THE
INDIAN LAW REPORTS
HIMACHAL SERIES, 2017

EDITOR

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Shimla.

August, 2017

Vol. XLVII (IV)

Pages: HC 421 to 932

Mode of Citation : I L R 2017 (IV) HP 1

Containing cases decided by the High Court of

Himachal Pradesh and by the Supreme Court of India

And

Acts, Rules and Notifications.

PUBLISHED UNDER THE AUTHORITY OF THE GOVERNMENT OF HIMACHAL PRADESH BY THE CONTROLLER, PRINTING AND STATIONERY DEPARTMENT, HIMACHAL PRADESH, SHIMLA-5.

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INDIAN LAW REPORTS

HIMACHAL SERIES

(August, 2017)

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SUBJECT INDEX

'C'

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit pleading that two daughters and one son were born to her- plaintiff underwent a sterilization operation in a camp organized by Health Department – however, she conceived and gave birth to a male child- hence, she filed a civil suit for seeking damages- defendants pleaded that there are chances of failure of sterilization operation and plaintiff should have visited the hospital to avoid the birth of the child- suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that the operation was not disputed- it was also not disputed that plaintiff had given birth to a child after 11 years of operation- Medical Officer deposed that failure can occur due to recanalisation up to 0.1 to 0.3% because of hormonal process of the body – negligence of defendant No.2 was not proved- a surgeon cannot guarantee 100% success in every case- Courts had rightly appreciated the evidence- appeal dismissed.

Title: Narvada Devi Vs. State of Himachal Pradesh and others Page-471

Code of Civil Procedure, 1908- Section 104- Order 43- An award passed by the arbitrator was put to execution - the presence of the judgment debtor was required - when he did not appear, the Court ordered his detention- an application for recall was filed, which was dismissed - aggrieved from the order, present appeal has been filed- an objection was raised regarding maintainability of the appeal – held that the award of the arbitrator has to be executed as a decree of the Civil Court – there is no provision of filing an appeal under Section 104 and Order 43 and the appeal cannot be filed under the provisions of Letters Patent – the orders passed by the Court do not fall within the definition of judgment and appeal is not maintainable- further the appeal is barred by limitation – appeal dismissed.

Title M/s Utkarsh Apparels & another Vs. M/s Winnsome Textiles Industries Ltd. (D.B)

Page-669

Code of Civil Procedure, 1908- Order 2 Rule 2- R had agreed to sell the property to V- when sale deed was not executed - V filed a suit seeking injunction pleading that R had refused to receive the sale consideration and had threatened to alienate and encumber the property – another suit was filed for seeking specific performance- earlier suit was withdrawn after filing a suit for specific performance - an application was filed for seeking dismissal of the suit which was rejected by the Court holding that some of the property and some of the parties to the lis are common but causes of action are not identical, hence, the application is liable to be dismissed – held in appeal that before subsequent suit can be held to be barred, it has to be shown that causes of action in the two suits are similar – the causes of action in the two suits are different and the Court had rightly dismissed the application- appeal dismissed.

Title: Ravinder Kumar Kansal (Dead) Through LRs & another Vs. Vinod Goel (D.B.)

Page-542

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment of plaint was filed – the application was dismissed by the Trial Court – held that the proviso to Order 6 Rule 17 provides that the amendment cannot be allowed after the commencement of trial, unless the party seeking the amendment satisfies the Court as to why it could not move the application for amendment despite exercise of due diligence – in the present case, the suit is at an advanced stage – no reason was assigned for not filing the application at the earliest – the application was rightly dismissed- petition dismissed.

Title: Naresh Kumar Vs. Kali Dass & others Page-861

Code of Civil Procedure, 1908- Order 7 Rule 1**-** Plaintiff filed a civil suit for the recovery of Rs.31,61,110/- along with interest @ 12% per annum till realization – plaintiff pleaded that

defendant was engaged as Junior Accountant at H.P.M.C. Head Office, Nigam Vihar, Shimla – defendant submitted a proposal to manage sale shop-cum-store at Baijnath for the sale of processed products of H.P.M.C., food/fertilizer/cattle feed and other input items – the proposal was accepted by the plaintiff- it was made clear that in case of any loss, the same would be borne by the defendant – the defendant started managing sale-cum-store at Baijnath – plaintiff suffered a loss of Rs. 36,90,000/- on account of lapses on the part of the defendant- departmental inquiry was initiated against the defendant and he was dismissed from services – defendant executed an affidavit acknowledging his liability to the extent of Rs. 35,87,301/- - defendant only paid a sum of Rs. 4,86,191/- - cheques issued by the defendant were dishonoured and proceedings under Section 138 were initiated against him – the suit was opposed by the defendant pleading that no reasonable opportunity was given to him to settle his liabilities – he denied that he was liable to pay any amount to the plaintiff- held that the version of the plaintiff that the defendant had not prepared any statement of account and had not got the accounts audited from internal statutory auditor is duly proved by the evidence- when the audit was subsequently conducted, a loss of Rs. 36,90,000/- was detected – the version of the defendant that all items in the shop were not considered by the plaintiff was not proved - the suit decreed for the recovery of Rs. 31,01,110/- along with interest @ 12% per annum.

Title: Himachal Pradesh Horticultural Produce Marketing and Processing Corporation Vs. Rakesh Awasthi Page-597

Code of Civil Procedure, 1908- Order 9 Rule 7- The tenant filed an application for setting aside ex-parte order passed by Rent Controller pleading that she was never served with the notice issued for her service by way of publication- the application was opposed by filing a reply pleading that mother and brother of the tenant were duly served and the tenant had a knowledge of the proceedings – the application was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held that reply was filed by the Advocate on behalf of respondents No. 1, 2 and 4- however, power of attorney was filed only on behalf of respondents No.1 and 2- therefore, it cannot be said that the reply was filed on behalf of respondent No. 4 as well- service of respondents No. 1 and 2 does not mean the knowledge on the part of the respondent No. 4 – the possibility that newspaper was not circulating in the area where she was residing cannot be ruled out- petition allowed and ex-parte order passed by Rent Controller set aside.

Title: Sunanda Sharma Vs. Shri D.P. Sood & anr. Page-571

Code of Civil Procedure, 1908- Order 22 Rule 4- Defendant No. 2 has died during the pendency of the suit- his estate is represented by defendant No. 5 – no other legal representative is surviving – the application allowed and defendant No. 5 ordered to be substituted as legal representative.

Title: The Himachal Pradesh State Industrial Development Corporation Limited Vs. M/s Himachal Air Products (P) Ltd Page-617

Code of Civil Procedure, 1908- Order 23 Rule 1(3)- Plaintiff filed an application for withdrawal of the suit on the ground that a formal defect had occurred on account of preparation of illegal record by the Field Staff of the Settlement Department- application was rejected by the Trial Court- held that initially suit was filed for declaration on the ground that plaintiff had become owner by way of adverse possession- suit was part and parcel of old khasra No. 31/5/1 which was in ownership and possession of the father of the plaintiff- the area of the land was disturbed and dislocated by the Settlement Staff- these facts gave sufficient reasons to the plaintiff to withdraw the suit- hence, application allowed and petitioner permitted to withdraw the suit with liberty to file a fresh suit subject to the payment of cost of Rs. 5,000/-.

Title: Kashmir Singh Vs. State of Himachal Pradesh Page- 465

Code of Civil Procedure, 1908- Order 29 Rule 9- An application for appointment of Local Commissioner to demarcate the suit land and to report the nature and extent of encroachment was filed- application was dismissed by the Trial Court as premature – a subsequent application was filed for the appointment of local Commissioner after the closure of evidence by the parties- application was dismissed by the Trial Court- held that the dispute between the parties related to the boundaries, which can be adjudicated only by the demarcation- Court had erred in dismissing the application- application allowed and Court directed to appoint Local Commissioner.

Title: Shankar Dass vs. Municipal Committee, Hamirpur Page-694

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit for declaration and injunction – an application for injunction was filed in which an order of status quo was issued – an appeal was filed which was allowed- held that P and I are recorded to be the owners of the suit land who had sold the land to K – the possession of K cannot be said to unauthorized – the Appellate Court had rightly reversed the order- however, the Appellate Court had relied upon the head notes of the judgment which is not permissible – the Court has to ascertain the ratio decidendi and to apply the same- direction issued to the Judicial Academy to conduct course on the same – petition dismissed.

Title: Paras Ram Vs. Kiran & others Page-717

Code of Civil Procedure, 1908- Order 47 Rule 1- An application for review was filed on the ground that the driving licence was issued in favour of the petitioner by the Competent Authority not only to drive light motor vehicle but also heavy goods vehicles and heavy transport vehicles throughout India- the petitioner cannot suffer for the fault of Competent Authority of issuing the licence for a period of six years instead of three years- held that the licence was issued for more than six years, whereas, it should have been legally issued for three years- owner cannot be expected to verify the validity of the licence from the issuing authority – if the judgment sought to be reviewed is allowed to remain in force, the petitioner will suffer irreparable loss and injury leading to miscarriage of justice – the petition allowed and the order passed in the petition recalled.

Title: Hans Raj & Another Vs. Bajaj Allianz Insurance Company Ltd. & Others

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Code of Criminal Procedure, 1973- Section 167 (2)- An FIR was registered against the petitioner for the commission of offences punishable under Sections 452, 392 and 307 read with Section 34 of I.P.C.- petitioner was arrested on 17.9.2016- other accused B and L were arrested earlier and the challan was filed against them prior to the arrest of the petitioner- petitioner filed an application for bail pleading that the challan was not filed against him within statutory period and he is entitled to bail- application was dismissed by the Magistrate on the ground that challan had already been filed before Additional Sessions Judge, which was to be withdrawn and presented before the Magistrate as Learned Sessions Judge was on leave – subsequently, an order was passed that the charge sheet was not filed against the petitioner and was being filed against him before the Court- held that challan was not filed initiallyagainst the petitioner and subsequently a supplementary challan was filed before the Additional Sessions Judge- challan was filed against the petitioner before the Magistrate after the expiry of 90 days- the Competent Court to receive the challan was the Court of Magistrate- Only Magistrate could have taken cognizance in the matter and Sessions Judge was not competent to take cognizance- presentation of challan before the Court competent to take cognizance is necessary - an indefeasible right occurred by not filing the challan within the statutory period- petition allowed- order rejecting the bail set aside- petitioner ordered to be released on bail in the sum of Rs.1 lac with one surety in the like amount.

Title: Balbir Singh @RanaVs. State of Himachal Pradesh Page-653

Code of Criminal Procedure, 1973- Section 210- A case was registered against the petitioner for the commission of offence punishable under Section 354 of I.P.C. – another case has been filed by the petitioner against the father of the prosecutrix – a prayer was made to consolidate two cases, which was allowed – held that no prejudice would be caused to the petitioner by clubbing the two cases – the order passed by Learned Special Judge upheld and petition dismissed.
Title: Jagarnath Vs. State of H.P & Another Page-791

Code of Criminal Procedure, 1973- Section 311- An application for summoning Deputy Director RFSL was filed on the ground that she had compared the disputed and specimen handwriting of the accused – her report is not per se admissible, hence, she be summoned – the application was allowed by the Trial Court – held that the Court has to form an opinion that examination of the witness is essential for just decision of the case – mere delay in filing of the application is not sufficient to dismiss the application – the report has already been proved and no prejudice would be caused by the examination - the Court had rightly allowed the application- petition dismissed.
Title: Sardar Singh Vs. State of Himachal Pradesh Page-639

Code of Criminal Procedure, 1973- Section 318- The informant noted that supply of water to his field was stopped- he found on inquiry that bandh was broken by accused and they were irrigating their fields- informant objected and tried to re-construct the bandh but the accused gave beatings to the informant- accused were tried and acquitted by the Trial Court- held in appeal that informant and his brother have enmity with accused- there are contradictions in the statements of prosecution witnesses- recovery of sickle was not proved- prosecution has not proved its case beyond reasonable doubt and the accused were rightly acquitted by the Trial Court- appeal dismissed.
Title: State of Himachal PradeshVs. Sunil Dutt & others Page-516

Code of Criminal Procedure, 1973- Section 340- The respondent had made an incorrect statement before the Court – show cause notice was issued by the Court as to why proceedings be not initiated against him for making a false statement – respondent filed a reply that he had put the signatures at the instance of the police and the passengers as the bus was getting late - the reply filed by the respondent is not satisfactory – prima facie respondent has committed an offence punishable under Section 193 of I.P.C.- Registrar (Judicial) directed to file a complaint against the respondent before CJM.
Title: Court on its own motion Vs. Bakshi Ram (D.B.) Page-792

Code of Criminal Procedure, 1973- Section 378- Accused outraged the modesty of the informant – accused was tried and acquitted by the Trial Court- held in appeal that there are contradictions in the testimonies of prosecution witnesses- independent person present in the room was not cited as witness- PW-3 and PW-4 did not support the prosecution version- there was delay in reporting the matter to the police, which was not explained – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.
Title: State of Himachal Pradesh Vs. Dhani Ram Page-453

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Section 354-A, 354-B, 354-C and 376 of I.P.C- the petitioner filed an application for bail pleading that he is innocent and has been falsely implicated – the recoveries have already been effected and custodial interrogation of the accused is not required – the petitioner is not in a position to temper with the prosecution evidence – he is a permanent resident of the State and is working as a teacher – the application allowed and petitioner ordered to be released in the event of his arrest on a personal bond of Rs. 10,000/- with one surety for the like amount.
Title: Eshan Akthar Vs. State of Himachal Pradesh Page-698

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 406, 420 and 506 of IPC and Section 24 of the Passports Act – the petitioner filed a petition seeking pre arrest bail- held that the plea of the petitioner that payment has been made is not supported by any document- the investigation is at initial stage and the petitioner is not co-operating in the investigation - the discretion to admit the petitioner on bail is not required to be exercised at this stage – the petition dismissed.

Title: Ashok Kumar Vs. State of Himachal Pradesh Page-830

Code of Criminal Procedure, 1973- Section 482- The Prosecutrix and petitioner fell in love with each other – petitioner belongs to Schedule Caste community whereas the prosecutrix is a Rajput – the parents of the prosecutrix were not willing to solemnize her marriage with the petitioner- the prosecutrix eloped with the petitioner and solemnized inter caste marriage – the petitioner and the prosecutrix are residing as husband and wife – held that the prosecutrix stated in her statement under Section 164 Cr.P.C that she had voluntarily eloped with the petitioner in her free volition – father of the prosecutrix also stated that he did not want to proceed further in the matter – no useful purpose would be served by continuing with the proceedings- petition allowed – FIR and consequent proceedings quashed.

Title: Shishu Pal Vs. State of H.P. & Others Page-712

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioners for the commission of offences punishable under Sections 498-A and 406 read with Section 34 of I.P.C.- challan was filed and the Court took cognizance – the petitioners filed the present petition challenging the order taking cognizance – held that a detailed order is not required to be passed at the time of taking cognizance- the petitioners are at liberty to raise all the pleas before the Court at the time of framing of charge-the present petition is premature and is dismissed.

Title: Vikas Kumar & ors. Vs. State of H.P. & Another Page-762

Code of Criminal Procedure, 1973- Section 482- Applicant filed an application for extension of time to furnish personal bond as per orders of the Court due to financial difficultiesto deposit 30% of the amount- application was allowed and the time was extended by the Court- however, amount was not deposited- petition was filed for quashing the order- held that there is no error in the order- petitioner could have approached the Court which passed the order for extension of time- there is no perversity or illegality in the order- petition dismissed.

Title: Sohan Lal Vs. Indira Devi and others Page-421

Code of Criminal Procedure, 1973- Section 482- Complainant filed a complaint pleading that he was defamed by publishing a news item stating that the complainant had received a bribe of Rs. 10,000/- - the Court issued the notices to the accused – aggrieved from the order, present petition has been filed seeking to quash the complaint – held that the Court has to be careful while quashing the complaint – Magistrate has to conduct an inquiry where he is not satisfied with the evidence led before him – the evidence led before the Magistrate also amounts to inquiry – there is no necessity of sending the complaint to the police for investigation – the Court summoning the accused must be satisfied that there are sufficient reasons to summon the accused – he must apply his mind to the material before him – however, the complainant has failed to make specific averments in the complaint – the responsibility of the editor cannot be fixed without specific averments – CDRs are not admissible under Section 65-B of Evidence Act- the petition allowed and the order taking cognizance and summoning the petitioners set aside.

Title: M/s CNN-IBN7 Vs. Maulana Mumtaz Ahmed Quasmi & Ors. Page-813

Constitution of India, 1950 - Article 226- Respondent No. 3 and 4 had surrendered some portion of their land for the public path at the time of sanctioning of building plan- however, the

respondents failed to honour the undertaking given by them on which the complaints were filed- Deputy Commissioner directed the District Revenue Officer to carry out the inspection- District Revenue Officer found that respondent No. 3 had raised construction of compound wall on the area being used for the purpose of public path- Commissioner, M.C. Shimla was requested to take action in accordance with law – an order was passed declaring the path as public path – the respondents filed a revision before Divisional Commissioner who asked the Commissioner, M.C. Shimla to keep the order in abeyance till the disposal of the revision petition- aggrieved from the order, present writ petition has been filed – held that the building plans of respondent No. 3 and 4 were sanctioned subject to undertaking furnished by the respondents regarding surrender of portion of their land for making the public path wider- there was no illegality in declaring the path as a public path – the respondents could not have violated the undertaking given by them – it is the duty of the land owners/building owners to provide proper path/streets giving proper access to the plots/houses of the persons residing adjacent to their buildings/lands – writ petition allowed- order passed by Divisional Commissioner quashed and set aside – Municipal Corporation Shimla directed to insure that the path in question is restored/widened after including the land undertaking to be surrendered by the private respondents.

Title: Madan Lal Verma Vs. Municipal Corporation, Shimla and others (D.B.) Page-771

Constitution of India, 1950 - Article 226- Writ petitioner was appointed as PET under PTA Grant-in-Aid Rules, 2006- his appointment was challenged by the present appellant- an inquiry committee was constituted, which held that the appointment of the writ petitioner was not in accordance with the instructions contained in para-11 of the guidelines/Notification dated 27.5.2008 – this order was upheld in appeal – writ petitioner filed a writ petition which was allowed and the orders were quashed- matter was remitted to the inquiry authority for a fresh decision- enquiry committee held that the appellant deserved to be appointed in place of the writ petitioner- a writ petition was filed and the order of the inquiry authority was set aside- aggrieved from the order, present appeal has been filed- held that writ court had clearly held earlier that the criterion specified in the year 2008 could not be applied retrospectively to the selection made in the year 2006- inquiry committee had made evaluation on the basis of criterion laid down in the year 2008- it was not shown that the appointing authority had adopted any arbitrary criterion for appointment of the writ petitioner- the writ court had rightly allowed the writ petition- appeal dismissed.

Title: Brij Lal Versus State of H.P. and others (D.B.) Page-681

Constitution of India, 1950- Article 226- A direction was issued to carry out the inspection in terms of guidelines as well as the norms fixed by Indian Nursing Council after affording adequate opportunities of hearing to the parties within two weeks- the inspection was carried out and the report was filed before the Court- the matter was disposed of with a direction to do the needful – present application has been filed for implementation of the judgment- held that no objection certificate was granted on the basis of earlier reports of Evaluation Committee which were discarded by the Court- inspection had not found any institution (including that of the petitioner) eligible for issuance of no objection certificate, therefore, the no objection certificate was rightly withdrawn and no fault can be found with the same – there was no violation of the judgment- petition dismissed.

Title: Jyoti Education Welfare Society Regd. Vs. State of Himachal Pradesh and another (D.B.)
Page-665

Constitution of India, 1950- Article 226- A lease was granted in favour of respondent No. 4 in industrial area, Shoghi- lessee established a flour mill, which was run for sometime – the lessee had availed certain credit facilities from State Bank of India- lessee committed default - his assets and liability were taken over by the Bank- Bank transferred the lease hold rights to the petitioner – petitioner was required to pay a sum of Rs. 59,74,033/- and also to liquidate the liabilities of

HPSEB, Department of Excise and Taxation and Department of Industries- the amount payable to the Bank was deposited and the liabilities were liquidated- no objection certificate was issued – however, the steps were not taken for executing the lease deed and handing over the possession – State contended that liabilities of other Government Departments are pending- held that names of the departments whose liabilities were to be satisfied were mentioned in the letter – it was never stated during the negotiations that liabilities of some other department were also to be satisfied – hence, direction issued to hand over the possession and execute the lease deed – further direction issued to deposit the amount due and admissible within four months from the date of adjudication in view of the undertaking.

Title: M/s Anand Auto Care Pvt. Ltd. Vs. State of H.P. and others (D.B.) Page-928

Constitution of India, 1950- Article 226- A tender was invited for the transportation of food articles from Principal Distribution Centre of Food Corporation of India to whole sale godowns of H.P. State Civil Supplies Corporation – the work was allotted to respondent No. 5 – aggrieved from the order, the petitioner filed the present writ petition- held that Deputy Commissioner stated that in his affidavit that before the tender could be opened, respondent No. 5, who was supplying food grains for more than 30 years, had offered to carry out the work at 5% less rates than the rate for the previous year – the rates of transportation were increasing every year and the offer of respondent No. 5 would have reduced financial burden on public exchequer – therefore, this offer was accepted – the decision to award work was taken in public interest – the decision was not taken to favour any person – the State can enter into an agreement with any person but it has to keep in mind the requirement of reasonableness – the Court can interfere with the decision making process when the decision was malafide or made to favour someone –malafide and favouritism have not been established - writ petition dismissed.

Title: Issar Goods Carrier Vs. The State of Himachal Pradesh and others (D.B.)

Page-763

Constitution of India, 1950- Article 226- An advertisement was issued for filling up various posts by the University- petitioner and S participated in the selection process- Committee recommended the name of S- petitioner filed a petition for challenging the appointment- petition was allowed and University was directed to re-do the entire selection process in accordance with law- held in appeal that petitioner had obtained 28.10 marks while S had obtained 32.9 marks - two experts were associated from other universities - Court had taken into consideration the bio-data of the petitioner while issuing the directions - however, Selection Committee had already taken the bio-data into consideration while making selection- it cannot be said that Selection Committee had not determined the merit of the candidates in a just and fair manner- it is not permissible for a candidate to appear before the Selection Committee and thereafter to challenge the process- appeal allowed and order passed by the Writ Court set aside.

Title: Seema Vs. CSK H.P. Krishi Vishwavidyalaya and another (D.B) Page-481

Constitution of India, 1950- Article 226- Appointment letter was issued in favour of respondent No.4 on 14.8.2007- appointment can be challenged within 15 days by filing an appeal before Deputy Commissioner- a period of 15 days cannot be condoned by the Appellate Authority- in the present case, result was declared on 14.8.2007 and the appeal was filed on 30.8.2007 beyond the period of limitation- appeal was rightly dismissed as barred by limitation - petition dismissed.

Title: Champa Devi Vs. State of H.P. and Others Page- 569

Constitution of India, 1950- Article 226- **Arms Act, 1959-** Section 44- The writ petitioner pleaded that he is an advocate and has to travel outside the State in discharge of his official duties – a prayer was made by him to carry pistol throughout India which was declined – the petitioner filed a writ petition which was dismissed by the Writ Court – held that the petitioner is an Advocate by profession - possibility of visiting various places in connection with his

professional activities cannot be ruled out- a reference should have been made to ministry of Home Affairs, Govt. of India in view of the fact that the case of the petitioner is a deserving case – writ petition allowed- direction issued to consider the application for issuance of armed license within two months.

Title: Vibhu Benal Vs. State of H.P. and others. (D.B) Page-568

Constitution of India, 1950- Article 226- Certain directions were issued by National Green Tribunal (NGT) for preservation and protection of the natural environment and ecology of Rohtang Pass- respondent No. 1 floated expression of interest for supply of 25 battery operated passengers transport vehicles – one party expressed its interest – the time was extended and 7 manufacturers expressed their interest – specifications were finalized and draft of request for proposal (RFP) was forwarded to all the participants – RFP was finalized after consultation and a tender was issued – since none was the manufacturer, therefore, a consortium having a technology alliance/partnership with foreign companies was allowed to bid - a corrigendum was issued – trial of the buses was conducted in which the buses of the petitioner failed while that of G succeeded – the order was given to G – aggrieved from the order, the present writ petition has been filed- held that HRTC was not aware of the technical specification – the project was unique in nature – hence, suggestions were sought from all the persons – right was reserved to amend RFP – RFP was amended due to deliberations in the pre bid conference- the consortium was necessary as no single party was competent to fulfill the condition – the petitioner had participated in the bid and is estopped from challenging the terms of the same - the Court can interfere with the policy decision, unless there is violation of public policy or some illegality – it has not been shown that there was some violation- petition dismissed.

