by plaintiff. He submitted his demarcation report dated 27.3.2001 (Ex. PW-2/A). However, defendants did not accept the said report for the reason that PW-2 Krishan Lal Kanungo was not competent to demarcate the land in question, as there was a boundary dispute about land owned by Government.

4. Plaintiff was out of station from 1.8.2002 to 12.8.2002 and during that period defendants felled trees in question, which were noticed by plaintiff on 13.8.2002 on his return, whereupon plaintiff filed present suit for permanent prohibitory injunction against defendants for restraining them to remove the timber from the spot. On 19.8.2002, timber of trees was converted into logs in presence of plaintiff and list was prepared.

5. During pendency of appeal, on application dated 8.10.2003, submitted by defendants, demarcation of land in question was again carried out by Assistant Collector 1st Grade, Shimla in presence of plaintiff, Sh. Laiq Ram, Range Officer and DW-2 Sh. Mela Ram Deputy Ranger, representatives of defendants. Report of this demarcation is Ex. PX, according to which trees in question were found inside Khasra No. 1164 owned and possessed by plaintiff. Satisfaction of representatives of defendants and also that of plaintiff Mathu Ram was also recorded in the said report. This demarcation report was not questioned by parties at any point of time.

6. Defendants disputed ownership of trees by claiming those trees in forest area and disputing demarcation report Ex. PW-2/A for want of competence of PW-2 Krishan Lal Kanungo to demarcate the land abutting to Government land and contended that demarcation was required to be carried out by Tehsildar or Naib Tehsildar and it was also claimed in written statement that timber in question was in safe custody of Forest Corporation and on 19.8.2002 at the time of conversion of trees in question, a list of total converted timber was prepared in presence of plaintiff on the spot.

7. During pendency of appeal before learned District Judge, defendants produced a copy of notification dated 28.4.2006, whereby control of forest present within jurisdiction of Municipal Corporation, Shimla was resumed by the State of Himachal Pradesh. On the basis of this notification, defendants claimed that after taking over management of forests vide this notification learned District Judge would not have passed impugned judgment and decree against defendants.

8. Notification dated 28.4.2006 has not been proved on record in accordance with law. Even if judicial notice of this notification is taken, then also it relates to resumption of control of forests from Municipal Corporations to the Government of Himachal Pradesh, whereas in present case issue involved is that whether defendants are entitled for taking timber of the trees felled by Municipal Corporation after receiving application of plaintiff which were found in land owned and possessed by plaintiff.

9. Ownership of land and trees is concerned, that stands proved to be that of plaintiff, as in demarcation conducted by Assistant Collector 1st Grade, Shimla, on request of defendants, it has specifically reported that trees in question were found in the land belonging to plaintiff. From evidence on record, it stands proved that Khasra No. 1164 is owned and

possessed by plaintiff and trees in question were standing on the said land, which were felled by defendants in the month of August, 2002 and converted into timbers.

10. The suit of plaintiff is for restraining defendants from taking away timber from his land on the basis of ownership of trees belonging to his land. There is nothing on record to show that management of private land or trees standing thereon have also been resumed by Government. In present case no tree or land of forest is involved. Therefore, issuance of notification dated 18.4.2006 has no effect on the present lis. Consequently, substantial question No. 1 is decided accordingly.

11. Trees in question were in the land owned and possessed by plaintiff. Plaintiff had filed an application for permission of felling these trees apprehending danger for life and property from those trees. Those trees were felled by defendants, but claiming right over them by stating that these trees were standing in forest land. However, the stand of defendants was shattered by demarcation report Ex. PA, which was accepted and not assailed by defendants. DW-1 in his statement in the Court has admitted the said demarcation was conducted by competent authority and as per said demarcation trees in dispute were found belonging to plaintiff. Therefore, plaintiff's ownership and possession upon trees stands duly established on record.

12. After felling of trees converted timber was also lying in the land of plaintiff. In para 7 of plaint, plaintiff claimed that converted timber were lying on the spot. In written statement or in statement of DW-1, it was no where stated that converted timber was shifted from the spot. In reply to the said para, defendants have only stated that contents of para 7 were wrong and hence denied. In replication, corresponding para of the plaint was re-affirmed by plaintiff. In para 9 of plaint, plaintiff had stated that defendants were bent upon to take the timber for their own use and irreparable loss and injury was likely to be caused to plaintiff unless defendants are restrained. In para 9 of written statement, defendants replied that timbers were in safe custody of Forest Corporation and at the time of conversion of the said trees, defendants prepared a list of total converted timber in presence of plaintiff on the spot. In replication, plaintiff admitted the preparation of list on the spot, but claimed right on the extracted timber. In written statement, it was also not stated that converted timber was shifted or taken in possession by defendants or their agents. Defendants had examined only one witness DW-1 Sh. Mela Ram Deputy Ranger who remained completely silent on this issue. In cross-examination, he only stated that these trees were handed over to Forest Corporation in the year 2002. He is silent about physical possession of converted timber. Definitely, trees were handed over to Forest Department for felling on the spot, but they were removed and/or taken in possession from the spot after filing of the suit or at any point of time, has not come on record. There is no pleading, much less, evidence on record led by defendants to rebut the claim of plaintiff regarding possession of converted timber lying on spot.

13. Handing over tress by Municipal Corporation to Forest Corporation for felling on its behalf did not transfer ownership and possession of trees or timber in favour of Forest Corporation. Forest Corporation was acting on behalf of defendants and trees and land was belonging to plaintiff. Therefore, until extracted timber is removed from spot, the plaintiff had right to seek permanent prohibitory injunction against defendants and their agents. Forest Corporation was an agent of defendants, nothing more or nothing less.

14. Learned counsel for the defendants submits that in para 9 of written statement, it has been specifically stated that timber in question was in safe custody of Forest Corporation, which is sufficient to show that possession of timber is with the Forest Corporation. The claim of defendants was not admitted by plaintiff in replication, rather it was denied.

15. It is settled law that pleadings in absence of proof cannot be made basis for deciding an issue in favour of a party. Hon'ble Supreme Court in ***Anvar P.V. Vs. P.K. Basheer and others (2014) 10 SCC 473*** has held as under:-

"1. Construction by plaintiff, destruction by defendant. Construction by pleadings, proof by evidence; proof only by relevant and admissible evidence. Genuineness, veracity or reliability of the evidence is seen by the court only after the stage of relevancy and admissibility. These are some of the first principles of evidence. What is the nature and manner of admission of electronic records is one of the principal issues arising for consideration in this appeal."

16. In ***Manager, Reserve Bank of India, Bangalore Vs. S. Mani and others (2005) 5 SCC 100***, Hon'ble Supreme Court has observed as under:-

"19. Pleadings are no substitute for proof. No workman, thus, took an oath to state that they had worked for 240 days. No document in support of the said plea was produced. It is, therefore not correct to contend that the plea raised by the respondents herein that they had worked continuously for 240 days was deemed to have been admitted by applying the doctrine of non-traverse. In any event the contention of the respondents having been denied and disputed, it was obligatory on the part of the respondents to add new evidence. The contents raised in the letters of the union dated 30-5-1988 and 11-4-1990 containing statements to the effect that the workmen had been working continuously for 240 days might not have been replied to, but the same is of no effect as by reason thereof, the allegations made therein cannot be said to have been proved, particularly in view of the fact that the contents thereof were not proved by any witness. Only by reason of non-response to such letters, the contents thereof would not stand admitted. The Evidence Act does not say so."

17. In present case, plaintiff in his deposition in Court, specifically stated that timber, lying in his land, be handed over to him. In his cross-examination, no question has been put to him disputing his statement that timber was not laying in his land. Further DW-1 also remained silent about taking possession of converted timber from the spot. He only stated that trees, marked by Forest Corporation, were felled. What happened thereafter, he is silent. Nowhere, he denied possession of plaintiff or claimed possession of converted timber. Therefore, there is nothing on record to establish that possession of converted timber was handed over to Forest Corporation. Felling trees and conversion of timber on the spot, does not establish possession of timber in question with defendants particularly when trees and obviously timber thereof belonged to plaintiff and also lying on spot in the land owned and possessed by plaintiff. Therefore, averments made in para 9 of written statement, in absence of proof, are not sufficient to infer handing over of possession of timber to Forest Corporation.

18. On the contrary plaintiff, in his plaint claimed that timber was lying on the spot and also stated in his examination-in-chief in Court that he was entitled for timber lying in his land and the plaintiff was not questioned on this issue in cross-examination.

19. Dealing with effect of not cross-examining a witness on a particular point/circumstance, the Apex Court, after considering various judgments, in case ***Laxmibai and another versus Bhagwantbuva and others*** reported in ***(2013) 4 Supreme Court Cases 97***, has observed as under:

"40 Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the

unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See: Khem Chand v. State of Himachal Pradesh, AIR 1994 SC 226; State of U.P. v. Nahar Singh (dead) & Ors., AIR 1998 SC 1328; Rajinder Pershad (Dead) by L.Rs. v. Darshana Devi (Smt.), AIR 2001 SC 3207; and Sunil Kumar & Anr. v. State of Rajasthan, AIR 2005 SC 1096)."

20. In instant case, pleading in plaint are duly supported by evidence in statement of plaintiff and not specifically denied in written statement and also not questioned in cross-examination. Therefore, possession of timber with plaintiff can safely be considered.

21. In view of above observation, plaintiff has proved his ownership and possession over the disputed timber and the defendants have failed to prove any right, title and interest thereupon. Ownership and possession of plaintiff over Khasra No. 1164 and trees standing there upon is undisputed, thus on the basis of evidence on record, converted timber of those trees lying on the spot in premises of plaintiff after felling of trees, unless contrary proved, is to be presumed in possession of plaintiff. Therefore, learned District Judge has not committed any mistake in passing impugned judgment and decree in favour of plaintiff.

22. In view of above discussion, present appeal fails and judgment and decree passed by learned District Judges for permanent prohibitory injunction restraining the defendants either themselves or through their agents from removing the timber in question from the land of the plaintiff is upheld and appeal is dismissed with costs.

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

State of Himachal Pradesh ….Appellant
Versus
Raj Kumar ….Respondent

Criminal Appeal No. 377 of 2015
Judgment reserved on: 29.03.2017
Date of Decision: 22.04.2017

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to the accused – the accused started harassing the deceased for not delivering a child and for not bringing sufficient dowry- a son was born but the harassment continued – the deceased committed suicide- the accused was tried and acquitted by the Trial Court- aggrieved from the order, present appeal has been filed- held in appeal that prosecution has to establishinstigation by the accused to commit suicide or conspiracy with others for the commission of the suicide- PW-2 and PW-3 did not support the prosecution version- testimonies of PW-1 and PW-8 are vague and there is no reference to the time, place and manner of harassment – the statements are not sufficient to prove the prosecution version- Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-7 to 22)

Cases referred:

Raja and others Vs. State of Karnataka (2016) 10 SCC 506

Vipin Jaiswal Versus State of Andhra Pradesh, (2013) 3 SCC 684
Gurcharan Singh Versus State of Punjab, (2017) 1 SCC 433

For the appellant : Mr. V.S. Chauhan, Additional Advocate General, with Mr. Puneet Rajta, Deputy Advocate General.
For the accused : Mr. Yudhbir Singh Thakur, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Aggrieved by acquittal of respondent-accused vide judgment dated 23.04.2015, passed by the learned Additional Sessions Judge (1), Mandi District Mandi, H.P. Camp at Sunder Nagar in Sessions Trial No. 07 of 2012 in case FIR No. 64/2011 dated 13.05.2011, registered under Sections 498-A and 306 of the Indian Penal Code in Police Station Sundar Nagar Mandi, H.P., the State has preferred present appeal with prayer to set aside impugned judgment and to convict respondent-accused under aforesaid sections.

2. On 13.05.2011 at about 12.20 AM, police machinery was set in motion by PW-2 Lal Singh and PW Bansi Ram (not examined) through telephonic message to Police Station, Sunder Nagar, District Mandi informing that Meera Devi (deceased) wife of accused had expired in suspicious circumstances. The said information was recorded as rapat No. 5/A dated 13.05.2011 Ex.PW-6/A and PW-10 Inspector Amar Chand alongwith Police officials including PW-9 ASI Tarlok Chand rushed to the spot where PW-1 Lalman, brother of deceased, made a statement Ex. PW-1/A under Section 154 Cr.PC stating therein that his sister deceased Meera Devi was married to accused about 20 years back and accused had been maltreating his sister for not delivering a child and dowry. However, after about 18 years of marriage, deceased delivered a son but despite that accused continued beating his sister under influence of liquor and for want of gifts from parents of deceased and as and when, after interval of 6-8 months, deceased visited her parental house, she had disclosed to him that accused was not desisting from beating her. About 8-9 months ago, on knowing that accused had beaten deceased very badly, he had rushed to their house alongwith his relatives. On 12.05.2011, at about 11.19 PM, he was telephonically informed by Jeet Ram about death of deceased whereupon he alongwith his brother accompanying relatives reached village Challoni in a Jeep and found dead body of deceased lying in the courtyard. On inquiring about it, accused told him that deceased hanged herself with rope on door of newly under construction house and he had brought deceased from the spot to the courtyard. It is alleged by PW-1 Lalman in his statement that his sister was subjected to beating and harassment by accused after marriage and accused compelled deceased to die and she committed suicide because of harassment and beatings in the hands of accused.

3. Aforesaid statement Ex. PW-1/A was sent to Police Station as 'Ruka' and on receiving said ruka, PW-7 SI Madan Lal lodged FIR Ex. PW-7/A and recorded endorsement Ex. PW-7/B in this regard on the ruka Ex. PW-1/A. Dead Body of deceased was sent for postmortem to Government Hospital, Sunder Nagar. PW-4 Dr. Rafia Banu conducted postmortem of deceased and Viscera was also sent to State FSL, Junga. As per report from State FSL no alcohol/poison was detected in liver, spleen, stomach, kidney and large intestine of the deceased. As per postmortem report Ex. PW-4/A deceased died due to asphyxia as a result of hanging leading to cardio respiratory failure and death.

4. PW-9 ASI Trilok Chand recorded statements of some of witnesses, whereas, PW-10 Inspector Amar Chand conducted and completed rest of investigation.

5. On completion of investigation challan was presented in Court and the accused was charge-sheeted under Sections 498-A and 306 IPC. On completion of trial, accused stands acquitted.

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

7. Prosecution has examined 10 witnesses to prove its case. Out of them PW-1 Lalman brother of deceased, PW-2 Lal Singh Pradhan Gram Panchayat, PW-3 Banita Kumari, niece of the deceased and accused, PW-8 Gulaba Ram maternal uncle of deceased have been examined to prove harassment to deceased by accused leading her to commit suicide. Rest of witnesses is Doctor and police officials who remained associated in investigation to perform their respective formal duties.

8. PW-2 Lal Singh Pradhan, Gram Panchayat and PW-3 Banita Kumari were declared hostile for resiling from their earlier statements recorded under Section 161 Cr.PC and were subjected to cross-examination by learned Public Prosecutor. It is settled that statement of hostile witnesses is not to be brushed aside in toto and Court can consider evidence of hostile witness to corroborate other evidence on record. It is also clearly well settled that mere fact that a witness is declared hostile does not make him unreliable witness so as to exclude his evidence from consideration altogether but the said evidence remains admissible in the trial and there is no legal bar to base conviction or acquittal upon testimony of hostile witness if corroborated by other reliable evidence. The Hon'ble Supreme Court in case Raja and others Vs. **State of Karnataka (2016) 10 SCC 506** has held as under:-

> "32. *That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."*

9. In examination-in-chief, PW-2 corroborated incident of suicide by deceased, telephonic information to police by him, investigation by police on the spot and taking rope in possession in his presence. Thereafter, he resiled from his statement recorded by police and during his cross-examination by Public Prosecutor he denied to have given any statement to the police stating therein that accused used to beat his wife after consuming liquor. Nothing with regard to harassing and beating deceased by accused could be extracted in his cross-examination.

10. PW-3 Banita Kumari in her cross-examination by Public Prosecutor, admitted making statement to police with regard to witnessing hanging body of the deceased with door of newly under construction house, lifting of dead body of deceased by accused. However she denied to have made statement regarding quarrel taken place between deceased and accused. She further stated that when they were staying with deceased and accused, no quarrel had taken place in their presence between couple and both of them used to live peacefully.

11. PW-1, Lalman in his deposition in Court, stated that accused used to beat his sister after consuming liquor and he was in habit of scolding her for dowry and whenever his sister used to visit his house after intervals of 6-8 months, she used to tell him that accused did not mend his ways and was in habit of beating her. He further stated that about 6 months prior to death of deceased, on receiving information that accused had beaten his sister, he and his brother alongwith his relatives went to accused's house to advise him whereupon accused admitted his fault of beating deceased under influence of liquor.

12. PW-8 Gulaba Ram who is maternal uncle of deceased, stated that both i.e. his niece (deceased) and accused usually quarrelled on the issue of dowry and accused was in habit of

beating deceased and deceased committed suicide on suffering maltreatment and harassment by accused.

13. On the basis of statements on record under Section 161 Cr.PC accused was charged under Sections 498-A and 306 IPC which reads as under:

> ***"498A. Husband or relative of husband of a woman subjecting her to cruelty****.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.*
>
> *Explanation.—For the purpose of this section, "cruelty" means—*
>
> *(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or*
>
> *(b) harassment of the woman where such harassment is with a view to coercing 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.*
>
> ***"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".*

14. Section 306 IPC provides punishment /abetment to commit suicide. The abetment is defined under Section 107 IPC which reads as under:-

> ***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. Illustration A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.*
>
> *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 facilitate the commission thereof, is said to aid the doing of that act."*

15. To prove guilt under Section 498-A IPC, prosecution has to establish 'cruelty' on the part of accused for which deceased was subjected to, as defined in explanation (a) and (b) appended to this section, according to which there must be a willful conduct of accused of such a nature so as likely to drive the woman to commit suicide or to cause grave injury or endanger life or limb or health (whether mental or physical) of the woman and/or there must be harassment of woman for any unlawful demand from woman or any person related to her or on account of failure to meet such demand. General allegations of cruelty or harassment may not be sufficient to convict accused for want of specific particulars of such cruelty and harassment.

16. The Hon'ble Supreme Court in case Vipin Jaiswal Versus State of Andhra Pradesh, reported in **(2013) 3 SCC 684** has held as under:

"11. In any case, to hold an accused guilty of both the offences under Sections 304B and 498A, IPC, the prosecution is required to prove beyond reasonable doubt that the deceased was subjected to cruelty or harassment by the accused. From the evidence of the prosecution witnesses, and in particular PW1 and PW4, we find that they have made general allegations of harassment by the appellant towards the deceased and have not brought in evidence any specific acts of cruelty or harassment by the appellant on the deceased".

17. For conviction of accused under Section 306 IPC, it is to be established on record that accused instigated deceased to commit suicide or conspired by engaging with some one else for that purpose or intentionally aided deceased by illegal omission or commission to do that. To convict accused for abetment of suicide ingredients of Section 107 IPC are must to be proved against accused.

18. The Hon'ble Supreme Court in case Gurcharan Singh Versus State of Punjab, reported in **(2017) 1 SCC 433** has held as under**:**

27. The pith and purport of Section 306 IPC has since been enunciated by this Court in Randhir Singh vs. State of Punjab (2004)13 SCC 129, and the relevant excerpts therefrom are set out hereunder.

"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. Vs. Orilal Jaiswal (1994) 1 SCC 73, 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."