Title: Ashok Leyland Limited Vs. Himachal Pradesh Road Transport Corporation and another (D.B.) Page-832

Constitution of India, 1950- Article 226- Grievance raised in the letter was redressed as verified by the Inspection Committee- trees were felled- Learned Advocate General prayed that direction be issued for taking steps for removal of dried up trees within the municipal limits of Shimla – consequently, direction issued to the Tree Committee to identify the dried up trees within the Municipal limits of the Shimla and to take appropriate action within three months.

Title: Court on its own motion Vs. State of Himachal Pradesh and others (D.B.) (CWPIL No.: 31 of 2017) Page-634

Constitution of India, 1950- Article 226- **Himachal Pradesh Co-operative Societies Act, 1968 -** Section 94- Petitioner was appointed as Secretary in the society- his appointment was challenged by respondent No.6 by filing a revision- revision was allowed and the selection of the petitioner was set aside- aggrieved from the order, present writ petition had been filed- held that the power of revision has been given where no appeal has been preferred- this power can be exercised at the instance of the party or suomotu- this power is in the nature of supervisory jurisdiction- remedy of revision cannot be invoked against the order passed by the society- proceedings under Section 94 would be the proceedings of the authorities under the Act but would not include the proceedings of the society- aggrieved party can approach the Civil Court- order passed in revision is without jurisdiction, hence the same ordered to be set aside- writ petition allowed.

Title: Rajan Kumar Vs. State of H.P. and others Page-619

Constitution of India, 1950- Article 226- Petitioner assailed the allotment of liquor vends in the revenue district of Una on the ground that bid of Rs. 46.51 crores accepted by Commissioner, Excise and Taxation, H.P. subsequent to the enhancement of bid to Rs. 46.50 crores by the petitioner is arbitrary, discriminatory and an act of colourable exercise of power since, no opportunity was afforded to the petitioner to participate in the process of negotiation – the

respondent pleaded that respondent had offered the highest bid of Rs. 45.99 crores whereas the bid offered by the petitioner was for Rs. 45.11 crores - the respondent increased the bid to Rs. 46.51 crores – the offer of the petitioner of Rs. 46.50 crores was not considered as the negotiation process stood concluded – held that initially the auction was cancelled as the highest bid had not matched the reserve price – fresh auction was conducted – petitioner quoted an amount of Rs. 42.77 crores, whereas, respondent quoted an amount of Rs. 41 crores – a notice was issued for grant of licence by negotiation – the petitioner offered a sum of Rs. 45.11 crores, whereas, the respondent quoted a sum of Rs. 45.99 crores- Commissioner recommended that the bid of private respondent be accepted- the petitioner revised her bid to 46.50 crores – she offered to be called for negotiation – the private respondent enhanced the bid from 45.99 crores to 46.51 crores – the plea of the Commissioner that negotiation stood concluded on 17.7.2017 is incorrect as the respondent had revised his offer on 18.7.2017 – the State cannot act arbitrarily and has to comply with the equality clause while granting exclusive privilege of selling liquor – the petitioner should have also been called for negotiation – Government cannot act in a manner to benefit a private party- the petitioner has increased her bid by 3.1 crorers and had agreed to deposit 20% of the bid amount- directions issued to the Chief Secretary to enter into fresh negotiation with the private parties by taking the amount of Rs. 49.51 crores to be the minimum reserve price with further conditions.

Title: Sarita Devi Vs. Secretary, Excise and Taxation Department & others (D.B.)
Page-741

Constitution of India, 1950- Article 226- Petitioner is a company incorporated under the Companies Act- respondent No.1 had directed the respondent No.2 to determine whether respondent No.2 had the authority to call for information under Right to Information Act from the petitioner- held that order has been passed without hearing the petitioner- Section 19(4) of the Act provides for giving a reasonable opportunity of being heard to the party- information was sought from the 3rd party and opportunity of hearing is necessary- petition allowed - order passed by respondent No.1 and communication issued by respondent No. 2 quashed and set aside.

Title: M/s Mohan Meakin Limited Vs. Information Commissioner Central Page-427

Constitution of India, 1950- Article 226- Petitioner is carrying on business of manufacture and sale of Indian made foreign liquor – petitioner imported some quantity of malt spirit from different places after getting permit from Collector Excise, Himachal Pradesh – subsequently, payment of permit/transport fee was imposed – the fee was demanded – the petitioner claimed that he had paid the applicable fee and filed writ petitions – the petitions were dismissed – the matter was taken to Hon'ble Supreme Court, which set aside the order of Hon'ble High Court and remanded the matter for a fresh decision – held that the Court has earlier held that the State was demanding the fee and not the tax – the contention that there has to be a quid pro quo before the fee can be imposed was rejected – the notification was issued in exercise of the powers vested in the State- the Hon'ble Supreme Court had found that the fee would not be payable on denatured spirit, rectified spirit or perfumed spirit and the transport shall not include the transport of foreign spirit or country spirit- it was also held that the State had not produced any material to justify the levy of fee – it was specifically held that the malt spirit of over proof strength cannot be subject matter of any regulation or control of the State- the State Government cannot claim to have power to legislate on alcohol of malt spirit of over proof strength merely on the ground that it can be made potable after dilution – the State Government is competent to levy fee for ensuring that industrial alcohol is not surreptitiously converted into potable alcohol and the State is not deprived of the revenue on the sale of such potable alcohol- there is a distinction between the tax and the fee – tax is levied as part of common burden while fee is for payment of specific benefit or privilege- the fee has to be determined on the basis of quid pro quo – the State has not produced any material to show that it was running any additional cost for ensuring that the malt spirit of over proof strength is not surreptitiously converted into potable liquor to deprive the State of the revenue on the sale of alcohol- no supplementary affidavit was filed to establish these facts – the

petitioner is paying the salary of the Excise Staff posted by the government in the petitioner's units at Kasauli and Solan – the petition allowed – notification quashed and notices demanding the payment of fee from the petitioner set aside.
Title: Mohan Meakin Ltd. Vs. The State of Himachal Pradesh and others (D.B.)
Page-903

Constitution of India, 1950- Article 226- Petitioner is the legal representative of late H who had served in British Army – he took part in freedom struggle and was ordered to be discharged - respondent No. 2 pleaded that H had fought second world war as a soldier of British Army and was ineligible to be declared as freedom fighter- held that it was not mentioned in the discharge certificate that discharge was on account on participation in the freedom struggle of the country – discharge certificate shows that conduct of H was exemplary – H had not applied to be declared himself a freedom fighter – no direction can be issued to declare him a freedom fighter and not to treat him as a deserter – petition dismissed.
Title: Balvinder Singh Mahal Vs. Union of India and another Page-701

Constitution of India, 1950- Article 226- Petitioner was appointed as Physical Education Teacher under PTA Grant in Aid Rules - his appointment was challenged by respondent No. 4 _ Inquiry Committee set aside the appointment of the petitioner after holding that the proper procedure was not followed and the appointment was not in accordance with the instructions of the Government- an appeal was filed, which was dismissed- a writ petition was filed, which was disposed of with a direction to re-consider the matter- a fresh Inquiry was conducted- inquiry committee prepared a fresh merit list and concluded that merit was ignored by appointing the petitioner- aggrieved from the report, present writ petition has been field- held that the criteria laid down in the letter dated 27.5.2008 cannot be applied retrospectively- it was to be determined whether the Committee had followed some reasonable criteria or not- criteria applied by earlier Selection Committee was not discussed- the record shows that Selection Committee had applied uniform criteria taking into consideration various relevant factors including respective educational qualifications of the candidates and their experience- all the three candidates were assessed on the basis of the same criteria- writ petition allowed and the order of Inquiry Committee set aside.
Title: Naresh Kumar Vs. State of H.P. and others Page-467

Constitution of India, 1950- Article 226- Petitioner was appointed as Physical Education Teacher on PTA basis- he joined on 14.11.2006- grant in aid was stopped without any reason- he made a representation and he was informed that he was appointed after 6.11.2006- the date after which the appointment on PTA Basis were discontinued- a clarification was issued by the Director of Elementary Education that the case of those persons could be considered for release of grant-in-aid, where the process had started prior to the cut off date- hence, direction was sought to release grant-in-aid- held that process was initiated on 27.10.2006- notice was issued prior to 6.11.2006 (the cut off date) - the last date for submission of the application was 3.11.2006- Directorate of Elementary Education had clarified that where the process was started prior to 6.11.2006- the teachers could be considered for grant-in-aid- petition allowed and respondents directed to pay the grant-in-aid with interest @ 6% per annum.
Title: Ravinder Kumar Vs. State of HimachalPradesh and others Page-439

Constitution of India, 1950- Article 226- Petitioner was appointed as mid-day meal worker on 30.9.2004- he was not allowed to work after 16.11.2011- fresh applications were invited for mid-day meal worker and interviews were also held- petitioner is entitled for regularization of his services- respondent pleaded that services of the petitioner were terminated on the basis of the complaint filed by teacher- complaint was considered along with previous allegations of misconduct – petitioner was ordered to be removed- held that petitioner has concealed the

material facts- petitioner had tendered apology to the school concerned- he remained absent from the duty earlier as he was arrested by the police- petitioner had not challenged the resolution passed by School Management Committee- petition dismissed.

Title: Hira Lal Vs. State of Himachal Pradesh and others Page-422

Constitution of India, 1950- Article 226- Petitioner was appointed as work charge mason in PWD- rules provide for promotion of work charge mason to work mistry- post of work mistry was abolished and the persons holding the posts were re-designated as road inspector- petitioner claimed that promotional avenue should have been provided to him by carrying out necessary amendments in the rules- petition was dismissed by the Writ Court- held in appeal that it is not disputed that there was a provision of promotion to work charge mason to post of work mistry at the time of appointment of the petitioner, which was abolished subsequently and the cadre of mason was divided into mason Grade-I, Grade-II and Grade-III- petitioner became mason Grade-II and was promoted as mason Grade-I - promotional avenues have been provided to the petitioner and similarly situated persons- writ petition was rightly dismissed in these circumstances- appeal dismissed.

Title: Karam Chand Vs. The Secretary (PWD) and others Page-529

Constitution of India, 1950- Article 226- Petitioner was engaged as Transport Multipurpose Assistant (Conductor)- his services were terminated- he filed a writ petition, which was dismissed- held in appeal that appointment of petitioner was made on contractual basis- State has formulated a policy that if a person is found guilty of having committed misconduct five times, the contract is to be cancelled- petitioner was found guilty of corruption- petitioner has committed serious acts of misconduct on more than 5 occasions during his six years service-petition was rightly dismissed- appeal dismissed.

Title: Mohinder Kumar Vs. Himachal Pradesh Road Transport Corporation & another (D.B.)
Page-562

Constitution of India, 1950- Article 226- Petitioner was engaged as daily wage beldar in the year 1994 – he continued to render services - the petitioner filed an original application, which was transferred to High Court pleading that the department was giving fictional breaks to prevent him from completing 240 days- the respondent pleaded that petitioner remained willfully absent and no breaks were given- the Writ Court allowed the writ petition- held in appeal the practice of giving artificial breaks has been deprecated by the Supreme Court – there is no evidence that petitioner had abandoned his job- the Writ Court rightly granted the relief to the petitioner-appeal dismissed.

Title: State of H.P. and Ors. Vs. Keshav Ram (D.B.) Page-867

Constitution of India, 1950- Article 226- Respondent No. 1 advertised one post of clerk to be filled from general category under limited direct recruitment scheme for class-IV employees – the petitioner submitted his written consent and was informed that he was permitted to sit in the competitive examination – 7 candidates appeared out of which the petitioner and respondent No. 4 qualified – petitioner obtained 50 out of 50 marks while respondent No. 4 obtained 48 marks out of 50 marks – Interview Committee awarded 4 marks to the petitioner and 6½ marks to the respondent No. 4 – consequently, respondent No. 4 was selected- aggrieved from the selection, the petitioner has filed the present petition – held that process of selection cannot be challenged by an unsuccessful candidate by pointing certain irregularities in the process – the petitioner is estopped from filing the present writ petition – petition dismissed as not maintainable.

Title: Jitender Guleria Vs. Himachal Pradesh Vidhan Sabha and others Page-703

Constitution of India, 1950- Article 226- Respondent was appointed as clerk in the Office of the Registrar of Newspaper for India, headquarter at Shimla- Office was shifted to Delhi along with staff- respondent was suspended from the service on charges of unauthorized absence from the duty and leaving the station without permission- inquiry was conducted against him which resulted in the removal of the respondent from the service- an appeal was filed and matter was remitted to disciplinary authority – a fresh chargesheet was served which resulted in imposition of major penalty- an appeal was filed and the matter was remitted to the disciplinary authority - again major penalty was imposed upon the respondent- a review petition filed by the respondent was dismissed- he filed an original application, which was dismissed- matter is pending adjudication before Delhi High Court- respondent approached Central Administrative Tribunal, Punjab at Chandigarh by filing the original application, which was allowed- held that respondent had assailed the order vide which his period of suspension was treated as the period not spent on duty and he sought further direction that subsequent period be treated as period spent on duty- Administrative Tribunal could not have allowed the original application in its entirety as the matter is pending before Delhi High Court- petition partly allowed.
Title: Union of India and others Vs. J.S.Thakur (D.B.) Page-425

Constitution of India, 1950- Article 226- Respondent/original applicant claimed that he has acquired a right of regularization after the completion of eight years of service on daily wage basis as per the policy framed by the State Government – the Tribunal ordered the regularization and consequent benefits – held that the plea of the respondent that the services of the respondent could have been regularized only on the availability of the post is not in accordance with the judgment of High Court in Gian Singh Versus State of H.P. and others, CWP No. 7140 of 2012 decided on 24.9.2014 upheld by a Division Bench of this Court in LPA No. 194 of 2015 vide judgment dated 3.12.2015- the Tribunal had rightly held the respondent to be entitled for regularization and consequential benefits- writ petition dismissed.
Title: State of H.P. & ors. Vs. Bhaskar Ram (D.B) Page-553

Constitution of India, 1950- Article 226- **Right to Information Act, 2005-** Section 7- Petitioner challenges the demand of postal charges for furnishing information – held that according to Rule 4(g) of Right to Information Rules, 2012 framed by the Central Government, the postal charges in excess of Rs. 50/- are payable - however, according to Rule 3 of H.P. Right to Information Rules, 2006 additional fee is payable for supply of information- the authorities are entitled to demand additional fee for the supply of information, which includes the postal charges as well - the State cannot be directed to bear the burden of postal charges in lakhs of application- petition dismissed.
Title: Hari Ram Dhiman Vs. State of Himachal Pradesh (D.B.) Page-788

Constitution of India, 1950- Article 226- State has filed a writ petition against the orders passed by the Administrative Tribunal – Tribunal had issued direction to consider the case of the original applicant in accordance with the direction issued in the case of a similarly situated person – the State has framed a litigation policy to avoid litigation whenever possible – hence, direction issued to the Chief Secretary to convene a meeting of the Principal Secretaries of Government of Himachal Pradesh, to apprise them of the importance, significance, advantages and benefits of adhering to litigation policy in letter and spirit – Principal Secretaries expected to convene a similar meeting for sensitizing the stock holders - further, direction issued to review all the cases periodically in terms of litigation policy.
Title: State of H.P. & another Vs. Raju Ram (D.B.) Page- 551

Constitution of India, 1950- Article 226- The appointment of M as member of H.P. Public Service Commission was challenged and it was prayed that directions be issued for framing guidelines for appointing the chairman and member of Commission- it was contended that

petitioner is a student of law and has no locus standi to file the present petition- held that the petitioner had taken information under Right to Information Act and found that no prescribed procedure for appointment to the constitutional post was followed – the petitioner is not a busy body – his petition is not motivated or filed for extraneous consideration- the issued raised by the petitioner is of vital importance – the objection overruled and notice ordered to be issued.

Title: Hem Raj Vs. State of H.P. & others (D.B.) Page-797

Constitution of India, 1950- Article 226- The respondent No.1 was appointed as Aanganwari worker – her appointment was assailed by the petitioner- the appointment of respondent No.1 was set aside – an appeal was filed, which was allowed – a writ petition was filed, which was disposed of with the direction to decide the veracity of the income certificate of the selected candidate – the income certificate was upheld by Tehsildar – an appeal was filed against this order, which was dismissed – aggrieved from the order, present writ petition has been filed- held that guidelines framed by the Government provide the cut of date for ascertaining the status of family as 1.1.2004- private respondent was reflected as part of the family of her brother – the correction ws made after 1.1.2004, which is irrelevant for determining the status- petition allowed- order passed by the authorities set aside.

Title: Hansa Devi Vs. Kaushalya Devi and others Page-803

Constitution of India, 1950- Article 226- Writ Court directed the State to ascertain the total area of the writ petitioner utilized for the construction of the road and thereafter to acquire the same and in case the land is not acquired, to hand over the possession to the petitioner – held that the written consent has not been obtained from the petitioner- in absence of any assertion regarding donation or any documentary evidence regarding the same it cannot be believed that petitioner had consented for the construction of the road over the land belonging to him – the Writ Court had rightly allowed the writ petition – appeal dismissed.

Title: State of H.P. & Others Vs. Bhoop Ram (D.B.) Page-697

'E'

Employees Compensation Act, 1923- Section 4- D died during the course of employment on 14.9.2009 – Commissioner awarded compensation of Rs.10,26,400/- and fastened the liability upon the insurer – it was contended that compensation was assessed on the basis of notification issued by Central Government deleting Explanation-II in Section 4 w.e.f. 10.1.2010, which was not permissible as the accident had taken place in the year 2009 when the Explanation-II was in force - held that the deletion was not retrospective – the rights of the parties would be governed by the law prevailing on the date of incident – the compensation becomes payable as soon as it falls due – thus, any subsequent amendment will not have any effect on the same – in view of un-amended provisions, the salary of workman has to be taken Rs. 4,000/- even if it exceeds the same- 50% of the statutory wages have to be taken for the application of the factor- hence, compensation of Rs. 4,30,560/- (2000 x 215.28) awarded along with interest @ 12% per annum from one month elapsing since the date of accident till realization. Title: The New India Assurance Company Limited Vs. Babu Ram and others Page-579

Employees compensation Act, 1923- Section 4(1)(a)- R was working as beldar – he, RW-1, RW-2, PW-1 and another person were deputed to remove the fault in the line at Hattu to restore the water supply to the house of S, where marriage was being solemnized – they remove the defect – the deceased suffered heaviness in his body – he was taken to hospital but died on the way – the claim petition was allowed by the Commissioner- it was contended by the Department that R was not on duty and the death had not taken place during the course of employment – held that the deceased was deputed to rectify the fault – there was a direct nexus between the employment and the death – appeal dismissed. Title: State of H.P. & anr. Vs. Rami Devi & ors. Page-692

H.P. Consolidation of Holdings (Prevention and Fragmentation) Act, 1971- Section 7- Plaintiff filed a civil suit for declaration that suit land is owned and possessed by him- defendant has no right and title over the same- suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that a specific plea regarding the jurisdiction of the Civil Court was raised before the Court- however, the Appellate Court had not considered this plea- the Appellate Court is required to address itself to all the issues and decide the case by giving reasons in support of such findings- appeal allowed and case remanded to the Appellate Court for a fresh decision in accordance with law. Title: Mast Ram (deceased) through LR's Vs. Subhash Chand and others Page-554

H.P. Urban Rent Control Act, 1987- Section 15- Landlord filed a rent petition seeking eviction of the tenant on the ground that the premises are required bonafide by the landlord for residence – it was pleaded that the landlord was employed as Ortho specialist in zonal hospital, Solan - he sought voluntarily retirement to look after his old mother and to run multi specialty Hospital – the tenant had not vacated the premises despite requests – the tenant opposed the petition by pleading that the mother of the petitioner had inducted him as a tenant and the petitioner had no locus standi to seek eviction – the petition was dismissed by the Rent Controller- held that Rent Controller concluded that only residential premises can be got vacated under Section 15 by specified landlord - demised premises is non-residential and the provision of Section 15 is not applicable to the same- however, Section 15(2) provides that a specified landlord can recover possession of the premises rented out to the tenant to reside or to start the business, which means that the provision is applicable to residential as well as non-residential building – the petitioner is running a clinic on the 1st floor of the building – the patient suffering from various type of ailments can have easy access to the building in case the same is situated in the ground floor as it would be difficult to them to climb the stairs – petitioner is one of the co-owners of the premises and therefore he is entitled to file a petition for eviction of the tenant – merely because the rent was being collected by another co-sharers, it cannot be said that he is not entitled to seek eviction- the rent was being deposited in the joint account – the version of the petitioner that demised premises fell into his share in family settlement is duly supported by his testimony and the testimony of his mother - the Rent Controller had wrongly dismissed the petition- revision allowed – order of Rent Controller set aside- the petitioner held entitled to recover the possession of the premises from the tenant immediately. (Para- 7 to 16) Title: Dr. Anil Bansal Vs. Dinesh Kohli Page-524

Himachal Pradesh Hindu Public Religious Institutions and Charitable Endowments Act, 1984- Section 29- Petitioner No. 1 claims himself to be the owner in possession of the land and temp of Sri Raghunath situated over the land – petitioner No. 1 is managing the temple exclusively as a private temple with the assistance of the petitioner No. 2, who has been appointed as a Kardar- the Government appointed Deputy Commissioner, Kullu as commissioner of temple and entered the temple in Schedule-I of H.P. Hindu Public Religious Institutions and Charitable Endowments Act, 1984 by issuing a notification- the notification was challenged on the ground that it was arbitrary illegal, unconstitutional, violative of principle of natural justice, politically motivated and actuated with malice – the State contended that there is public interest and many festivals are being organized for which various arrangements have to be made, repeated thefts had taken place in the temple which has caused resentment in the public and public had made representation for taking over the temple and for creating the trust – held that the question whether religious endowment is public or private is a mixed question of law and facts- in case of private endowment beneficiaries are specific individuals while in case of public endowment, the beneficiaries are general public – the Court has to rely upon the historical origin of the temple, manner in which the affairs of temple have been managed and the manner in which expenses are being met, offering worship as a matter of right, dedication of temple for the benefit of public, how the temple is being treated and location of temple etc. – the disputed question of facts cannot be adjudicated in exercise of writ jurisdiction and the remedy lies with

the civil court – the petition disposed of with a direction to institute a civil suit. (Para-20 to 66) Title: Maheshwar Singh and another Vs. State of Himachal Pradesh and others (D.B.) Page-870

Hindu Marriage Act, 1955- Section 13(1) (i-a)- Applicant had filed a petition for divorce on account of cruelty, misbehavior and desertion – parties moved a joint application seeking divorce on the basis of mutual consent –Court posted the matter after six months – application was filed for recalling the order stating that the parties were living separately for more than six months and, therefore, petition be decided immediately – this application was dismissed- aggrieved from the order, the present petition has been filed- held that no High Court or Civil Court can grant relief by invoking the principle of irretrievable breakdown of marriage- power to waive off period of six months is not available to any Court except the Supreme Court – District Judge had rightly dismissed the application- petition dismissed. Title: Kunal Ranawat Vs. Rativa Jahan Ranawat Page-507

Hindu Marriage Act, 1955- Section 24- The Court allowed the application for maintenance pendente lite and awarded maintenance @ Rs. 4,000/- per month in addition to Rs. 3000/- per month already awarded by Additional Chief Judicial Magistrate, Dehra under Protection of Women from Domestic Violence Act – litigation expenses of Rs. 10,000/- were also awarded - aggrieved from the order, present petition has been filed- held that husband is running a dental clinic and his monthly income is Rs.10,000/- Rs. 12,000/- - he is already paying maintenance of Rs.3,000/- to his wife- the maintenance amount was fixed by the Court after taking into consideration, the income of the husband – the wife is not entitled to maintenance pendente lite- hence, the order set aside- however, litigation expenses enhanced to Rs. 20,000/-. Title: Balwant Singh Vs. Dinakshi Rana Page-690

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Income Tax Act, 1961- Section 80IB- Assessee is carrying on the activity of manufacturing knitted cloth with the aid of power- he had not employed more than 10 workers for more than five months in assessment years in question – he claimed exemption, which was allowed by Commissioner of Income Tax- aggrieved from the order, the present appeal has been filed- held that if the foremen are taken into consideration, the assessee is entitled to benefit of Section 80IB – the employment of foremen was found to be factually correct on inspection – the findings were correctly recorded by the Commissioner of Income Tax- no substantial question of law arises in this case- appeal dismissed. Title: Commissioner of Income Tax, Shimla Vs. M/s Him Knit Feb. (D.B.) Page-685

Income Tax Act, 1961- Section 80-IC- The petitioner is assessed to income tax- petitioner started its business in the year 2005- three separate units were established, one at Baddi and two at Shimla- assessee filed return which was scrutinized and order was passed under Section 143- Assessing Officer held theassesseeeligible for statutory deduction under Section 80-IC- deduction were allowed to the assessee for the next three successive assessment years- when the income tax return was filed for the year 2010-2011, Assessing Officer took a view that the petitioner had not obtained Central Excise 4/6 Digit classification or National Industrial Classification (NIC) Code on 1998 and the assessee was not eligible for the statutory deduction- similar, orders were passed during the subsequent years- Assessing Officer also issued a notice under Section 148 that the income had escaped assessment during earlier years- petitioner filed the present writ petition against the order- held that Code/Classification is required only for those activities which fall under the category of manufacture- assessee is running a Call Centre, which does not deal with the computer hardware- petitioner is not manufacturing/producing any articles- Assessing Officer had wrongly held that assessee was not entitled to statutory deduction- it was not permissible to re-open the assessment after the expiry of four years from the relevant

assessment year- writ petitions allowed and show cause notice quashed. Title: Altruist Technologies Pvt Ltd. Vs. Deputy Commissioner of Income Tax (D.B.) Page-491

Indian Penal Code, 1860- Section 279- Accused was driving a vehicle in a rash and negligent manner- vehicle being driven by accused collided with another vehicle- accused was tried and acquitted by the Trial Court- held in appeal that accident had taken place in the middle of the road- there was a truck ahead of the vehicle of the accused and the accused had no option but to take his vehicle to the right- informant was late and was driving the vehicle in a fast speed- Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Munni Lal Page-650

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a jeep in a rash and negligent manner – the jeep hit a cycle – the cyclist was declared brought dead in the hospital – the accused was tried and acquitted by the Trial Court- held in appeal that statement of PW-2 was contrary to the site plan and the prosecution version – no other eyewitness was examined- in these circumstances, the rashness and negligence was not proved- the accused was rightly acquitted by the Trial Court- appeal dismissed. Title: State of H.P. Vs. Prem Kumar @ Shegalu Ram Page-806

Indian Penal Code, 1860- Section 279, 337 and 304-A- Accused was driving a jeep in a rash and negligent manner – he failed to control the same and it rolled down 250 meters below the road – the occupants sustained injuries and one J died in the accident – the accused was tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that the accident was not denied – the vehicle was travelling on a road passing through hilly terrain – the driver is supposed to drive vehicle cautiously and in a normal speed- the mechanical expert had died prior to his examination in the Court and his report could not be proved- thus, it is not proved that the accident was not caused due to any mechanical defect – the judgments passed by the Courts are not sustainable- revision allowed and accused acquitted. Title: Kishori Lal Vs. State of H.P. Page-721

Indian Penal Code, 1860- Section 307- **Indian Arms Act, 1959-** Section 27- Accused had a quarrel with his wife- accused brought his gun and shot her on the neck- accused was tried and acquitted by the Trial Court- However, the Court ordered the confiscation of his gun as he was not found to be a fit person to keep the gun- held in appeal that wife did not support prosecution version and stated that her husband was going to the fields with the loaded gun to protect the crop from the animals- he lost his control and the trigger of the gun was accidently pressed- however, it was proved that accused was under the influence of liquor- he was talking irrelevantly and was smelling heavily of alcohol – hence, there is every possibility that accused can commit similar offences in future - accused was rightly acquitted by the trial Court and gun was rightly ordered to be confiscated – appeal dismissed. Title: Jasbir Singh Vs. State of Himachal Pradesh Page-636

Indian Penal Code, 1860- Section 307, 326 and 342 read with Section 34- Informant party led plinth for the construction of the house on road side over the Government land- house of the accused party is situated nearby to the plinth- accused came and attacked PW-1 and PW-2- accused were tried and convicted by the Trial Court- held in appeal that there is no evidence that accused had prior meeting of minds and had assaulted the victims in a prearranged and preplanned manner- there is no evidence that accused had restrained the injured from proceeding beyond certain circumscribed limits - there are contradictions regarding the persons who had inflicted the stab wound- it was admitted that 4-5 persons were present who had fled away from the place of incident – the possibility that they had inflicted injury cannot be ruled out - recovery was also not proved- Court had wrongly convicted the accused- appeal allowed-

judgment passed by the Trial Court set aside and accused acquitted of the charged offences. Title: Jamna Devi Vs. State of Himachal Pradesh Page-499

Indian Penal Code, 1860- Section 323 and 325 read with Section 34- Accused gave beatings to the informant and PW-4- accused was tried and acquitted by the Trial Court- held in appeal that the incident had taken place over the cycle but the ownership of the cycle was not ascertained by the police- cycle was also not taken in possession – no independent witness was associated by the police- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Mohinder Singh Page-563

Indian Penal Code, 1860- Section 325, 504 and 506- An altercation took place between informant and the accused- accused picked up stone and hit the informant on the face causing dislocation of six teeth- accused was tried and acquitted by the Trial Court- held in appeal that no independent was examined – informant has enmity with the accused- Dental Surgeon was not examined to prove the dislocation of the teeth- Trial Court had rightly acquitted the accused in these circumstances- appeal dismissed. Title: State of Himachal Pradesh Vs. Bhagmal Page-479

Indian Penal Code, 1860- Section 342, 323 and 325- Informant had gone to cut grass from his land and he noticed on reaching the spot that accused were cutting grass from his land –when the informant made enquiry into the matter, accused tied him with a rope in their courtyard and gave beatings to him- the informant was rescued by President, Gram Panchyat- accused were tried and acquitted by the Trial Court- held in appeal that eye-witness was not examined- the rope with which the informant was tied was also not recovered- the informant has given a different version regarding the incident – the Trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Chuni Lal & another Page-451

Indian Penal Code, 1860- Section 353, 332, 333 and 506 read with Section 34- **Prevention of Damage to Public Property Act, 1984-** Section 3- The Informant is driver in HRTC- he was driving the bus towards Kaza- he stopped the bus near Kufri for dropping the passengers- first accused threw a beer bottle on the wind screen of the bus- second accused pelted the stone on the wind screen- windscreen was damaged in the incident - third accused hit the driver's window with beer bottle causing damage to the glass- accused pulled the informant out of the bus and gave him beatings- accused were tried and convicted by the Trial Court- held in appeal that investigation were not fair – statements of prosecution witnesses were not satisfactory and there are material contradictions in their statements- presence of the accused at the spot was suspect- the Trial Court had wrongly convicted the accused- appeal allowed and judgment of Trial Court set aside- accused acquitted. Title: Surinder Singh Alias Jatu Vs. State of Himachal Pradesh Page-609

Indian Penal Code, 1860- Section 354 and 323- The informant was returning home after answering the call of nature- accused came and outraged her modesty- accused was tried and acquitted by the Trial Court- held in appeal that independent witnesses did not support the prosecution version- testimony of the informant was made suspect by this fact- accused was rightly acquitted in these circumstances- appeal dismissed. Title: State of Himachal Pradesh Vs. Ramesh Kumar Page-460

Indian Penal Code, 1860- Section 376, 511 and 506- Prosecutrix had gone to the house of her neighbour – the accused molested her – he had molested her earlier as well – the accused was tried and convicted by the Trial Court- held in appeal that there are material contradictions in the testimonies of prosecutrix and other witnesses- medical evidence ruled out the sexual intercourse – there is enmity between the family of the accused and the family of the prosecutrix – the Trial

Court had wrongly convicted the accused – appeal allowed and the accused acquitted. Title: Lalit Kumar Vs. State of Himachal Pradesh Page-724

Indian Succession Act, 1925- Section 63- Deceased, D was the owner of 1/4th share in the suit land – she executed a Will in favour of defendant No.1- plaintiff filed a suit pleading that Will was got executed from D by way of misrepresentation and fraud- suit was contested by the defendant No. 1 pleading that the Will was genuine and was executed by the deceased in her sound disposing state of mind- plaintiff had sold her share in the suit land and had not visited the deceased, even at the time of her death- defendant No.1 was looking after the deceased and had performed the last rites of the deceased – suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that no marginal witness was examined by the defendant No.1 to prove the due execution of the Will- no evidence was led to examine as to why the plaintiff was left out by testatrix from the Will- even the registring officer was not examined – appeal allowed and judgments of the Trial Court and Appellate Court set aside. Title: RamkiVs. Katki and Others Page-429

Indian Succession Act, 1925- Section 63- K was the owner in possession of the suit land – plaintiff and proforma defendants were his legal heirs – the defendants starting interfering with the suit land with the plea that K had executed a Will in their favour – K had never executed any Will – the defendants pleaded that K had executed a valid Will in their favour in his sound disposing state of mind – the suit was decreed by the Trial Court – an appeal was filed, which was dismissed – held in second appeal that the execution of the Will is shrouded in the suspicious circumstances- K was aged 105-110 years and it was not expected from a person of his age to move about and visit the place of marginal witness and the scribe – marginal witness did not say that the testator had put his thumb mark after understanding and admitting the contents of the Will to be true and correct – he did not say that he had seen the testator putting the thumb mark on the Will- K used to sign the documents and no explanation has been given as to why he had put the thumb mark on the Will- K was residing in a different Village and the version of the defendants that he was residing with the defendants is not correct – the Courts had rightly discarded the Will- appeal dismissed. Title: Ram Rattan & ors. Vs. Nandu Ram & ors. Page-486

Industrial Disputes Act, 1947- Section 14, 15- Labour Court held that the reference petition was not maintainable as the claim of the workman that he was retrenched in the year 2005 is not correct- held that once an award is received by the Labour Court, it is bound to make an award and it cannot dismiss the petition as not being maintainable- further the wrong year of retrenchment will not make any difference in the ultimate outcome- the court was bound to see whether the workman had worked continuously and his services were illegally terminated or not, which it had not done- appeal allowed and the case remitted to the Labour Court for adjudication on merits. Title: Sansar Chand vs. State of Himachal Pradesh and another Page- 775

Industrial Disputes Act, 1947- Section 25- Claimant was engaged as beldar – her services were terminated on the pretext that project in which she was engaged stood closed – reference was made to the Labour Court which held that the State had not complied with the provision of Section 25 – held that there is no evidence that claimant was informed that her engagement was project specific and was liable to be terminated in case of closure of project – provisions of Industrial Disputes Act were not followed while terminating the services of the claimant – appeal dismissed. Title: State of H.P. and another Vs. Vishambri Devi Page-863

Industrial Disputes Act, 1947- Section 25F- Petitioners were engaged as daily waged labourers on 1.5.1995- their services were terminated in the month of October, 1996 without complying with the provisions of Industrial Disputes Act- respondents pleaded that petitioners were engaged for a specific project and when the project came to an end, petitioners were disengaged- Tribunal

dismissed the claim of the petitioner- held that petitioners had completed more than 240 days in the preceding 12 months from the date of termination of their services- verbal termination of the services of the petitioners was in violation of the provisions of the Industrial Disputes Act- petitions allowed and award of the Industrial Tribunal set aside- respondents directed to re-engage the petitioner with continuity in services, full back wages and all consequential benefits. Title: Desh Raj Vs. The Divisional Engineer, Telecom Projectand another Page-441

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Land Acquisition Act, 1894- Section 18- The Collector denied to forward the reference to the Court on the ground that award was declared null and void – aggrieved from the act of the Collector, present writ petition had been filed- held that it is mandatory for the Collector to make a reference to the Court and it is not for him to decide and reject the same – the Collector had erred in not forwarding the representation to the Court- petition allowed- Collector directed to forward the reference petition to the Court and reference Court held to be at liberty to answer the petition by taking into consideration the factum of award having been declared null and void and any other factors bearing on the same – petition disposed of. Title: Liaq Ram Vs. State of H.P. & Anr. Page-668

Limitation Ace, 1963- Section 5- Suit was decreed by the Trial Court - District Attorney forwarded the copy of judgment and decree to the State with his opinion that the case was a weak one - Law Department also concluded that the decree of the Trial Court was reasonable one- Office of the Accountant General (A & E), Himachal Pradesh returned the pension case with the remarks that family pension cannot be authorized as per the direction of the Trial Court for want of a qualifying service of 10 years – opinion of Law Department was sought and Law Department advised that appeal should be filed against the judgment and decree- hence, appeal was filed along with an application for condonation of delay- application was dismissed by the Appellate Court – held that term sufficient cause needs liberal construction to advance substantial justice – initially a bonafide decision was taken not to agitate the matter but when it was found that the pensionary benefit cannot be released in accordance with the law, appeal was filed- there was a sufficient cause as the judgment could not have been implemented in view of the specific objection of the Accountant General - application for condonation of delay allowed and delay in filing of first appeal condoned. Title: The Secretary Education and others Vs. Jayabanti Devi wife of late Sh. Desh Raj Page-534

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Motor Vehicle Act, 1988- Section 149- The deceased was hit by a motor cycle being driven by Respondent no. 2 on the left side of the road in a rash and negligent manner- she was taken to the hospital but was declared dead- MACT awarded compensation of Rs. 2,00,000/- along with interest @ 7.5% which was to be paid by the Respondent no. 1 (owner) and Respondent no. 2 (driver) on the ground that the driving license was fake and there was breach of terms and conditions of the policy - aggrieved from the award, present appeal has been filed pleading that the insurance company should have been directed to indemnify the insured- held that the insurance company cannot be exonerated from the liability on the ground that the driving license was fake unless it is proved that the owner was in any manner negligent- in the present case, the owner had handed over the motor cycle to the driver after checking the license and he was not supposed to verify from the Registration and Licensing Authority whether the license was genuine or not- it was not proved by the insurance company that the owner was negligent or had failed to exercise any reasonable care- Tribunal had wrongly exonerated the insurance company of liability- the appeal allowed and insurance company directed to indemnify the owner. Title: Munish Jain and another vs. Sunita Devi and others Page-676

Motor Vehicles Act, 1988- Section 149- Claimant suffered multiple injuries in a motor vehicle accident caused by the rash and negligent driving of the driver of the vehicle- a claim petition was filed, which was allowed- it was directed that compensation shall be paid by the owner of the vehicle – held in appeal that registration certificate of the vehicle shows that it was a heavy transport vehicle- Tribunal held that driving licence did not authorize the driver to drive heavy transport vehicle as there was no endorsement on the same to this effect- Driving licence shows that the driver was authorized to drive light motor vehicle as well as heavy transport vehicle- the vehicle being driven by the driver was a transport vehicle- heavy motor vehicle is not a distinct category in Section 10(2) of the Act- Tribunal had wrongly saddled the owner with liability- appeal allowed and Insurance Company directed to pay the compensation. Title: Gurpreet SinghVs. Kapil Dev and others Page-476

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Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 60 bottles of country made liquor Lal Quila each containing 750 ml. – accused was tried and acquitted by the Trial Court- held in appeal that there are material contradictions in the statements of the prosecution witnesses- no independent witness was examined- link evidence is also missing- Trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Rajesh Kumar Page-457

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Specific Relief Act, 1963- Section 5 and 38- Plaintiff pleaded that he is co-owner in possession of the suit land- the defendant got himself recorded in possession of the suit land as gair maurusi tenant – the defendant started interfering with the suit land after this entry and started construction work despite requests not to do so- hence, the suit was filed for seeking possession and injunction – the defendant pleaded that he is in possession of the suit land since 1972 and has a right to raise construction – the suit was decreed by the Trial court- an appeal was filed, which was allowed- held in second appeal that possession of the defendant was proved by the evidence- the correction was made after hearing the co-sharers – the proprietary rights were conferred upon the tenants on the commencement of H.P. Tenancy and Land Reforms Act- the Appellate Court had rightly allowed the appeal- appeal dismissed. Title: Shashi Kumar and others Vs. Sunka Ram Page-512

Specific Relief Act, 1963- Section 20- Plaintiff No. 1 entered into an agreement with defendant No. 1 for the purchase of the land for a consideration of Rs. 7 lacs- a cheque of Rs. 1 lac was issued towards part payment - remaining consideration was to be paid at the time of registration of the sale deed- the cheque was dishonoured – a notice was issued to the plaintiff No. 1 – plaintiff No. 1 sent a demand draft of Rs. 1 lac and asked the defendant No. 1 to execute the sale deed within 15 days – however, when the deed was not executed, the present suit was filed – the defendant No. 1 pleaded that plaintiff No. 1 is not an agriculturist and is not entitled to purchase the land- defendant No. 2 claimed that he had purchased the land for a valuable consideration and is a bona fide purchaser having no notice – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that a person has to show his readiness and willingness to perform his part of the agreement before specific performance can be ordered – since the cheque issued by the plaintiff No. 1 was dishonoured, there was no readiness and willingness on his part – the demand draft was sent after two months of the agreement – the sale deed was to be executed within two months – High Court cannot interfere with the findings of facts recorded by the Courts – there is no perversity in the findings – appeal dismissed. Title: Ved Prakash and another vs. Krishan Kumar Gupta and another Page-777

Specific Relief Act, 1963- Section 34 and 36 - Plaintiffs filed a civil suit pleading that they are owners in possession of the suit land – the defendants in connivance with the revenue staff

procured a false and frivolous entry showing themselves to be tenants at will behind the back of the plaintiffs – the defendants are threatening to interfere with the possession of the plaintiffs on the basis of wrong entry – the suit was opposed by the defendants pleading that they are in possession of the suit land for more than 35 years on the payment of Chakota – the entries were recorded after proper inquiry – hence, it was prayed that the suit be dismissed- the suit was decreed by the Trial Court - an appeal was filed, which was also dismissed – held in second appeal that the plaintiffs were recorded to be the owners of the suit land in the copies of Khasra Girdwari and Jambandi - mutations were attested in favour of defendants conferring proprietary rights upon them – however, there is no record that procedure prescribed by law was followed before changing the entries – the bar of jurisdiction of the civil court will also not be attracted due to the violation of mandatory provision of law – further there is no evidence of the compliance of the principles of natural justice – the Courts had properly appreciated the evidence – appeal dismissed. Title: Rattan Chand & others Vs. Karam Singh & ors. Page- 603

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration and injunction that he got 1/3rd share in the suit land by way of registered gift deed from R – he became the owner of the share of R- the revenue entries to the contrary are wrong and illegal – hence, the suit was filed – the defendants pleaded that plaintiff is not in possession- the suit is not maintainable – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that the mutation of the gift deed was not attested regarding the share of R in the Shamlat land – the Revenue Officer had erred in not including the share of R in the Shamlat land – the Courts had rightly decreed the suit – appeal dismissed. Title: Bhagwan Dass Vs. Roshan Lal (since deceased) through his legal heirs and another Page-588

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit pleading that he is appointed as a lecturer in Computer Science by the defendant – the post was temporary and his services could be terminated by giving one month's notice or payment of salary in lieu of the notice period – plaintiff submitted his resignation after giving one month notice- he was relieved – the defendant issued a letter demanding Rs. 67,200/- in lieu of the training imparted by the defendant for electrosoft certification course – the defendant threatened to recover the amount through the police – defendant is not entitled for the money – the defendant pleaded that plaintiff had applied for training with an undertaking to serve the college for at least one year- the defendant had paid a training fee of Rs. 33,600/- and had a right to recover the amount – the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that the defendant is located in Jalandhar – one letter was received at Una but subsequent letter were addressed to the subsequent employer at its Head Office located at New Delhi – the suit was not maintainable at Una in these circumstances- Appellate Court had rightly reversed the decree – appeal dismissed. Title: Anil Kanwar Vs. The Registrar Dr. B.R. Ambedkar Regional Engineering College, Jalandhar Page-584

Specific Relief Act, 1963- Section 34 and 38- Plaintiff pleaded that suit land was leased by the defendants in favour of plaintiff in June, 2001 on a monthly rent of Rs.300/- for constructing a shop- the plaintiff constructed a shop by incurring expenses of Rs.1 lac – the defendants were bent upon to get the suit land vacated despite the payment of rent – the defendants pleaded that a wooden structure/khokha was taken on lease by plaintiff from defendant No.4 for a consideration of Rs.8,000/- from 25.7.2003 till 31.3.2004 with an undertaking to vacate the same after the expiry of the period- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that plaintiff had failed to prove that any permanent lease was executed in his favour – the plea of the defendants was duly proved by the agreement in which plaintiff had agreed to vacate the khokha after 31.3.2004 – Plaintiff failed to honour the undertaking – the suit was rightly dismissed by the Courts- appeal dismissed. Title: Gian Chand Vs. Ram Parshad and others Page-462

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration that they have become the owners on the commencement of H.P. Tenancy and Land Reforms Act and order passed by Assistant Collector 1st Grade is null and void as it was passed behind the back of the plaintiffs – suit was dismissed by the Trial Court- an appeal was filed, which was allowed and the suit was decreed- held in second appeal that entries were changed in the year 1976, however, order was not produced on record- entries were corrected after the commencement of H.P. Tenancy and Land Reforms Act- proprietary rights were conferred automatically on the date of notification of the Act- mere entries in the revenue record will not help the defendants- appeal dismissed. Title: Roshan Lal deceased through LRs Lalita Devi &ors Vs. Ramesh Chand & another Page- 546

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that defendants No.2 and 3 were the owners of the suit land- plaintiffs had constructed a hotel after taking approval from the Assistant Town Planner, Kullu – plaintiffs constructed a septic tank and a pollution treatment plant upon the land owned by defendants No.2 and 3- plaintiffs had become owners by way of adverse possession- defendants No.2 and 3 executed a sale deed in favour of defendant No.1- defendant No.1 is interfering with the possession of the plaintiffs on the basis of sale deed - suit was opposed by defendants pleading that plaintiffs never remained in possession- sale deed was validly executed – plaintiff No.1 had demolished the boundary wall constructed by the defendant No.1 for which a criminal case was registered- suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that plaintiff cannot seek a decree for declaration on the basis that they have become owners on the basis of adverse possession in view of judgment of Supreme Court in ***Gurdwara Sahib versus Gram Panchyat (2014) 1 SCC 669***– suit was rightly dismissed by the courts - appeal dismissed. Title: Ashok Kumar and others Vs. Subhash Sharma and others Page-573

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for injunction and damages pleading that he is owner in possession of the suit land – the defendants started interfering in the suit land and damaged the maize crop sown in it – the defendants pleaded that the land was previously owned by K who had sold it to R, predecessor-in-interest of defendants No. 1 to 8 for consideration of Rs. 17,200/- - the possession was also delivered to R in part performance of the agreement – plaintiff had filed a civil suit earlier regarding the suit land, which was dismissed and the present suit is barred by the principle of res-judicata – the suit was dismissed by the Trial Court- an appeal was filed, which was allowed and the decree passed by Trial Court was set aside- held in second appeal that the land is recorded in possession of plaintiff and one P- no evidence was led to rebut the presumption of correctness- the Khasra numbers in previous litigation were different- hence, the plea that the suit was barred is not acceptable – the Appellate Court had rightly decreed the suit – appeal dismissed. Title: Devi Singh & others Vs. Rama Devi & others Page-593

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that the suit land was earlier owned by his father- no mutation of inheritance was attested on his death- defendants are trying to raise construction in front of the ancestral house of the plaintiff, which would impair the light, air and sun shine of the house- defendants have no right to raise construction over the joint land- suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that parties are shown to be joint owners in possession of the suit land in the revenue record- Court had held in the earlier litigation that a family partition had taken place in the year 1983- land was allotted to the defendants in the family partition and they have a right to raise construction over the same- Courts had correctly appreciated the evidence- appeal dismissed. Title: Bhupinder Singh Thakur Vs. Kanwar Singh and Ors. Page- 519

Specific Relief Act, 1963- Section 38- Plaintiff(s) filed a civil suit for seeking permanent prohibitory injunction pleading that suit land is in possession of the plaintiff as per the

agreement between the parties – the plaintiff had advanced a loan of Rs.70,000/- and the possession was delivered with an understanding that plaintiff was to remain in possession till the repayment of loan – the defendant is threatening to take forcible possession without any right to do so- defendant pleaded that he had accompanied the plaintiff to execute a Will and put his thumb mark on a document believing it to be Will – the document is the result of fraud and misrepresentation – no loan was ever taken by the defendant nor the possession was handed over to the plaintiff – the Trial Court dismissed the suit- an appeal was filed, which was also dismissed- held that the document set up by the plaintiff is in the nature of mortgage deed – it is required to be registered by law – the document was not registered and is not enforceable- the Courts had rightly dismissed the suit – appeal dismissed. Title: Daya Ram (since deceased) through his LRs Het Ram and others Vs. Thakaru Ram (since deceased) through his LRs Smt. Gita Devi & another Page-590

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit seeking injunction pleading that they are owners in possession of the suit land- defendant is interfering with the suit land without any right to do so- suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that ownership and possession of the plaintiffs were not proved by the copies of jamabandis and oral evidence- the plea of the defendant that he has right of easement is not proved- he has also taken the plea of adverse possession- evidence was led in support of the plea- mere failure to frame issue will not prejudice any party- Courts had correctly appreciated the evidence- appeal dismissed. Title: Roop Lal Vs. Durga Dass & others Page-446

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

Sohan Lal ….Petitioner.
Versus
Indira Devi and others ….Respondents.