28. Significantly, this Court underlined by referring to its earlier pronouncement in Orilal Jaiswal (supra) that courts have to be extremely careful in assessing the facts and circumstances of each case to ascertain as to whether cruelty had been meted out to the victim and that the same had induced the person to end his/her life by committing suicide, with the caveat that if the victim committing suicide appears to be hypersensitive to ordinary petulance, discord and differences in domestic life, quite common to the society to which he or she belonged and such factors were not expected to induce a similarly circumstanced individual to resort to such step, the accused charged with abetment could not be held guilty. The above view was reiterated in Amalendu Pal @ Jhantu vs. State of West Bengal (2010) 1 SCC 707.

29. That the intention of the legislature is that in order to convict a person under Section 306 IPC, there has to be a clear mens rea to commit an offence and that there ought to be an active or direct act leading the deceased to commit suicide, being left with no option, had been propounded by this Court in S.S. Chheena vs. Vijay Kumar Mahajan (2010) 12 SCC 190.

30. In Pinakin Mahipatray Rawal vs. State of Gujarat (2013) 10 SCC 48, this Court, with reference to Section 113A of the Indian Evidence Act, 1872, while observing that the criminal law amendment bringing forth this provision was necessitated to meet the social challenge of saving the married woman from being ill-treated or forcing to commit suicide by the husband or his relatives demanding dowry, it was underlined that the burden of proving the preconditions permitting the presumption as ingrained therein, squarely and singularly lay on the prosecution. That the prosecution as well has to establish beyond reasonable doubt that the deceased had committed suicide on being abetted by the person charged under Section 306 IPC, was emphasized".

19. In present case PW-2 and PW-3 desisted from supporting prosecution case and nothing incriminatory could be extracted in their evidence despite their cross examination by learned Public Prosecutor. Now statements of two witnesses i.e. PW-1 and PW-8 remains for consideration. Even if they are taken to be the gospel truth, there is only casual reference about beating of deceased and demand of dowry. They are not specific with respect to time, place and manner of harassment and demand of dowry by the accused. In their statement, there is no reference of willful conduct on the part of accused to drive deceased to commit suicide and also that of harassment for any unlawful demand or failure to fulfill such demand. There are only bald statements of PW-1 and PW-8 with regard to beatings and demand of dowry which are not sufficient to hold accused guilty for committing the offence under Sections 498-A and 306 IPC. There is nothing on record to say that accused instigated deceased to commit suicide or engaged with some one else for the said purpose or intentionally aided deceased to end her life.

20. It also emerges from statements of prosecution witnesses that marriage of deceased and accused had taken place about 23-24 years back and after 18 years of marriage, couple had begotten a son who was about 4 years old at the time of incident and the couple had celebrated birth of son which was also attended by PW-1 and PW-8 alongwith others. PW-1 alleged that accused was a contractor of apple orchard since last 20 years and he and accused were working together but on his refusal to work together, accused threatened to see him and that on account of behaviour of accused, deceased committed suicide. However, PW-8 also admitted that all expenses of hospital, during birth of child, were borne by accused. All these circumstances run counter to the allegations of harassment of deceased for want of dowry and render version of PW-1 and PW-8 doubtful.

21. On overall assessment of evidence on record, we are of considered opinion that prosecution has failed to prove essential ingredients for establishing guilt of accused under Sections 498-A as well as 306 IPC beyond reasonable doubt by leading a cogent, reliable and convincing evidence on record. It cannot be said that the learned trial court has not appreciated the evidence correctly and completely and acquittal of accused has resulted into travesty of justice or has caused mis-carriage of justice.

22. It is a settled principle of law that acquittal strengthens to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Accused has advantage of being acquitted by the trial Court and appellant has not been able to make out a case for interference in acquittal of accused in present appeal.

23. In view of above discussion, the present appeal, being devoid of any merit, is dismissed, as also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be sent back immediately.

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

State of Himachal Pradesh ....Appellant
Versus
Subhkaran ....Respondent

Criminal Appeal No. 279 of 2014
Judgment reserved on :12.04.2017
Date of Decision : 22.04.2017

Indian Penal Code, 1860- Section 363, 366 and 376- Prosecutrix was returning from School – she was kidnapped by the accused with an intent to compel her to marry him- she was sexually assaulted against her will in the house of the uncle of the accused- police was informed- prosecutrix and accused were recovered – the accused was tried and acquitted by the Trial Court- aggrieved from the judgement, present appeal has been filed- held that prosecutrix was proved to be aged 16 years 11 months and 12 days on the date of incident – Medical Officer found the evidence of sexual intercourse – the prosecutrix had not complained to any person in the bus that she was being taken away forcibly– prosecutrix had a mobile phone but did not complain to any person – hence, her consent was proved – she had left the home voluntarily- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-6 to 31)

Cases referred:

Laxmibai and another versus Bhagwantbuva and others, (2013) 4 SCC 97
Dehal Singh versus State of Himachal Pradesh, (2010) 9 SCC 85
Manu Sao versus State of Bihar, (2010) 12 SCC 310
Raja and others Vs. State of Karnataka (2016) 10 SCC 506

For the appellant	:	Mr. V.S. Chauhan, Additional Advocate General with Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.
For the respondent	:	Mr. Sunny Dhatwalia, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

State has preferred instant appeal against acquittal of respondent assailing judgment dated 22.04.2014, passed by the Additional Sessions Judge, Judge(II) Kangra at Dharamshala District Kangra, H.P. in Sessions trial in RBT S.C. No. 80J/VII/13/12 dated 22.04.2014, in FIR No. 171/11, registered at Police Station Jawali District Kangra, H.P. under Sections 363,366 and 376 IPC.

2. As per prosecution case on 15.07.2011 at about 12.00 (Noon), 17 years old prosecutrix, student of 10th class, while coming back from the school after taking her examination, was kidnapped by respondent from her lawful guardianship from a place Trilokpur with intent to compel her to marry with him and thereafter during succeeding night she was sexually assaulted by respondent against her will and consent in the house of his uncle in village Ghera/Seri.

3. On 15.07.2011, police machinery was set in motion by PW-5 Jagdish Chand, father of prosecutrix, by lodging missing Report in Police Post Kotla at about 9.00 PM with request to search his daughter as she had not returned home from school after her examination, which was over at about 12.30 PM.

4. It is the case of prosecution that during day time prosecutrix had made a mobile phone call to her friend PW-14 Usha Devi and PW-5 father of prosecutrix while present in Police Post Kotla was conveyed about this by parents of PW-14 Usha Devi and thereafter PW-1 Sonu Kumar wastraced at Mecleod Ganj through his mobile, used by prosecutrix to call PW-14 Usha Devi. He led police party, PW-2 Rajinder Singh Guleria Pradhan, PW-5 Jagdish Chand and others to the house of respondent wherefrom, on information of father of respondent, Police Party and others traced respondent and prosecutrix sleeping in the house of his uncle in village Seri. Prosecutrix was handed over to her father and respondent was arrested and also respondent and prosecutrix were medically examined. During investigation, towel, bed sheets and white chuni of prosecutrix and her date of birth certificate were also taken in possession. After completion of investigation finding prima facie, involvement of respondent in committing an offence under Sections 363,366 and 376 of the Indian Penal Code, challan was presented in the Court. On conclusion of trial, the trial Court has acquitted respondent.

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

6. Prosecution has successfully proved on record, by producing date of birth certificate of prosecutrix Ex. P-5 issued under Section 12/17 of Birth and Death Registration Act, 1969 by Registrar Gram Panchayat Trilokpur, that date of birth of prosecutrix was 22.07.1994. PW-4 Kishan Kumar, Panchayat Sahayak Gram Panchayat Trilokpur proved contents of the said certificate by comparing with original record which was not disputed by or on behalf of respondent as this witness was not cross-examined despite granting opportunity. Dealing with effect of not cross-examining a witness on a particular point/circumstance, the Apex Court, after considering various judgments,in case Laxmibai and another versus Bhagwantbuva and others reported in **(2013) 4 SCC 97,** has observed as under:

> *"40 Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See: Khem Chand v. State of Himachal Pradesh, AIR 1994 SC 226; State of U.P. v. Nahar Singh (dead) & Ors., AIR 1998 SC 1328; Rajinder Pershad (Dead) by L.Rs. v. Darshana Devi (Smt.), AIR 2001 SC 3207; and Sunil Kumar & Anr. v. State of Rajasthan, AIR 2005 SC 1096)".*

7. As per medical evidence, age of prosecutrix is 17 to 18 years. However, when admissible conclusive un-rebutted evidence of exact date of birth is available on record, determination of age on the basis of medical evidence is neither necessary nor relevant. In present case, though not required, medical evidence corroborates age of prosecutrix as proved on the basis of date of birth certificate. Therefore, age of prosecutrix, on the date of incident stands proved as 16 years 11 months and 12 days.

8. PW-11 Dr. Pankaj Katoch proved MLC Ex. PW-11/B issued by him after medical examination of respondent on 16.07.2011 establishing that there was nothing to suggest that respondent was incapable of performing sexual intercourse.

9. PW-13 Dr. Surekha Gupta proved MLC Ex. PW-13/B with respect to medical examination of prosecutrix alongwith her opinion Ex. PW-13/C endorsed thereupon according to which there was evidence of sexual intercourse. PW-10 Dr. Arvind Kumar also medically examined prosecutrix on 20.07.2011 who, on the basis of such physical examination as also that of PW-13 Dr. Surekha Gupta, opined that sexual intercourse had occurred.

10. In fact, respondent had not disputed rather claimed acquaintance with prosecutrix and her family and also in his statement under Section 313 Cr.PC, he stated that on relevant date, prosecutrix made telephonic call for picking her from the school after examination and further that prosecutrix was in visiting terms with him and his family, and he had also stayed in the house of prosecutrix and mother of prosecutrix had borrowed Rs.10,000/- from him and was assuring his marriage with prosecutrix and when he did not fulfill further demand of money, he was falsely implicated at the instance of family of prosecutrix.

11. Statement under Section 313 Cr.PC is not a substantive piece of evidence and it is not equivalent to confession of accused. Conviction cannot be based solely on the basis of statement made under Section 313 Cr.PC where prosecution failed to discharge its onus to prove its case as onus to prove certain facts is on the party who asserts. Similarly, in case where prosecution discharges its burden to prove certain facts leading to some presumption or indicating guilt of accused resulting shift of onus upon accused to rebut the same then onus to prove facts contrary to prosecution case cannot be said to be discharged by accused only on the basis of statement given under Section 313 Cr.PC. In such a situation accused has also to lead substantive evidence either under Section 315 Cr.PC or to bring some substantive evidence on record during evidence of prosecution in statements of witnesses as statement under Section 313 Cr.PC can only be considered and referred to corroborate substantive evidence led by either party. Statement under Section 313 Cr.PC has corroborative value and it can also be taken into consideration to complete the chain of missing link. False or impossible plea in statement under Section 313 Cr.PC may also be taken as adverse circumstance against accused. Accused has a right to remain silent but at the same time when onus is upon him to explain certain facts and circumstances which are only in his exclusive knowledge (say under Section 106 of Evidence Act), silence can be fatal for him. The Hon'ble Supreme Court in case Dehal Singh versus State of Himachal Pradesh reported in **(2010) 9 SCC 85** has held as under:-

> "23" Statement under Section 313 of the Code of Criminal Procedure is taken into consideration to appreciate the truthfullness or otherwise of the case of prosecution and it is not an evidence. Statement of an accused under Section 313 of the Code of Criminal Procedure is recorded without administering oath and, therefore, said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act............. There is reason not to treat the statement under Section 313 of the Code of Criminal Procedure as evidence as the accused cannot be cross-examined, with reference to those statements....................."

12. In another case Manu Sao versus State of Bihar, reported in **(2010) 12 SCC 310**, the Apex Court has elaborated evidentiary value of statement of accused under Section 313 Cr.PC as under:-

> *"12 Let us examine the essential features of this Section 313 Cr.P.C. and the principles of law as enunciated by judgments, which are the guiding factors for proper application and consequences which shall flow from the provisions of Section 313 of the Code.*
>
> *13. As already noticed, the object of recording the statement of the accused under Section 313 of the Code is to put all incriminating evidence against the*

accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also to permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and besides ensuring the compliance thereof the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or in the alternative to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross- examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put to the accused every important incriminating piece of evidence and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence.

14. The statement of the accused can be used to test the veracity of the exculpatory of the admission, if any, made by the accused. It can be taken into consideration in any enquiry or trial but still it is not strictly evidence in the case. The provisions of Section 313 (4) explicitly provides that the answers given by the accused may be taken into consideration in such enquiry or trial and put as evidence against the accused in any other enquiry or trial for any other offence for which such answers may tempt to show he has committed. In other words, the use is permissible as per the provisions of the Code but has its own limitations. The Courts may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution, however, such statements made under this Section should not be considered in isolation but in conjunction with evidence adduced by the prosecution".

13. PW-2 Rajinder Singh remained associated with PW-5 Jagdish Singh, father of prosecutrix and also in investigation since beginning till last. However, in the Court, he was declared hostile for resiling from his earlier statement recorded under Section 161 Cr.PC. It is settled position of law that statement of hostile witness is not to be brushed aside in toto but Court can consider evidence of hostile witness to corroborate other evidence on record. It is also well settled that mere fact that a witness is declared hostile does not make him unreliable witness so as to exclude his evidence from consideration altogether but the said evidence remains admissible in the trial and there is no legal bar to base conviction or acquittal upon testimony of hostile witness if corroborated by other reliable evidence. Hon'ble Supreme Court in case **Raja and others Vs. State of Karnataka (2016) 10 SCC 506** has held as under:-

"32. That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in Himanshu @ Chintu (supra) by drawing sustenance of the proposition amongst others from Khujii vs. State of M.P. (1991) 3 SCC 627 and Koli Lakhman Bhai Chanabhai vs. State of Gujarat (1999) 8 SCC 624. It was enounced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."

14. In the aforesaid settled position and in the light of admitted and proved facts and circumstances, veracity of prosecution witnesses particularly that of prosecutrix is to be evaluated for determining the guilt of respondent on the basis of material on record.

15. PW-5 Jagdish Singh is father of PW-3, prosecutrix. When prosecutrix did not return home till late evening despite her examination was over about 12.30 PM, PW-5 approached PW-2 Rajinder Singh Guleria, Panchayat Pradhan whereafter both of them went to police post Kotla and filed an application Ex. PW-5/A about missing of prosecutrix. According to PW-5 during that period a telephonic call was received from father of PW-14 Usha Devi, a friend of prosecutrix, disclosing that PW-14 had received a telephonic call from prosecutrix from Mobile Phone No. 9805497823 and the said fact was brought in the notice of police.

16. On tracing PW-1 Sonu Kumar through his mobile used by prosecutrix to call Usha Devi, he took police party as well as PW-2 and PW-5 to the spot wherefrom Police party and others reached in the house of respondent and on the basis of information given by father of respondent, prosecutrix and respondent were traced in village Seri sleeping in a room in house of uncle of respondent. These facts stand proved on record being not disputed in cross-examination. From trend of cross-examination read with explanation given in statement of respondent recorded under Section 313 of the Code of Criminal Procedure, it can safely be inferred that it is admitted fact that in the night of 15.07.2011 prosecutrix was found sleeping with respondent in house of his uncle. There are positive suggestions put to prosecutrix, also admitted by her, that when she and respondent reached in the house in village Seri, an elderly couple was present there and room of that couple was opposite to the room in which she was and those persons had inquired respondent about her and respondent had told that she was his friend and those persons provided meal to them and she shared bed with respondent during night. In cross-examination of PW-15 Investigating Officer also, though denied by him, it was suggested that at place Ghera prosecutrix had told him that she had gone with respondent with her consent.

17. Replying to question No. 34, in statement under Section 313 of the Code of Criminal Procedure, respondent stated that prosecutrix was in visiting terms with him and his family and she invariably used his taxi and he had also stayed in the house of prosecutrix. In cross-examination to PW-5 Jagdish Singh, about which he expressed ignorance, it was suggested that respondent and prosecutrix were good friends, they loved each other and prosecutrix wanted to marry respondent. The facts that prosecutrix accompanied respondent to his house and stayed with him in the house of his uncle and was found sleeping in one room with respondent also have corroboration from trend of cross-examination.

These facts also stand proved on record beyond reasonable doubt.

18. In examination-in-chief, PW-3 categorically stated that respondent sexually assaulted her during night on 15.07.2011 and in cross-examination, she stated that she was sexually assaulted by respondent twice. The fact that she had not resisted at that time, was not disputed rather admitted by her. A suggestion put to prosecutrix, which she admitted, that she had shared bed with respondent during that night, also corroborates the prosecution story that during the night of 15.07.2010, prosecutrix was exposed to sexual intercourse by respondent. This fact also stands established with corroboration of scientific evidence on record.

19. Now, question as to whether prosecutrix was enticed or taken by the respondent out of lawful guardianship by taking her from school to his uncle's house and she was subjected to sexual intercourse without her consent, and in case there was consent of prosecutrix as to whether prosecutrix was competent to consent for the same, is to be decided.

20. Prosecutrix, in her statement Ex. PW-3/A recorded under Section 154 of the Code of Criminal Procedure as well as in Court, stated that after examination, at about 12.00 noon, she reached near gate of her school at Trilokpur near the van of respondent, where respondent allured her for marriage and on her refusal, forcibly put her in his van and took away. They left the said van on stopping for empty fuel tank at Bhali and therefrom travelled in a

bus to Banoi wherefrom respondent took her to his home at Jhikar in a long white car where father of respondent scolded him and directed to leave prosecutrix with her parents, and about half an hour thereafter, respondent arranged a Alto car and also clothes of his sister-in-law (Bhabi) and informed her that they had to go Ghera where after and they started to Ghera in Alto Car. On the way, her school dress was got changed by respondent and she also contacted her friend through mobile phone of PW-1 Sonu Kumar driver of car, and from Ghera they went to village Seri on foot where after taking meals, respondent took her in a room of his uncle and slept with her and ravished her.

21. Prosecutrix also admitted that the bus boarded by them was full of passengers and there were 3-4 other persons already sitting in the long white car in which they travelled from Banoi to Jhikar. She went with respondent from school to Bhali in his van in broad day light, travelled in public transport vehicle i.e. bus from Bhali to Banoi, therefrom to village of respondent in a car with 3-4 other passengers, from Jhikar to Ghera in car driven by PW-1 Sonu Kumar, walked together on foot for 3 Kms from Ghera to Seri but she did not complain and even tried to complain to anybody in the bus or in the car or to anybody at Bhali, Banoi, Jhikar, Ghera or Seri. She was allegedly taken away forcibly by respondent in his van during peak hours of school as it was time when examination was over and maximum students were bound to be present at the gate of the school. Prosecutrix herself stated that there were other vehicles also parked in front of the gate of the school but there is, not even murmur, in her statement either in Ex. PW-3/A or in the Court that she had even made slightest effort to raise alarm or to approach any persons on these public places against forcible act of respondent.

22. It is also noticeable that respondent was scolded by his father for bringing prosecutrix to his house and was asked to leave prosecutrix with her parents but at that time also prosecutrix conspicuously, not only remained silent but voluntarily accompanied respondent in car of PW-1 to go to Village Ghera, changed her clothes, made mobile call to PW-14 and thereafter walked with respondent for about 3 Kms to reach house of his uncle at Seri for staying. At Seri also, on claiming her to be his friend in reply by respondent to question raised by his uncle, she remained silent and continued to join respondent even in bed till both of them were traced by police and her father.