CRMMO No. 335 of 2016.
Decided on: 11.05.2017.

Code of Criminal Procedure, 1973- Section 482- Applicant filed an application for extension of time to furnish personal bond as per orders of the Court due to financial difficultiesto deposit 30% of the amount- application was allowed and the time was extended by the Court- however, amount was not deposited- petition was filed for quashing the order- held that there is no error in the order- petitioner could have approached the Court which passed the order for extension of time- there is no perversity or illegality in the order- petition dismissed. (Para-2 and 3)

For the petitioner	Mr. Vishal Bindra, Advocate.
For the respondents	None for respondent No. 1. Mr. Vikram Thakur and Ms. Parul Negi, Dy. AGs for respondent No. 2/State.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition filed under Article 227 of the Constitution of India read with Section 482 of Criminal Procedure Code (hereinafter referred to as 'Cr.P.C' for short), the petitioner has prayed for quashing of order dated 28.09.2016, passed by the Court of learned Additional Sessions Judge (II), Mandi, in an application filed by the present petitioner for extension of time for furnishing personal bond as well as surety bonds. The impugned order reads as under.

> *"The applicant has moved an application for extension of time for furnishing personal bond and surety bond as per the order dated 30.08.2016. The applicant/convict has given the reason that due to financial crises he could not comply the order and deposit the 30% of the amount as directed under the aforesaid order. As such, the present application filed by the applicant/convict is allowed and time is extended and he is directed to comply the order dated 30.08.2016 on or before 25.10.2016. Application stands disposed off. It be tagged with the main case file."*

2. It is a matter of record that despite indulgence having been shown by the Court below by way of impugned order, the petitioner did not deposit 30% amount, as was ordered to be deposited vide order 30.08.2016, on or before 25.10.2016. Not only this, rather than approaching the Court which had granted extension in favour of the petitioner to deposit the amount, he filed the present petition under Section 227 of the Constitution of India read with Section 482 of Cr.P.C assailing the order so passed by the learned Court below granting extension of time in favour of the petitioner and that too on an application so filed by him.

3. In my considered view, this application is not only misconceived but is also abuse of process of law. Apparently, there is no manifest error committed by learned Court below while passing order dated 28.09.2016. In fact, this order was passed by learned Court below on an application which was filed by the present petitioner for extension of time for furnishing personal bond as well as surety bond in terms of order dated 30.08.2016. In case, the petitioner was not in a position to comply with the direction which was passed by learned Court below, then the proper course for the petitioner was to have had approached the said Court praying for either

modification of the order or for extension of the time to comply with order dated 30.08.2016. However, rather than approaching the Court below, the petitioner has filed the present petition. Therefore, as there is no perversity or illegality with the impugned order and further as there is no jurisdictional error committed by learned Court below while passing order dated 28.09.2016, this petition is dismissed being mis-conceived.

4. Petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Hira Lal ….Petitioner.
Versus
State of Himachal Pradesh and others ….Respondents.

CWP No.: 10089 of 2011
Decided on: 15.05.2017.

Constitution of India, 1950- Article 226- Petitioner was appointed as mid-day meal worker on 30.9.2004- he was not allowed to work after 16.11.2011- fresh applications were invited for mid-day meal worker and interviews were also held- petitioner is entitled for regularization of his services- respondent pleaded that services of the petitioner were terminated on the basis of the complaint filed by teacher- complaint was considered along with previous allegations of misconduct – petitioner was ordered to be removed- held that petitioner has concealed the material facts- petitioner had tendered apology to the school concerned- he remained absent from the duty earlier as he was arrested by the police- petitioner had not challenged the resolution passed by School Management Committee- petition dismissed. (Para-7 to 10)

For the petitioner: Ms. Sunita Sharma, Advocate.
For the respondents: Mr. Vikram Thakur and Ms. Parul Negi, Dy. AGs for respondents No. 1 and 2.
Mr. K.R. Thakur, Advocate for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

As per report of the Registry, newly added respondent No. 6 stands duly served, however, no one has appeared on its behalf, accordingly, respondent No. 6 is proceeded against *ex parte*.

2. By way of this writ petition, the petitioner has prayed for the following reliefs.

i) That the writ in the nature of certiorari may kindly be issued and oral order of termination may kindly be quashed and set aside.

ii) The writ of mandamus may kindly be issued directing the respondents No. 4 and 5 to allow the petitioner to work as cook and release the salary of the petitioner for the month of October and November immediately.

Any such other order which this Hon'ble Court may deed fit and proper may also be passed in the circumstances of the case."

3. No appointment order of the petitioner has been annexed with the petition. The fact of the petitioner having been appointed as mid-day meal worker is intended to be substantiated on the basis of Annexure P-1, which is a copy of a certificate, dated 26.09.2011, issued by CEC/Central Head Teacher, Govt. Primary School, Binan, District Kullu, in which, it is mentioned that the petitioner was appointed as a mid- day meal worker vide resolution No. 8, dated 30.09.2004. Grievance of the petitioner is that though the petitioner has been regularly performing his duties as a mid-day meal worker after his appointment since 30.09.2004, he was suddenly not allowed to work w.e.f. 16.11.2011, though neither any complaint was filed against him and otherwise also he was performing his duties with full dedication and sincerity to the complete satisfaction of his employer. It is further the case of the petitioner that respondent No. 4 in fact had invited applications for the appointment of mid day meal worker in GPS, Binan on 16.11.2011 and interviews were also held on 24.11.2011. According to the petitioner, he apprehended that Chairman Shri Tape Ram wanted to appoint his "near and dear" in place of the petitioner and that is why, services of the petitioner were verbally terminated so that vacancy of mid-day meal worker could be shown. It was further the case of the petitioner that he was arbitrarily not allowed to work by the respondents though he had completed more than seven years' service and had in fact become eligible for regularization of his services. As per him, despite his having made representation to respondents No. 4 and 5 to allow him to perform his duties as mid-day meal worker, he was not allowed to work. It is in this background that the writ petition was filed by the petitioner.

4. Replies to the writ petition stand filed by respondents No. 1 and 2 as well as by respondents No. 3 and 4. There is also on record an affidavit filed by Director of Elementary Education, dated 15th July, 2015, pursuant to order passed by this Court on 10.04.2015, which interalia states that mid-day meal workers are paid fixed remuneration of Rs. 1000/- per month during school days by the School Management Committee out of grants made available by the Centre and State Government in the ratio of 75:25 and the said appointment is non-governmental on a fixed remuneration. It is also mentioned in the said affidavit that appointing/disciplinary authority in respect of Cook-cum-Helper is the Executive Committee of the School Management Committee and in case performance of the selected candidate is not found satisfactory, then the School Management Committee has full power to remove such person.

5. It is further evident from the reply which has been filed by respondents No. 3 and 4 that the services of the present petitioner were not terminated verbally, as has been alleged in the writ petition but the same were terminated on the basis of a complaint dated 24.09.2011 (Annexure R-4 appended with the reply filed by respondents No. 3 and 4) filed by one Shri Duni Chand, JBT Teacher who alleged therein that on 20.09.2011, when he was in the class and imparting education to the students, at around 10:50 a.m. petitioner entered the class room and started verbally abusing him and thereafter also started physically assaulting him and in the said process, he (petitioner) also tore his (Duni Chand) clothes. Reply further demonstrates that pursuant to the said complaint received against the petitioner, a meeting of the General House, under Chairmanship of the Chairman of School Management Committee was held on 22.09.2011, in which, the complaint so received against the petitioner was considered alongwith other previous allegations which were against him about his mis-conduct and thereafter on account of said conduct of the petitioner, he was ordered to be removed from the job.

6. No rejoinder has been filed by the petitioner to either of the replies filed by respondents No. 1 and 2 or by respondents No. 3 and 4.

7. In my considered view, the petitioner in the present case is not entitled for any relief from this Court for the reasons that neither the petitioner has been able to demonstrate on record that any legal or fundamental right of his has been infringed by the respondents and further for the reason that the petitioner has also not approached this Court with clean hands. A perusal of the averments made in the writ petition demonstrate that very innocuous pleadings and prayers have been made in the same to the effect that the petitioner, who was working as

mid-day meal worker w.e.f. 30.09.2004, was all of a sudden verbally not permitted to further join his services on 16.11.2011 onwards as respondents wanted to show the post of mid day meal worker vacant in the said school and one Shri Tape Ram, the Chairman of the School Management Committee intended to adjust someone in whom he had interest against said post. The petitioner has nowhere disclosed in the petition that in fact a complaint was filed against him by JBT Teacher Duni Chand and on the basis of said complaint, a decision was taken against him by the school management committee with regard to discontinuation of his services as mid-day meal worker.

8. This court is not commenting upon the veracity of the complaint or the legality of the proceedings which were undertaken by the School Management Committee out of which, services of the petitioner were terminated but least that was expected from the petitioner was that he should have approached the Court with clean hands and thereafter left it upon the Court to pass appropriate orders in the facts and circumstances of the case. However, the petitioner did not approach the Court with clean hands. He concealed material facts and, as such, the petitioner cannot be shown any indulgence by this Court in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India.

9. Besides this, a perusal of the reply filed by respondents No. 3 and 4 also demonstrate that the complaint filed against the petitioner by Duni Chand was not the sole incident of misconduct alleged against him and previously also, the petitioner was guilty of such like misconduct and in fact, he had also tendered apology in this regard to the school concerned, which is on record as Annexure R-2 (appended with reply) dated 05.09.2009. Respondents have also appended with their reply Annexure R-3, which is a letter dated 08.04.2011 written by the present petitioner to the Central Head Teacher of the School concerned, from which it is apparent that the petitioner remained absent from duty w.e.f. 22.03.2011 to 07.04.2011, wherein probably he tried to convince the authority concerned that why he remained absent from duty and he disclosed that an FIR was registered against him, as a result of which he was arrested and that was the reason that he could not report for duty. Therefore, also in my considered view, on account of his act and conduct also, the petitioner is not entitled for any discretionary relief from this Court.

10. The contention of Ms. Sunita Sharma, learned counsel for the petitioner that the alleged act of respondents of verbally terminating the services of the petitioner cannot be sustained in law is also without any merit. Here it is not a case where the services of the petitioner were verbally terminated as alleged. His services were terminated by way of a resolution passed by the School Management Committee, which fact was concealed by the petitioner at the time when he filed the writ petition. Even if it is presumed that at the time of filing of this petition, the petitioner was not in possession of any order/minutes of meeting, vide which his services were terminated, but least that was expected from the petitioner was that after the factum of termination of his services by way of resolution by the School Management Committee concerned was brought on record by the respondents alongwith their replies, then immediately steps should have been taken by the petitioner to challenge the same by way of amending the writ petition, which till date has not been done by the petitioner. Therefore, here is a case where the basic order/basic communication, vide which services of the petitioner were terminated by the respondents, has not been assailed by him and in the absence of any challenge to the same in the writ petition, no relief even otherwise can be granted in favour of the petitioner.

In view of the discussion above, the present writ petition being devoid of merit is dismissed. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Union of India and others ….Petitioners.
Versus
J.S.Thakur …..Respondent.

CWP No.3572 of 2012.
Date of decision: 15.05.2017.

Constitution of India, 1950- Article 226- Respondent was appointed as clerk in the Office of the Registrar of Newspaper for India, headquarter at Shimla- Office was shifted to Delhi along with staff- respondent was suspended from the service on charges of unauthorized absence from the duty and leaving the station without permission- inquiry was conducted against him which resulted in the removal of the respondent from the service- an appeal was filed and matter was remitted to disciplinary authority – a fresh chargesheet was served which resulted in imposition of major penalty- an appeal was filed and the matter was remitted to the disciplinary authority - again major penalty was imposed upon the respondent- a review petition filed by the respondent was dismissed- he filed an original application, which was dismissed- matter is pending adjudication before Delhi High Court- respondent approached Central Administrative Tribunal, Punjab at Chandigarh by filing the original application, which was allowed- held that respondent had assailed the order vide which his period of suspension was treated as the period not spent on duty and he sought further direction that subsequent period be treated as period spent on duty- Administrative Tribunal could not have allowed the original application in its entirety as the matter is pending before Delhi High Court- petition partly allowed. (Para-12 to 16

For the Petitioners : Mr.Ashok Sharma, Assistant Solicitor General of India, with Ms.Sukarma Sharma, Advocate.
For the Respondent : Mr.Lalit K.Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The instant petition has been filed with the following prayer:-

"That the impugned order dated 13.10.2011 (Annexure P-1) passed by the ld. Central Administrative Tribunal below may kindly be quashed and set-aside."

2. The brief facts leading to the filing of the instant petition are that the respondent filed Original Application before the learned Central Administrative Tribunal, Chandigarh Bench, Circuit at Shimla (for short "Tribunal") claiming therein the following reliefs:-

"a) The Respondents may kindly be directed to treat the period of suspension i.e. 29-3-1982 to 9-2-1990 as spent on duty and to treat the said period as qualifying service for the purposes of pension and other retirement benefits with all consequential benefits;

b) The period of 23-1-1998 to 18-12-1998 and 2-6-2003 to 25-7-2003 treated as Extra-Ordinary Leave by the Respondents vide orders contained in Annexures A-11 and A-12 may kindly be directed to be treated as qualifying service for pension and other retirement benefits in the interests of justice;

c) The applicant may kindly be held to be entitled to the 2nd ACP with effect from 9-8-1999;

d) The Respondents may kindly be directed to supply the copies of the statements of General Provident Fund deductions/ accumulations since the year 1998 to the date of retirement of the applicant;

e) Any action taken or orders passed by the Respondents for denying the above relief to the applicant, may kindly be declared wrong, illegal, arbitrary and may be quashed and set aside in the interests of justice;

f) The respondents may kindly be directed to produce the record and after the perusal thereof, any other or further relief as may be warranted by the facts and circumstances of this case, may also be allowed in favour of the applicant and against the respondents in the interests of justice."

3. The respondent in the year 1965 was appointed as a Clerk Grade-II in the Office of the Registrar of Newspaper for India, headquarter at Shimla. In the year 1977, the said Office was shifted to Delhi alongwith its staff. Since the respondent belonged to Shimla, he wanted himself to be posted in Shimla, but his request could not be materialized. On 29.03.1982, the respondent was suspended from service on charges of unauthorized absence from duty and leaving station without permission. The inquiry was conducted against the respondent wherein it was alleged that he did not co-operate with the inquiry committee. Since the respondent did not co-operate in the inquiry, vide order dated 20.06.1994, the disciplinary authority awarded major punishment by ordering his removal from service.

4. On an appeal having been filed before the appellate authority i.e. Secretary I &B, the matter was remitted back to the disciplinary authority vide order dated 24.05.1995 for *denovo* inquiry by holding that there were procedural lapses.

5. After issuing a fresh charge sheet to the respondent, inquiry was ordered vide order dated 31.10.1995 and on 25.01.1997, the Inquiry Officer submitted his report. The disciplinary authority after considering inquiry report vis-à-vis the representation made by the respondent awarded major penalty.

6. However, on an appeal having been preferred before the appellate authority by the respondent, the matter was once again remitted back to the disciplinary authority for rectifying certain procedural lapses. Thereafter, the disciplinary authority once again vide its order dated 24.02.2000 awarded major penalty against the respondent.

7. The review filed by the respondent was also dismissed vide order dated 09.04.2001. The respondent thereafter approached the Principal Bench of the Central Administrative Tribunal at Delhi by filing OA No.548 of 2000, however, the said OA was dismissed vide order dated 05.03.2003 and the matter is now pending adjudication before the learned Delhi High Court in WP(C) No.3216 of 2006 filed by the respondent against the aforesaid order of the Tribunal dated 05.03.2003.

8. However, later on, the respondent appears to have approached the learned Central Administrative Tribunal, Bench at Chandigarh, Circuit at Shimla, by filing Original Application No.10/HP/2009 and had sought the reliefs as has been quoted in verbatim in para No.2 (supra).

9. As observed earlier, the learned Tribunal allowed the Original Application by granting all the reliefs to the respondent as were prayed for.

10. Aggrieved by the said decision, the petitioners have assailed the order primarily on the ground that the reliefs as claimed for by the respondent could not have been granted by the Tribunal as this matter was already sub-judice before the learned Delhi High Court.

11. We have heard the learned counsel for the parties and gone through the material placed on record.

12. In order to appreciate the controversy, it would be necessary to first advert to the precise relief that had been sought for by the respondent while filing Original Application No.548 of 2002 which was decided by the learned Tribunal vide its order dated 05.03.2003.

13. The records reveal that the respondent had assailed order dated 09.04.2001 vide which his period of suspension with effect from 29.03.1982 to 09.02.1990 was treated as period not spent on duty and had sought further direction that the subsequent period from 10.02.1990 to 10.12.1996 be treated as period spent on duty. Thus, it is evidently clear that as regards the period with effect from 29.03.1982 to 09.02.1990 and the subsequent period with effect from 10.02.1990 to 10.12.1996 has not been treated as period spent on duty by the respondent and such contention stands affirmed by the learned Tribunal in its order dated 05.03.2003. However, as observed earlier, the matter with regard to this lis is sub-judice before the Delhi High Court in WP(C) No.3216 of 2006.

14. If that be the position, obviously, the petitioners are right in contending that the Original Application filed by the respondent could not have been allowed in toto and, therefore, to the extent the impugned order holds the respondent to be entitled for regularization of his suspension period from 29.03.1982 to 09.02.1990 for the purpose of pensionary benefits obviously cannot be sustained. Even, the further direction to make payment of difference of arrears of pay and pensionary benefits revised from time to time and thereafter his pension to be affixed accordingly also cannot be sustained and is accordingly set aside. Therefore, even the further direction to consider the case of the respondent for regularization of period from 23.01.1998 to 18.12.1998 and from 02.06.2003 to 25.07.2003 is also not sustainable and would be dependent on the outcome of the decision of WP (C) No.3216 of 2006. This position is unexceptional and, therefore, has rightly not been disputed by the learned counsel for the respondent.

15. As regards the other reliefs as awarded in favour of the respondent, it would be noticed that the same have not been specifically assailed in the petition and even otherwise we do not really find any reason to interfere with the said findings.

16. Having said so, the petition is party allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

M/s Mohan Meakin Limited ….Petitioner.

Versus

Information Commissioner Central and Others …Respondents.

CWP No.: 1166 of 2011.
Decided on: 17.05.2017.

Constitution of India, 1950- Article 226- Petitioner is a company incorporated under the Companies Act- respondent No.1 had directed the respondent No.2 to determine whether respondent No.2 had the authority to call for information under Right to Information Act from the petitioner- held that order has been passed without hearing the petitioner- Section 19(4) of the Act provides for giving a reasonable opportunity of being heard to the party- information was sought from the 3rd party and opportunity of hearing is necessary- petition allowed - order passed by respondent No.1 and communication issued by respondent No. 2 quashed and set aside.

(Para 4 to 10)

For the petitioner Mr. K.D. Sood, Sr. Advocate with Mr. Rajnish K. Lal, Advocate.

	Respondents No. 1 and 3 proceeded *ex parte* vide order dated 21.03.2017.
For the respondents	Mr. M.A. Khan, Sr. Advocate with Mr. Raj Kumar Negi, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, the petitioner has prayed for the following reliefs.

"*a) Quash orders Annexure P-1 and Annexure P-2;*

b) Direct the production of all the relevant records;

c) Allow any other writ, order or direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case; and

d) Allow the costs of the petition."

2. Brief facts necessary for the adjudication of the present case are that the present petitioner which is a company incorporated under the Companies Act alongwith registered office at Solan is aggrieved by an order passed by respondent No. 1, dated 04.01.2011, Annexure P-1, vide which respondent No. 1 has directed respondent No. 2 to revisit the matter and determine whether respondent No. 2 had the authority to call for the information from the present petitioner which was sought under The Right to Information Act, 2005 by respondent No. 3, and also against Annexure P-2 i.e. communication dated 18.01.2011 issued by respondent No. 2 to the present petitioner pursuant to Annexure P-1, whereby respondent No. 2 directed the present petitioner to furnish the information as was desired under The Right to Information Act, 2005.

3. Despite service as no one appeared for respondents No. 1 and 3, they were accordingly proceeded against *ex parte* by this Court on 21.03.2017.

4. I have heard Mr. K.D. Sood, learned senior counsel appearing for the petitioner as well as Mr. M.A. Khan, learned senior counsel appearing on behalf of respondent No. 2. It is a matter of record, impugned order Annexure P-1 has been passed by respondent No. 1 without hearing the present petitioner. This is evident from the perusal of the impugned order itself which demonstrates that the parties present before respondent No. 1 when the said matter was heard and disposed of were *(a) Appellant (b) Public Authority, Registrar of Companies, Chandigarh (Ministry of Corporate Affiars).*

5. Sub-Section 4 of Section 19 of The Right to Information Act, 2005 reads as under:

> *"Section 19 (4): If the decision of the Central Public Commission or the State Information Commission, as the case may be, against which an appeal is preferred relates to information of a third party, the Central Information Commission or State Information Commission, as the case may be, shall give a reasonable opportunity of being heard to that third party."*

6. The impugned order passed by respondent No. 1 is in flagrant violation of the statutory provisions so contained under The Right to Information Act, 2005, as the information which was being sought by respondent No. 3 under the Right to Information Act pertained to third party, therefore, it was incumbent upon the respondent No. 1 to have had given a reasonable opportunity of being heard to the petitioner as the same was third party as is envisaged under Sub-Section 4 of Section 19 of the Right to Information Act.

7. Not only this, the impugned order was not sustainable in the eyes of law as Section 2 (f) of Act contemplates that information which has to be sought interalia means that information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

8. There is no finding returned in the impugned order that the information which was being sought by respondent No. 3 and qua which directions have been issued by respondent No. 1 to respondent No. 2 was such information as can be accessed by a Public Authority under any other law for the time being in force.

9. This is further evident from the reply which has been filed to the present petition by respondent No. 2 in which it is categorically mentioned that information sought by respondent No. 3 is not required to be filed with respondent No. 2 under the provisions of Companies Act. Para 5 of the reply filed by respondent No. 2 is quoted here-in-below.

> *"5. that it is admitted the information sought by respondent No. 3 is not required to be filed with the Registrar of Companies under the provisions of Companies Act, 1956. It is further submitted that under the RTI Act, 2005, the Central Information Commission has no power to pass an order related to a third party without giving an opportunity of being heard to the third party. It is further submitted that the ROC can provide information which is available with this office. Moreover, the documents related to the companies filed with ROC are public documents and available for inspection and for obtaining certified copies under Section 610 of the Companies Act, 1956. As the document available with ROC are already in public domain being available for inspection and certified copies, the provisions of RTI Act are not applicable. There is no question of providing any information which is already in public domain."*

10. Therefore, as is evidently clear, the impugned order Annexure P-1 passed by respondent No. 1 is not only in violation of the statutory provisions of The Right to Information Act, 2005, but the order so passed is also in excess of the jurisdictions vested in the said authority to pass order under the Right to Information Act. Accordingly, in view of the above discussion, this writ petition is allowed and order dated 14.01.2011, Annexure P-1, passed by respondent No. 1 is quashed and set aside. Communication dated 18.01.2011, Annexure P-2, which is an after-shoot of Annexure P-1, is also accordingly quashed and set aside.

The petition stands disposed of in the above terms, so also pending miscellaneous application(s), if any.

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

Smt. Ramki ….Appellant.
Versus
Smt. Katki and Others ….Respondents.