23. It is prosecution case that prosecutrix contacted PW-14 Usha Devi on mobile which helped police to trace her. PW-2 Rajinder Singh Guleria, PW-14 Usha Devi and PW-17 ASI Deepak Kumar corroborated the said fact. PW-1 Sonu Kumar also stated that respondent and girl accompanying him, while travelling in his car, used his mobile to call someone. It establishes that prosecutrix was free to call anybody when she was travelling with respondent which falsify the stand of prosecutrix that she was forcibly taken or enticed by respondent for getting married.

24. Admittedly location of prosecutrix and respondent was traced on the basis of her telephonic call to her friend PW-14 Usha Devi. Prosecutrix and PW-5 admitted that mother of prosecutrix was also having mobile phone. While travelling with respondent, prosecutrix having opportunity to make a call, made it to her friend but not to her mother. She did not try to inform her parents about forcible act allegedly being committed by respondent and taking her without her consent.

25. Age of prosecutrix in instant case stands proved more than 16 years and consent on her part in the episode is duly established on record. Therefore, for consent, no case under Section 375 punishable under Section 376 IPC is made out against respondent.

26. So far as charges under Sections 363 and 366 IPC are concerned, prosecutrix is below 18 years of age and for taking or enticing a minor female under 18 years of age from lawful guardianship respondent can be convicted as for age of prosecutrix, her consent will be immaterial for purpose of Section 361 IPC, in case it is found that she was taken or enticed by respondent. But before convicting a person under Section 363 and 366 IPC, evidence must

establish that there was an active role of that person in enticing or taking a minor out of lawful guardianship with intention to compel minor to marry.

27. In her statement Ex. PW-3/A, prosecutrix stated that respondent visited her house thrice. On the other hand in Court she deposed that she was not known to respondent prior to the incident. However, in her later part of statement, she stated that respondent had visited her house once, two years prior to the incident but was not seen by her and his visit was informed to her by her cousin. She also stated that her friend Neha used to talk with respondent on Mobile Phone and to tell her that a person from Dharamshala knew her. She also stated that her mother might have taken lift in vehicle of respondent many times. Father of prosecutrix, PW-5 Jagdish Singh admitted that vehicle of respondent was being plied regularly in village but he expressed his ignorance about taking lift in the said vehicle by prosecutrix or his wife and visits of respondent in his house on numerous occasions and also night stay in his and his wife's absence. He also denied knowledge about friendship and love affair of his daughter with respondent and desire of his daughter to marry respondent. He did not deny these facts specifically and gave evasive replies to the suggestions put to him with regard to relations of respondent and his family.

28. Though, respondent claiming visiting house of prosecutrix on various occasions as also stated in his statement under Section 313 Cr.PC, however, prosecutrix denied the same and her father expressed ignorance about the same. Therefore, statement under Section 313 Cr.PC, in isolation, can not be made basis for deriving inference of such intimacy for want of substantive evidence on record in this regard. Hence, there is nothing on record to establish that even prior to date of incident, respondent played some role at any stage to solicit or persuade prosecutrix to abandon her legal guardianship. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of prosecutrix. That part, in our opinion, as held in S. Varadarajan vs. State of Madras AIR 1965 SC 942, falls short of an inducement to the minor to slip out of the keeping of her lawful guardianship and is, therefore, not tantamount to 'taking' or 'enticing'.

29. Prosecutrix was just about to reach majority and she herself left alongwith respondent. From evidence on record, it is duly proved that she boarded various vehicles including public transport and travelled with respondent at various places and also walked on foot about 3 Kms. She knowingly and voluntarily joined respondent. There is nothing on record to show any inducement by respondent or any active participation on his part by him in formation of intention of prosecutrix to accompany him. Active role on the part of respondent for inducing prosecutrix in taking or enticing prosecutrix out of the keeping of lawful guardianship of her parents cannot be said to have established. Intimacy of respondent with prosecutrix so as to entice or influence her is neither alleged nor admitted much less established on record. Therefore, respondent cannot be said to have 'taken' her out of her lawful guardianship. In present case, there is no enticing or taking as required to punish respondent under Sections 363 and 366 IPC.

30. From the above discussion, it is evident that the evidence adduced by the prosecution, cannot be treated as cogent, reliable, credible and trustworthy so as to prove offence alleged to be committed by respondent beyond reasonable doubt.

31. It is a settled principle of law that acquittal strengthens presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. The respondent has been acquitted by the trial Court. It cannot be said that learned trial court has not appreciated evidence correctly and completely and acquittal of accused has resulted into travesty of justice or has caused mis-carriage of justice. In this appeal, prosecution has failed to make out a case for interference in impugned judgment.

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

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

State of Himachal Pradesh …..Petitioner
Versus
Sanjiv Kumar and others …..Respondents.

Cr. Appeal No. 622 of 2008
Decided on : 24/04/2017

Indian Penal Code, 1860- Section 498-A read with Section 34- Prosecutrix was married to accused- she was being tortured for not bringing sufficient dowry- dressing table, sewing machine, refrigerator etc. were given to the accused by the father of the prosecutrix, who is a labourer – the accused continued to harass her and demanded Rs. 2 lacs for enabling the husband of the prosecutrix to start a business –the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed and the accused was acquitted- held in appeal that there was delay in recording of FIR, which was not properly explained – no specific time of making the demand was given – the evidence of the prosecutrix that accused attempted to assault her is not trustworthy- the Appellate Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 12)

For the petitioner: Mr. Vivek Singh Attri, Dy. Advocate General.
For the Respondents: Mr. J.L.Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the judgement recorded by the learned Sessions Judge, Hamirpur, whereby he reversed the findings of conviction pronounced upon the accused by the learned Judicial Magistrate 1st Class, Nadaun, District Hamirpur.

2. The brief facts of the case are that prosecutrix submitted application against the accused persons in Police Station, Nadaun, making the allegations that she was married to accused Sanjeev Kumar and since then all the accused persons had been torturing her for not bringing dowry. She was married about eight months back. It is written by her that after three months of marriage, one dressing table, sewing machine and a refrigerator, etc. were given by her father, who is a labourer, to the accused persons on their demand. But still they were not satisfied. All of them continued torturing her and made her to write on a paper that the accused persons were not demanding any dowry and that her father was giving some articles of his own to her. Her mother-in-law started telling her that her father is an army retired personnel and that she should bring Rs.2,00,000/- from him so that her husband Sanjeev Kumar settled in a business, otherwise, she should not return to the matrimonial home. Then, she states that she tried to talk to her in-laws on telephone, but they would not talk to her. She reports that in case she goes to her house she would be killed because her father could not give them Rs.2,00,000/-. So a request was made to take action and after completing all codal formalities and on conclusion of the investigation into the offences, allegedly committed by the accused, challan was prepared and filed in the Court.

3. A charge stood put to the accused by the learned trial Court for theirs committing offences punishable under Sections 498-A read with Section 34 IPC to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the C.P.C., were recorded in which they pleaded innocence and claimed false implication. They chose to lead evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal upon the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Sessions Judge, standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the material on record. Hence, he contends qua the findings of acquittal warranting reversal by this Court, in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Sessions Court 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 complainant, stayed at her matrimonial home from 28th November, 2002 uptill March, 2003. However, she, with respect to the purported penal misdemeanor(s), misdemeanor(s) whereof stood perpetrated upon her at her matrimonial home, during the period aforesaid, belatedly in August, 2003 lodged a report with the Police Station, concerned. The aforesaid belated lodging of the apposite F.I.R. by the complainant, with respect to the offences detailed therein, without any explanation being afforded by her, for the delay in the aforesaid lodging of the F.I.R, constrains this Court, to, conclude that prima facie the allegations constituted in the apposite F.I.R., hence spurring from proactive concoction besides premeditation. Consequently, the allegations constituted by the complainant, in the apposite F.I.R., cannot acquire any virtue of credibility.

10. Be that as it may, a perusal of the apposite F.I.R, makes a disclosure that the complainant, had initially satisfied the demands of the respondents/accused with respect to a refrigerator, sewing machine and a dressing table. However, subsequently, the accused/respondents herein made a demand upon her, for bringing to her matrimonial home, a sum of Rs.2 lacs, as financial assistance, for enabling the accused/respondent, to establish his business. Adduction of direct evidence, qua the aforesaid demand, cannot be insisted upon, as it is made within the precincts of the matrimonial home wherein the complainant resided, thereupon with secrecy gripping the making of the aforesaid demand besides its standing known only to the complainant, would also constrain this Court, to not insist qua the prosecution, projecting direct evidence in respect thereof. Nonetheless, the veracity of the aforesaid demand, has to be adjudged from the following aspects (a) the stay of the complainant at her matrimonial home being short lived. (b) there occurring no recital with specificity qua the time when the aforesaid demand was made by the accused upon the complainant. Since the complainant, has not in the aforesaid F.I.R., spelt with specificity the exact time of the making of the aforesaid demand by the accused upon her, despite her stay at her matrimonial home being short lived, limited stay whereof of the complainant, at her matrimonial home, though hence enjoined upon her, to with precision specify the timing of the making of the aforesaid demand upon her by the accused, yet when she omits to with specificity make any recital in the apposite F.I.R qua the aforesaid fact, does constrain this Court to make a conclusion qua the aforesaid allegation being construable to be a mere invention also an after thought. Consequently, imputation of credence thereon, is unwarranted.

11. No potent evidence, in display of the accused subjecting the complainant, to any incident of physical assault, is adduced by the prosecution. PW-1 in her cross-examination, has made a disclosure qua the accused never physically assaulting her yet she has qualified the aforesaid disclosure, by stating that the accused had once attempted to assault her. However, the statement of the complainant, that the accused once attempted to assault her, though does also constitute evidence, of the accused/respondents hence by attempting to assault her, his

hence besetting her with a mental trauma, nonetheless even the aforesaid evidence is rendered incredible, on account of hers, throughout her short stay at her matrimonial home, hers not rearing the aforesaid allegations against the accused, rather hers belatedly in August, 2003 rearing them. In aftermath, the belated rearing, of the aforesaid allegations by the complainant upon the accused respondents, renders it to acquire a stain of concoction or premeditation. In sequel thereof, it is not amenable to imputation of credence thereon.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned Sessions Judge, has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Sessions Judge 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. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Govind Ram (Deceased) through LRs ....Appellant
Versus
Beli Ram and others ....Respondents

RSA No. 4339 of 2013
Reserved on: April 24, 2017
Decided on: April 25, 2017

Partition Act, 1893- Section 4- Plaintiff filed a civil suit for partition of the joint property – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that jamabandi shows that parties are recorded to be the joint owners – oral evidence also proved the joint ownership – prior partition was not proved – the preliminary decree was rightly passed- appeal dismissed. (Para- 11 to 20)

Cases referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Ambanna v. Ghanteappa, AIR 1999 Karnataka 421
Narinder Chand Mehra and another versus Surinder Chand Mehra and others, (1999-2) 122 P.L.R. 16
Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161

For the appellant Mr. N.K. Thakur, Senior Advocate with Ms. Jamuna, Advocate.
For the respondents: Mr. G.R. Palsra, Advocate, for respondents No.1 to 3.
Nemo for respondent No.4.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant Regular Second Appeal under Section 100 of the Civil Procedure Code has been filed against judgment and decree dated 29.8.2013 passed by the learned Additional

District Judge-II, Mandi, HP in Civil Appeal No. 05/2013, affirming the judgment and decree dated 21.11.2012, passed by the learned Civil Judge (Senior Division), Court No.1, in Civil Suit No. 46/01/2011, whereby suit for partition having been filed by the respondents-plaintiffs ('plaintiffs', hereafter), came to be decreed.

2. Briefly stated the facts of the case as emerge from the record are that plaintiffs filed a suit for partition under Section 4 of the Indian Partition Act ('Act' for short), averring therein that the land bearing Khewat No. 70/68, Khatauni No. 78/76, Khasra No. 1165/887 and 1167/902, Kitas 2 measuring 0-9-18 Bigha situate in Mauja Sidhyani, Muhal Sadhera, Hadbast No. 134, Tehsil Sadar, District Mandi, HP ('suit property, hereafter), as recorded in joint ownership of the parties. Plaintiffs further averred that the suit land is jointly in ownership and possession of the parties. Suit property consists of two storied residential house having five rooms alongwith two verandas and some portion of the land is vacant, surrounding the residential house. Plaintiffs further claimed that whole of the suit land is joint and unpartitioned and they want to develop their shares according to their choice. Plaintiff further alleged that the defendant-appellants ('defendant', hereafter) is trying to grab whole share of the plaintiffs and as such they filed suit for partition. In the aforesaid background, plaintiffs sought decree of partition of suit property in their favour.

3. Defendant refuted foresaid claim of the plaintiffs by raising preliminary objections qua maintainability, estoppel, cause of action, locus standi and suit being not properly valued. On merits, defendant nowhere disputed revenue record adduced on record by the plaintiffs, however, he claimed that suit land is not jointly owned and possessed by the parties. Defendant specifically stated in the written statement that existing residential house was constructed by him by spending huge amount and plaintiffs never spent any money for the construction of residential house. Perusal of written statement suggests that the defendant admitted that there was an ancestral house over the suit property, which was demolished after it was gutted in fire. Defendant further stated that the plaintiff No.1-Beli Ram, was allowed to live in the lower story of the house till he constructs his own house. With the aforesaid submissions, the defendant claimed that the plaintiff No.1 has no right, title or interest over the suit property. As far as right of plaintiffs No.2, 3 and defendant No. 2, are concerned, defendant claimed that since they have been married and residing in their matrimonial houses, they have no interest in the property. Defendant, while admitting description of the land as given in para-1 of the plaint, stated that same is not in the joint ownership and possession as it has been partitioned by family partition/settlement/arrangement. In the aforesaid background, defendant prayed that suit for partition having been filed by the plaintiffs may be dismissed.

4. Learned trial Court, on the basis of pleadings of the parties, framed following issues:

"1. Whether the plaintiffs are entitled to the preliminary decree of partition of the suit land as prayed for? OPP

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

3. Whether the plaintiffs have no enforceable cause of action to file the present suit, as alleged? OPD

4. Whether the plaintiffs are estopped by their own act and conduct to file the present suit, as alleged? OPD

5. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as alleged? OPD

6. Whether the plaintiffs have no locus standi to file the present suit, as alleged? OPD

7. Relief.

5. Subsequently, learned trial Court, vide judgment and decree dated 21.11.2012, decreed the suit of the plaintiff and held the plaintiffs entitled to preliminary decree of partition. Learned trial Court also held the plaintiffs and defendant entitled to 1/5th share each in the suit property.

6. Defendant, feeling aggrieved by the aforesaid judgment and decree, preferred an appeal under Section 96 CPC before the Additional District Judge-II, Mandi, which came to be registered as Civil Appeal No. 05/2013. However, the fact remains that the aforesaid appeal was dismissed by the first appellate Court vide judgment and decree dated 29.8.2013. Hence, this Regular Second Appeal.

7. The Regular Second Appeal was admitted by this Court on 26.4.2014, on the following substantial question of law:

> "Whether the findings of the learned trial Court as well as first Appellate Court are result of complete misreading and misinterpretation of the evidence and material on record and against the settled position of law?

8. Mr. N.K. Thakur, learned Senior Advocate duly assisted by Ms. Jamuna, Advocate, vehemently argued that that the impugned judgments and decrees passed by learned Courts below are not sustainable in the eye of law as the same are not based upon correct appreciation of evidence adduced on record by the respective parties and as such deserve to be set aside. Mr. Thakur while inviting attention of this Court to the impugned judgments and decrees passed by learned Courts below argued that the learned Courts below have gravely erred in passing the impugned judgments and decrees, especially in the absence of any site plan, specifically giving therein description, if any, of the suit property sought to be partitioned by the plaintiffs. Mr. Thakur contended that no decree, if any, could be passed by the learned Courts below in the absence of specific details/ identification of property as such judgment, which is unexecutable, deserves to be set aside. Mr. Thakur, while inviting attention of this Court to the pleadings as well as evidence on record adduced by the defendant, stated that it is duly established on record that house over land is sole property of the defendant No.1 and plaintiff has no right, whatsoever in the house. Mr. Thakur, further contended that the civil court had no jurisdiction in partitioning the land, which is assessed to land revenue and same could only be partitioned by revenue court. Mr. Thakur, further contended that bare perusal of Ext. PW-1/B suggests that there are other co-owners in the land in dispute but they were not made party and no decree as such could be passed by the court below, without impleading them as party, because no effective decree of partition could be passed in their absence. Mr. Thakur, further contended that in view of established position as stands reflected in the revenue record, impugned judgments and decrees are unexecutable. Moreover, no evidence worth the name has been led by the plaintiffs to prove that house is joint between the parties, whereas, defendant has proved beyond reasonable doubt that house was constructed by him alone and he is sole proprietor of the same. In the aforesaid background, Mr. Thakur contended that suit having been filed by the plaintiffs for partition deserves to be dismissed, after setting aside the impugned judgments and decrees passed by the learned Courts below.

9. Mr. G.R. Palsra, learned counsel representing respondents No.1 to 3-plaintiffs ('plaintiffs', hereafter), supported the impugned judgments and decrees passed by the learned Courts below. Mr. Palsra while refuting the contentions having been made by the learned counsel representing the defendant No.1, vehemently argued that there is no illegality or infirmity in the impugned judgments and decrees passed by the learned Courts below, as such same are required to be upheld by this Hon'ble Court. While inviting attention of this Court to the impugned judgments and decrees passed by the learned Courts below, Mr. Palsra contended that both the Courts have dealt with each and every aspect of evidence in its right perspective and by no stretch of imagination, it can be said that the Courts below misappreciated or misconstrued the evidence, be it ocular or documentary, led on record by the respective parties. With a view to substantiate his aforesaid arguments, he invited attention of this Court to the evidence led on record by the respective parties to demonstrate that the plaintiffs successfully proved on record

that suit land is jointly owned and possessed by the plaintiffs as well as defendant No.1 to the extent of 1/5th share each and as such there is no illegality committed by the learned Courts below, while decreeing the suit for partition. While specifically inviting attention of this Court to the Ext. PW-1/B, Mr. Palsra contended that the revenue record place on record alongwith plaint, prove beyond doubt that suit land is jointly owned and possessed by the parties and defendant No.1 is not the sole proprietor of same as claimed by him. Mr. Palsra further contended that the defendant No.1 has nowhere proved on record by leading cogent and convincing evidence that he is sole proprietor of the suit land. While concluding his arguments, Mr. Palsra contended that keeping in view the reasoning assigned by the learned Courts below, after appreciating evidence on record, there is no occasion for this Court to interfere, especially in view of the concurrent findings of facts and law recorded by the learned Courts below. In this regard, he placed reliance upon the judgment passed by the Hon'ble Supreme Court of India in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**.

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

11. With a view to explore answer to the substantial question of law as well as submissions having been made by the learned counsel representing the parties, this Court carefully examined the pleadings as well as evidence adduced on record by the respective parties, which admittedly does not suggest that learned Courts below have misappreciated or misconstrued the evidence available on record, rather a careful perusal of the pleadings as well as evidence on record suggests that the learned Courts below have dealt with each and every aspect of the matter meticulously and there is no misappreciation of evidence as alleged by the learned counsel representing the defendant No.1. Perusal of para-1 of the plaint clearly suggests that plaintiffs while seeking partition under Section 4 of the Act, have given specific details of suit property. Plaintiffs have categorically stated in plaint that land is in joint ownership and possession of the parties and in this regard, he placed reliance upon Jamabandi for the year 2006-07, Ext. PW-1/B, perusal whereof suggests that parties i.e. plaintiffs and defendants are in joint ownership and possession of the suit property measuring 00-09-18. Similarly, perusal of para-2 of the plaint further suggests that the plaintiffs have given specific details with regard to residential house existing over the suit land as described herein above. Plaintiffs have specifically stated that two story residential house consisting of five rooms and two verandas is existing on suit land and vacant space is also surrounding the residential house. Plaintiffs have further stated that whole of the suit land is joint and unpartitioned one and has not been divided by metes and bounds. In view of the specific pleadings made by the plaintiffs in the plaint, this Court sees no force in the argument having been made by the learned counsel for defendant Nno.1 that since there was no specific detail with regard to property, no decree of partition could be passed by the courts below. Perusal of the averments as contained in the plaint as referred herein above, clearly suggests that prayer for partition made by the plaintiffs by way of suit as referred above, is not with regard to house existing over suit land, rather plaintiffs have specifically claimed themselves to be in joint ownership and possession of the land as well as house. Moreover, plaintiffs, by way of suit, sought preliminary decree of partition qua suit land, comprising of Khewat No. 70/68, Khatauni No. 78/76, Khasra Nos. 1165/887 and 1167/902, Kita 2, measuring 0-9-18 Bigha situate in Mauja Sidhyani, Mohal Sadhera, Hadbast No. 134, Tehsil Sadar, District Mandi, HP. Hence, arguments of the learned counsel representing the defendant No.1 can not be accepted that no decree, if any, could be passed by the learned Courts below, in the absence of site plan giving therein identification and description of the house, which is sought to be partitioned. Since entire suit land, as referred to herein above, is/was sought to be partitioned, there is/was no requirement, as such, for the plaintiffs to give site plan as alleged by the learned counsel representing defendant No.1. Perusal of Jamabandi, Ext. PW-1/B, placed on record by the plaintiffs, clearly proves on record that property is jointly recorded in the ownership and possession of the parties. Similarly, Ext. PW-1/B further suggests that the plaintiffs and defendants are joint owners in possession with respect to suit land, which consists of *Gair Mumkin Makaan* (Rihayashi) measuring 00-03-10 Bigha and *Jaye Safed* measuring 00-06-

08 Bigha. If the description as given in the aforesaid document i.e. Ext. PW-1/B is taken into consideration, plea of defendant can not be accepted that he is the sole proprietor of the suit land. Though presumption of truth is attached to the record of right, but the same is rebuttable. But, interestingly, in the instant case, defendant No.1 has not been able to rebut the presumption attached to aforesaid document i.e. Ext. PW-1/B, because no evidence has been led on record by defendant No.1, suggestive of the fact that that he is the sole proprietor /owner of suit land. Apart from above, defendant has nowhere disputed the correctness of Ext PW-1/B, as clearly emerges from written statement. In the written statement having been filed by defendant No.1 itself, though he claimed that suit property was partitioned in family arrangement and he had built the house on suit land from his own resources, but there is no evidence available on record to prove aforesaid contentions having been made in the written statement, while disputing the claim of the plaintiffs.

12. PW-1 Beli Ram categorically stated before the Court that suit property is joint and unpartitioned, which further consists of two storied residential house existing over the suit land, which is surrounded by vacant space. It has also come in his statement that the property was joint and unpartitioned, as such, same is liable to be partitioned. In support of his aforesaid contention, PW-1 i.e. plaintiff No.1 Beli Ram placed reliance upon document, Ext. PW-1/B, as has been discussed above. Plaintiffs also examined PW-2 Tulsi Devi, PW-3 Roshan Lal and PW-4 Ranjeet Singh, who stated on oath that the suit property is joint between the parties and two storied residential house exists over the suit land. Careful perusal of the cross-examination conducted upon these witnesses, nowhere suggests that defendant No.1 was able to extract anything contrary to what was stated in their examination-in-chief.

13. PW-1, Beli Ram, in this cross-examination admitted that old house had fallen but he specifically denied that all the responsibility was taken by defendant No. 1 with regard to family. Similarly, he denied that house was built from his own resources by defendant No.1. Though, DW-2 Govind Ram and DW-3 Khima Ram, while making their statements on oath, stated that plaintiff N0.1 and defendant No.1 were living separately and cultivating the lands separately, but admitted that they used to reside separately in the ancestral house. Aforesaid witnesses also admitted that ancestral house had fallen and some of the land was vacant at the spot. DW-1 Govind Ram stated that house existed over suit land, belonged to him as he had exclusively contributed for the construction of the house, but in his statement, it has come that he had given lower story to plaintiff No.1, for living till the time, he constructed his own house. He further contended that plaintiff No. 1 had no right, title or interest over the residential house. DW-1 further stated that plaintiff No.1 was serving as a Conductor in HRTC. However, the cross-examination conducted upon DW-1, if is perused carefully, he categorically admitted that at the time, when the house was built, they were living jointly and their father was alive. He also admitted that all the responsibility of family was taken by their father. Most importantly, in his cross-examination, he admitted that house was joint and they have equal shares. DW-1 further stated in his examination-in-chief that house was given by defendant No.1 to plaintiff No.1 Beli Ram for living. Similarly, he feigned ignorance that separate land was given to plaintiff No.1 for the construction of house. While answering the suggestion put to the defendant that plaintiff shared residential house existing over suit land with him, he feigned his ignorance and admitted that new house was constructed about 40 years ago, and at that time, parents of parties were alive. He also admitted that parents of the parties were alive and they have been looking after affairs of the family. Defendant Govind Ram, in his cross-examination stated that suit property has been partitioned but he was unable to produce any document with regard to the partition or any particulars thereof. He also admitted that suit property is shown to be in joint ownership and possession of all the brothers and sisters, but he could not produce any document to show that house was exclusively constructed by him. Defendant No.1 also examined DW-3 Khima Ram, who worked as a Mason during the construction of the house over the property. DW-3 stated that expenses of construction were borne by Govind Ram. In his cross-examination, he admitted that house was constructed about 40-50 years ago, when parents of parties were alive. He also

admitted that at that time, family was joint and Naradu was head of family and all the expenses were made jointly in the family at the instance of Naradu.

14. Careful perusal of statements having been made by the defendant's witnesses before the Court, clearly proves on record that suit property is jointly owned and possessed by the parties. Though defendant No.1 Govind Ram, made an attempt to prove on record that after collapse of house, he constructed new house after spending from his own pocket, but there is no evidence led on record in this regard and otherwise also, if, for the sake of arguments, it is accepted that reconstruction of house was done at the expenses of defendant No. 1, even in that eventuality, rights of the plaintiffs can not be defeated, because, admittedly, property is jointly owned and possessed by the parties.

15. Apart from above, defendant's own witnesses have admitted in their cross-examination that house was reconstructed during the life time of their father and all the expenses were borne jointly in the family, at the instance of head of family i.e. Naradu. Defendant No.1 himself admitted that the house was construction about 40-50 years ago, when his father was alive.

16. Similarly, though defendant No.1 asserted that plaintiffs No.2 and 3 and proforma defendant No.2, are living separately in their families, but denied that they have any interest in the suit property. But interestingly, there is no evidence worth the name, adduced on record by defendant No.1 to prove that plaintiffs No.2 and 3 and proforma defendant No. 2, have no right in the suit property, after marriage, because, it clearly emerges from the revenue record described hereinabove that parties are joint owners of the suit property i.e. house and vacant space.

17. Hence, no illegality or infirmity can be found in the findings of learned Courts below that since rights of plaintiffs No. 2 and 3 and proforma defendant No.2 have not been denied by the plaintiff No.1 and defendant No.1, they are also entitled to share in the suit property, in accordance with revenue record. Similarly, though it is claimed in the written statement that suit property stands partitioned inter se parties, in terms of a family arrangement/ settlement, but there is no evidence led on record in support of this claim and as such rightly the courts below, while accepting the plea of the plaintiffs for partition of suit property, held that suit property is jointly owned and possessed by the parties.

18. Mr. Thakur, learned Senior Advocate, specifically invited attention of this Court to the statement of PW-1 to demonstrate that he had admitted factum of partition /family arrangement in his statement, but perusal of statement of PW-1 nowhere supports the claim of the defendant, because, while answering suggestion put to him, plaintiff(PW-1) stated that the family partition was forged.

19. This Court also examined the judgments relied upon by the learned counsel representing defendant No.1 i.e. **Ambanna** v. **Ghanteappa**, AIR 1999 Karnataka 421 and **Narinder Chand Mehra and another** versus **Surinder Chand Mehra and others**, (1999-2) 122 P.L.R. 16, to demonstrate that no decree of partition can be passed by court merely on the basis of pleadings and site plan is necessary for identification and description of house, which is sought to be partitioned. There can be no quarrel with regard to the proposition of law that as per Order 7 Rule 3 CPC, particulars of property, sought to be partitioned, are required to be given in the plaint, but in the instant case, as has been discussed in detail, plaintiffs have given details of property sought to be partitioned and as such judgments referred to hereinabove had no applicability to the facts and circumstances of the case at hand.

20. Needless to say that learned trial Court has only passed preliminary decree of partition inter se parties qua suit property and final decree shall be drawn after report of revenue official, who shall identify the property and put the owners into possession as per their shares. Hence, in view of specific details given in the plaint, there was no requirement as such of site plan, in the present case.

21. Consequently, in view of the evidence led on record by plaintiffs, which is further corroborated by the defendant's witnesses, this Court sees no illegality or infirmity in the impugned judgments and decrees passed by the learned Courts below and same deserve to be upheld.

22. Substantial question of law is answered accordingly.

23. Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264,** has held as under:

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

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

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

> "35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)
>
> "24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:
>
> (i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
>
> (ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type

of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same." ***(pp.174-175)***

26. Accordingly, the appeal lacks merits and is dismissed. Judgments and decrees passed by the learned Courts below are upheld. Pending applications, are disposed of. Interim orders, if any, are vacated.

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

Varun Bhardwaj ....Petitioner.

Versus

State of H.P. ....Respondent.

Cr. Revision No. 268 of 2016
Reserved on 07.04.2017
Date of Decision: 25.04.2017

Code of Criminal Procedure, 1973- Section 228- Police filed a charge sheet for the commission of offence punishable under Section 307 of I.P.C- the Court framed the charge- aggrieved from the order, present revision has been filed- held that the Court is not required to make a formal opinion that accused is certainly guilty of the commission of offence– the Court had not properly appreciated the material on record- revision allowed- order of the Trial Court set aside.

(Para- 6 to 23)

Cases referred:

State of Karnataka v. L. Muniswamy and Ors, AIR 1977 SC 1489

Niranjan Singh Karam Singh Punjabi, Advocate, v. Jitendera Bhimraj Bijja and Ors. with State of Maharashtra v. Jintendra Bhimraj Bijjaya and Ors., with Jitendra Bhimraj Bijje and Ors v. State of Maharashtra, 1990 CRI.L. J. 1869

Nahar Singh v. The State, AIR (39) 1952 Allahabad 231, Abani Chowdhury v. The State, 1980 Cri.L. J. 614

Sham Sunder v. State of Himachal Pradesh 1993 (2) SLJ 2106.

Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors, AIR 1980, SCC 52, 1979 CRI. L. J. 1390

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

Amit Kapoor v. Ramesh Chander and Anr, (2012) 9 SCC 460

Chitresh Kumar Chopra v. State (Government of NCT of Delhi), (2009) 16 SCC 605,

Satish Mehra v. State (NCT of Delhi) and Anr, (2012) 13 SCC 614
Sheoraj Singh Ahlawat and Ors v. State of Uttar Pradesh and Anr.,(2013) 11 SCC 476,
Vinay Tyagi. v. Irshad Ali alias Deepak and Ors., (2013) 5 SCC 762,
L. Krishna Reddy v. State by Station House Officer and Ors, (2014) 14 SCC 401
State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335
Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 309

For the petitioner: Mr. N.K. Thakur, Senior Advocate, with Mr. Divya Raj Singh, Advocate.
For the respondent: Mr. P.M. Negi, Additional Advocate General, with Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

The instant criminal revision petition filed under Section 397 read with Section 401 of the Cr.PC, is directed against the order dated 24.6.2016, (in short 'the impugned order') passed by the learned Additional Sessions Judge-I, Una, District Una, HP, in Session Trial No.67/2015, whereby charge under Section 307 of the IPC has been framed against the petitioner-accused.

2. Briefly stated facts as emerge from the record are that police of Police Station Haroli, District Una, HP, on the basis of statement having been made by one Sh. Amanjot Singh, S/o Shri Ranjeet Singh (hereinafter referred to as the complainant) under Section 154 of the Cr.PC, registered an FIR No. 110 of 2015 on 4.5.2015, against the petitioner-accused under Section 307 of the IPC. Police on the basis of registration of aforesaid FIR conducted investigation and submitted report under Section 173 of the Cr.PC, alleging therein commission of offence punishable under Section 307 of the IPC by the petitioner-accused. Learned Additional Sessions Judge vide order dated 24.6.2016, framed charge under Section 307 of the IPC against the petitioner-accused. In the aforesaid background, present petitioner-accused has approached this Court by way of instant proceedings praying therein quashing of impugned order dated 24.6.2016, passed by the learned Additional Sessions Judge, Una.

3. Mr. N.K. Thakur, learned Senior Advocate, duly assisted by Mr. Divya Raj Singh, Advocate, representing the petitioner vehemently argued that the impugned order (Annexure P-2) is not sustainable in the eye of law as the same is not based upon the correct appreciation of material made available on record by the police along with challan filed by it under Section 173 of the Cr.PC, and as such, same deserves to be quashed and set-aside. Mr. Thakur, while specifically referring to the impugned order strenuously argued that there is/was no application of mind by the court below while framing charge under Section 307 of the IPC against the petitioner-accused and as such, great prejudice has been caused to the petitioner-accused, who by no stretch of imagination, could be charged with Section 307 of the IPC, especially in view of the material placed on record by the Investigating Agency, along with charge sheet. Mr. Thakur, while specifically inviting attention of this Court to the impugned order dated 24.6.2016 contended that there is no discussion, if any, with regard to the material, on the basis of which, learned Additional Sessions Judge, came to the conclusion that the petitioner-accused is required to be charged under Section 307 of the IPC and as such, impugned order being cryptic in nature deserves to be quashed and set-aside. Mr. Thakur, specifically invited attention of this Court to the MLC No. 466/15 and report of Regional Forensic Science Laboratory (RFSL), Dharamshala, placed on record by the police along with charge-sheet to demonstrate that no prima-facie case, if any, is made out against the petitioner and as such, there was no occasion for the court below to charge the present petitioner accused under Section 307 of the IPC. While specifically inviting attention of this Court to the aforesaid MLC/opinion given by the medical expert, Mr. Thakur stated that no injury, if any, has been found on the neck of the victim/complainant namely

Amanjot Singh. He further contended that medical expert has specifically opined that injury is superficial and simple in nature. Mr. Thakur, also invited attention of this Court to the report submitted by the RFSL Dharamshala to demonstrate that even alleged weapon i.e. (Sickle) "Darat" does not contain any human blood. Mr. Thakur contended that there is/was no prima-facie case made out by the prosecution to implicate the petitioner-accused under Section 307 of the IPC and as such, impugned order cannot be allowed to sustain. He also stated that aforesaid opinion was given on 6.5.2015, by the Surgeon of Regional Hospital, Una, and thereafter, x-ray and C.T. Scan, were conducted and fresh opinion was rendered on 29.6.2015, wherein injury allegedly sustained by the complainant/victim was termed to be simple in nature. Mr. Thakur, forcefully contended that the aforesaid material aspect has been totally ignored by the learned court below while framing the charge under Section 307 of the IPC deliberately to make it a Session case. As per Mr. Thakur, had the court below perused the report of the police juxtaposing the MLC, there would have been no occasion for it to frame charge under Section 307 of the IPC against the petitioner-accused. While concluding his arguments, Mr. Thakur, further contended that bare perusal of evidence so collected by the prosecution even without any rebuttal from the side of the petitioner suggests that no conviction can ever be passed for an offence under Section 307 of the IPC and as such, impugned order being contrary to the provisions of law as well as facts deserves to be quashed and set-aside. Lastly, Mr. Thakur, contended that no case much less under Section 307 of the IPC is even prima-facie made out for framing the charge. In the aforesaid background, Mr. Thakur, prayed that impugned order may be quashed and set-aside. In the regard aforesaid, Mr. Thakur, also placed reliance on judgments titled as ***State of Karnataka v. L. Muniswamy and Ors,*** **AIR 1977 SC 1489*****, Niranjan Singh Karam Singh Punjabi, Advocate, v. Jitendera Bhimraj Bijja and Ors. with State of Maharashtra v. Jintendra Bhimraj Bijjaya and Ors., with Jitendra Bhimraj Bijje and Ors v. State of Maharashtra,*** **1990 CRI.L. J. 1869*****, Nahar Singh v. The State, AIR (39) 1952 Allahabad 231, Abani Chowdhury v. The State, 1980 Cri.L. J. 614 and Sham Sunder v. State of Himachal Pradesh 1993 (2) SLJ 2106.***

4. Per contra, Mr. P.M. Negi, learned Additional Advocate General, duly assisted by Mr. Ramesh Thakur, learned Deputy Advocate General, representing the respondent-State supported the impugned order passed by the court below. He vehemently argued that there is no illegality and infirmity in the impugned order and same is based upon the correct appreciation of the material made available on record by the police along with charge sheet filed under Section 173 and as such, same deserves to be upheld. Mr. Negi, strenuously argued that there is no merit in the contention of Mr. Thakur, learned senior counsel for the petitioner that there has been misappreciation of material adduced on record by the police along with charge sheet because it is well settled that at the time of framing of charge, learned court below is not expected to sift the entire evidence, rather it is required to be seen whether prima-facie case exists against the accused or not? As per Mr. Negi, in the instant case, there is ample evidence adduced on record by the Investigating Agency suggestive of the fact that the petitioner accused made a serious attempt of causing injury on the neck of the complainant with 'darat' as a result of, which he suffered injury on his neck. Mr. Negi further argued that had the complainant not taken side, he would have either died or have received serious injury on his neck, hence, there is no illegality and infirmity in the impugned order, whereby the petitioner accused has been charged rightly under Section 307 of the IPC. Mr. Negi invited attention of this Court to the provision contained in Section 307 IPC to demonstrate that any injury caused with an intention or knowledge on person of other person is punishable under Section 307 of the IPC. While refuting the contention of Mr. Thakur, learned counsel representing the petitioner that there is nothing much in the medical opinion renderd by the doctor, who examined the victim for the first instance as well as report submitted by RFSL Dharamshala, Mr. Negi forcefully contended that learned court below is/was not required to examine the same in detail while framing the charge, rather, the same were required to be considered and analyzed at the stage of trial. While concluding his arguments, Mr. Negi forcefully contended that court below at the stage of framing charge is/was only required to see prima-facie evidence, if any against the petitioner accused and as such, this Court has no occasion, whatsoever, to interfere with the well reasoned order passed by the

learned court below, which otherwise appears to be based upon proper appreciation of material made available on record by the Investigating Agency. Mr. Negi placed reliance on judgment passed by the Hon'ble Apex Court titled ***Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja and Ors, AIR 1980, SCC 52, 1979 CRI. L. J. 1390*** as well as ***State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, to suggest that court has limited jurisdiction under Section 397 of the Cr.PC.