RSA No. 185 of 2008.
Reserved on 06.04.2017.
Decided on: 22.05.2017

Indian Succession Act, 1925- Section 63- Deceased, D was the owner of 1/4th share in the suit land – she executed a Will in favour of defendant No.1- plaintiff filed a suit pleading that Will was got executed from D by way of misrepresentation and fraud- suit was contested by the defendant No. 1 pleading that the Will was genuine and was executed by the deceased in her sound disposing state of mind- plaintiff had sold her share in the suit land and had not visited the deceased, even at the time of her death- defendant No.1 was looking after the deceased and had performed the last rites of the deceased – suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that no marginal witness was examined by the defendant No.1 to prove the due execution of the Will- no evidence was led to examine as to why

the plaintiff was left out by testatrix from the Will- even the registring officer was not examined – appeal allowed and judgments of the Trial Court and Appellate Court set aside. (Para-17 to 32)

Cases referred:

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

Adivekka and others Vs. Hanamavva Kom Venkatesh (Dead) by LRS. and another, (2007) 7 Supreme Court Cases 91

Yumnam Ongbi Tampha Ibema Devi Versus Yumnam Joykumar Singh And Others, (2009) 4 Supreme Court Cases 780

S.R. Srinivasa And Others Versus S. Padmavathamma, (2010) 5 Supreme Court Cases 274

For the appellant	Mr. B.S. Chauhan, Sr. Advocate with Mr. Vaibhav Tanwar, Advocate.
For the respondents	Ms. Sunita Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned Additional District Judge, Mandi, H.P., camp at Karsog, in Civil Appeal No. 57 of 2005, dated 04.12.2007, vide which learned Appellate Court while dismissing the appeal filed by the present appellant upheld the judgment and decree passed by the Court of learned Civil Judge (Sr. Divn.) Karsog, in Civil Suit No. 17 of 2004, dated 20.11.2004, whereby learned trial Court had dismissed the suit filed by the present appellant/plaintiff for declaration and injunction.

2. Brief facts necessary for the adjudication of this case are that the appellant-plaintiff (hereinafter referred to as the 'plaintiff') filed a suit for declaration and injunction to the effect that the suit land comprised in Khewat Khatauni No. 143/276, 277, 278, Kita 10, measuring 3-09-16 Bighas, situated in Muhal Sanarali/415, Tehsil Karsog, District Mandi, (HP) (hereinafter referred to as the 'suit land') was recorded in the ownership and possession of the plaintiff, defendant No. 1 and proforma defendants and that one Dassi, widow of Twaru was having half share in the suit land whereas out of the remaining land, 1/4th share belonged to the plaintiff and 1/4th share belonged to the defendant. It was the case of the plaintiff that by playing fraud upon Smt. Dassi, defendant with the connivance of witnesses got a Will executed in her favour i.e. Will No. 179, dated 11.10.1994, whereas Smt. Dassi never intended to execute the alleged Will for bequeathing her entire share in favour of defendant No. 1. It was further the case of the plaintiff that she i.e. plaintiff was also in good terms with Smt. Dassi who was her mother and in fact Will which was got executed by defendant No. 1 in her favour from Smt. Dassi was a result of misrepresentation and the said Will was thus liable to be declared null and void. It was further mentioned in the plaint that in order to disinherit the plaintiff, the defendant pressurized Smt. Dassi to file a suit for declaration to the effect that the plaintiff was not the daughter of Twaru, however, in her statement Smt. Dassi had clearly admitted that plaintiff was daughter of Twaru. In the said suit which was decided on 29.08.1997, it stood decided that plaintiff was in fact the daughter of Twaru. It was further mentioned in the plaint that the cause of action accrued in favour of the plaintiff on 12.10.2004 when defendant filed a suit against Khem Singh and the plaintiff qua the suit land and on inquiry, plaintiff came to know that a Will had been executed by Smt. Dassi in favour of defendant No. 1 and on the basis of said Will, the property in dispute stood mutated in the name of defendant No. 1 on 22.05.1998. According to the plaintiff, she was not aware that any Will was executed by Smt. Dassi in favour of defendant No. 1. The plaintiff prayed for passing a decree to declare the Will No. 179, dated 11.10.1994, allegedly executed by Smt. Dassi in favour of defendant as null and void as the same was executed by

playing fraud and misrepresentation and it was further prayed that defendants be restrained through a permanent prohibitory injunction decree from alienating the suit land in any manner.

3. The suit so filed by the plaintiff was contested by defendant No. 1 who was the contesting defendant and who by way of her written statement took the stand that the Will in issue was a genuine Will and even the plaintiff had accepted the Will at the time of mutation of the same before the Assistant Collector 2nd Grade, Karsog, when the mutation was attested. According to the defendant, plaintiff had sold her share of the land and she never used to visit the house of her mother Dassi and she had not come to see their mother (Dassi) even at the time of her death. As per defendant, Smt. Dassi was looked after by her and her land was cultivated by her husband till her death. It was further the case of the defendant that after the death of Smt. Dassi, her Kriya-karam and funeral were performed by defendant and her husband. On these bases, the claim put in the plaint by the plaintiff was contested by the defendant.

4. By way of replication, the plaintiff while denying the averments made in the written statement reiterated the stand as was taken by her in the plaint.

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

> *"1. Whether the plaintiff is entitled for decree of declaration that registered Will No. 179 dated 11.10.1994 is result of fraud, mis-representation and is liable to be set aside? OPP.*
>
> *2. Whether the plaintiff is entitled for the decree of permanent prohibitory injunction against the defendants? OPP.*
>
> *3. Whether the suit is bad for non-joinder and mis-joinder of necessary parties? OPD.*
>
> *4. Whether the suit is time barred? OPD.*
>
> *5. Whether this suit is barred by principle of res-judicata? OPD*
>
> *6. Whether the Will No. 179 dated 11.10.1994 executed by deceased Dassi in favour of Katki defendant No. 1 is genuine one? OPD.*
>
> *7. Relief."*

6. On the basis of evidence adduced by the respective parties both oral as well as documentary, learned trial Court decided the issues so framed as under:-

> *"Issue No.1 : No..*
> *Issue No. 2 : No.*
> *Issue No. 3 : No.*
> *Issue No.4 : No.*
> *Issue No.5 : No.*
> *Issue No.6 : No.*
> *Relief : The suit of the plaintiff is dismissed as per the operative portion of judgment."*

7. Learned trial Court held that in view of oral deposition of witnesses and the fact that Will is executed to disinherit other persons from the property and as plaintiff had been given her share after the death of her father in the property and deceased Dassi had executed the Will in favour defendant in lieu of services rendered by her for 35 years and in view of the fact that defendant had performed last rites and last ceremonies of her mother, Issues No. 1 and 6 stood decided in favour of defendant. This is the entire reasoning given by learned trial Court while deciding Issues No. 1 and 6. For the purpose of ready reference, the reasoning so returned on Issues No. 1 and 6 by the learned trial Court is reproduced here-in-below.

> *" Keeping in view the oral deposition of witnesses, and Will is executed just to disinherit other persons in the property and more so, plaintiff has been given her*

share earlier after the death of his father in the property and deceased Dassi Devi executed a Will in favour of defendant in lieu of services rendered by her for 35 years and defendant has performed last rites and ceremony of her mother Dassi Devi. Thus, issues No. 1 is decided against the plaintiff and issue No. 6 is decided in favour of the defendant."

8. Learned trial Court further held that as Issue No. 1 stood decided against the plaintiff and issue No. 6 stood decided in favour of defendant No. 1, the plaintiff was not entitled for a decree of permanent prohibitory injunction against the defendant. On these bases, the suit so filed by the plaintiff was dismissed by the learned trial Court.

9. In appeal, learned Appellate Court while upholding the judgment and decree so passed by the learned trial Court held that a perusal of Will Ext. D-1 demonstrated that same was registered in the office of Sub-Registrar and it was specifically recited in the Will that Smt. Dassi had inherited the suit land from her husband Twaru, whereas plaintiff was born of her after her second marriage with Nanti and thus Ramki was daughter of Nanti and in fact it was Katki who rendered services in favour of Dassi for about 30 years and that was why she bequeathed her property in favour of Katki. Learned Appellate Court further held that execution of Will Ext. D-1 stood proved from the testimony of DW2 and DW4 and as evidence led by the defendant demonstrated that Will was executed in lieu of services rendered to Dassi by defendant No. 1, therefore, the Will was not shrouded by any suspicious circumstance. Learned Appellate Court also held that as there was litigation between the plaintiff and defendant No.1, the same demonstrated that both of them were not having good terms. It also held that records demonstrate that Dassi had given 2 ½ bighas of land in favour of plaintiff and plaintiff had sold the same to Nihal Chand etc. On these bases, learned Appellate Court upheld the judgment and decree passed by learned trial Court and dismissed the appeal so filed by the appellant.

10. Feeling aggrieved, the appellant has filed this appeal.

11. The present appeal was admitted by this Court on 31.05.2010 on the following substantial questions of law.

"1. Whether in the absence of non-examination of attesting witness, the findings on issue No. 6 are sustainable in the eyes of law.

2. Whether the findings on issue No. 1 are sustainable in the eyes of law specially when the allegations with respect of commission of fraud goes un-rebutted in pleadings as well as in evidence."

12. On 20.07.2012, the following substantial question of law was also framed by this Court.

"3. That the judgment passed by the learned Addl. District Judge Mandi in Civil Appeal No. 57 of 2005 is against the dead person reason being that the respondent Smt. Katki had expired during the pendency of appeal i.e. on 30/04/2006 and the judgment and decree passed by t he learned Addl. District Judge, Mandi in the appeal No. 57 of 2005 dated 4/12/2007 could not have been passed and is a nullity in the eyes of law."

13. The substantial question of law No. 3 was not pressed at the time of arguments, accordingly, this Court is adjudicating upon substantial questions of law No. 1 and 2, on which, the appeal was admitted initially. For the sake of brevity and to avoid repletion, the substantial questions of law No. 1 and 2 are being answered together.

14. Mr. B.S. Chauhan, learned senior counsel appearing for the appellant has argued that judgments and decrees passed by both the learned Courts below are not sustainable in the eyes of law and both the learned Courts have erred in not appreciating that the Will propounded by defendant No. 1 was in fact shrouded with suspicious circumstances and these suspicious circumstances were neither successfully dispelled by defendant No. 1, nor the Will in issue was proved on record in accordance with law. On these bases, it was argued by Mr. Chauhan that the

judgments and decrees passed by both the learned Courts below were perverse and not sustainable in the eyes of law and were liable to be set aside. Mr. Chauhan further argued that the factum of the Will having been propounded as a result of fraud and misrepresentation remained un-rebutted in pleadings as well as in evidence and this aspect of the matter has also been ignored by both the learned Courts below. In support of his arguments, Mr. Chauhan has relied upon the following judgments.

i) (2009) 4 Supreme Court Cases 780, YUMNAM ONGBI TAMPHA IBEMA DEVI Versus YUMNAM JOYKUMAR SINGH AND OTHERS.

ii) *(2010) 5 Supreme Court Cases 274, S.R. SRINIVASA AND OTHERS Versus S. PADMAVATHAMMA.*

15. On the other hand, Ms. Sunita Sharma, learned counsel for the respondent-defendant No. 1 has strenuously argued that there was no merit in the present appeal as there were concurrent findings returned against the present appellant by both the learned Courts below that the Will in issue was a valid Will, duly executed by the testator and the same was not shrouded with any suspicious circumstance as alleged. Ms. Sunita Sharma, further argued that the execution of the Will stood duly proved in accordance with law and as far as the factum of Will having been got executed as a result of fraud and misrepresentation was concerned, plaintiff has miserably failed to prove the same. On these bases, it was submitted by Ms. Sunita Sharma, that as the appeal was without any merit, the same be dismissed with cost. In support of her arguments, she relied upon the following judgments.

i) AIR 1958 CALCUTTA 440 (V 45 C111)Earnes Bento Souza versus John Francis Souza and others,

ii) AIR 1961 PUNJAB 411 (C 48 C 120), Makhan Mal L. Ram Ditta Mal and others, v. Mst. Pritam Devi and others,

iii) AIR 1965 Kerala 32(V 52 C 13), Punnakkal Konnu's daughter Ammu v. Thekkekara Kunhunn's son Krishanan and other,

iv) AIR 1974 ORISSA 170 (V 61 C 53), Harish Chander Sahu and Another v. Basant Kumar Sahu and others,

v) AIR 1983 Punjab and Haryana, 384, Lal Singh and another v. Bant Singh and others,

vi) AIR 1984 Punjab And Haryana 270, Labh Singh and another v. Piara Singh (deceased by L.Rs.) and another.

16. I have heard the learned counsel appearing for the parties and also gone through the records of the case as well as the judgments and decrees passed by both the learned Courts below.

17. Section 68 of The Indian Evidence Act, 1872 provides that if a documents is required by law to be attested, then 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 a attesting witness alive, and subject to the process of the Court and capable of giving evidence. Proviso to the said Section further provides 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, unless its execution by the person by whom it purports to have been executed is specifically denied.

18. The Will in issue in the present case is Ext. D-1. A perusal of the same demonstrates that this Will has been scribed by one Shri Ram Lal Sharma, Advocate and marginal witness to the same are Kishan Chand s/o Molak r/o Village Panchakur, upper Karsog and Nanak Chand s/o Brestu r/o village Madarnu, upper Karsog. It is not in dispute that the Will in issue is a registered Will.

19. It is settled law that when suspicion is cast on the genuineness of the Will, then the initial onus is on the propounder to remove all reasonable doubts in the matter.

20. It has been held by the Hon'ble Supreme Court in ***H. Venkatachala Iyengar Vs. B.N. Thimmajamma***, ***AIR 1959 SC 443***, that in the cases in which execution of the Will is surrounded by suspicious circumstances, it may raise a doubt as to whether the testator was acting of his own free will. The Hon'ble Supreme Court has further held that in such circumstances, the initial onus is on the propounder to remove all reasonable doubts in the matter. The presence of suspicious circumstances makes initial onus heavier. Such suspicion cannot be removed by the mere assertion of the propounder that the will bears signature of the testator or that the testator was in a sound and disposing state of mind at the time when the will was made.

21. The Hon'ble Supreme Court has held in ***Adivekka and others Vs. Hanamavva Kom Venkatesh (Dead) by LRS. and another***, ***(2007) 7 Supreme Court Cases 91***, that where there are suspicious circumstances, the onus would be on the propounder to remove suspicion by leading appropriate evidence. Section 63 of the Succession Act lays down the mode and manner in which an unprivileged Will is to be executed. Section 68 of the Evidence Act postulates the mode and manner in which proof of execution of document is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the Court and capable of giving evidence. The proof of Will is not required as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be.

22. Before proceeding further, it is relevant to mention that PW1 Smt. Ramki has entered the witness box to support her case and in her testimony, she stated that both she and defendant No. 1 were the daughters of Smt. Dassi and that their father was Twaru. This witness has further categorically deposed in the Court that the Will in issue was got procured by the defendants by playing fraud upon their mother and that in fact she in her capacity of daughter of Dassi was entitled to half of the said property. Incidentally, in her cross examination, there is no suggestion given to the plaintiff on behalf of defendant No. 1 that the Will in dispute was not got executed by defendant No. 1 from the testatrix by playing fraud upon her.

23. In the present cases defendant No. 1 examined five witnesses. She herself entered the witness box as DW1 and besides her, Shri Ram Lal Sharma, was examined as DW2, who is the scribe of the Will. One Shri Bhagat Ram entered the witness box as DW-3 but said Bhagat Ram is not a marginal witness to the said Will. DW4 is Bharat Bhushan, who as per his deposition was serving as M.C. in the Tehsil office in the year 1993. DW5 is Shri Gulab Singh, but he is also not a marginal witness to the Will in issue.

24. DW1 in her deposition has stated that the Will in issue was scribed by Shri Ram Lal, Advocate and the same was scribed as per desire of her mother and that her mother had appended her signatures on the said Will in the presence of witnesses Krishan Lal and Nanak Chand and thereafter they had gone before the Tehsildar where the said Will was registered.

25. DW2 Shri Ram Lal deposed that Will Ext. D-1 was scribed by him and after scribing the same, he had read the contents of the same to the testatrix who thereafter had appended her thumb impression upon the same in the presence of witnesses Krishan Chand and Nanak Chand, who had also appended their signatures on the same as marginal witnesses. However, it is a matter of record that DW3 Bhagat Ram had deposed that the Will in issue was scribed by Shri Ram Lal Sahrma, Advocate and after the said will was scribed, it was read over and explained to the testatrix who thereafter appended her thumb impression upon the same and the said Will was registered before the Sub Registrar. However, it is a matter of record that Shri Bhagat Ram is not a marginal witness to the Will in issue.

26. DW4 Shri Bharat Bhushan, who was an official serving in the office of Tehsildar, Karsog, had brought the relevant record pertaining to registration of Will Ext. D-1.

27. DW5 Shri Gulab Singh deposed to the effect that he knew Dassi and that Dassi had two daughters i.e. Ramki and Katki. Ramki was the younger one. This witness further stated that Dassi was looked after by both her daughters and that Dassi died at Lichhdi. He deposed that her last rites were performed by both her daughters.

28. In the present case, execution of the Will in issue was not proved on record by the defendant by examining any of the marginal witnesses. Here is a case where one of the daughters of the testatrix had laid challenge to the veracity of the Will on the ground that the same is a result of fraud and misrepresentation. In other words, here is a Will where the younger daughter was left out of the inheritance of the property in dispute by the testatrix by way of Will in dispute. Thus as a close relative was left out from the Will, the allegation of the said close relative is that testatrix had never intended to execute any such Will as was being propounded by the beneficiary and Will in fact was a result of fraud and misrepresentation. In these circumstances, the initial onus to discharge the suspicious circumstances was heavily upon the defendant. In my considered view, as per evidence on record, defendant No. 1 has miserably failed to discharge said onus on record. Neither there is cogent explanation on record as to why the plaintiff was left out by the testatrix from the Will in issue and further, the will has not been proved in accordance with law as per the mandate of Section 68 of the Indian Evidence Act, as neither of the marginal witnesses was examined in the Court to prove the Will in issue by defendant No. 1. It is not the case of defendant No. 1 nor is there any material on record from which it can be inferred that at the time when statements of defendant's witness were recorded, both the marginal witnesses were not alive. Therefore, as neither of the marginal witnesses was examined by the defendant to prove the Will in issue, in my considered view, the said Will was never proved on record in accordance with law. This aspect of the matter has been ignored by both the learned Courts below. Learned Courts below have erred in not appreciating that the veracity of the Will or due execution of the Will could not be proved by the testimony of DW2 and DW4. The conclusion arrived to this effect by both the learned Courts below is perverse and not sustainable in law.

29. Now I will deal with the judgments which have been cited by learned counsel for the parties to substantiate their respective stands.

30. A three judge Bench of the Hon'ble Supreme Court in ***YUMNAM ONGBI TAMPHA IBEMA DEVI Versus YUMNAM JOYKUMAR SINGH AND OTHERS,*** *(2009) 4 Supreme Court Cases 780* has held.

> *"11. As per provisions of Section 63 of the Succession Act, for the due execution of a Will:*
>
> *(1) the testator should sign or affix his mark to the Will;*
>
> *(2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a Will;*
>
> *(3) the Will should be attested by two or more witnesses, and*
>
> *(4) each of the said witnesses must have seen the testator signing or affixing his mark to the Will and each of them should sign the Will in presence of the testator.*
>
> *12. The attestation of the Will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attested (sic attesting) witness should put his signature on the Will animo attestandi. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a Will is required by law to be attested, execution has to be proved in the manner laid down in section and the Evidence Act which requires*

that at least one attesting witness has to be examined for the purpose of proving the execution of such a document.

13. Therefore, having regards to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a Will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator.

14. In Girja Datt Singh v. Gangotri Datt Singh this court observed as follows: [AIR p.351, para 15]

"15. When this position was realised the learned counsel for Gangotri fell back on an alternative argument and it was that the deceased admitted execution and completion of the will Ex. A-36 and acknowledged his signature thereto before the Sub-Registrar at Tarabganj and this acknowledgment of his signature was in the presence of the two persons who identified him before the Sub- Registrar viz. Mahadeo Pershad and Nageshur who had in their turn appended their signatures at the foot of the endorsement by the Sub-Registrar. These signatures it was contended were enough to prove the due attestation of the will Ex. A-36. This argument would have availed Gangotri if Mahadeo Pershad and Nageshur had appended their signatures at the foot of the endorsement of registration animo attestandi.

> *But even apart from this circumstance it is significant that neither Mahadeo Pershad nor Nageshur was called as a witness to depose to the fact of such attestation if any. One could not presume from the mere signatures of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68 of*
>
> *the Indian Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore cannot help Gangotri."*

15. In B. Venkatamuni v. C.J. Ayodhya Ram Singh it was observed as follows: (SCC pp.456-60, paras 15-24)

> *"15. It is, however, well settled that compliance with statutory requirements itself is not sufficient as would appear from the discussions hereinafter made.*
>
> *16. The approach of the Division Bench of the High Court did not address itself the right question. It took an erroneous approach to the issue as would appear from the decision of this Court in Surendra Pal v. Dr. Saraswati Arora [1974(2) SCC 600] whereupon again Mr V. Balachandran himself placed reliance, wherein the law was stated in the following terms: (SCC p. 605, para 7)*
>
> *'7. The propounder has to show that the will was signed by the testator; that he was at the relevant time in a sound disposing state of mind, that he understood the nature and effect of the dispositions, that he put his signature to the testament of his own free will and that he has signed it in the presence of the 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 there may be cases in which the execution of the will itself is surrounded by suspicious circumstances, such as, where the signature is doubtful, the testator is of feeble mind or is overawed by powerful minds interested in getting his property, or where in the light of the relevant circumstances the dispositions appear to be unnatural, improbable and unfair, or where there are other reasons for doubting that the dispositions of the will are not the result of the testator's free will and mind. In all such cases where there may be legitimate suspicious circumstances those must be reviewed and satisfactorily explained before the will is accepted. Again in cases where the propounder has himself taken a prominent part in the execution of the will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence. After all, ultimately it is the conscience of the court that has to be satisfied, as such the nature and quality of proof must be commensurate with the need to satisfy that conscience and remove any suspicion which a reasonable man may, in the relevant circumstances of the case, entertain."

17. In H. Venkatachala Iyengar v. B.N.Thimmajamma it was opined: (AIR pp. 451-52, paras 19-20)

'19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious

circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

18. In Guro v. Atma Singh this Court has opined: (SCC p. 511, para 3)

'3. With regard to proof of a will the law is well settled that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a will by Section 63 of the Succession Act, 1925. 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 signature of the testator as required by law is sufficient to discharge the onus. Where, however there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before the will could be accepted as genuine. Such suspicious circumstances may be a shaky signature, a feeble mind and unfair and unjust disposal of property or the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit. The presence of suspicious circumstances makes the initial onus heavier and the propounder must remove all legitimate suspicion before the document can be accepted as the last will of the testator.'

19. Yet again Section 68 of the Evidence Act postulates the mode and manner of proof of execution of document which is required by law to be attested stating that the execution must be proved by at least one attesting witness, if an attesting witness is alive and subject to the process of the court and capable of giving evidence.

20. This Court in Daulat Ram v. Sodha stated the law thus: (SCC p. 43, para 10)

'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 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 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." (emphasis in original)"

31. The Hon'ble Supreme Court in *S.R. SRINIVASA AND OTHERS Versus S. PADMAVATHAMMA, (2010) 5 Supreme Court Cases 274* has held that in the absence of execution of Will having been proved, as none of the attesting witnesses were examined, the statement of the scribe itself was not sufficient to prove the Will as animus to attest was not evident from the document. In the present case also the scribe who was examined as DW2 has not stated that he had signed the Will with the intent to attest the same and in his statement he has merely deposed that he was the scribe of the Will.

32. I am not independently dwelling upon each of the judgment cited by learned counsel for the respondent. Suffice it to say that law laid down in all the said judgments is that Registration Officer/Sub Registrar can be regarded as an attesting witness if execution of Will is admitted before him. With respectful agreement as far as laws declared by various Hon'ble High Courts are concerned, in my considered view, the judgments so cited by learned counsel for the respondents have no applicability in the facts and circumstances of the present case. In the present case, neither the Registration Officer nor the Sub Registrar, before whom the Will was purportedly admitted by the testatrix, were examined in the Court by the defendants. Thus, the judgments which have been relied by learned counsel for the respondents have no applicability in the facts and circumstances of the present case.