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

6. 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."*

7. Before adverting to ascertain the genuineness and correctness of the submissions having been made by the learned counsel representing the respective parties, this Court deems it fit to reproduce impugned order as well as Charge sheet dated 24.6.2016, whereby present petitioner-accused has been charged for the commission of offence under Section 307 of the IPC.

> *Order dated 24.6.2016.*
>
> *"Heard and perused the Challan. From the careful perusal of Challan and documents on record, I am satisfied that there is enough material on record to charge accused Varun Bhardwaj for the commission of offence punishable under Section 307 IPC and if the evidence as brought is accepted the same shall be sufficient to connect him with the crime. The accused is charged accordingly for the aforesaid offence to which he pleaded not guilty and claimed trial. Now put up on 12.8.2016 for fixation of date for prosecution evidence."*
>
> *"Charge Sheet dated 24.6.2016*
>
> *I,………….do hereby charge you accused Varun bhardwaj as under:-*
>
> *That you accused on 3.5.2015 at about 10.00 PM at place Jatpur (Santoshgarh), PS Haroli, District Una, caused injuries to complainant Amanjot Singh on his neck with sharp edged weapon i.e. Darat with such intention and knowledge and under such circumstances, that if by that act you have caused death of said Amanjot Singh, you would have been guilty of murder and you thereby committed an offence punishable under Section 307 IPC and within the cognizance of this Court.*
>
> *And I hereby direct that you accused be tried on the aforesaid charge by this Court."*

Though, learned court below in its order supra, has stated that from the careful perusal of challan and documents on record, he is satisfied that there is enough material on record to charge the accused for the commission of offence punishable under Section 307 of the IPC and if evidence is accepted, the same shall be sufficient to connect him with the crime, but this Court really finds it difficult to accept aforesaid satisfaction as recorded by the court, especially after having glance of the record. This Court is fully conscious about the fact that the present petition has been filed under Section 397 of the Cr.PC, which empowers this court with power to call for and examine the record of any proceeding before any inferior court for the purpose of satisfying itself or himself as to the legality or regularity of any proceedings or order made by it. This Court certainly cannot find any quarrel with the arguments having been made by Sh. P.M. Negi, learned Additional Advocate General representing the State that for the purpose of satisfying as to the legality and regularity of any proceedings or order made by inferior court, this Court needs to see whether there is well founded error and it may not be proper for this Court to scrutinize the orders which on the face of it, appears to be taken in accordance with law. Similarly, this Court cannot loose sight of the fact that in various judgments of Hon'ble Apex Court as well as this Court, it has been held that revisional jurisdiction can be invoked, where the decisions under challenge are grossly erroneous, and there is no compliance of the provisions of law, the finding recorded is based on no evidence, material evidence is ignored or judicial discretion is exercised arbitrarily or perversely. This Court also agrees with the contention of Mr. Negi that revisional jurisdiction of higher Court is very limited one and it cannot be exercised in a routine manner because admittedly exercise of this jurisdiction should not lead to injustice ex-facie. Exposition of law till date as laid down by the Hon'ble Apex Court certainly suggests that where court is dealing with question as to whether the charge has been framed properly and in accordance with law in a given case, it may be reluctant to exercise its revisional jurisdiction unless the case substantially falls within the category mentioned herein above. It is well settled that while framing the charge, the court is required to evaluate the material and documents on record with a view to find out that if the facts emerging therefrom, taken on their face value, discloses the existence of all the ingredients, constituting the alleged offence or not and for the limited purpose, court may sift the evidence. Hon'ble Apex Court in case titled ***Amit Kapoor v. Ramesh Chander and Anr, (2012) 9 SCC 460*** held that framing of a charge is an exercise of jurisdiction by the trial Court in terms of Section 228 of the Cr.PC unless the accused is discharged under Section 227 Cr.PC. The Hon'ble Apex Court has further held that under the sections 227 and 228 Cr.PC, the Court is required to consider the 'record of the case' and the documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the Court and in its opinion there is ground for presuming that the accused has committed an offence, it shall proceed to frame the charge. The Hon'ble Apex Court has further held that once the facts and ingredients of the Section concerned exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. Most importantly, the Hon'ble Apex Court in the aforesaid judgment has concluded that the satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. At this stage, this court deems it fit to reproduce the following paras of aforesaid judgment having been passed by the Hon'ble Apex Court as follows:-

> *"17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for*

exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

18. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases.

19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well settled law laid down by this Court in the case of State of Bihar v. Ramesh Singh (1977) 4 SCC 39:

> *"4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the Court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If "the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing", as enjoined by Section 227. If, on the other hand, "the Judge is of opinion that there is ground for presuming that the accused has committed an offence which— … (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused", as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence*

> *then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. It the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even, at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."*

20. The jurisdiction of the Court under Section 397 can be exercised so as to examine the correctness, legality or proprietary of an order passed by the trial court or the inferior court, as the case may be. Though the section does not specifically use the expression 'prevent abuse of process of any court or otherwise to secure the ends of justice', the jurisdiction under Section 397 is a very limited one. The legality, proprietary or correctness of an order passed by a court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. The jurisdiction could be exercised where there is palpable error, non-compliance with the provisions of law, the decision is completely erroneous or where the judicial discretion is exercised arbitrarily. On the other hand, Section 482 is based upon the maxim quando lex liquid alicuiconcedit, conceder videtur id quo res ipsa esse non protest, i.e., when the law gives anything to anyone, it also gives all those things without which the thing itself would be unavoidable. The Section confers very wide power on the Court to do justice and to ensure that the process of the Court is not permitted to be abused.

21. It may be somewhat necessary to have a comparative examination of the powers exercisable by the Court under these two provisions. There may be some overlapping between these two powers because both are aimed at securing the ends of justice and both have an element of discretion. But, at the same time, inherent power under Section 482 of the Code being an extraordinary and residuary power, it is inapplicable in regard to matters which are specifically provided for under other provisions of the Code. To put it simply, normally the court may not invoke its power under Section 482 of the Code where a party could have availed of the remedy available under Section 397 of the Code itself. The inherent powers under Section 482 of the Code are of a wide magnitude and are not as limited as the power under Section 397. Section 482 can be invoked where the order in question is neither an interlocutory order within the meaning of Section 397(2) nor a final order in the strict sense. Reference in this regard can be made to Raj Kapoor & Ors. v. State of Punjab & Ors. [AIR 1980 SC 258 : (1980) 1 SCC 43]}. In this very case, this Court has observed that inherent power under Section 482 may not be exercised if the bar under Sections 397(2) and 397(3) applies, except in extraordinary situations, to prevent abuse of the process of the Court. This itself shows the fine distinction between the powers exercisable by the Court under

these two provisions. In this very case, the Court also considered as to whether the inherent powers of the High Court under Section 482 stand repelled when the revisional power under Section 397 overlaps. Rejecting the argument, the Court said that the opening words of Section 482 contradict this contention because nothing in the Code, not even Section 397, can affect the amplitude of the inherent powers preserved in so many terms by the language of Section 482. There is no total ban on the exercise of inherent powers where abuse of the process of the Court or any other extraordinary situation invites the court's jurisdiction. The limitation is self-restraint, nothing more. The distinction between a final and interlocutory order is well known in law. The orders which will be free from the bar of Section 397(2) would be the orders which are not purely interlocutory but, at the same time, are less than a final disposal. They should be the orders which do determine some right and still are not finally rendering the Court functus officio of the lis. The provisions of Section 482 are pervasive. It should not subvert legal interdicts written into the same Code but, however, inherent powers of the Court unquestionably have to be read and construed as free of restriction.

22. In Dinesh Dutt Joshi v. State of Rajasthan & Anr. [(2001) 8 SCC 570], the Court held that

"6. … [Section 482] does not confer any power but only declares that the High Court possesses inherent powers for the purposes specified in the Section. As lacunae are sometimes found in procedural law, the Section has been embodied to cover such lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this section are, however, required to be reserved as far as possible for extraordinary cases."

23. In Janata Dal v. H.S. Chowdhary & Ors. [(1992) 4 SCC 305], the Court, while referring to the inherent powers to make orders as may be necessary for the ends of justice, clarified that such power has to be exercise in appropriate cases ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist. The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the powers requires a great caution in its exercise. The High Court, as the highest court exercising criminal jurisdiction in a State, has inherent powers to make any order for the purposes of securing the ends of justice. Being an extra ordinary power, it will, however, not be pressed in aid except for remedying a flagrant abuse by a subordinate court of its powers.

24. If one looks at the development of law in relation to exercise of inherent powers under the Code, it will be useful to refer to the following details :

As far back as in 1926, a Division bench of this Court In Re: Llewelyn Evans, took the view that the provisions of Section 561A (equivalent to present Section 482) extend to cases not only of a person accused of an offence in a criminal court, but to the cases of any person against whom proceedings are instituted under the Code in any Court. Explaining the word "process", the Court said that it was a general word, meaning in effect anything done by the Court. Explaining the limitations and scope of Section 561A, the Court referred to "inherent jurisdiction", "to prevent abuse of process" and "to secure the ends of justice" which are terms incapable of having a precise definition or enumeration, and capable, at the most, of test, according to well-established principles of criminal jurisprudence. The ends of justice are to be understood by ascertainment of the truth as to the facts on balance of evidence on each side. With reference to the facts of the case, the Court held that in the absence of any other method, it has no choice left in the application of the Section except, such tests subject to the caution to be exercised in the use of inherent jurisdiction and the avoidance of interference in details and directed providing of a legal practitioner.

25. Having examined the inter-relationship of these two very significant provisions of the Code, let us now examine the scope of interference under any of these provisions in relation to quashing the charge. We have already indicated above that framing of charge is the first major step in a criminal trial where the Court is expected to apply its mind to the entire record and documents placed therewith before the Court. Taking cognizance of an offence has been stated to necessitate an application of mind by the Court but framing of charge is a major event where the Court considers the possibility of discharging the accused of the offence with which he is charged or requiring the accused to face trial. There are different categories of cases where the Court may not proceed with the trial and may discharge the accused or pass such other orders as may be necessary keeping in view the facts of a given case. In a case where, upon considering the record of the case and documents submitted before it, the Court finds that no offence is made out or there is a legal bar to such prosecution under the provisions of the Code or any other law for the time being in force and there is a bar and there exists no ground to proceed against the accused, the Court may discharge the accused. There can be cases where such record reveals the matter to be so predominantly of a civil nature that it neither leaves any scope for an element of criminality nor does it satisfy the ingredients of a criminal offence with which the accused is charged. In such cases, the Court may discharge him or quash the proceedings in exercise of its powers under these two provisions.

26. This further raises a question as to the wrongs which become actionable in accordance with law. It may be purely a civil wrong or purely a criminal offence or a civil wrong as also a criminal offence constituting both on the same set of facts. But if the records disclose commission of a criminal offence and the ingredients of the offence are satisfied, then such criminal proceedings cannot be quashed merely because a civil wrong has also been committed. The power cannot be invoked to stifle or scuttle a legitimate prosecution. The factual foundation and ingredients of an offence being satisfied, the Court will not either dismiss a complaint or quash such proceedings in exercise of its inherent or original jurisdiction. In the case of Indian Oil Corporation v. NEPC India Ltd. & Ors. [(2006) 6 SCC 736], this Court took the similar view and upheld the order of the High Court declining to quash the criminal proceedings because a civil contract between the parties was pending.

27. Having discussed the scope of jurisdiction under these two provisions, i.e., Section 397 and Section 482 of the Code and the fine line of jurisdictional distinction, now it will be appropriate for us to enlist the principles with reference to which the courts should exercise such jurisdiction. However, it is not only difficult but is inherently impossible to state with precision such principles. At best and upon objective analysis of various judgments of this Court, we are able to cull out some of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be :

> *27.1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.*
>
> *27.2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic*

ingredients of a criminal offence are not satisfied then the Court may interfere.

27.3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

27.4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.

27.6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

27.7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

27.8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

27.9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

27.10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

27.11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

27.12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed with by the prosecution.

27.13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

27.14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

27.15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

{Ref. State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. [AIR 1982 SC 949]; Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao Chandrojirao Angre & Ors. [AIR 1988 SC 709]; Janata Dal v. H.S. Chowdhary & Ors. [AIR 1993 SC 892]; Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors. [AIR 1996 SC 309; G. Sagar Suri & Anr. v. State of U.P. & Ors. [AIR 2000 SC 754]; Ajay Mitra v. State of M.P. [AIR 2003 SC 1069]; M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors. [AIR 1988 SC 128]; State of U.P. v. O.P. Sharma [(1996) 7 SCC 705]; Ganesh Narayan Hegde v. s. Bangarappa & Ors. [(1995) 4 SCC 41]; Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors. [AIR 2005 SC 9]; M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors. [AIR 2000 SC 1869]; Shakson Belthissor v. State of Kerala & Anr. [(2009) 14 SCC 466]; V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors. [(2009) 7 SCC 234]; Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr. [(2009) 11 SCC 203]; Sheo Nandan Paswan v. State of Bihar & Ors. [AIR 1987 SC 877]; State of Bihar & Anr. v. P.P. Sharma & Anr. [AIR 1991 SC 1260]; Lalmuni Devi (Smt.) v. State of Bihar & Ors. [(2001) 2 SCC 17]; M. Krishnan v. Vijay Singh & Anr. [(2001) 8 SCC 645]; Savita v. State of Rajasthan [(2005) 12 SCC 338]; and S.M. Datta v. State of Gujarat & Anr. [(2001) 7 SCC 659]}.

27.16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance to the requirements of the offence.

28. At this stage, we may also notice that the principle stated by this Court in the case of Madhavrao Jiwaji Rao Scindia (supra) was reconsidered and explained in two subsequent judgments of this Court in the cases of State of Bihar & Anr. v. Shri P.P. Sharma & Anr. [AIR 1991 SC 1260] and M.N. Damani v. S.K. Sinha & Ors. [AIR 2001 SC 2037]. In the subsequent judgment, the Court held that, that judgment did not declare a law of universal application and what was the principle relating to disputes involving cases of a predominantly civil nature with or without criminal intent."

Close reading of the judgment supra suggests that normally court at the stage of framing of charge, is not required to make formal opinion that the accused is certainly guilty of having committed offence, rather, courts are required to see whether prima facie case exists against the accused or not? At this stage, this Court also takes assistance from the law laid down by the Hon'ble Apex Court in case titled ***Chitresh Kumar Chopra v. State (Government of NCT of Delhi), (2009) 16 SCC 605***, wherein the Hon'ble Apex Court has held that at the stage of framing of charge, the Court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the

ingredients constituting the alleged offence. But at the same time, Hon'ble Apex Court has cautioned the courts below to sift evidence for the limited purpose as it is not expected even at the initial stage to accept the same as a gospel truth all that the prosecution states. In nutshell ratio of aforesaid judgment is that at the time of stage of framing of charge, probative value of material on record cannot be gone into rather material of the prosecution has to be accepted as true at that stage.

8. The Hon'ble Apex Court in case titled ***Satish Mehra v. State (NCT of Delhi) and Anr, (2012) 13 SCC 614***, while deliberating on the issue of power of higher Court to quash proceedings after framing of charge, has held that power of High Court to interdict a proceeding either at the threshold or at an intermediate stage of trial is inherent in a High Court on the broad principle that in case allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence there can be reason as to why the accused should be made to suffer the agony of legal proceedings that more often than not gets protracted. The relevant paras of the judgment referred supra are reproduced herein below:-

> *"14. The power to interdict a proceeding either at the threshold or at an intermediate stage of the trial is inherent in a High Court on the broad principle that in case the allegations made in the FIR or the criminal complaint, as may be, prima facie do not disclose a triable offence there can be reason as to why the accused should be made to suffer the agony of a legal proceeding that more often than not gets protracted. A prosecution which is bound to become lame or a sham ought to interdicted in the interest of justice as continuance thereof will amount to an abuse of the process of the law. This is the core basis on which the power to interfere with a pending criminal proceeding has been recognized to be inherent in every High Court. The power, though available, being extra ordinary in nature has to be exercised sparingly and only if the attending facts and circumstances satisfies the narrow test indicated above, namely, that even accepting all the allegations levelled by the prosecution, no offence is disclosed. However, if so warranted, such power would be available for exercise not only at the threshold of a criminal proceeding but also at a relatively advanced stage thereof, namely, after framing of the charge against the accused. In fact the power to quash a proceeding after framing of charge would appear to be somewhat wider as, at that stage, the materials revealed by the investigation carried out usually comes on record and such materials can be looked into, not for the purpose of determining the guilt or innocence of the accused but for the purpose of drawing satisfaction that such materials, even if accepted in its entirety, do not, in any manner, disclose the commission of the offence alleged against the accused.*
>
> > *15. The above nature and extent of the power finds an exhaustive enumeration in a judgment of this court in State of Karnataka vs. L. Muniswamy and others[2] which may be usefully extracted below : (SCC pp. 702-03, para 7)*
> >
> > *" 7. The second limb of Mr Mookerjee's argument is that in any event the High Court could not take upon itself the task of assessing or appreciating the weight of material on the record in order to find whether any charges could be legitimately framed against the respondents. So long as there is some material on the record to connect the accused with the crime, says the learned counsel, the case must go on and the High Court has no jurisdiction to put a precipitate or premature end to the proceedings on the belief that the prosecution is not likely to succeed. This, in our opinion, is too broad a proposition to accept. Section 227 of the Code of Criminal Procedure, 2 of 1974, provides that:*
> >
> > *. . . . .*

> *This section is contained in Chapter XVIII called "Trial Before a Court of Session". It is clear from the provision that the Sessions Court has the power to discharge an accused if after perusing the record and hearing the parties he comes to the conclusion, for reasons to be recorded, that there is not sufficient ground for proceeding against the accused. The object of the provision which requires the Sessions Judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the accused. The High Court therefore is entitled to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case. Section 482 of the New Code, which corresponds to Section 561-A of the Code of 1898, provides that: . . . . .*
>
> *In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."*

16. It would also be worthwhile to recapitulate an earlier decision of this court in Century Spinning & Manufacturing Co. vs. State of Maharashtra noticed in L. Muniswamy's case holding that: (SCC p. 704, para 10)

> *"10……..the order framing a charge affects a person's liberty substantially and therefore it is the duty of the court to consider judicially whether the materials warrant the framing of the charge."*

It was also held that the court ought not to blindly accept the decision of the prosecution that the accused be asked to face a trial.

17. While dealing with contours of the inherent power under Section 482 Cr.P.C. to quash a criminal proceeding, another decision of this court in Padal Venkata Rama Reddy alias Ramu vs. Kovvuri Satyanaryana Reddy and others reported in (2011) 12 SCC 437 to which one of us (Justice P.Sathasivam) was a party may be usefully noticed. In the said decision after an exhaustive consideration of the principles governing the exercise of the said power as laid down in several earlier decisions this court held that:

> *31. . . . . When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. The scope of exercise of power under Section 482 and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or*

otherwise to secure the ends of justice were set out in detail in Bhajan Lal[4]. The powers possessed by the High Court under Section 482 are very wide and at the same time the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution."

18. In an earlier part of this order the allegations made in the FIR and the facts disclosed upon investigation of the same have already been noticed. The conclusions of the High Court in the petitions filed by the accused for quashing of the charges framed against them have also been taken note of along with the fact that in the present appeals only a part of said conclusions of the High Court is under challenge and therefore, would be required to be gone into.