33. Both the substantial questions of law are answered accordingly.

34. In view of the discussion above, this appeal is allowed and the judgments and decrees passed by the Court of learned Additional District Judge, Mandi, camp at Karsog, in Civil Appeal No. 57 of 2005, dated 04.12.2007 and learned Civil Judge (Sr. Divn.) Karsog, in Civil Suit No. 17 of 2004, dated 20.11.2004, are set aside and the suit of the plaintiff is decreed to the effect that registered Will No. 179, dated 11.10.1994 is declared as null and void and defendant No. 1 is also restrained by way of a decree of permanent prohibitory injunction from alienating the suit land in any manner. Pending application(s), if any, also stands disposed of.

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

Ravinder Kumar ….Petitioner.
Versus
State of Himachal Pradesh and others ….Respondents.

CWP No.: 1772 of 2012
Decided on: 26.05.2017.

Constitution of India, 1950- Article 226- Petitioner was appointed as Physical Education Teacher on PTA basis- he joined on 14.11.2006- grant in aid was stopped without any reason- he made a representation and he was informed that he was appointed after 6.11.2006- the date after which the appointment on PTA Basis were discontinued- a clarification was issued by the Director of Elementary Education that the case of those persons could be considered for release of grant-in-aid, where the process had started prior to the cut off date- hence, direction was sought to release grant-in-aid- held that process was initiated on 27.10.2006- notice was issued prior to 6.11.2006 (the cut off date) - the last date for submission of the application was 3.11.2006- Directorate of Elementary Education had clarified that where the process was started prior to 6.11.2006- the teachers could be considered for grant-in-aid- petition allowed and respondents directed to pay the grant-in-aid with interest @ 6% per annum. (Para-4 to 6)

For the petitioner Mr. Rajesh Kumar, Advocate.
For the respondents Mr. Vikram Thakur, Dy. AG for the respondents.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

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

"i) That the respondent authorities may kindly be directed to release the due and admissible Grant-in-aid as per the Govt. Policy to the petitioner from 31..03.2007 to till date.

ii) That any other order which may deem fit be passed in the interest of justice and fair play."

2. The case of the petitioner is that a resolution was passed for the appointment of Physical Education teacher on PTA basis by respondent No. 4 on 27.10.2006 (Annexure P-1), pursuant to which, a public notice was issued by respondent No. 4 (Annexure P-2) inviting applications from eligible candidates to fill up the said post. The last date mentioned in the said public notice vide which applications were to be submitted by interested candidates was 03.11.2006. It is further the case of the petitioner that 13 candidates responded to the said public notice, who were duly interviewed by the Parents Teacher Committee on 13.11.2006 and the present petitioner was found to be most meritorious as per the result of the interviews so held (Annexure P-3) and thereafter, the petitioner was offered appointment as P.E.T. by respondent No. 4 on PTA basis and he joined as such on 14.11.2006. According to the petitioner, he is continuing as such till date. It is further the case of the petitioner that initially grant-in-aid was released in his favour by the respondent-State from 14.11.2006 to 30.03.2007, however, thereafter the same was abruptly stopped without any cause or reason. As per the petitioner, he took up his case by way of representations with the respondents, who vide communication dated 12.10.2010, informed him that grant-in-aid was discontinued as far as the petitioner is concerned for the reason that he was appointed on PTA basis after 06.11.2006 i.e. the date fixed by the government where after appointments on PTA basis were discontinued. It is the case of the petitioner that the said act of respondents-State of not allowing grant-in-aid in his favour after 30.03.2007 onwards, on the pretext that his appointment was post 06.11.2006, is not sustainable in the eyes of law because there is a clarification issued by Director of Elementary Education, Shimla to Dy. Director of Elementary Education, District Kangra, dated 02.04.2007, in which it is clearly mentioned that in case, process for selection of PTA teacher was started prior to 06.11.2006, then the teachers who are appointed pursuant to that process on PTA basis could be considered for release of grant-in-aid. On these bases, it has been prayed by the petitioner that the respondents may be directed to release grant-in-aid in his favour as per the government policy from 31.03.2007 onwards.

3. By way of their reply, respondents have opposed the prayer so made by the petitioner on the ground that petitioner was engaged during the period when ban had been imposed on PTA appointments and thus grant-in-aid was rightly stopped by the respondents. A perusal of the reply filed by the respondents-State also demonstrates that though it stands admitted in the said reply that the petitioner stood appointed on PTA basis at GHS Boh, District Kangra after following the due process i.e. after the post was advertised, interviews were conducted and the most meritorious candidate was selected, however, the fact still remains that his selection was made when ban on PTA appointments was imposed. This is the only ground on which the respondents-State has defended its stand of stopping grant-in-aid to the petitioner. Para 6 of the reply filed to petition by respondents No. 1 to 4 is quoted here-in-below.

" That in reply to the contents of this para it is submitted that although the petitioner has been engaged by the PTA Committee of GHS Boh, District Kangra after following the proper process i.e. advertising the post, conducting the interview and selecting the meritorious candidate etc. but the petitioner was engaged during the period when ban has been imposed on the PTA appointments, his grant in aid has rightly been stopped by the respondent No. 4. However, the petitioner is being paid out of PTA fund @ Rs. 3500/- per month by the SMC/PTA Committee."

4. I have heard learned counsel for the parties and also perused their respective pleadings. In my considered view, the act of the respondents-State of denying release of grant-in-aid as per the government policy to the petitioner from 31.03.2007 is totally unjustifiable in the eyes of law. It is not in dispute that petitioner came to be appointed as P.E.T. on PTA basis on 14.11.2006 and he joined his duties as such from 15.11.2006. However, it is also an undisputed fact that process on the basis of which, the appointment was so offered to the petitioner on 14.11.2006 stood initiated vide resolution passed by respondent No. 4 on 27.10.2006. It is also a matter of record that public notice was issued by respondent No. 4 inviting applications from the eligible candidates for the post of P.E.T. on PTA basis much before 06.11.2006. The cut of date or the last date for submissions of application was also 03.11.2006. At this stage, it is relevant to take note of the fact that there is a clarification issued by the Director of Elementary Education, Shimla (respondent No. 2) to Dy. Director of Elementary Education, District Kangra (respondent No. 3), dated 02.04.2007, which is appended by the petitioner alongwith the petition as Annexure P-7, the operative part of which reads as under.

> *"With reference to your letter No. EDN-KNG-A-..PTA..GIA/2006 dated 14th March, 2007 received through FAX on 21.3.2007 on the subject cited above. In this connection it is informed that is the process for the selection of PTA teacher was started prior to 6/11/2006, teachers provided by the PTA can considered for the grant in aid keeping in view the guidelines issued vide this office letter even number dated 20th February 2007."*

5. In my considered view, in view of above clarification which itself stands issued by the Directorate of Elementary Education, Shimla to Dy. Director of Elementary Education, District Kangra, the act of respondent-State of not releasing grant-in-aid in favour of petitioner on the ground that his appointment was post 6.11.2006 is not sustainable in the eyes of law. When respondent-State has itself issued a clarification that teachers appointed on PTA basis, whose process of selection stood initiated prior to 6.11.2006, could be considered for grant-in-aid keeping in view the guidelines issued vide office letter dated 20th February, 2007, the non release of grant-in-aid in favour of present petitioner cannot be justified on any count. Even otherwise, it is neither the pleaded case of the respondents nor otherwise evident from the documents placed on record by the respondents that when respondent No. 4 or the petitioner came to know that there shall be a ban on appointments of teachers on PTA basis, the entire exercise of selection for the post of PET teacher in the respondent No. 4-school was made in haste and the appointment of the petitioner was a result of said exercise which was undertaken in haste.

6. In view of above discussion, this petition is allowed and the respondents are directed to release grant-in-aid in favour of the petitioner as per the government policy w.e.f. 31.03.2007 till date forthwith with further direction to continue to pay such grant-in-aid as per government policy in favour of petitioner in future also. Respondent-State shall also be liable to pay simple interest at the rate of 6% per annum on the amount which is due to the petitioner as grant-in-aid w.e.f. 31.03.2007 till date.

7. The petition stands disposed of in the above terms, so also pending miscellaneous application(s), if any.

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

Shri Desh Raj ….Petitioner.
Versus
The Divisional Engineer, Telecom Project and another … Respondents.

CWP No.: 6124 of 2011
a/w CWP No. 6125 of 2011
Decided on: 29.05.2017

Industrial Disputes Act, 1947- Section 25F- Petitioners were engaged as daily waged labourers on 1.5.1995- their services were terminated in the month of October, 1996 without complying with the provisions of Industrial Disputes Act- respondents pleaded that petitioners were engaged for a specific project and when the project came to an end, petitioners were disengaged- Tribunal dismissed the claim of the petitioner- held that petitioners had completed more than 240 days in the preceding 12 months from the date of termination of their services- verbal termination of the services of the petitioners was in violation of the provisions of the Industrial Disputes Act- petitions allowed and award of the Industrial Tribunal set aside- respondents directed to re-engage the petitioner with continuity in services, full back wages and all consequential benefits. (Para-12 to 16)

Cases referred:

Anoop Sharma Versus Executive Engineer, Public Health, (2010) 5 SCC 497

Mackinnon Mackenzie and Company Limited Versus Mackinnon Employees Union, (2015) 4 SCC 544

For the petitioner(s). Mr. B.C. Negi, Sr. Advocate with Mr. Raj Negi, Advocate.

For the respondent(s) Mr. Y.P.S. Dhaulta, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (*oral*)

Both these petitions are being disposed of by a common judgment as the petitioners in these two writ petitions are aggrieved by the common award passed by the Court of learned Central Government Industrial Tribunal-cum-Labour Court-1, Chandigarh, Camp at Shimla, No. 1 of 2002, dated 07.09.2010, whereby the learned Court below has answered the reference in favour of the employer and against the petitioners therein.

2. Brief facts necessary for the adjudication of the present case are that the following references were received by the learned Court below in respect of the present petitioners from the appropriate government.

> *"1. No. L-40012/202/2001 (IR (DU)) dated 19-12-2001*
>
> > *"Whether the action of the management of the Divisional Engineer, Telecom Project, Sanjay Sadan, Shimla, in ordering disengagement/termination of the services of Sh. Desh Raj s/o Sh.Kansh Ram is just and legal and if not what relief the workman is entitled to and from which date?"*
>
> *2. No. L-40012/61/2002 IR (DU) dated 14.08.2002*
>
> > *"Whether the action of the management of the Divisional Engineer, Telecom Project, Shimla, in terminating the services of Sh. Bodh Raj, labour on daily wages w.e.f. October 1996 is just and legal? If so, what relief the workman is entitled to?"*

3. Present petitions have been preferred by S/Shri Desh Raj and Bodh Raj, therefore, this Court will be referring only that part of the pleadings which pertained to present petitioners. There were three claimants before the learned Tribunal below including the present petitioners and the case of the present petitioners before the learned Tribunal below was that they were engaged as daily waged labourers under the control of Divisional Engineer, Telecom Project, Sanjay Sadan, Shimla w.e.f. 01.05.1995 and they continued to serve as such till October, 1996, when their services were verbally terminated without complying with the provisions of either Section 25-F of the Industrial Disputes Act or Section 25-H of the same. It was further the case of the petitioners that despite the fact that they had completed more than 240 days in the preceding 12 months, as from the date, when their services were verbally terminated, neither any notice was given to them, nor any payment in lieu of such notice was paid to them as is envisaged under Section 25 of the Industrial Disputes Act. As per the petitioners their services stood terminated in

violation of statutory provisions of the Industrial Disputes Act and accordingly, they had prayed for relief of reinstatement in service with full back wages alongwith interest with continuity in service.

4. In the reply so filed to the claim of the workmen by the management, the factum of their engagement w.e.f. 1.5.1995 and the factum of their verbal termination was not disputed. However, the defence taken by the management was that the claimants were engaged as casual labourers on daily wage basis without written order of appointment, which was for a specific project scheme and after completion of the said project, the task force was abolished in June 1997, hence there was no question of continuing the engagement of casual labourers after the completion of the project. It was further the stand of the management that verbal engagement of the claimants was not extended after October, 1996 and thus, their engagement was brought to an end, though there was no record available in this regard in the office. It was further the stand of the management that there was no violation of statutory provisions of the Industrial Disputes Act as Section 25-F of the Industrial Disputes Act was not attracted at all because there was no question of termination of services as was alleged by the claimants as this was a case where claimants were engaged verbally as casual labourers on daily wage basis. On these bases, the disengagement of the claimants was justified by the management.

5. The learned Tribunal below vide award dated 07.09.2010 answered the same against the claimants and in favour of the management. The claim thus filed by the petitioners was dismissed.

6. It was held by learned Tribunal that the factum of the claimants having been completed more than 240 days prior to the date of their disengagement was of no consequence as requirement was that a workman should have had completed 240 days in the preceding year and the claimants had failed to demonstrate that in the preceding year, they had completed 240 days. The exact findings returned in this regard by the learned Tribunal are quoted here-in-below.

> *"The requirement of law is that workman should have completed 240 days of work in the preceding year from the date of his termination. The certificate is regarding the working days in total and tenure and not in the preceding year from the date of termination."*

7. It was further held by the learned Tribunal that even otherwise, disengagement on completion of the project would not amount to any retrenchment and in these circumstances, there was nothing to demonstrate that their services were in fact terminated. It was further held by learned Tribunal below that the workman had failed to prove that in the preceding year, they had completed 240 days from the date of their termination. On these bases, it was held by the learned Tribunal that there was no force in the claim of workman and they were not entitled to relief as claimed for.

8. Feeling aggrieved, the petitioners herein have filed the present petitions.

9. Mr. B.C. Negi, learned Senior Counsel appearing for the petitioners in both the petitions argued that the award passed by learned Tribunal below was perverse and not sustainable in the eyes of law. He further argued that learned Tribunal below erred in not appreciating that it is not the preceding year, which is to be taken into consideration for the purpose of calculating 240 days and what has to be taken into consideration was preceding 12 months as from the date of termination of the workman for the said purpose. He further submitted that learned Tribunal had erred in holding that on completion of project, services of claimants were rightly brought to an end as except bald statements made in the reply to this effect, there was nothing on record from which it could be inferred that the appointment of the claimants was project specific and their services were disengaged as the project work stood completed. Mr. Negi further argued that when it stood demonstrated from records that the petitioners had completed more than 240 days in the preceding 12 months as from the date of their verbal termination, then the statutory provisions of Industrial Disputes Act were attracted

and their services could not have been terminated without complying with the provisions of Industrial Disputes Act in general and Section 25-F of the said Act in particular. Mr. Negi has also drawn the attention of this Court to an order passed by learned Central Administrative Tribunal, Chandigarh Bench, Circuit Bench at Shimla, in OA No. 1093-HP-96, dated 15.03.2000, which is appended with the petitions as Annexure P-3, whereby in an original application filed before the said Tribunal by the workmen, similarly situated persons as the present petitioners, learned Tribunal had allowed the same and had set aside the verbal disengagement of the workmen and had further issued directions of reengagement as well as for consideration of their claims for being granting temporary status in terms of scheme of 7th November, 1989. Mr. Negi has also drawn the attention of this Court to a judgment passed by Hon'ble Division Bench of this Court in *CWP No. 55 of 2002,* dated *05.05.2008*, which in fact was a petition filed by the present respondents against the order passed by learned Tribunal, in which, the Hon'ble Division Bench of this Court while setting aside the directions passed by learned Tribunal to the effect that case of the original applicants therein be considered for grant of temporary status in terms of scheme dated 7th November, 1999, upheld the order so passed by the learned Tribunal whereby it quashed the oral termination and directed reinstatement of the said employees. Mr. Negi has relied upon the following two judgments.

1. *Anoop Sharma Versus Executive Engineer, Public Health, (2010) 5 SCC 497 and*
2. *Mackinnon Mackenzie and Company Limited Versus Mackinnon Employees Union, (2015) 4 SCC 544.*

10. On the other hand, Mr. Y.P.S. Dhaulta, learned counsel for the respondents, had supported the award passed by the learned Tribunal. Mr. Dhaulta argued that there is no perversity in the award passed by the Court of learned Tribunal below that claimants had failed to demonstrate that they had completed 240 days in the preceding year from the date of their verbal termination. It was further argued by Mr. Dhaulta that as it were the claimants who were before the learned Tribunal, therefore, onus was upon the claimants to prove that they had completed 240 days in the preceding 12 months. Mr. Dhaulta further submitted that as the project against which claimants were engaged stood completed, the services of the claimants could not have been continued without there being availability of any work and as such also, the disengagement of the claimants was not contrary to law and findings returned to this effect by the learned Tribunal below did not warrant any interference. Lastly, it was submitted by Mr. Dahulta that the verbal disengagement of the claimants was otherwise also not assailable because the claimants had failed to place on record any evidence from which it could be inferred that there was any violation of the provisions of Industrial Disputes Act. On these bases, it was argued that as there was no merit in the petitions, the same deserves to be dismissed.

11. I have heard the learned counsel for the parties and also gone through the impugned award as well as the documents placed on record.

12. It is not in dispute that petitioners/claimants in both these petitions had completed more than 240 days in the preceding 12 months as from the date when their services were verbally terminated in October, 1996. In fact this has not even been disputed during the course of arguments by learned counsel for the respondents. In the case of petitioner Bodh Raj the same is evident from document at page 17 and 19 of the record of learned Tribunal as well as from the statement of MW1 Jitender Sharma, who in his cross examination has admitted that Bodh Raj had complete 240 days in the preceding year from the date of his termination. In the case of Desh Raj, it has been admitted by the employer that the workman was engaged on 01.05.1995 and his services were terminated on 31.08.1996. No mandays chart has been placed on record by the employer to persuade this Court to the contrary that said workman had not completed more than 240 days in the preceding 12 months as on the date when his services were verbally terminated. Therefore, as it stood proved on record that both the petitioners had completed more than 240 days in the preceding 12 months from the date of their verbal

disengagement, their said disengagement prima facie is not sustainable in law as the same is in violation of the provisions of Section 25(f) of the Industrial Disputes Act as also admittedly before their termination neither any notice was given to them nor they were paid wages in lieu of such notice.

13. There is another aspect of the matter, which also renders the award passed by learned Tribunal below not sustainable in the eyes of law. It has been held by ***Hon'ble Supreme Court in Anoop Sharma Versus Executive Engineer, Public Health***, (2010) 5 SCC 497, that if a workman is retrenched verbally or if he was simply asked not to come on duty, then the employer will be required to lead tangible and substantive evidence to prove compliance with clauses *(a)* and *(b)* of Section 25-F of the Act. In the present case, it is apparent from the reply filed to the claim petitions by the management that the services of both the claimants were retrenched orally. There is no evidence what to talk of tangible and substantive evidence produced on record by the management that there was compliance of clauses *(a)* and *(b)* of Section 25-F of the Industrial Disputes Act. Therefore, also the award passed by learned Tribunal is not sustainable in the eyes of law and the same is liable to be quashed and set aside.

14. Hon'ble Supreme Court in ***Mackinnon Mackenzie and Company Limited Versus Mackinnon Employees Union***, (2015) 4 SCC 544, while relying upon its earlier judgment, delivered in *Anoop Sharma Versus Executive Engineer, Public Health*, (2010) 5 SCC 497, supra, has held that the termination of an employee in violation of mandatory provisions of Chapter *5(a)* and *5(b)* of the Industrial Disputes Act is *void ab initio* in law and ineffective and suffers from nullity, in the eye of the law and in the absence of very strong and compelling circumstances in favour of the employer, the Court must grant declaration that the termination was *non est* and therefore the employees should continue in service with full back wages and award all the consequential benefits.

15. There is another factor which is also weighing with this Court while it is setting aside and quashing the award under challenge and the same is that in an original application filed before the Central Administrative Tribunal, Chandigarh Bench by the workmen, similarly situated persons as the present petitioners, learned Tribunal held the verbal termination to be *non est* in the eyes of law and had ordered their re-engagement and the order passed to this effect by the learned Administrative Tribunal has been affirmed by this Court in CWP No. 55 of 2002 vide judgment dated 05.05.2008. It has not been disputed by the respondents that original applicants before the Central Administrative Tribunal (CAT) were not similarly situated as the petitioners. Therefore, also in my considered view, the award passed by learned Tribunal below cannot be sustained and relief of re-engagement cannot be denied to the petitioners.

16. In view of above discussion, the writ petitions are allowed and award under challenge passed by the Court of learned Presiding Officer, Industrial Tribunal-cum-Labour Court-1, Chandigarh, Camp at Shimla, No. 1 of 2002, dated 07.09.2010 is quashed and set aside and the respondents are directed to re-engage the petitioners with continuity in service, full back wages and all consequential benefits which are due and admissible be granted to them from the date of their termination onwards.

The writ petition is disposed of in the above terms, so also the pending miscellaneous application (s), if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Roop Lal …..Appellant
Versus
Durga Dass & others …..Respondents

RSA No. 388 of 2006
Reserved on: 17.05.2017
Decided on: 01.06.2017

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit seeking injunction pleading that they are owners in possession of the suit land- defendant is interfering with the suit land without any right to do so- suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that ownership and possession of the plaintiffs were not proved by the copies of jamabandis and oral evidence- the plea of the defendant that he has right of easement is not proved- he has also taken the plea of adverse possession- evidence was led in support of the plea- mere failure to frame issue will not prejudice any party- Courts had correctly appreciated the evidence- appeal dismissed. (Para-8 to 22)

Case referred:
Aditya Kumar Bhanot vs. Savita Devi and others (1992) 1 SLC 31

For the appellant. Mr. G.R. Palsra, Advocate.
For the respondents. Mr. Virender Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present regular second appeal has been maintained by the appellant, who was defendant before the learned Trial Court (hereinafter referred to as "the defendant"), challenging the judgment and decree, dated 23.05.2006, of the learned District Judge, Mandi, H.P. passed in Civil Appeal No. 21 of 2005, whereby the judgment and decree, dated 30.12.2004, passed by learned Civil Judge (Junior Division), Chachiot at Gohar, District Mandi, H.P., passed in Civil Suit No. 174 of 1997, was upheld, wherein the suit of the respondents, who were plaintiffs before the learned Trial Court (hereinafter referred to as 'the plaintiffs'), was decreed.

2. Succinctly, the key facts, which are indispensable for determination and adjudication of the present appeal, are that the plaintiffs, by way of filing a suit, sought a decree of permanent prohibitory injunction against the defendant. The plaintiffs sought that the defendant be restrained from interfering in the land owned and possessed by them, which is comprised in Khewat Khatauni No. 90/130 and 93/133, Khasra No. 732, measuring 0-1-7 bighas, and Khasra No. 718, measuring 0-0-6 bighas, situated in Muhal Karao Hadbast No. 49, Illaqua Kohalu, Tehsil Chachiot, District Mandi, H.P. (hereinafter referred to as 'the suit land'). The plaintiffs have further averred that they are owners-in-possession of the suit land and the defendant has no right, title and interest over the suit land. The plaintiffs have further pleaded that the defendant caused unlawful interference in the suit land w.e.f. 10.10.1997 with an intention to dispossess the plaintiffs and despite repeated requests, the defendant did not desist from his unlawful acts of interference. The defendant also gave beatings to plaintiff No. 1 (Durga Dass). As per the plaintiffs, cause of action accrued in their favour on 01.10.1997 when the defendant started interfering in the ownership, possession and enjoyment of the plaintiffs over the suit land and right to sue accrued on 12.10.1997 when the defendant finally refused to desist from his illegal acts of interfering in the suit land.

3. The defendant, by way of filing the written statement, contested and resisted the suit of the plaintiffs. Preliminary objections, viz., maintainability, cause of action, suit being bad for mis-joinder and non-joinder of necessary parties, were raised. On merits, it has been averred that the plaintiffs are not owners of the suit land. As per the defendant, he has his residential-cum-commercial building over a part of Khasra No. 725, Khewat Khatauni No. 126/187, situated in Muhal Karao and Khasra No. 732, located on the same Muhal, measuring 0-1-3 bighas suit land, is being used by the defendant as his courtyard, as by the previous owner, from whom the defendant had purchased the same and had been using the same for the last over thirty years. The defendant had been using the building and the courtyard openly, peacefully, uninterruptedly and to the full knowledge of the plaintiff. The defendant has further pleaded that his possession has matured into right of easement through prescription and the plaintiffs have lost all rights over the suit land. The defendant has also pleaded that he has maintained a suit for permanent prohibitory injunction qua Khasra No. 7321, which was pending in the Trial Court and stay had been granted therein. He has further pleaded that Khasra No. 718 has been recorded in the joint ownership of plaintiffs and one Shri Janku, but the plaintiffs are out of possession from this land. It has been further contended by the defendant that the date, as portrayed by the plaintiffs qua unlawful interference by him over the suit land, is fictitious. As per the defendant, there is no question of restraining him from causing interference over the suit land and no cause of action has accrued in favour of the plaintiffs and the date of accrual of cause of action is also false and fictitious. Lastly, the defendant prayed for dismissal of the suit.