19. The view expressed by this Court in Century Spinning's case (supra) and in L. Muniswamy's case (supra) to the effect that the framing of a charge against an accused substantially affects the person's liberty would require a reiteration at this stage. The apparent and close proximity between the framing of a charge in a criminal proceeding and the paramount rights of a person arrayed as an accused under Article 21 of the Constitution can be ignored only with peril. Any examination of the validity of a criminal charge framed against an accused cannot overlook the fundamental requirement laid down in the decisions rendered in Century Spinning and Muniswamy (supra). It is from the aforesaid perspective that we must proceed in the matter bearing in mind the cardinal principles of law that have developed over the years as fundamental to any examination of the issue as to whether the charges framed are justified or not."

The Hon'ble Apex Court in ***Sheoraj Singh Ahlawat and Ors v. State of Uttar Pradesh and Anr.,(2013) 11 SCC 476***, also reiterated that while framing charges, court is required to evaluate the material and documents on the record with a view to find out if the facts emerging thereform, taken at their face value, discloses the existence of all the ingredients constituting the alleged offence. Though Court in the aforesaid judgment has held that court is not required to go deep into the probative value of material on record but held that what needs to be evaluated is whether there is a ground for presuming that the offence has been committed or not. The relevant paras are reproduced herein below:-

"15. This Court partly allowed the appeal qua the parents-in-law while dismissing the same qua the husband. This Court explained the legal position and the approach to be adopted by the Court at the stage of framing of charges or directing discharge in the following words:

"11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence." (emphasis supplied)

16. Support for the above view was drawn by this Court from earlier decisions rendered in State of Karnataka v. L. Muniswamy 1977 Cri.LJ 1125, State of Maharashtra & Ors. v. Som Nath Thapa and Ors. 1996 Cri.LJ 2448 and State of

M.P. v. Mohanlal Soni 2000 Cri.LJ 3504. In Som Nath's case (supra) the legal position was summed up as under: (scc P.671, para 32)

> *"32. … if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage." (emphasis supplied)*

17. So also in Mohanlal's case (supra) this Court referred to several previous decisions and held that the judicial opinion regarding the approach to be adopted for framing of charge is that such charges should be framed if the Court prima facie finds that there is sufficient ground for proceeding against the accused. The Court is not required to appreciate evidence as if to determine whether the material produced was sufficient to convict the accused. The following passage from the decision in Mohanlal's case (supra) is in this regard apposite: (SCC p. 342, para7)

> *"7. The crystallized judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."*

18. In State of Orissa v. Debendra Nath Pandhi (2005) 1 SCC 568, this Court was considering whether the trial Court can at the time of framing of charges consider material filed by the accused. The question was answered in the negative by this Court in the following words: (SCC pp. 577 & 579, paras 18 &23)

> *"18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced...Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police...*

xx xx xx xx

> *23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material..." (emphasis supplied)*

19. Even in Smt. Rumi Dhar v. State of West Bengal & Anr. (2009) 6 SCC 364, reliance whereupon was placed by counsel for the appellants the tests to be applied at the stage of discharge of the accused person under Section 239 of the Cr.P.C., were found to be no different. Far from readily encouraging discharge, the Court held that even a strong suspicion in regard to the commission of the offence would be sufficient to justify framing of charges. The Court observed: (SCC p. 369, para 17)

> *"17....While considering an application for discharge filed in terms of Section 239 of the Code, it was for the learned Judge to go into the details of the allegations made against each of the accused persons so as to form an opinion as to whether any case at all has been made out or not as a strong suspicion in regard thereto shall subserve the requirements of law...*

20. To the same effect is the decision of this Court in Union of India v. Prafulla Kumar Samal and Anr. v. (1979) 3 SCC 4, where this Court was examining a similar question in the context of Section 227 of the Code of Criminal Procedure. The legal position was summed up as under: (SCC p. 9, para 10)

> *"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:*
>
> *(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:*
>
> *(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.*
>
> *(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.*
>
> *(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post Office or a mouth- piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."*

9. The Hon'ble Apex Court in case titled ***Vinay Tyagi. v. Irshad Ali alias Deepak and Ors., (2013) 5 SCC 762***, has held that opinion for presuming that the accused has committed an offence, is to be formed by the Court on basis of the record of the case, documents submitted therewith and to a limited extent, plea of defence, in order to be satisfied that ingredients of offence substantially exist. However, the Hon'ble Apex Court while making

aforesaid observation has also observed that prosecution case at this stage requires to be examined on the plea of demur i.e. presumption is of very weak and mild nature. Relevant paras of the judgment are being reproduced herein below:-

> *"16. Once the Court examines the records, applies its mind, duly complies with the requisite formalities of summoning the accused and, if present in court, upon ensuring that the copies of the requisite documents, as contemplated under Section 173(7), have been furnished to the accused, it would proceed to hear the case.*
>
> *17. After taking cognizance, the next step of definite significance is the duty of the Court to frame charge in terms of Section 228 of the Code unless the Court finds, upon consideration of the record of the case and the documents submitted therewith, that there exists no sufficient ground to proceed against the accused, in which case it shall discharge him for reasons to be recorded in terms of Section 227 of the Code.*
>
> *17.1. It may be noticed that the language of Section 228 opens with the words, 'if after such consideration and hearing as aforesaid, the Judge is of the opinion that there is ground for presuming that the accused has committed an offence', he may frame a charge and try him in terms of Section 228(1)(a) and if exclusively triable by the Court of Sessions, commit the same to the Court of Sessions in terms of Section 228(1)(b). Why the legislature has used the word 'presuming' is a matter which requires serious deliberation. It is a settled rule of interpretation that the legislature does not use any expression purposelessly and without any object. Furthermore, in terms of doctrine of plain interpretation, every word should be given its ordinary meaning unless context to the contrary is specifically stipulated in the relevant provision.*
>
> *17.2. Framing of charge is certainly a matter of earnestness. It is not merely a formal step in the process of criminal inquiry and trial. On the contrary, it is a serious step as it is determinative to some extent, in the sense that either the accused is acquitted giving right to challenge to the complainant party, or the State itself, and if the charge is framed, the accused is called upon to face the complete trial which may prove prejudicial to him, if finally acquitted. These are the courses open to the Court at that stage.*
>
> *17.3. Thus, the word 'presuming' must be read ejusdem generis to the opinion that there is a ground. The ground must exist for forming the opinion that the accused had committed an offence. Such opinion has to be formed on the basis of the record of the case and the documents submitted therewith. To a limited extent, the plea of defence also has to be considered by the Court at this stage. For instance, if a plea of proceedings being barred under any other law is raised, upon such consideration, the Court has to form its opinion which in a way is tentative. The expression 'presuming' cannot be said to be superfluous in the language and ambit of Section 228 of the Code. This is to emphasize that the Court may believe that the accused had committed an offence, if its ingredients are satisfied with reference to the record before the Court.*
>
> *18. At this stage, we may refer to the judgment of this Court in the case of Amit Kapur v. Ramesh Chander & Anr. [JT 2012 (9) SC 329] wherein, the Court held as under : (SCC pp. 476-77,paras 16-18)*
>
> > *"16. The above-stated principles clearly show that inherent as well as revisional jurisdiction should be exercised cautiously. If the jurisdiction under Section 482 of the Code in relation to quashing of an FIR is circumscribed by the factum and caution afore-noticed, in that event, the revisional jurisdiction, particularly while dealing with framing of a charge, has to be even more limited.*

17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the 'record of the case' and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the Section exists, then the Court would be right in presuming that there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

18. It may also be noticed that the revisional jurisdiction exercised by the High Court is in a way final and no inter court remedy is available in such cases. Of course, it may be subject to jurisdiction of this court under Article 136 of the Constitution of India. Normally, a revisional jurisdiction should be exercised on a question of law. However, when factual appreciation is involved, then it must find place in the class of cases resulting in a perverse finding. Basically, the power is required to be exercised so that justice is done and there is no abuse of power by the court. Merely an apprehension or suspicion of the same would not be a sufficient ground for interference in such cases." (emphasis in original)

19. On analysis of the above discussion, it can safely be concluded that 'presuming' is an expression of relevancy and places some weightage on the consideration of the record before the Court. The prosecution's record, at this stage, has to be examined on the plea of demur. Presumption is of a very weak and mild nature. It would cover the cases where some lacuna has been left out and is capable of being supplied and proved during the course of the trial. For instance, it is not necessary that at that stage each ingredient of an offence should be linguistically reproduced in the report and backed with meticulous facts. Suffice would be substantial compliance to the requirements of the provisions.

10. The Hon'ble Apex Court in judgment titled ***L. Krishna Reddy v. State by Station House Officer and Ors, (2014) 14 SCC 401***, has held that Court is neither substitute nor an adjunct of the prosecution, rather once a case is presented to it by the prosecution its bounden duty is to sift through the material to ascertain whether prima-facie case has been established, which would justify and merit the prosecution of a person. The relevant paras are as follows:-

"10. Our attention has been drawn to Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia as well as K. Narayana Rao but we are unable to appreciate any manner in which they would persuade a court to continue the prosecution of the parents of the deceased. After considering Union of India v. Prafulla Kumar Samal, this Court has expounded the law in these words: (Stree Atyachar Virodhi Parishad case, SCC p. 721, para 14)

"14. … In fact, Section 227 itself contains enough guidelines as to the scope of enquiry for the purpose of discharging an accused. It provides

that "the Judge shall discharge when he considers that there is no sufficient ground for proceeding against the accused". The 'ground' in the context is not a ground for conviction, but a ground for putting the accused on trial. It is in the trial, the guilt or the innocence of the accused will be determined and not at the time of framing of charge. The Court, therefore, need not undertake an elaborate enquiry in sifting and weighing the material. Nor it is necessary to delve deep into various aspects. All that the Court has to consider is whether the evidenciary material on record if generally accepted, would reasonably connect the accused with the crime. No more need be enquired into"

11. The court is neither a substitute nor an adjunct of the prosecution. On the contrary, once a case is presented to it by the prosecution, its bounden duty is to sift through the material to ascertain whether a prima facie case has been established which would justify and merit the prosecution of a person. The interest of a person arraigned as an accused must also be kept in perspective lest, on the basis of flippant or vague or vindictive accusations, bereft of probative evidence, the ordeals of a trial have to be needlessly suffered and endured. We hasten to clarify that we think the statements of the complainant are those of an anguished father who has lost his daughter due to the greed and cruelty of his son-in-law. As we have already noted, the husband has taken his own life possibly in remorse and repentance. The death of a child even to avaricious parents is the worst conceivable punishment."

11. In the recent judgment, Hon'ble Apex Court in case bearing Criminal Appeal No.577 of 2017 (arising out of SLP (CrL.) No. 287 of 2017) titled ***Vineet Kumar and Ors. v. State of U.P. and Anr.,*** while considering the scope of interference under Section 397 Cr.PC and 482 Cr.PC, by the High Courts, has held that High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceedings ought to quashed. The Hon'ble Apex Court has further held that the saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In the aforesaid case, the Hon'ble Apex Court taking note of seven categories, where power can be exercised under Section 482 of the Cr.PC, as enumerated in the judgment titled as ***State of Haryana and others vs. Bhajan Lal and others***, 1992 Supp (1) SCC 335, i.e. where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, quashed the proceedings:-

"19. We have considered the submissions made by the parties and perused the records.

20. Before we enter into the facts of the present case it is necessary to consider the ambit and scope of jurisdiction under Section 482 Cr.P.C. vested in the High Court. Section 482 Cr.P.C. saves the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

21. This Court time and again has examined scope of jurisdiction of High Court under Section 482 Cr.P.C. and laid down several principles which govern the exercise of jurisdiction of High Court under Section 482 Cr.P.C. A three-Judge Bench of this Court in State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699,held that the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the

process of the Court or that the ends of justice require that the proceeding ought to be quashed. In paragraph 7 of the judgment following has been stated:

> *"7....In the exercise of this wholesome power, the High Court is entitled to quash a proceeding if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."*

22. The judgment of this Court in State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335, has elaborately considered the scope and ambit of Section 482 Cr.P.C. Although in the above case this Court was considering the power of the High Court to quash the entire criminal proceeding including the FIR, the case arose out of an FIR registered under Section 161, 165 IPC and Section 5(2) of the Prevention of Corruption Act, 1947. This Court elaborately considered the scope of Section 482 CR.P.C./ Article 226 in the context of quashing the proceedings in criminal investigation. After noticing various earlier pronouncements of this Court, this Court enumerated certain Categories of cases by way of illustration where power under 482 Cr.P.C. can be exercised to prevent abuse of the process of the Court or secure ends of justice. Paragraph 102 which enumerates 7 categories of cases where power can be exercised under Section 482 Cr.P.C. are extracted as follows:

> *"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*
>
> > *(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*
> >
> > *(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*

> *(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*
>
> *(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.*
>
> *(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*
>
> *(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*
>
> *(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."*

23. A three-Judge Bench in State of Karnataka vs. M. Devenderappa and another, 2002 (3) SCC 89, had occasion to consider the ambit of Section 482 Cr.P.C. By analysing the scope of Section 482 Cr.P.C., this Court laid down that authority of the Court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice the Court has power to prevent abuse. It further held that Court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of Court or quashing of these proceedings would otherwise serve the ends of justice. Following was laid down in paragraph 6:

> *"6......All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsae esse non potest (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it*

is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto." Further in paragraph 8 following was stated:

"8.....Judicial process should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death. The scope of exercise of power under Section 482 of the Code and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any court or otherwise to secure the ends of justice were set out in some detail by this Court in State of Haryana v. Bhajan Lal."

24. In Sunder Babu and others vs. State of Tamil Nadu, 2009 (14) SCC 244, this Court was considering the challenge to the order of the Madras High Court where Application was under Section 482 Cr.P.C. to quash criminal proceedings under Section 498A IPC and Section 4 of Dowry Prohibition Act, 1961. It was contended before this Court that the complaint filed was nothing but an abuse of the process of law and allegations were unfounded. The prosecuting agency contested the petition filed under Section 482 Cr.P.C. taking the stand that a bare perusal of the complaint discloses commission of alleged offences and, therefore, it is not a case which needed to be allowed. The High Court accepted the case of the prosecution and dismissed the application. This Court referred to the judgment in Bhajan Lal case (supra) and held that the case fell within Category 7. Apex Court relying on Category 7 has held that Application under Section 482 deserved to be allowed and it quashed the proceedings."

12. The Hon'ble Apex Court in its judgment ***L. Krishna Reddy*** referred supra has categorically held that Court is neither substitute nor an adjunct of the prosecution, rather once a case is presented to it by the prosecution, its bounden duty is to sift through the material to ascertain whether prima-facie case has been established which would justify and merit the prosecution of a person. The Hon'ble Apex Court, while making aforesaid observation has also held that while carrying out aforesaid exercise, interest of a person arraigned as an accused, must be taken into consideration lest he/she may have to suffer the ordeals of a trial based on flippant or vague or vindictive accusations, bereft of probative evidence. In recent judgment titled ***Prashant Bharti v. State (NCT of Delhi)***, (2013) 9 SCC 309, the Hon'ble Apex Court has held as under:-

"22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in Rajiv Thapar & Ors. vs. Madan Lal Kapoor wherein this Court inter alia held as under: (SCC pp.347-49, paras 29-30)

29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the

prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section - 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

> *30.1 Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?*
>
> *30.2 Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.*
>
> *30.3 Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?*
>
> *30.4 Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?*
>
> *30.5 If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal - proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."*

23. The details in respect of each aspect of the matter, arising out of the complaints made by Priya on 16.2.2007 and 21.2.2007 have been examined in extensive detail in the foregoing paragraphs. We shall now determine whether the steps noticed by this Court in the judgment extracted hereinabove can be stated to have been satisfied. In so far as the instant aspect of the matter is concerned, the factual details referred to in the foregoing paragraphs are being summarized hereafter.

> *23.1. Firstly, the appellant-accused was in Sector 37, Noida in the State of Uttar Pradesh on 15.2.2007. He was at Noida before 7.55 pm. He, thereafter, remained at different places within Noida and then at Shakarpur, Ghaziabad, Patparganj, Jorbagh etc. From 9.15 pm to 11.30 pm on 15.2.2007, he remained present at a marriage anniversary function celebrated at Rangoli Lawns at Ghaziabad, Uttar Pradesh. An affidavit to the aforesaid effect filed by the appellant- accused was found to be correct by the investigating officer on the basis of his mobile phone call details. The accused was therefore not at the place of occurrence, as alleged in the complaint dated 16.2.2007.*
>
> *23.2. Secondly, verification of the mobile phone call details of the complainant/prosecuterix Priya revealed, that on 15.2.2007, no calls were made by the appellant-accused to the complainant/prosecuterix, and that, it was the complainant/prosecuterix who had made calls to him.*
>
> *23.3. Thirdly, the complainant/prosecuterix, on and around the time referred to in the - complaint dated 16.2.2007, was at different places of New Delhi i.e., in Defence Colony, Greater Kailash, Andrews Ganj and finally at Tughlakabad Extension, as per the verification of the investigating officer on the basis of her mobile phone call details. The complainant was also not at the place of occurrence, as she herself alleged in the complaint dated 16.2.2007.*
>
> *23.4. Fourthly, at the time when the complainant/prosecuterix alleged, that the appellant-accused had misbehaved with her and had outraged her modesty on 15.2.2007 (as per her complaint dated 16.2.2007), she was actually in conversation with her friends (as per the verification made by the investigating officer on the basis of her mobile phone call details).*
>
> *23.5. Fifthly, even though the complainant/prosecuterix had merely alleged in her complaint dated 16.2.2007, that the accused had outraged her modesty by touching her breasts, she had subsequently through a supplementary statement (on 21.2.2007), levelled allegations against the accused for offence of rape.*
>
> *23.6. Sixthly, even though the complainant/prosecuterix was married to one Manoj Kumar Soni, s/o Seeta Ram Soni (as indicated in an affidavit appended to the Delhi police format for information of tenants and duly verified by the investigating officer, wherein she had described herself as married), in the complaint made to the police (on 16.2.2007 and 21.2.2007), she had suggested that she was unmarried.*
>
> *23.7. Seventhly, as per the judgment and decree of the Civil Judge (Senior Division), Kanpur (Rural) dated 23.9.2008, the complainant was married to Lalji Porva on 14.6.2003. The aforesaid marriage subsisted till 23.9.2008. The allegations made by the complainant dated 16.2.2007 and 21.2.2007 pertain to occurrences of 23.12.2006, 25.12.2006, 1.1.2007 and - 15.2.2007, i.e., positively during the subsistence of her marriage with Lalji Porwal. Thereafter, the complainant Priya married another man Manoj on 30.9.2008. This is evidenced by a "certificate of marriage" dated*

30.9.2008. In view of the aforesaid, it is apparent that the complainant could not have been induced into a physical relationship, based on an assurance of marriage.

23.8. Eighthly, the physical relationship between the complainant and the accused was admittedly consensual. In her complaints Priya had however asserted, that her consent was based on a false assurance of marriage by the accused. Since the aspect of assurance stands falsified, the acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC. Especially because the complainant was a major on the date of occurrences, which fact emerges from the "certificate of marriage" dated 30.9.2008, indicating her date of birth as 17.7.1986.

23.9. Ninthly, as per the medical report recorded by the AIIMS dated 16.2.2007, the examination of the complainant did not evidence her having been poisoned. The instant allegation made by the complainant cannot now be established because even in the medical report dated 16.2.2007 it was observed that blood samples could not be sent for examination because of the intervening delay. For the same reason even the allegations levelled by the accused of having been administered some intoxicant in a cold drink (Pepsi) cannot now be established by cogent evidence.

23.10. Tenthly, The factual position indicated in the charge-sheet dated 28.6.2007, that despite best efforts made by the investigating officer, the police could not recover the container of the cold drink (Pepsi) or the glass from which the - complainant had consumed the same. The allegations made by the complainant could not be verified even by the police from any direct or scientific evidence, is apparent from a perusal of the charge-sheet dated 28.6.2007.

23.11. Eleventhly, as per the medical report recorded by the AIIMS dated 21.2.2007 the assertions made by the complainant that the accused had physical relations with her on 23.12.2006, 25.12.2006 and 1.1.2007, cannot likewise be verified as opined in the medical report, on account of delay between the dates of occurrences and her eventual medical examination on 21.2.2007. It was for this reason, that neither the vaginal smear was taken, nor her clothes were sent for forensic examination."

13. From the careful perusal of the aforesaid judgments, it clearly emerge that Courts below, at the stage of framing charge in exercise of jurisdiction under Sections 227 and 228 of the Cr.PC, are required to consider the record of the case and the documents submitted therewith and thereafter, may either discharge the accused or where it appears to the court that there is a ground for presuming that the accused has committed offence, it shall frame the charge. It clearly emerges from the reading of the aforesaid judgments that the satisfaction of the Court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction.

14. True it is, at the initial stage of framing of charge, the court is concerned not with proof but with the strong suspicion whether the accused has committed an offence, which if put to trial, could prove him guilty. In all the judgments, referred supra, the Hon'ble Apex Court has held that at the time of framing of charge, Court should come to conclusion that prima-facie case, if any, exists to the satisfaction of the Court against the accused. The Hon'ble Apex Court in ***L. Krishna Reddy's*** case supra, taking note of judgments passed by the Hon'ble Apex Court in cases titled "***Stree Atyachar Virodhi Parishad v. Dilip Nathumal Chordia"*** *as well as "**K. Narayana Rao"***, wherein the Hon'ble Supreme Court held that though Courts need not undertake an elaborate enquiry while sifting and weighing the material but court needs to consider whether evidenciary material on record, if generally accepted would reasonably connect

the accused with the crime or not, it has held that once a case is presented to the Court by the prosecution, it is the duty of the Court to sift through the material to ascertain whether prima-facie case has been established against the accused or not?

15. Now on the basis of aforesaid principles as have been laid down in the judgments supra, this Court would proceed to examine whether, learned trial court while exercising power under Section 228 of the Cr.PC, actually perused material made available on record by the prosecution, to ascertain whether prima-facie case exists against the accused or not?

16. At the very outset, it may be stated that at the time of issuance of notice, this Court had called for the records of the court below, which was duly received by this Court, careful perusal whereof suggests that victim/complainant got his statement recorded under Section154 of the Cr.PC on 4.5.2015 stating therein that he has given examination of 10th Class and is the only brother and his house is situated in Jatpura on the bank of the road. He further stated that at about 7:00 pm, when there was some noise on the main road, he came out to see what is happening and found that many people had gathered there. He also stated that some of the people gathered were Jasveer, Avinash, Rakesh, Harjab Singh and his uncle Amarjeet Singh. He further reported that after the dispute was over and when they were coming back to the houses, a motorcyclist i.e. the petitioner accused namely Varun came from his back side and gave a blow of a sickle (darat) on his neck with an intention to kill him. He further stated that he took side, as result of which, blow of darat landed on his left shoulder. He also reported that had he not taken the side, the blow would have landed on his neck and he would have died. The complainant victim also stated in his statement that after giving the blow of darat, motorcyclist fled towards Una throwing the weapon of offence on the spot. On the basis of aforesaid statement under Section 154 of the Cr.PC, having been got recorded by the complainant/victim, on 4.5.2015, police registered formal FIR No. 110 of 295 against the petitioner accused under Section 307 of the IPC. Perusal of document available on record further suggests that police got complainant/victim examined from medical officer, Regional Hospital Una on 4.5.2015. Perusal of medical opinion rendered by the Medical Officer, Regional Hospital Una suggests that victim complainant was brought for medical examination at around 12.45 am on 4.5.2015, whereas perusal of initial communication sent by the Incharge, police station Haroli, suggests that request was made for medical examination on 3.5.2015. Even MLC placed on record suggests that the police made request vide police docket SPL-3 dated 3.5.2015. It is not understood that when incident took place on 4.5.2015, that too at 12.05 a.m., how police could make communication to Medical Officer, Regional Hospital, Una on 3.5.2015, requesting therein for medical examination of the complainant/victim. Similarly, perusal of statement of the complainant recorded under Section 154 of the Cr.PC suggests that initially matter was reported by the complainant/victim to the police on 4.5.2015 at 12.05am, pursuant to which FIR bearing No. 110 of 2015 came to be registered. Perusal of FIR made available on record suggests that FIR was registered on 4.5.2015 at 1:30 hours, whereas copy of rapat No.25 (Rojnamcha) suggests that it was entered on 3.5.2015 at 11:30pm and when, FIR was registered on 4.5.015 that too at 1:30 pm, it is not understood how police could make request vide communication dated 3.5.2015, to the Medical Officer, Regional Hospital requesting therein for medical examination of the complainant victim. Perusal of Medical opinion/MLC suggests that victim complainant was brought for medical examination at 12:45 am on 4.5.2015 on the basis of police SPL-3 dated 3.5.20115, whereas as per the own version of the Investigating Agency, initial statement of the complainant victim was recorded under Section 154 of the Cr.PC at 12:05 am. If the aforesaid version of the Investigating Agency is accepted to be true, this court has reason to infer that they must have consumed some time to lodge formal FIR against the petitioner accused.

17. Leaving everything aside, perusal of medical opinion rendered by the medical officer nowhere suggests that at the time of examination, injury, if any, much less grievous was witnessed/seen on the body of the complainant/victim with the alleged blow of sickle (darat). Medical Officer has reported no injury on the neck of the victim. The Medical Officer concerned has also reported that there is no bleeding and movement of left shoulder was normal. Further doctor i.e. surgical specialist vide its opinion on 6.5.2015, termed the injury to be simple in

nature. The Surgical Specialist has further concluded that there is no mark on the scalper region and neck and injury on the person concerned is superficial injury. There is a specific finding of doctor that there is no injury on the neck and the injury explained at Sr. No. 2 is simple in nature. Apart from above, this court had an occasion to peruse report submitted by the RFSL, Dharamshala, H.P, which is reproduced herein below:-

> *"Three sealed parcels were received for examination in Biology and Serology Division on 14.05.15. The seals on the parcels were seen intact and tallied with the specimen seals sent with the docket. The parcels were signed, cut and opened. The description of the exhibits in the parcels was as under:*
>
> *Parcel-I:- Sealed with eight seals of 'V'. It contained exhibit-1.*
>
> *Exhibit-1:- One metallic rusty darat/dagger measured about 55 cm.*
>
> *Parcel-II:- Sealed with eight seals of 'S'. It contained exhibit-2.*
>
> *Exhibit-2:-One white colour "JOCKEY' make, sleeveless vest having some brown stains on the back of left shoulder region. The exhibit was mentioned as vest of Amanjot Singh.*
>
> *Parcel-III:- Sealed with one seal of 'MORTUARY UNA'. It contained exhibit-3.*
>
> *Exhibit-3:- One glass vial having about 4.5 ml of red colour liquid. The exhibit was mentioned as blood sample of Amanjot Singh.*
>
> *<u>Results</u>*
>
> *The exhibits/cuttings were subjected to biological and serological analyses in the laboratory. Benzidine test was performed to detect the presence of blood. The species of origin was determined by using gel-diffusion technique. On the basis of aforesaid examinations, results were as under:-*
>
> 1. *Blood was not detected in exhibit-1 (darat/dagger).*
> 2. *Human blood was detected in exhibit-2 (vest, Amanjot Singh), but was insufficient for blood grouping.*
> 3. *Human Blood was detected in exhibit-3 (blood sample, Amanjot Singh)."*

Aforesaid RFSL report further suggests that blood was not detected on Ext.1 i.e. darat/dagger, allegedly used by the petitioner accused while causing injury on the body of the victim/complainant. Similarly report suggests that human blood was found on Ext.2, i.e. vest of complainant but the same was insufficient for blood grouping.

18. This Court also carefully perused the statements recorded by the Investigating Agency under Section 161 Cr.PC of the complainant/victim as well as other persons, who were allegedly with the complainant at the time of alleged occurrence, perusal whereof suggests that around 10:00pm on 4.5.2015, victim had gone out of his house along with his uncle Amarjit Singh on the main road, where there was noise with regard to traffic jam. All the witnesses have stated that at that time, the petitioner accused Varun, who is indulged in smuggling of sand was also there. Apart from above, all the witnesses have stated that since petitioner accused had suspicion that the victim complainant is an informer of police, he attempted to cause injury on the neck of the complainant with sickle.

19. Careful perusal of statements made by the aforesaid witnesses suggests that on 6.5.2015, when their statements under Sections 161 Cr.PC, were recorded, they introduced altogether different story with regard to involvement of the petitioner accused in smuggling of sand. It emerges from the statements as referred above that petitioner accused had been stealing/smuggling sand from the land of Sh. Amarjeet Singh, who happened to be uncle of Amanjot Singh/complainant and in this regard, Sh. Amarjit Singh had repeatedly warned him not to indulge himself in illegal smuggling of sand. Though, there is mention qua the lodging of

report by the aforesaid witnesses against the petitioner but there is nothing on record suggestive of the fact that there was some dispute inter-se them over illegal smuggling of sand by the petitioner accused that too with the persons, who got their statements recorded under Section 161 Cr.PC. Similarly, this Court was unable to find any evidence on record that pursuant to the aforesaid statements having been made by the witnesses under Section 161 Cr.PC, police made an attempt to bring on record evidence suggestive of the fact that petitioner was actually indulged/involved in illegal smuggling of sand. Similarly, there is no evidence led on record by the Investigating Agency to substantiate the claim of the claimant-victim that attempt to kill him was made by the petitioner accused on having doubt that he is a police informer.

20. This Court after carefully examining the document made available on record by the Investigating Agency sees substantial force in the argument having been made by the learned counsel for the petitioner that there is/was no material much less substantial available on record to frame charge under Section 307 of the IPC. Similarly, perusal of impugned order passed by the Court below reproduced herein above, nowhere suggests that court below before proceeding to frame charge under Section 228 of the Cr.PC against the accused carefully sifted/perused the material made available on record to ensure/ascertain whether prima-facie case exists against the accused or not? The Hon'ble Apex Court in *L.* ***Krishna Reddy's*** case supra, has specifically held that while framing charge under Section 228 Cr.PC, court must keep in mind the interest of the person arraigned as an accused, who may be put to the ordeals of trial on the basis of flippant and vague evidence. In the instant case, perusal of impugned order nowhere suggests that learned trial Court while proceeding to frame charge made an endeavor to sift/peruse the material adduced on record by the Investigating Agency. There appears to be no application of mind by the learned court below while charging under Section 307 Cr.PC. The Hon'ble Apex Court further held that once a case is presented to it by the prosecution, it is bounden duty of Court to sift through the material to ascertain whether a prima-facie case has been established or not. But even if otherwise, ratio as laid down by the Hon'ble Apex Court in other cases cited above are also taken into consideration, it clearly emerge from the same that in all probabilities, learned court below while framing charge is required to ascertain whether prima-facie case exists or not. Needles to say exercise, if any, carried out by the Court while ascertaining whether prima-facie case, if any, exists against the accused or not, must reflect in order, whereby charge is proposed to be framed. But in the instant case, as has been discussed in detail, there appears to be no attempt, if any, made by the learned trial Court to ascertain whether prima-facie case exists against the accused at the time of framing of charge or not and as such, impugned order is not sustainable being totally contrary to the law laid down by the Hon'ble Apex Court in the judgment referred herein above.

21. True, it is jurisdiction of this Court under Section 397 of the Cr.PC is very limited but same can be exercised so as to examine the correctness, illegality or proprietary of order passed by the trial Court or inferior court as the case may be. The legality, proprietary or correctness of an order passed by an inferior court is the very foundation of exercise of jurisdiction under Section 397 but ultimately it also requires justice to be done. In the judgments referred herein above, the Hon'ble Apex Court has held that jurisdiction vested in this Court in terms of Section 397 Cr.PC can be exercised to the fact that there is a palpable error, non-compliance with the provision of law or where decision is completely erroneous or where the judicial discretion is exercised arbitrarily.

22. Hence, in the instant case, for the reasons stated above, this Court sees substantial reason to exercise its revisionary power to correct impugned order, which on the face of it is not based upon the principles as have been laid down in the judgments recorded by the Apex Court while discussing scope of power of Court to frame charge under Section 228 of the Cr.PC. In the ***Vineet Kumar's*** case supra, the Hon'ble Supreme Court has held that Court cannot permit prosecution to go on if the case falls in one of the categories as enumerated in the case titled *State of Haryana and others vs. Bhajan Lal and others*, because judicial process is a solemn proceeding and same should not be an instrument of oppression or, needless harassment. This court has no hesitation to conclude after carefully examining the impugned order vis-à-vis ,

material available on record that learned court below merely acted as a post office, who accepted the charge sheet under Section 173 of the Cr.PC as verbatim without making on effort to ascertain whether prima-facie case exists against the accused or not? Impugned order nowhere reveals that learned court below while passing impugned order made an effort to sift through the material produced before it to conclude whether prima-facie case is made out against the petitioner. Hence, this Court has reason to conclude that great prejudice has been caused to the petitioner.

23. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, the present revision petition is allowed and impugned order dated 24.6.2016 passed by the court below is quashed and set-aside. However, the matter is remanded back to the learned court below to consider the matter afresh in light of the findings/observations returned/made in the instant judgment passed by this Court. Parties are directed to remain present before the learned Court below on **22.5.2017**, to enable it to consider the matter as directed above. Records of the case along with copy of judgment be also sent forthwith. Pending applications, if any, are disposed of.

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

HPSEB and others .....Petitioners.

Versus

Agro Industrial Packaging India Ltd. .....Respondent.

CWP No. 5056 of 2011

Date of decision: 26/04/2017

Constitution of India, 1950- Article 226- Respondent is a consumer of electricity supplied by the petitioner and had agreed to pay the tariff levied upon it in accordance with the prevalent rules – the petitioner sought demand and energy charges from the respondent- a dispute was raised before Forum for Rederessal for Grievances of HPSEB Consumers, who decided that the final claim raised by the petitioners is not based upon actual figures and facts - aggrieved from the order, present writ petition has been filed – held that respondent had agreed to pay the electricity tariff as per the prevalent rules - it had sought assured contract demand of 754.08 KVA– demand and energy charges were in accordance with the prevalent rates – there is no infirmity in the demand of charges from the respondent- petition allowed.(Para-2 to 4)

For the petitioners: Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.

For the respondent: Mr. Hamender Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge, (oral):

The respondent is an industrial Unit. It receives power supply from the petitioners. The petitioners are aggrieved by the orders comprised in Annexures P-16, whereby the Forum for Redressal of Grievances of HPSEB Consumers pronounced that a final claim of Rs.15,06,396/- raised by the HPSEB, is not based on actual figures and facts. The petitioners pray for the annexure aforesaid being quashed and set aside. The petitioners also pray for a further direction being rendered upon the respondent, to pay the demand raised by the petitioners with respect to Rs. 2349352/- including 1% surcharge together with interest @ 18% per annum, from the date it was due and payable, till its actual realization.

2. The respondent resists and repudiates the contentions of the petitioners. The controversy inter-se the parties at contest before this Court, is qua, the tenability of raising of tariff by the petitioner with respect to electrical energy consumed by the respondent-unit. Admittedly, the respondent, is, a consumer of electricity under the petitioners. In an agreement concluded inter-se the parties, agreement whereof exists on the paper book, the respondent-unit, had, agreed/accepted, to pay to the petitioner with respect to electricity consumed by it, the apposite commensurate tarrif, as would come to be levied upon it, in accordance with the prevalent rules in force. The respondent, too, does not controvert or contest the fact, that, it was under an enjoined legal obligation, to defray to the petitioner/suppliers of electricity to its unit at Gumma, tariff at the prevalent rates. In face thereof, now it is imperative to determine, as, to whether the petitioners, had levied tariff with respect to electrical energy consumed by the respondent-unit, in, accordance with the prevalent rates. The tariff, as, demanded by the petitioners from the respondent-unit, with respect to consumption of electricity by it, is, on the strength, of, Annexure-P-1. A perusal of the aforesaid annexure, divulges that the annexure aforesaid ordains levy, of, electricity tariff by the petitioner upon the respondent-Unit, on a two way basis, in as much, as, the respondent-unit was obliged to pay both demand charges and energy charges. Demand charges stand conveyed, in, Annexure-P-1, to, imply that they would be levied, on, the actual maximum recorded demand, in, a month in any 30 minutes interval, in, a month or 80% of the contract demand whichever, is, higher.

3. The respondent-Unit does not contest the fact that it was legally obliged to in consonance with the terms of the concluded contract interse the parties, to defray electricity tariff to the petitioners at the prevalent rates, however, it, contests the fact of it being under a duty under law, to, defray to the petitioners, the relevant demand charges at the rate contemplated in, Annexure-P-1. For clinching the contest qua the facet aforesaid, it is imperative to determine whether the respondent-unit, had agreed or contracted to defray to the petitioners, electricity tariff, as ordained in Annexure-P-1. Moreover, prevalence of Annexure-P-1, at the apposite stage, has, to be determined, on, the strength of the fact of its being in vogue or in-force during the disputed period, in as much, as, from 1-11-2001 till 31-08-2003. A perusal of the contract entered inter-se the parties, comprised, at, page 23 of the writ book, discloses that the assured contracted demand made by the respondent-Unit for supply of electricity to it by the petitioner, being comprised in 754.08 KVA besides the said agreement remaining, in force, as well, as, in operation during the disputed period.

4. On a consideration of the above material on record this Court is of the firm and confident view that given the evident acceptance by the respondent-Unit, to defray to the petitioners, electricity tariff, at the prevalent rules, acceptance whereof is comprised, in, the operable contract qua the disputed period, whereby, the respondent-unit had sought assured contract demand of supply of electricity to the tune of 754.08 KVA. Hence, given the relevant acceptance by the respondent-unit under a concluded contract inter-se the parties besides it hence accepting the applicability of the relevant contractual tariff rates with respect to electrical energy consumed, at its industrial unit. In sequel when Annexure P-2 also portrays the mode(s) of raising or levying of tariff by the petitioners qua electrical energy consumed by the respondent-unit, hence the effect of the respondent agreeing to or abide by the prevalent rates of levying of electricity tariff, is of its also conveying its acquiescence to accept the rates of electricity tariff postulated, in Annexure P-2. The petitioners by applying the two way mode, of levying of electricity tariff, in as much, as, by raising demand, both, qua the energy charges, as well, as qua demand charges, its, comprising the prevalent rates/modes of levy of tariff, modes of levy of tariff stand accepted by the respondent under a concluded contract executed inter-se the parties at contest hence did not transgress the domains thereof. Therefore, the respondent-unit is estopped from contending that the levy of electricity tariff by the petitioner on anvil of the prevalent rates comprised in Annexure P-1 is either arbitrary or capricious, rather the raising of electricity tariff by the petitioners with respect to the electricity consumed, by the respondent-unit is to be considered to be anvilled upon firm and formidable material existing on record. Obviously the

relevant tariff, as raised by the petitioners, is to be defrayed by the respondent-unit. Consequently, I find merit in the petition, which is accordingly allowed. No costs.