4. The learned Trial Court on 10.11.1999 framed the following issues for determination and adjudication:

"1. Whether the plaintiffs are owner in possession of the suit land, as alleged? OPP.

2. Whether the defendant is causing unlawful interference in the suit land, as alleged? OPP

3. If issues No. 1 & 2 are proved in affirmative whether the plaintiffs are entitled to the relief of injunction as prayed for? OPP

4. Whether the plaintiffs have no locus-standi and cause of action to file the suit as alleged? OPD

5. Whether the suit is not maintainable in the present form? OPD

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

7. Whether the defendant is owner in possession of the suit land by way of adverse possession, as alleged? OPD.

8. Relief."

5. After deciding issues No. 1 to 3 in favour of the plaintiff and issues No. 4 to 7 against the defendants, the suit of the plaintiffs was decreed. Subsequently, the defendant preferred an appeal before the learned Lower Appellate Court which was also dismissed. Hence the present regular second appeal, was admitted for hearing on the following substantial questions of law:

"1. Whether both the courts below have misread, misconstrued and misinterpreted the oral as well as documentary evidence of the parties especially documents Ex. DW-3/A, Ex. DW-3/B, Ex. DW-3/C and Ex. DB which has materially prejudiced the case of the appellant?

2. Whether issue with regard to adverse possession has been wrongly framed instead of issue with regard to right of easement by way of prescription, which has also materially prejudice the case of the appellant?"

6. Learned counsel for the appellants has argued that the learned trial Court has not framed the issue, which has arisen from pleadings, to the extent that whether the defendant

has right to use the suit land as path by way of prescription, thus the judgment and decree passed by the learned trial Court, which was upheld by the learned lower Appellant Court is required to be set aside.

7. On the other hand, learned counsel for the respondents has argued that the judgment and decree, passed by the learned trial Court is just, reasoned and the learned trial Court has framed the issue which has arisen. further the defendant/appellant has led his evidence after knowing his case fully well and at this stage, after more than 20 years, he cannot say that the issue, which were required to be framed, has not been framed by the learned trial Court.

8. In order to appreciate the rival contentions of the parties, I have gone through the record carefully. PW-1, Durga Dass, while appearing in the witness box, has deposed that the suit land comprised in Khasra No. 732, is in his ownership and possession and Khasra No. 718 is in the ownership and possession of plaintiffs No. 2 and 3, who are his minor sons. He stated that he has installed a machine in the suit land towards the road about 10-12 years back and in the remaining land he has kept stones and iron articles. As per PW-1, his residential-cum-commercial building is over Khasra No. 725 and land of the defendant is situated in Khasra No. 732, measuring 0-1-7 bigha. He stated that the defendant used the path, which is in front of Khasra No. 725, for about 7-8 years, but he has never utilized the suit land as courtyard. He contended that when Khasra No. 725 was sold to the defendant, he never give right to the defendant qua the courtyard and path. He further contended that on 01.10.1997, the defendant by removing stones, has started making the path in the suit land and when he tried to stop him, the defendant quarreled with him. In his cross-examination, he denied that on 09.10.1997, he put the stones forcibly on the suit land, as well as the fact that the defendant had ever used the suit land as courtyard and path. He also denied that the co-sharers have courtyard and path on the suit land.

9. PW-2, Gian Chand, has stated that on some part of the suit land there is a house of the plaintiffs and the plaintiff has installed a machine on some portion over the suit land and on other portion, the stones were kept by the plaintiffs. As per his version, the defendant has no path through the land of the plaintiffs and they are in litigation from the year 1997 due to the fact that the defendant is demanding the path from the land of the plaintiffs. In his cross-examination, he feigned ignorance about the date when the plaintiffs kept stones on the suit land, he denied that plaintiff No. 1, Durga Dass has forcibly kept stones over the vacant portion of the land, however he admitted that stones are still lying there. He further denied that the defendant is having courtyard and path through the suit land. In his cross-examination, he has not stated anything contrary to his examination-in-chief.

10. PW-3, Roshan Lal, has stated that he has seen the suit land and the plaintiffs have installed a machine over the same and the house of the defendant is situated behind the shop of the plaintiffs. He further stated that the defendant has no path and courtyard in the land of the plaintiffs. In his cross-examination, he has stated that he is not aware about the fact that who are the owners of the suit land in the revenue entries. He deposed that the stones are kept in the land measuring 10-12 feet. He has admitted the possession of the plaintiffs over the suit land, where the stones are kept. In his cross-examination, he stated that the land, on which the stones are kept, is in ownership and possession of the plaintiff, Durga Dass.

11. RPW-1, Man Singh, has stated that the plaintiff Durga Dass, has installed a machine in forty feet land and remaining land is vacant, in which stones are kept. As per this witness, the defendant has no path through the land of the plaintiffs. In his cross-examination, he feigned ignorance about the Khasra No., on which the house of defendant is existing.

12. The Jamabandi, Ext. PA and Ex. PB, proves that the plaintiffs are owner-in-possession of the suit land and that fact is also supported by the statements of the witnesses. The plea of the defendant is that the residential-cum-commercial building existing on Khasra No.

725, Khewat Khatauni No. 126/187, situated in Muhal Karao and adjoining Khasra No. 732, is used by the defendant as courtyard of his building since long, which was firstly being used by the previous owner from whom the defendant has purchased this residential-cum-commercial building, comprised in Khasra No. 725 and after that by the defendant for over thirty years peacefully and openly to the knowledge of the plaintiffs, enjoying the suit land, which has matured into a right of easement through prescription and plaintiffs have lost their right, title or interest over the same.

13. Roop Lal, defendant, to prove his plea, has appeared in the witness box as DW-1 and stated that in Khasra No. 732, he has courtyard and path leading to his house, whereas Khasra No. 718 is vacant. He further stated that his house over Khasra No. 725 is about 50-60 years old and the said house belonged to Jiwanu, Janku, Mithnu and Gulabu, Jiwanu has sold his share to one Narad, from whom he had purchased the share, whereas Mithun and Gulabu sold their share to Durga and later on Durga has also sold his share to him. The courtyard and path is being used by him since the time of existence of the house over the above land. He deposed that the house was purchased by him about 25-30 years ago and the plaintiffs have never remained in possession of the suit land. He admitted that Durga Dass has forcibly kept stones over the suit land in the year 1997. He also clarified that disputed path is only path leading to his house and except this, he has no alternate path. In his cross-examination, he stated that when he purchased the house from the plaintiffs about thirty years ago, no written document was prepared. He feigned ignorance about his age about 30 years ago, however he stated that at the time of filing the suit his age was 40 years. He admitted that the plaintiffs have kept stones on some portion of the land.

14. Ram Singh, DW-2, has stated that the suit land is in possession of defendant, Roop Lal, since 22-23 years and except him, no other person is in possession of the same. He also stated that there is no path from the backside of the defendant's house. He deposed that on some portion of the land stones are kept and remaining portion is path of defendant, Roop Lal. In his cross-examination, he feigned ignorance about the Khasra Nos. of the land in dispute, as well as about the owner of the suit land. He stated that stones are kept in front of the house of the defendant, Roop Lal, though defendant is in possession of the suit land. He further stated that for the last 22-23 years, except the possession of the defendant he has not seen anyone else in possession over the suit land. He deposed that about 25-30 years back, defendant purchased the house and since then, he is using the courtyard and path.

15. DW-3, Sidhu Ram has stated that there is a path and courtyard of the house of the defendant and except that there is no entry to his house. He further stated that the parties compromised the dispute on spot and notices Ext. DW-3/A and Ext. DW-3/B, are correct as per the original record. The compromise, Ext. DW-3/C is also correct as per record, which was not objected by the plaintiffs. He further stated that these documents are issued and signed by the Secretary, Murari Lal. In his cross-examination, he admitted that Ext. DW-3/C is a carbon copy and in which, there are no signatures of the parties.

16. In written statement, filed by the defendant before the learned trial Court, wherein he has taken the preliminary objections with respect to locas standi, maintainability, cause of action, suit being bad for mis-joinder and non joinder of necessary parties. On merits, defendant has denied that the plaintiffs are owner-in-possession over the suit land. However, he pleaded that the residential-cum-commercial building of the defendant is existing on the part of Khasra No. 725, Khewat Khatauni No. 126/187, situated in Muhal Karao and Khasra No. 732 is situated in same Muhal, measuring 0-1-3 Bighas, which was being used since long by the previous owner, from whom the defendant has purchased the building. The defendant has using the building and the courtyard openly, peacefully, uninterruptedly and to the full knowledge of the plaintiff.

17. The copy of jamabandi for the year 1994-95, Ex. PA shows that the suit land comprised in Khasra No. 732, measuring 0-1-3 bighas land is being owned and possessed by the

plaintiff Durga Dass, in which the defendant has no right, title or interest. Whereas, in another copy of jamabandi for the year, 1994-95, Ex. PB, the land comprised in Khasra No. 718 is shown to be owned by Janku, Jiwanu and Mithnu. There is also an entry in remarks column that vide mutation No. 305, Janku, Mithun and Jiwanu have sold their 31/43 share in favour of Mohan Lal and Binder, plaintiffs No. 1 & 2, in which the defendant has also no right, title and interest.

18. Now the case of the defendant is that he has been using the suit land as courtyard for the last 30 years peacefully. Meaning thereby that the case of the defendant is that the suit land was being used by the defendant peacefully without any intervention and now he has title to the suit land, being in possession. So, it is clear that the defendant is claiming the land by way of his possession over the same for the last 30 years, knowing fully well about his case to the issue with regard to adverse possession. The defendant has led his evidence on all the points, meaning thereby that the issue, which was framed by the learned Court below, whether the defendant is in owner-in-possession of the suit land by way of adverse possession, as alleged, covers the issue involved in the present case and this Court after going through the record of the case, finds that the defendant has led his evidence knowing his case. Further the defendant, in his examination-in-chief, has particularly stated that he purchased the house about 25-30 years back and at that time he might have been 10 years old. He has further stated that he is using the suit land as courtyard and path. Again his case is with respect to the courtyard and then path and he has led his evidence after knowing fully well what his case is about, also the plea of the defendant qua non-framing of the issue of the easementary right of passage by way of prescription is concerned, the same is not of much importance as the defendant has also taken the plea of adverse possession with regard to the suit land. If the defendant really succeeds in proving the adverse possession over the suit land, the question of acquisition of easementary right by prescription or by any other mode would be insignificance.

19. It is true that that omission to frame issue affects the disposal of the suit on merits, but if parties go to trial fully knowing the case of each other, lead evidence, make statements against each other, in that circumstance, non framing of issue does not vitiate the trial. In the present case, the defendant has taken the plea of right of easement by way of prescription in para-1 of his written statement, averred therein that his is enjoying the same for the last thirty years peacefully, uninterruptedly and openly, which has matured into legal right, however he has also taken the plea that as the suit land is being used as courtyard, probably due to this reason, learned trial Court has framed the issue of adverse possession, which is more pervasive in nature and virtually covers the plea of easementary right also. If the defendant proves the plea of adverse possession, there is no further need to prove any easementary right, as the person in adverse possession has all attributes of an owner of the suit land and an owner of the suit land cannot claim easementary right qua the same parcel of land, as both these pleas are contradictory and negative of each other.

20. From the evidence, it is clear that the defendant has tried to prove the existence of passage through suit land and his case is that he has acquired easementary right of passage by prescription. When the case of the defendant is that he has purchased his house over Khasra No. 725, from the previous owners, from whom the plaintiff, Durga Dass has also purchased some share in the suit land, in these circumstance, the defendant could have legally claimed easement of necessity qua the part of the suit land, through which the defendant is claiming passage for the last more than thirty years. It has further come in the evidence of the defendant that the plaintiffs have forcibly kept stones over the suit land. However, as the plaintiffs are admittedly owner of the suit land, there is presumption under the law that the owner shall be deemed to be in possession of the vacant land. So far as the plea of easement by prescription is concerned, the same is not legally available to the defendant, as he has already taken up the plea of adverse possession, which firmly over shadows the plea of acquisition of right by prescription.

21. From the above, it is clear that the parties have led their evidence on all the issues involved in the present case and further this Hon'ble Court in **Aditya Kumar Bhanot vs.**

Savita Devi and others (1992) 1 SLC 31, has held that where the parties are well aware about each others claim, lead evidence, make submissions during arguments without asking for framing of a particular issue, failure to frame an issue, in such circumstance, does not vitiate the decision nor cause any prejudice to the parties.

22. Applying this law to the facts of the present case, this Court finds that, as far as the plea of the learned counsel, with regard to the non framing of issues is concerned that requires to be rejected in view of the discussion made hereinabove. Further the defendant has failed to prove the adverse possession and it is the plaintiffs, who are in ownership and possession of the suit land and as discussed hereinabove in detail, this Court finds that the findings of the learned Courts below are just, reasoned and they have not committed any illegality, accordingly, substantial question of law No. 1 is answered holding that the learned Courts below have correctly appreciated the evidence as has come on record including oral as well as documentary evidence, especially the document Ext. DW-3/A to Ext. DW-3/C and Ex. DB. As far as the substantial question No. 2 is concerned, the same is answered holding that the defendant has himself pleaded that he is using the suit land as courtyard and has also led evidence on all the aspects, thus the issue is correctly framed and no prejudice is caused to the defendant. Hence, the judgments and decree passed by the learned Courts below needs no interference and the instant appeal, which sans merits, deserves dismissal and is dismissed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs.

23. Pending miscellaneous application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant

Versus

Chuni Lal & another .....Respondents

Cr. Appeal No. 397 of 2008
Reserved on: 23.05.2017
Decided on: 01.06.2017

Indian Penal Code, 1860- Section 342, 323 and 325- Informant had gone to cut grass from his land and he noticed on reaching the spot that accused were cutting grass from his land –when the informant made enquiry into the matter, accused tied him with a rope in their courtyard and gave beatings to him- the informant was rescued by President, Gram Panchyat- accused were tried and acquitted by the Trial Court- held in appeal that eye-witness was not examined- the rope with which the informant was tied was also not recovered- the informant has given a different version regarding the incident – the Trial Court had rightly acquitted the accused- appeal dismissed. (Para-8 to 14)

Cases referred:

K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant: Mr. Virender K. Verma, Addl. AG with Mr. Pushpinder Jaswal, Dy. AG.
For the respondents: Mr. Lovneesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present criminal appeal, under Section 378 of the Code of Criminal Procedure has been maintained by the State of Himachal Pradesh, against the judgment of acquittal, dated 17.03.2008, passed by the learned Additional Chief Judicial Magistrate, Sarkaghat, District Mandi, H.P., in Police challan No. 260-II/2003.

2. During the pendency of the appeal accused/respondent No. 1, Chuni Lal has expired, now the appeal against him stands abated.

3. The key facts, giving rise to the present appeal as per the prosecution story are that on 02.10.2003, at about 2.00 p.m., Bansi Lal/complainant (hereinafter to be called as "the complainant") has gone to cut the grass from his land, at Village Nabahi. When he reached at the spot he noticed that the Chuni Lal (respondent No. 1) and his son Arun Sharma (respondent No. 2) (hereinafter to be called as the "accused persons") were cutting trees from his land. When complainant asked them about the same, accused persons tied him with rope in their courtyard and gave beatings to the complainant. The complainant was rescued by Ishwar Dass, President, Gram Panchayat Nabahi. On next day, the matter was reported to the Police, on the basis of which, FIR, under Sections 342, 323 and 325, read with Section 34 of IPC was registered against the accused.

4. Prosecution, in order to prove its case, examined as many as 8 witnesses. Statements of accused persons were recorded under Section 313 Cr.P.C, wherein they denied the prosecution case and claimed innocence. Accused persons did not lead any defence evidence. The learned trial Court, vide impugned judgment dated 17.03.2008, acquitted the accused persons for the commission of offence punishable under Sections 342, 323 and 325, read with Section 34 IPC, hence the present appeal.

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

6. Learned Additional Advocate General has argued that the prosecution has proved the guilt of the accused persons beyond the shadow of reasonable doubt and accused/respondent No. 2 is liable to be convicted for the offences, he was charged with. On the other hand learned counsel for the accused-respondent has argued that the prosecution has failed to prove the guilt of the accused and even the Investigating Officer has not appeared in the present case as witness, the recovery of the plants has not been affected by the prosecution. He has further argued that as per the medical examination, no injuries were found on the accused persons and no trees were recovered from their possession. There is also variation in statement of the complainant given by him in the Court and in his complaint, Ex. PW-1/A. In rebuttal, learned Additional Advocate General has argued that the prosecution has duly proved the injuries sustained by the accused persons and also proved the guilt of the accused beyond the shadow of reasonable doubt, thus the present judgment of acquittal, passed by learned trial Court is required to be set aside and accused/respondent No. 2 is liable to be convicted for the offences, he was charged with.

7. To appreciate the arguments of learned Additional Advocate General and learned defence counsel, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

8. PW-1, Bansi Lal, complainant, has deposed that on 02.10.2003, at about 2.30 p.m., when he has gone to cut the grass from his land, he noticed that Chuni Lal and his son were cutting the trees from his land, when he asked them about this, they gave beatings to him, prior to taking him to their courtyard and then tied him with rope at their courtyard. He further deposed that when Arun Lal alongwith Ishwar Dass, President, Gram Panchayat Nabahi, came there, they rescued the complainant from the accused persons. In his cross-examination, he denied that he has any dispute with the accused persons and so he is falsely implicating them.

9. PW-2, Ishwar Lal, President, Gram Panchayat, Nabahi, has denied that on 02.10.2003 at about 3.15 p.m., Arun Kumar has come to his shop and told him that accused persons have tied Bansi Lal, with rope, in their courtyard and he rescued the complainant. PW-3, Gian Chand, who was the witness of recovery memo Ext. PW-3/A, through which rope was taken into possession, has specifically denied the recovery of the rope. PW-6, Inspector, Aashish Sharma, has registered the FIR, Ext. PW-6/A and prepared the challan in the present case. PW-7, Dr. P.C. Saini, has medically examined the complainant and issued MLC Ext. PW-7/A. Other witnesses are the formal witnesses.

10. The case of the prosecution is that the accused persons gave beatings to the complainant, however as per evidence produced by the prosecution, this fact has not been supported by any witness. Even Arun Kumar, eye witness has not been examined in this case. As far as the rope is concerned, with which the accused persons have allegedly tied the complainant, recovery of the same has not been proved. The Investigating Officer of the case has not been examined and relevant document, i.e, site plan has also not been proved on record. Furthermore, the complainant has himself given different version in the Court by deposing that accused persons initially given beatings to him and thereafter he was taken to courtyard, whereas in his complaint, Ext. PW-1/A, he deposed that he was beaten by the accused persons at their courtyard.

11. Keeping in view the aforesaid discussion and the fact that there is material contradiction even in the statement of the complainant, and as no other witness has supported the case of the prosecution, Investigation Officer was not examined and recovery was not proved, so this Court finds that the prosecution has failed to proved the guilt of the accused at all.

12. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

13. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

14. In view of the aforesaid decisions of the Hon'ble Supreme Court and the discussion made hereinabove, I find no merit in this appeal and the same deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant
Versus
Dhani Ram ......Respondent

Cr. Appeal No. 138 of 2009
Reserved on: 15.05.2017
Decided on: 01.06.2017

Code of Criminal Procedure, 1973- Section 378- Accused outraged the modesty of the informant – accused was tried and acquitted by the Trial Court- held in appeal that there are contradictions in the testimonies of prosecution witnesses- independent person present in the room was not cited as witness- PW-3 and PW-4 did not support the prosecution version- there

was delay in reporting the matter to the police, which was not explained – Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-7 to 16)

Cases referred:

K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant : Mr. Pushpinder Jaswal, Dy. AG with Mr. Rajat Chauhan, Law Officer.
For the respondent : Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present criminal appeal, under Section 378 of the Code of Criminal Procedure has been maintained by the appellant-State, against the judgment of acquittal, dated 25.09.2008, passed by the learned Sub Divisional Judicial Magistrate Chachiot at Gohar, District Mandi, H.P., in Police challan No. 70-1/2007.

2. The key facts, giving rise to the present appeal as per the prosecution story are that on 15.01.2007, complainant alongwith her husband came to the Police post Balichowki and reported that on 14.01.2007, the complainant alongwith her husband, Hem Raj, children and her sister-in-law, Bhuvneshwari went to the house of their relative Nika Ram at Nauna as guests and after having food, two separate double beds were given to them for sleeping and the complainant alongwith her three daughters, sister-in-law and grand-daughter of Nika Ram slept on one double bed, whereas on the another double bed accused Dhani Ram and one other person, who runs a clinic in Nauna were slept. At about 1.00 a.m., when the complainant was in deep sleep, accused came towards her bed and after putting his hands inside her blanket started touching her private parts, on this, she woke up and asked him not to do so, but despite that accused also put his hands into her salwar, thereafter she raised noise and on her noise, her husband, sister-in-law and children woke up. Further the case of the prosecution is that the accused insulted the complainant by his act and due to shame, the complainant could not report the matter earlier. On the basis of complainant's statement, FIR was registered against the accused.

3. Prosecution, in order to prove its case, examined as many as 6 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C, wherein he denied the prosecution case and claimed innocence. Accused did not lead any defence evidence. The learned trial Court, vide impugned judgment dated 25.09.2008, acquitted the accused.

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

5. Learned Deputy Advocate General has argued that the judgment of acquittal, passed by the learned Court below, is against the facts, which has come on record and is liable to be set aside, as the learned Court below has failed to take into consideration that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. On the other hand learned counsel for the accused-respondent has argued that the prosecution has failed to prove the guilt of the accused and there is no evidence against the accused which connects him with the alleged offence and the judgment passed by the learned Court below needs no interference.

6. To appreciate the arguments of learned Deputy Advocate General and learned defence counsel, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

7. PW-1, complainant, while appearing in the witness box stated that on 14.01.2007, she alongwith her husband, children and her sister-in-law, went to the house of Nika Ram at Nauna. After having their food they slept on two double beds in a single room and on one double bed, the complainant alongwith her three daughters, her sister-in-law, Bhuvneshwari and grand-daughter of Nika Ram, Sita Devi slept, whereas on another double bed, her husband, Hem Ram, Dhani Ram and one other person, who runs a chemist shop, slept. At about 1.00 a.m., the accused woke up and came towards the bed of the complainant, he also started touching her private parts and put his hands into her salwar. On this, she raised noise and on her noise, all the persons woke up and after the said occurrence, on 15.01.2007, she reported the matter at Police Post Balachowki. In her cross-examination she stated that she was not familiar to the accused and has heard the name of the accused in the house of Nika Ram. She stated that on the said day, she has taken her food at 10.00 p.m. and she is not aware about the exact time when the accused and Parkash have taken their food. She deposed that about half an hour after having food, she alongwith her three daughters, her sister-in-law and Sita Devi has gone to sleep and kept the light on, the door was also open and about 11.00 p.m., her husband, accused Dhani Ram and Prakash came to the room, but she does not know who switched off the light and closed the door. She admitted that she saw the time to be 1.00 a.m., on the wall clock, after raising noise, when she switched on the light, but they have not called Nika Ram during the night or any other person. She further admitted that after the said occurrence, they have left to their quarters in a vehicle and reported the matter to police on 15.01.2007. She deposed that from their quarters, the distance of police post is ½ kms and due to shame, she could not go to the police on the same day, but her husband went to police post Balichowki. She further deposed that on the next day, at 9.00 a.m., her husband went to open the medical store, who returned back at 6.00 p.m. She admitted that the accused had not come to the house of Nika Ram in her presence and had come inside the room with her husband, during night.

8. PW-2, Hem Raj, husband of the complainant, has deposed that on 14.01.2007, he alongwith his family has gone to Nauna and after having their food, they had slept in a single room on two separate double beds and on one double bed he, accused Dhani Ram and Ved Prakash, who deals in medicine had slept, whereas on the other double bed his wife, three daughters, his sister and Sita Devi were slept. At about 1.00 a.m., the accused stood up and went to answer the call of nature, after urinating he came inside the room and started doing mischief with his wife, who was sleeping on the other bed. In his cross-examination, he admitted that he is familiar to the accused for the past 6-7 years and has good friendship with him as the accused used to sit in his shop daily. He deposed that on the said day, he had taken food with his wife and family members and he does not know that with whom the accused and Ved Prakash have taken their food. He admitted that at 8.00 to 9.00 p.m., he alongwith his wife and family members went to sleep and accused came to their room at 11.00 pm. He further admitted that when the accused alongwith Ved Prakash came to room he was still awake, but her wife and other relatives were sleeping. He deposed that at 1.00 am, after hearing noise, he woke up and switched on the light of the room. He further deposed that he has not called Nika Ram during the night and straightaway went to Balichowki. He admitted that he knows the telephone numbers of police post Balichowki, as well as the Police station Aut, as he is a news reporter. He further admitted that he has not informed the incident to Police on the same day. He stated that on the next day at 8.00 am, he went to open his shop and from his shop the distance of Police Post is about five minutes. He denied that he had borrowed money from the accused for the operation of his wife. He further denied that due to enmity, he has registered a false case against the accused.