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

Jai Chand ......Petitioner.
Versus
Jagdish Chand ....Respondent.

CMPMO No. 89 of 2017.
Decided on: 26th April, 2017

Code of Civil Procedure, 1908- Order 26 Rule 9- An application for demarcation was filed pleading that the defendant had encroached upon suit land by raising construction during the pendency of suit – he had also cut a Biuhal tree- application was filed to determine the extent of encroachment – demarcation was conducted by the Field Kanungo after filing the application- the demarcation report was affirmed by the Competent Authority – Trial Court dismissed the application on the ground that there was no necessity of demarcation by the Court in view of the demarcation having been conducted by the Revenue Authorities, - aggrieved from the order, present petition has been filed- held that once the demarcation has been conducted, no permission to demarcate the land afresh can be granted – Trial Court had rightly dismissed the application – petition dismissed.(Para-4 and 5)

For the petitioners : Mr. Rajesh Kumar, Advocate.
For the Respondent : Mr. K.S. Banyal, Senior Advocate with Ms. Sarswati, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Order Annexure A-3 dated 19.8.2016 passed in an application filed under Order 26 Rule 9 CPC by learned Civil Judge (Junior Division), Barsar, District Hamirpur is under challenge in this petition.

2. The Court below has dismissed the application with the observations that the demarcation of the suit land is got conducted by the petitioner-plaintiff during the pendency of the suit and the demarcation report has been affirmed by the competent authority. Also that till the previous demarcation report is in existence and not set aside, no fresh prayer for demarcation of the suit land can be entertained.

3. Interestingly enough, the application Annexure P-1 has been filed for demarcation of the suit land on the ground that the respondent-defendant during the pendency of the suit had encroached upon the suit land for raising construction thereon and also cut a '*Biuhal*' tree therefrom. The demarcation, therefore, is required to find out the extent of the alleged encroachment made by him.

4. Admittedly, the demarcation of the land was conducted by the Field Kanoongo on 15.6.2010 i.e. after filing of the application Annexure P-1. The demarcation report even has been affirmed also by the competent authority on 14.7.2010. Meaning thereby that in view of the demarcation report in existence has been submitted by the Field Kanoongo, after demarcation of the land on the spot at the instance of the petitioner-plaintiff, no permission to demarcate the land afresh could have been granted. Learned trial Judge, therefore, has not committed any illegality or irregularity in dismissing the application.

5. The contentions raised on behalf of the petitioner-plaintiff that in the demarcation conducted on 15.6.2010, the nature and extent of the encroachment has not been pointed out, can be raised in the trial Court during the course of the proceedings in the suit, however, in the given facts and circumstances and for all the reasons recorded hereinabove, the present is not a case where fresh demarcation of the suit land could be ordered. Learned trial Judge has, therefore, rightly dismissed the petition. Being so, the impugned order Annexure A-3 calls for no interference and is hereby affirmed. The petition is dismissed with the above observations. Pending application(s), if any, shall also stand disposed of.

Copy Dasti.

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

Jiwa Nand .....Petitioner.

Versus

State of Himachal Pradesh ......Respondent.

Cr. Revision No. 207 of 2011
Reserved on : 19.04.2017
Date of decision: 26.04.2017

Indian Penal Code, 1860- Section 279 and 338- Accused was driving HRTC Bus in a rash and negligent manner – he struck driver side of the bus with a wall due to which minor R sustained injury on his arm – the accused was tried and convicted by the trial Court- an appeal was preferred, which was dismissed- held in revision that photographs show that there was sufficient space for driving the bus after keeping sufficient distance from the wall – there are scratches on the back side of the bus starting from the rear tyre of the bus – scratches were also visible on the wall against which the driver side of the bus was struck – this shows that the bus was taken to the extreme right side of the Road due to which child sustained injuries – it was the duty of the accused driving the bus to keep in mind the possibility of the passengers having some part of their body outside of the bus – rashness and negligence of the accused was duly proved- revision dismissed. (Para-10 to 14)

Cases referred:

Gujarat State Road Transport Vs. Keshavlal Somnath Panchal, AIR 1981 Guj. 205
Sushma Mitra Vs. M.P. State Road Transport Co., 1974 ACJ 8

For the petitioner: Mr. G.R. Palsra, Advocate.
For the respondent: Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this revision petition, the petitioner/accused has challenged the judgment passed by the Court of learned Additional Sessions Judge, Mandi in Criminal Appeal No. 01 of 2009, dated 15.09.2011, vide which learned appellate Court while dismissing the appeal filed by the present petitioner, upheld the judgment of conviction passed by the Court of learned Additional Chief Judicial Magistrate, Court No. 1, Mandi in Criminal Case No.271-II/2005, dated 15.10.2009, whereby learned trial Court had convicted the present petitioner for commission of offence punishable under Sections 279 and 338 of the Indian Penal Code and sentenced him to undergo simple imprisonment for a period of three months and to pay a fine of Rs.1000/- and in

default of payment of fine, to further undergo simple imprisonment for a period of one month under Section 279 of the Indian Penal Code and had further sentenced him to undergo simple imprisonment for a period of six months and to pay a fine of Rs.1000/- and in default of payment of fine, to further undergo simple imprisonment for a period of one month under Section 338 of the Indian Penal Code and had ordered both the sentences to run concurrently.

2. The case of the prosecution was that on 26.09.2005 at around 2:20 p.m., accused was driving HRTC bus bearing registration No. HP-33-5420 in a rash and negligent manner so as to endanger human life and personal safety of others, near Ayurvedic Office, Zonal Hospital, Mandi and had struck the driver side of the bus with a wall, as a result of which, one of the occupant of the bus, namely Rahul, son of Pushap Raj, a minor boy aged about 4 years received grievous injury on his arm, which was dangerous to his life. As per the prosecution, the accident was the result of rash and negligent driving of the accused on a public road, as a result of which, Rahul had received grievous injuries on his person. On the basis of a statement recorded under Section 154 of the Code of Criminal Procedure (Ex. PW8/A) of Lala Ram, FIR Ex. PW11/A was registered at Police Station Sadar, Mandi. On the basis of the said FIR, investigation was carried out. In the course of investigation, site plan of the spot of occurrence of the incident was prepared, the offending bus was taken into possession alongwith its documents. The Investigating Officer took into possession the driving licence of the accused. Shirt of the injured boy was also taken into possession. Investigating Officer also obtained M.L.C. of Rahul and mechanical report of the offending bus was also obtained. Photographs of the site were also obtained by the Investigating Officer and statements of witnesses were also duly recorded under Section 161 of the Code of Criminal Procedure.

3. After completion of investigation, challan was filed against the accused under Sections 279,336, 337 and 338 of the Indian Penal Code. Accordingly, notice of accusation was put to him, to which he pleaded not guilty and claimed trial.

4. Learned trial Court on the basis of evidence placed on record by the prosecution both ocular as well as documentary, held that the prosecution had succeeded in proving the charge against the accused. It was held by the learned trial Court that the prosecution had succeeded in proving on record beyond reasonable doubt that at the time of accident, bus bearing registration No. HP-33-5420 was being driven by the accused in a rash and negligent manner so as to endanger human life and personal safety of others, on account of which, Rahul received fracture injury grievous in nature on his arm due to the rash and negligent driving of the accused, who had struck the driver side of the bus in issue with a wall because of his rash and negligent driving. Learned trial Court held that there was sufficient space on the spot for the accused to have had driven the bus in a proper manner and there was no occasion with the accused to drive the bus in issue in such a manner that it would have struck against the wall on the side of the road from the driver side. Learned trial Court held that the accused was found driving the bus in such a manner that no space was left on his own side between the bus and the wall, which reflected that the accused was driving the bus totally on the wrong side without leaving any space, which resulted the bus striking against the wall and causing grievous injury in the arm of a minor boy. Learned trial Court did not found any merit with the contention of the defence that it was the victim who had put his arm all of a sudden outside the bus. It was held by the learned trial Court that even if said argument was to be believed that the arm of Rahul was outside the bus in question, then also there was no occasion for the accused to have driven the bus in such a manner so as to have struck the same against the wall which was situated on one side of the road and that too with the driver side of the bus. It was further held by the learned trial Court that the factum of the injury having been received by Rahul being grievous injury stood proved by MLC Ex. PW7/A. On these bases, it was held by the learned trial Court that the prosecution had successfully proved its case against the accused for having committed offences punishable under Sections 279 and 338 of the Indian Penal Code.

5. In appeal, the findings so returned by the leaned trial Court were upheld by the learned appellate Court. While confirming the findings of the learned trial Court, it was held by

the learned appellate Court that the statements of PW-1 Mohan Singh, PW-4 Dharma Devi and PW-6 Naresh Kumar clearly and categorically proved that the injuries were received by the child on account of bus which was being driven by the accused having struck against the wall, as a result of which, the arm of the child was fractured. It was further held by the learned appellate Court that the said prosecution witnesses had denied the defence of the accused that the child had extended his arm outside the bus and that the accident occurred on account of the negligence of the child or that the accident occurred as the road was too narrow. Learned appellate Court also held that the testimonies of the said witnesses were also corroborated by the statement of Dr. Virender Singh, who conducted the medical examination of the child. Learned appellate Court also held that photograph Ex. PW8/H demonstrated that there was scratch on the body of the bus, which proved that the side of the bus had hit the wall. It was further held by the learned appellate Court that in fact driver was under obligation to drive the vehicle carefully so as not to hit the objects outside the bus and also had to keep this possibility in mind that the passengers do extend their arms and body parts outside the bus. While relying upon the judgment of the High Court of Gujarat in **Gujarat State Road Transport** Vs. **Keshavlal Somnath Panchal**, AIR 1981 Guj. 205, it was held by the learned appellate Court that the driver has to keep the fact in mind that passengers keep their arms on the window sill and he has to drive the vehicle in such a manner so as not to cause any harm to them. Learned appellate Court has also placed reliance upon the judgment reported in **Sushma Mitra** Vs. **M.P. State Road Transport Co.**, 1974 ACJ 8. On these bases, it was held by the learned appellate Court that the accused had not taken the said precaution and the same thus clearly demonstrated that the accused was negligent. Learned appellate Court concluded that learned trial Court had rightly held accused to be negligent in driving the bus, as a result of which, the bus had hit its side with the wall. It further held that the factum of the child having suffered grievous injury on his arm on account of the accident stood duly proved and corroborated by the prosecution witnesses as well as the testimony of Dr. Virender Singh and the photographs on record. Thus, learned appellate Court while upholding the judgment of conviction passed by the learned trial Court, dismissed the appeal so filed by the present petitioner.

6. Feeling aggrieved, the petitioner has filed this appeal.

7. Petitioner has primarily assailed the judgment passed by both the learned Courts below on the ground that both the learned Courts below erred in not appreciating that the accident in fact had taken place on account of the negligence of the child and not on account of the negligence of the driver, as had been concluded by both the learned Courts below. This as per the petitioner was the perversity with the findings so recorded by both the learned Courts below against him and on these bases, it was prayed on behalf of the petitioner that the judgment of conviction passed against him by both the learned Courts below be set aside. No other point was urged.

8. On the other hand, Mr. Vikram Thakur, learned Deputy Advocate General submitted that there was neither any perversity nor any illegality with the findings of conviction so returned against the petitioner by both the learned Courts below, as it stood proved on record beyond doubt that the accident in fact had taken place on account of rash and negligent driving of the bus by the present petitioner and the accident had not taken place due to the alleged negligence of the child, who was injured in the accident. Accordingly, it was prayed on behalf of the State that as there was no merit in the case, the same be dismissed.

9. I have heard the learned counsel for the parties and have also gone through the records of the case as well as the judgment passed by both the learned Courts below.

10. In order to satisfy the judicial conscious of the Court as to whether the accident had taken place due to rash and negligent driving of the present petitioner or on account of the negligence of the child, who had suffered injuries in the accident, this Court perused the statements of prosecution witnesses as well as the evidence on record to find out as to whether there was any perversity in the finding of conviction recorded against the petitioner by both the learned Courts below or not.

11. Photographs of the site of accident are on record as Ex. PW8/C, Ex. PW8/D, Ex. PW8/E, PW8/F, PW8/G and Ex. PW8/H. A perusal of these photographs demonstrates that though the road at the place where the bus had struck against the wall is not very wide, but there was adequate space for the said bus to be driven by keeping sufficient distance from the wall. Besides this, a perusal of these photographs demonstrate that it is not as if the child suffered injury because his arm was extended outside the window which struck against the wall despite there being adequate distance between the bus and the wall. Photographs also demonstrate that there are scratches on the back side of the bus starting from the rear tyre of the bus as well as on the wall against which the driver side of the bus was struck. This proves that the bus in fact was driven by the driver in such a manner that rather than keeping the same towards the left side of the road, the driver drove the same to extremely right side of the road, which resulted in the driver side of the bus striking against the wall which was on the right side of the road, as a result of which, the minor child travelling in the bus suffered grievous injuries.

12. A perusal of the site map which is Ex. PW8/B also demonstrates that there was sufficient road available at the site for the accused driver to have had driven the bus without brushing against the wall which was on the driver side of the bus had the bus been driven by him in a prudent manner. Besides this, statement of Dharma Devi (PW-4), mother of the minor child who had received injuries on account of rash and negligent driving of the accused, also categorically deposed in the Court that her son suffered injuries on account of the bus having struck against a wall, which was on the driver side of the bus. Though this witness was subjected to lengthy cross-examination by the defence, however, her credibility could not be impeached by the defence and from her cross-examination, nothing could be elicited by the defence so as to establish that that the accident in fact took place on account of the negligence on the part of the child or on account of mother of the child, i.e. PW-4. PW-6 Naresh Kumar deposed that the accused had struck the bus against the wall on the driver side of the bus, as a result of which the child who was passenger in the bus had suffered injuries. In his cross-examination, this witness denied the suggestion that there was no negligence of the driver in the accident. PW-7 Dr. Virender Singh has stated in the Court that he had medically examined the child and that the injuries suffered by him were grievous in nature.

13. In my considered view, the findings of conviction returned against the present petitioner by the learned trial Court and affirmed by the learned appellate Court can neither be said to be perverse nor it can be said that the findings so returned by both the learned Courts below are not borne out from the records of the case. As is evident even from the above discussion, the evidence placed on record by the prosecution both ocular as well as documentary clearly demonstrates that the accident in fact took place due to rash and negligent driving of the accused, because it was the duty of the accused who was driving the bus to have had driven the bus in such a manner so as to keep in mind the factum of its passengers having some part of their body outside the bus. It is apparent and evident from the evidence on record that it is not as if there was some reasonable gap between the bus and the wall which was on the driver side of the bus. Had that been the case and had the child suffered injuries in such a situation, then probably this Court could have given benefit of doubt to the driver. However, as is evident from the evidence on record, in the present case, the bus was driven by the present petitioner in such a manner that he struck the driver side of the same with a wall which was on the driver side of the bus despite there being enough space on the road for having had driven the bus in such a manner that there was adequate space between the driver side of the bus and the wall on the said side of the bus. Therefore, in the present case, it is evident that the accident in fact took place due to rash and negligent driving of the bus and the same cannot be attributed to the minor child who suffered grievous injury on account of the said accident. It is pertinent to mention here that this Court is also not oblivious to the fact that in exercise of its revisional jurisdiction, this Court is not to re-appreciate the evidence *per se* and all that this Court has to see is that as to whether there is any perversity in the findings recorded by the learned Courts below or not and whether the view taken by learned Courts below was a possible view in light of evidence on record.

14. In my considered view, as I have already mentioned above, a perusal of the records demonstrate that the findings returned by both the learned Courts below are duly borne out from the records of the case and the same thus cannot be said to be perverse.

15. Hence, in view of my discussion held above, as there is no merit in the present revision, the same is accordingly dismissed.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACTING CHIEF JUSTICE AND HON'BLE MR. JUSTICE, SANDEEP SHARMA, JUDGE.

Om Prakash … Petitioner

Versus

State Election Commission Himachal Pradesh & others …Respondents

CWP No. 815 of 2017-B
Date of Decision : April 27, 2017

Constitution of India, 1950- Article 226-The Notification providing calendar for preparation of electoral roll has been issued- any aggrieved person can approach the authority for inclusion/exclusion of the names from the rolls – parties can file their claims/objections, which would be considered by the authority concerned – petition disposed of. (Para-2 to 6)

For the petitioner : Mr. Rajnish Maniktala, Advocate, for the petitioner.
For the respondent : Ms. Nishi Goel, Advocate, for respondent No. 1.
Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Addl. Advocate Generals and Mr. J. K. Verma, Dy. A.G. for respondent No. 2.
Mr. Hamender Chandel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ. (Oral)

Learned Advocate General invites attention of this Court to the notification dated 11th April, 2017, providing the following calendar for preparation of electoral rolls:

1.	Draft publication of electoral rolls	11.04.2017
2.	Period for filing claims and objections before the Revising Authority	12.04.2017 to 21.04.2017.
3.	Period for deciding claims and objections by the Revising Authority	Within five days from the filing of claims and objections.
4.	Period for filing appeals before the Electoral Roll Registration Officer	Within three days from the order passed by the Revising Authority
5.	Period for deciding appeals by the Electoral Roll Registration Officer	Within three days from filing of appeal
6.	Final publication of electoral rolls	On or before 4th May, 2017.

2. He further states that by virtue of the statutory provisions, every person aggrieved, including the petitioner, can approach the authorities concerned for inclusion/exclusion of their names from the electoral rolls in respect of various wards of Municipal Corporation, Shimla.

3. For whatever reason, if names of eligible voters stand excluded or erroneously included, we find that there is a statutory remedy. Prior to the publication of the final electoral roll, parties can file claims/objections which mandatorily are required to be dealt with in accordance with law. Every eligible voter has a right for inclusion of his name in the electoral rolls. As such, we are of the considered view that this fact requires to be widely publicized. The voters are required to be informed and educated of their valuable rights. As such, in the given facts and circumstances, we direct respondents No. 1 and 3 to give wide publication, both in electronic and print media, informing the voters of such rights and passing of this order.

4. We further direct that the Deputy Commissioner, Shimla (Respondent No. 2) as also Election Commissioner (Respondent No. 1), for the purposes of receiving objections/applications would not only keep their offices open on 30.4.2017 and 1.5.2017 but would also ensure and make adequate arrangements of opening up of at least five centers, with respect to 35 wards for which elections to the Municipal Corporation, Shimla are scheduled to be held. This would only facilitate the voters in filing appropriate applications, to be decided in accordance with law.

5. We further direct that such of those applications which are received by the authorities, both in their offices and at such centers, shall be considered and decided by the competent authority, strictly in accordance with law.

6. We find that petition under Section 24 of the Himachal Pradesh Municipal Corporation Election Rules, 2012 (Annexure P-40) is yet pending against respondent No. 1. Ms. Nishi Goel, learned counsel for respondent No. 1 states that the same shall be considered and decided in accordance with law, well before 4th May, 2017. Petitioner undertakes to fully cooperate in adjudication thereof.

7. In the aforesaid terms, present petition is disposed of , as also pending application(s), if any.

Authenticated copy of the order be supplied to the learned counsel for the parties today itself.

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