9. The material contradiction, which, in the present case has come on record, is that the complainant has stated that she has not seen the accused earlier and she saw him first time, when he came inside the room alongwith her husband at 11.00 pm. On the other hand, PW-2, husband of the complainant, in his cross-examination, specifically admitted that he knows the accused for the last 6-7 years and has good friendly relation with him, as he used to come to his shop daily. He further admitted in his cross-examination that he alongwith his wife and other family members had gone to sleep between 8.00 to 9.00 pm, whereas the accused and Ved

Prakash have come to the room at 11.00 pm and at that time he was awake. The other contradiction, which has come on record, is that the complainant, in her cross-examination has stated that after the said occurrence, she raised noise and switched on the light at 1.00 pm, however on the other hand, PW-2, husband, has stated that on hearing noise, he stood up and switched on the light. Further, though the complainant, her husband, her children and her sister-in-law came to the house of Nika Ram as guests, but after the incident, they have not called Nika Ram, rather they left for their quarters at Balichowki. Therefore, the behavior of the complainant and her husband not to disclose the incident to the owner of the house is highly improbable. It is also strange that the alleged third person, Ved Prakash, who could be the prime witness in the present case, has not even been cited as a witness.

10. As far as PW-3, Nika Ram, is concerned, he has denied that on 14.01.2007, Hem Raj, alongwith his family members has come to his house as guest. Similarly, PW-4, Sita Devi, has also feigned ignorance about the fact that whether Hem Raj had come to their house or not. In her cross-examination, she denied the fact she slept with the complainant and heard noise at 1.00 am. Thus, both these witnesses have not supported the prosecution's case.

11. The case of the prosecution neither been supported by PW-3, Nika Ram nor PW-4, Sita Devi, however as per the prosecution story, when the alleged act was committed by the accused, Sita Devi was sleeping with the complainant, but Sita Devi has denied the case of the prosecution in its entirety. Likewise, PW-3, Nika Ram, has also denied the fact that on 14.01.2007, the husband of the complainant alongwith his family had come to his house.

12. PW-6, Shiv Chand, Investigation Officer of the case has deposed that on 15.01.2007, the complainant came to the police post Balichowki and registered rapat Ex. PW-5/A, which was sent through Constable Pankaj Kumar No. 164 to Police Station Aut, on the basis of which FIR Ex. PW-6/A was registered and the endorsement Ex. PW-6/B was made. Thereafter he prepared site plan Ex. PW-6/C and recorded the statement of the witnesses Nika Ram, Ex. PW-6/D and Sita Devi, PW-6/E. In his cross-examination, he admitted that distance of the quarters of the complainant from police post is about 200 meters.

13. Thus, in the absence of any reasonable and plausible explanation, with regard to delay in reporting the matter, an adverse inference has to be drawn against the prosecution story and the contradictory statements of the witnesses create suspicion. Even the version of the complainant and her husband are contradictory. It has also come on record that the husband of the complainant is press reporter and their quarters are just at a distance of 200 meters from the police post, despite that they have not lodged FIR immediately, but after 18 hours, at 6.00 pm, the matter was reported to the police.

14. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

15. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

16. So, this Court finds that, prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt.

17. In view of the aforesaid decisions of the Hon'ble Supreme Court and the discussion made hereinabove, I find no merit in this appeal and the same deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

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

Cr. Appeal No. 429 of 2008
Reserved on: 23.05.2017
Decided on: 01.06.2017

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 60 bottles of country made liquor Lal Quila each containing 750 ml. – accused was tried and acquitted by the Trial Court- held in appeal that there are material contradictions in the statements of the prosecution witnesses- no independent witness was examined- link evidence is also missing- Trial Court had rightly acquitted the accused- appeal dismissed. (Para-7 to 20)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant Mr. Virender K. Verma, Addl. AG with Mr. Pushpinder Jaswal, Dy. AG.
For the respondent Mr. Ashok K. Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present criminal appeal, under Section 378 of the Code of Criminal Procedure has been maintained by the appellant-State, against the judgment of acquittal, dated 07.04.2008, passed by the learned Additional Chief Judicial Magistrate, Dehra, District Kangra, H.P., in Criminal Case No. 167-III/2005.

2. The key facts, giving rise to the present appeal as per the prosecution story are that on 01.06.2005, SI/SHO Prem Chand alongwith HHC Pushap Arun, HHC Jarnail Singh and Constable Gurmeet Singh was on naka at Tatahan, at about 12.30 am, a vehicle, bearing registration No. HP-19A-5373 came from Bankhandi side and when the vehicle was stopped and checked, five cardboard boxes, containing 60 bottles of country made liquor, *Lal Quila* (each containing 750 Mls) were recovered from the vehicle driven by Rajesh Kumar, without any license and permit, out of which, thee bottles were separated for chemical examination and sealed with seal "P". The other cardboard boxes, containing liquor, were also sealed with Seal "P" and taken into possession alongwith vehicle and its documents, vide memo, Ex. PW-5/A. Ruka, Ex. PW-2/A, was sent to the Police Station through HHC Jarnail Singh, on the basis of which, FIR, Ex. PW-2/B, under Section 61 (1) (a) of the Punjab Excise Act, as applicable to the State of H.P. was registered against the accused. During the course of investigation, Investigating Officer prepared the spot map of recovery Ex. PW-7/B and three bottles were sent to Laboratory at Kandaghat, for chemical examination and when report was received, it was found that samples of country made liquor contained alcoholic strength. The statements of the witnesses were recorded under Section 161 Cr.P.C. and after completion of investigation challan was presented.

3. Prosecution, in order to prove its case, examined as many as 7 witnesses. Statement of accused was recorded under Section 313 Cr.P.C, wherein he denied the prosecution case and claimed innocence. Accused did not lead any defence evidence. The learned trial Court, vide impugned judgment dated 07.04.2008, acquitted the accused for the commission of offence

punishable under Section 61 (1) (a) of the Punjab Excise Act, as applicable to the State of H.P., hence the present appeal.

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

5. Learned Additional Advocate General has argued that PW-3, PW-5 and PW-6 have fully proved the case of the prosecution and the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. He has further argued that the accused was apprehended with 60 bottles of country made liquor, *Lal Quila* and he could not produce any permit. He has argued that as the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt, accused is liable to be convicted for the offence, he was charged with. On the other hand, learned counsel for the accused-respondent has argued that the link evidence is missing and there are lot of contradictions in the statements of the witnesses, which makes their statements unreliable. He has further argued that no independent witness was examined by the prosecution.

6. To appreciate the arguments of learned Additional Advocate General and learned defence counsel, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

7. PW-1, HHC Jarnail Singh, has deposed that on 13.06.2005, MHC, Yudhvir Singh, has given him three sample bottles of country made liquor, *Lal quila* to deposit them to CTL Kandaghat and the same were deposited by him there, on 14.06.2005. He further deposed that when sample bottles of liquor were with him, no tampering was made by anyone.

8. PW-2 ASI Vinod Kumar, has deposed that in the year, 2005, he was posted at Haripur as Investigating Officer and on 01.06.2005 after receiving *Rukka*, Ext. PW-2/A, FIR, Ext. PW-2/B, was registered, which bears his signature. In his cross-examination, he deposed that at night there was no facility of night bus at Haripur road. He feigned ignorance about the fact that by whom *Rukka* was brought to Police Station. He denied that on the basis of Ext. PW-2/A, FIR, Ext. PW-2/B, was falsely registered.

9. PW-3, Constable Gurmeet Singh, who was also posted at Haripur, deposed that on 01.06.2005, he alongwith HHC Arun Kumar, HHC Jarnail Singh and driver, Narender Kumar, was present at Tatahan on Naka, in the night at about 12.30 am, one vehicle bearing No. HP-19A-5373, came to the spot and stopped by the Police for checking. On inquiry, the driver of the vehicle disclosed his name as Rajesh Kumar. When the vehicle was checked, five cardboard boxes, containing 60 bottles of country made liquor *Lal quila* (each bottle containing 750 Mls) were recovered from the possession of the accused. He further deposed that out of total recovered bottles of liquor, three bottles were separated for chemical examination and sealed on the spot by Investigating Officer with seal "P". Thereafter, *Rukka* was prepared and sent to Police Station. He admitted his signature on *fard.* He stated that the accused was carrying the liquor without any permit. In his cross-examination, he stated that he alongwith SHO Prem Chand and HHC Jarnail Singh, proceeded from the Police Station in Government vehicle, at around 12.00 midnight. He further stated that they have put the stones on road to stop the vehicle and thereafter recovered the country made liquor *Lal quila*, which was in cardboard boxes, from the vehicle. He deposed that the vehicle was checked by SHO and they remained there till 1.30 am. He further deposed that the seal handed over to him by SHO. He admitted his signature on *fard.*

10. PW-4, HHC Yudhvir Singh, has deposed that on 01.06.2005, three sample bottles of liquor (each containing 750 Mls), with seal "P" were sent through HHC, Jarnail Singh, to CTL Kandaghat, for chemical examination. In his cross-examination, he denied that he has not sent the samples of liquor to CTL Kandaghat.

11. PW-5, HC, Pushp Arun, has deposed that in the year, 2005 he was posted at Haripur. In his cross-examination, he deposed that place of Naka is at a distance of 6-7 Kms. from the Police Station. He admitted that they have not put anything on the spot for closing the road. He further admitted that on the spot, there was no light and the entire proceedings were

conducted with the headlight of vehicle. He deposed that some liquor bottles were without label and in some bottles the quantity of liquor was lesser. He further deposed that the vehicle of the accused was driven by SHO to the Police Station and during the investigation 1-2 vehicles crossed through the spot, which were checked by us.

12. PW-6, Constable Narender Kumar, has deposed that they proceeded from the Police Station at about 10.30 pm and during the investigation, no vehicle was crossed through the spot. He has further deposed that all proceedings were completed with the help of torchlight and he drove the vehicle of the accused to the Police Station.

13. PW-7, SI/SHO Prem Chand, has deposed that on 01.06.2005 at about 12.30 am (night), he alongwith other Police officials was on Naka at Tatahan and at the same time, a vehicle bearing Registration No. HP-19A-5373, coming towards Bankhandi side, was stopped by them and on checking the vehicle, five cardboard boxes, containing 60 bottles of country made liquor, *Lal quila*, were recovered from the possession of the driver, Rajesh Kumar and the vehicle alongwith its documents, was taken into possession vide memo Ext. PW-5/A and three bottles as sample, were separated for chemical examination. *Rukka*, Ext. PW-2/A was sent to Police Station through HHC Jarnail Singh. In his cross-examination, he stated that during the proceedings, they used emergency light, which was with them. He further stated that no other vehicle crossed through the spot during the investigation. He further stated that they have proceeded from the Police Station at about 11.00 pm and the accused himself drove the vehicle to the Police Station.

14. In the present case, there are material contradictions in the statements of the witnesses. It has come in the statement of PW-3 that they proceeded from the Police Station at about 12.00 pm, but as per the version of PW-7, SHO, Prem Chand, they went to the spot at about 11.00 pm. Similarly, PW-3, has deposed that the road was closed by them by putting stones, whereas PW-5, Pushp Arun, has deposed that they have not put anything on the road. As per PW-6 and 7, during investigation, no other vehicle has crossed through the spot, however PW-5, has stated that during the investigation, 1-2 vehicles crossed from there, which were checked by them. It is also come in the statement of PW-5 that entire proceedings were conducted by them with the help of headlight of the vehicle, but as per the version of PW-6, entire proceedings were completed with torchlight. Further there is also contradiction qua the fact that by whom the vehicle was driven.

15. So, there are major contradictions in the statement of the witnesses, further there is no independent witness available and statements of official witnesses, do not inspire confidence. It has been held by this Hon'ble Court in ***State of H.P. vs. Madan Lal*** and **State of H.P. vs. Malkiat Singh and another**, that in case, link evidence is missing, the acquittal of the accused cannot be interfered with.

16. Thus, in the absence of any reasonable and plausible explanation, an adverse inference has to be drawn against the prosecution story, as the contradictory statements of the witnesses create suspicion.

17. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

18. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

19. So, in the opinion of this Court, the findings of the learned Court below cannot be said to be perverse and against the law, as the prosecution has failed to prove the guilt of the accused beyond reasonable doubt.

20. In view of the aforesaid decisions of the Hon'ble Supreme Court and the discussion made hereinabove, I find no merit in this appeal and the same deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh …Appellant
Versus
Ramesh Kumar …Respondent

Cr. Appeal No. 776 of 2008
Reserved on: 22.05.2017
Decided on: 01.06.2017

Indian Penal Code, 1860- Section 354 and 323- The informant was returning home after answering the call of nature- accused came and outraged her modesty- accused was tried and acquitted by the Trial Court- held in appeal that independent witnesses did not support the prosecution version- testimony of the informant was made suspect by this fact- accused was rightly acquitted in these circumstances- appeal dismissed. (Para-7 to 14)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant : Mr. Virender K. Verma, Addl. AG with Mr. Pushpinder Jaswal, Dy. AG.
For the respondent : Mr. Digvijay Singh, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present criminal appeal, under Section 378 of the Code of Criminal Procedure has been maintained by the State of Himachal Pradesh, against the judgment of acquittal, dated 17.09.2008, passed by the learned Additional Chief Judicial Magistrate, Court No. 1, Sundernagar, District Mandi, H.P., in Police challan No. 522-1/2004.

2. The key facts, giving rise to the present appeal as per the prosecution story are that on 21.07.2004, at about 2.00 p.m., at village Bari, when complainant was returning to home after answering the call of nature from the nearby fields, suddenly, Ramesh Kumar/accused (hereinafter to be called as "the accused"), appeared from behind the bushes and caught hold the complainant from shoulders and gagged her mouth to prevent her from raising alarm and physically assaulted the complainant, with intention to outrage her modesty and caused injuries to her. Somehow, the complainant managed to rescue and on raising alarm, Narain Singh and Umawati came to the spot and on seeing them, the accused fled away from the spot. Thereafter, the complainant, at about 4.00 p.m., reported the matter to the Police Station, Sundernagar, on the basis of which, FIR No. 231/04, dated 21.07.2004, under Sections 354 and 323 of IPC, was registered against the accused. The complainant was sent to medical examination at Civil Hospital, Sundernagar, where she was medically examined by Dr. R.K. Gupta and he opined that the injuries sustained by the complainant are simple and issued MLC. During the course of investigation, I.O. prepared the spot map, he also recorded the statements of the witnesses under Section 161 Cr.P.C. and after completion of investigation challan was presented in the Court.

3. Prosecution, in order to prove its case, examined as many as 7 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C, wherein he denied the prosecution case and claimed innocence. Accused did not lead any defence evidence. The learned trial Court, vide impugned judgment dated 17.09.2008, acquitted the accused for the commission of offences punishable under Sections 354 and 323 IPC, hence the present appeal.

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

5. Learned Additional Advocate General has argued that the findings of the learned Court below are against the record, as the learned Court below has on the basis of surmises and conjectures, acquitted the accused and so the judgment of acquittal, passed by the learned Court below be set aside and accused be convicted, as the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. On the other hand, learned defence counsel has argued that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt, so the well reasoned judgment of the learned Court below needs no interference.

6. To appreciate the arguments of learned Additional Advocate General and learned defence counsel, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

7. PW-1, complainant, while appearing in the witness box, has testified the involvement of the accused at the place of occurrence alongwith the presence of Narain Dass, PW-2 and Umawati, PW-3, being eye-witnesses of the occurrence. The complainant deposed that she was assaulted and beaten up by the accused, when she was returning home after answering the call of the nature from the nearby fields. She further deposed that the accused caught hold her from shoulders and gagged her mouth, which led to the bleeding from her nose. She further stated that thereafter she raised alarm, on which Narain Dass (PW-2) and Umawati (PW-3) came on the spot and the accused, who was holding the complainant fled away.

8. In order to establish the aforementioned facts, as has come on record, the statements of Narain Dass, PW-2 and Umawati, PW-3, are significant, as they are stated to be the eye-witnesses of the said occurrence.

9. Both these witnesses in their statements, have denied the fact, with regard to the involvement of the accused in the said incident. It has nowhere come in the statements of both these witnesses that on complainant's raising alarm, they found the accused present at the place of occurrence, holding the complainant from her shoulders. In his statement, PW-2, Narain Dass, has deposed that on the date of incident, people told him that daughter-in-law of Sh. Dass is crying, however he feigned ignorance as to why she was crying. Similarly, PW-3, Umawati, in her statement has deposed that she met with the complainant outside her house and the complainant narrated the whole incident to her of being molested by the accused in the fields.

10. To prove their case, prosecution has also examined other witnesses, i.e., Saroj Thakur, PW-4 and Mast Ram, PW-5, however the evidence of both these witnesses is also of hear say in nature, as they met the complainant afterward.

11. The eye-witnesses of the present case, have not supported the case of the prosecution and denied their presence on the spot of occurrence, in these circumstance, the whole testimony of the complainant becomes vulnerable, when the other witnesses has not supported the prosecution case. So, this Court finds that, the prosecution has failed to prove the guilt of the accused conclusively and beyond reasonable doubt.

12. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

13. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

14. In view of the aforesaid decisions of the Hon'ble Supreme Court and the discussion made hereinabove, I find no merit in this appeal and the same deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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

Shri Gian Chand .....Appellant.

Vs.

Ram Parshad and others. .....Respondents.

RSA No.: 337 of 2008
Reserved on: 26.04.2017
Date of Decision: 14.06.2017

Specific Relief Act, 1963- Section 34 and 38- Plaintiff pleaded that suit land was leased by the defendants in favour of plaintiff in June, 2001 on a monthly rent of Rs.300/- for constructing a shop- the plaintiff constructed a shop by incurring expenses of Rs.1 lac – the defendants were bent upon to get the suit land vacated despite the payment of rent – the defendants pleaded that a wooden structure/khokha was taken on lease by plaintiff from defendant No.4 for a consideration of Rs.8,000/- from 25.7.2003 till 31.3.2004 with an undertaking to vacate the same after the expiry of the period- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that plaintiff had failed to prove that any permanent lease was executed in his favour – the plea of the defendants was duly proved by the agreement in which plaintiff had agreed to vacate the khokha after 31.3.2004 – Plaintiff failed to honour the undertaking – the suit was rightly dismissed by the Courts- appeal dismissed.
(Para-12 to 14)

For the appellant: Mr. J.R. Poswal, Advocate.
For the respondents: Ms. Anjali Soni Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge **:**

By way of this appeal, the appellant has assailed the judgment and decree passed by the Court of learned District Judge, Bilaspur in Civil Appeal No. 29 of 2007, dated 26.03.2008, vide which, learned appellate Court while dismissing the appeal of the present appellant, upheld the judgment and decree so passed by the learned trial Court in Civil Suit No. 48/1 of 2004, dated 23.04.2007, vide which learned trial Court dismissed the suit for declaration so filed by the present appellant against the respondents.

2. Brief facts necessary for the adjudication of this appeal are that the appellant/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit against the defendants for declaration and permanent injunction to the effect that the suit land comprised in Khevat No. 8 min, Khatauni No. 20 min, Khata No. 118, measuring 0-45-85, situated in Mauja Modar, Pargna Kot-Kehloor, Up-Tehsil Shri Naina Devi Ji, District Bilaspur, as per Jamabandi for the year 1998-99 though was owned by the defendants, had been leased out by them in favour of the plaintiff in June 2001 for monthly rent of Rs.300/- as ground rent and same was given to plaintiff to construct a shop, who thereafter constructed a shop over the same in July, 2001 by incurring

expenses to the tune of Rs.1,00,000/-. He was running a Tea shop over the same by further incurring expenses to the tune of Rs.50,000/-. According to the plaintiff, despite the fact that he was regularly paying rent to the defendants, they were bent upon to get vacated the shop from the plaintiff and on these basis, the plaintiff filed the suit praying for declaration that the suit land had been permanently leased in his favour by the defendants and further for decree of permanent prohibitory injunction restraining the defendants from causing any interference over the possession of the plaintiff over the suit land. In the alternative, a decree for possession of the suit land was prayed for in case the defendants were successful in displacing the plaintiff during the pendency of the suit.

3. The claim of the plaintiff was contested by the defendants, who in the written statement took the stand that land comprised in Khasra No. 118 was never leased out in favour of the plaintiff, but a wooden structure/Khokha was taken on lease by plaintiff from defendant No. 4 from 25.07.2003 to 31.03.2004 for a consideration of Rs.8000/- with the undertaking that the plaintiff would hand over the vacant possession of the same immediately after the expiry of said period and the said undertaking was given on a stamp paper. It was also the case of the defendants that the Khokha in issue was not constructed by the plaintiff, but was constructed by defendants. On these bases, the case of the plaintiff was refuted by the defendants.

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

> *"1. Whether the plaintiff is a permanent lessee on the doctrine of estoppels of the shop in question, as alleged? OPP.*
>
> *2. Whether the plaintiff is entitled to the relief of injunction as prayed for? OPP.*
>
> *3. Whether the suit is not maintainable? OPD.*
>
> *4. Whether the plaintiff has no cause of action and locus standi to file the present suit? OPD.*
>
> *5. Relief.*

5. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	*No.*
Issue No. 2:	*No.*
Issue No. 3:	*Yes.*
Issue No. 4:	*Yes.*
Relief:	*The suit of the plaintiff is dismissed as per operative part of the judgment.*

6. Learned trial Court vide judgment and decree dated 23.04.2007, dismissed the suit so filed by the plaintiff by holding that the plaintiff had failed to prove that any permanent lease was executed in his favour by the defendants. Learned trial Court further held that agreement Ex. PW2/B, which as per the admission of the plaintiff in his cross-examination, was prepared on stamp papers, as were purchased by him, demonstrated that the said lease was up to 31.03.2004, after which the plaintiff had undertaken to vacate the Khokha without any objection. Learned trial Court further held that the factum of defendants being owners of the suit land was not disputed by the plaintiffs. It further held that there was no entry in any revenue record to the effect that any lease stood executed by the defendants in favour of the plaintiff qua Khasra No. 118. Learned trial Court also took note of the fact that defendants in their pleadings as well as while deposing as witness had denied creation of any lease of vacant land in favour of plaintiff and had rather stated that a Khokha was leased out to the plaintiff from 25.07.2003 to 31.03.2004 as per agreement Ex. PW2/B and the plaintiff had not handed over possession of

Khokha to the defendants after expiry of the agreement period. Learned trial Court also held that plaintiff had failed to prove that there was any registered instrument regarding creation of any permanent lease. It further held that after the expiry of the period as was contemplated in agreement Ex. PW2/B, the possession over the suit land of the plaintiff was that of a trespasser and injunction could not be granted in favour of a trespasser, as the same would perpetuate the unlawful possession of the plaintiff over the same. On these bases, learned trial Court dismissed the suit of the plaintiff.

7. In appeal, learned appellate Court though reversed the findings returned by the learned trial Court on Issues No. 3 and 4, yet went on to dismiss the appeal so filed by the present appellant. Learned appellate Court after referring to the pleadings as well as evidence on record, held that relief of injunction could not be granted to the plaintiff, as he had failed to prove the existence of Khokha in question with the help of site plan and further there were other Khokhas also situated over the suit land and effective and executable decree for permanent prohibitory injunction could be passed in favour of the plaintiff only in case he had proved the exact location of Khokha on Khasra No. 118, measuring 0-45-85. Learned appellate Court also held that learned trial Court had rightly denied the relief of injunction to the plaintiff by holding that there was no permanent lease in favour of the plaintiff qua the shop in question. Learned appellate Court thus held that relief of permanent prohibitory injunction could not be granted in his favour as he had failed to prove the identity and description of the land as well as Khokha with the help of site plan.

8. Feeling aggrieved by the judgment and decree so passed by the learned appellate Court, the appellant has filed the present appeal.

9. This appeal was admitted on 18.03.2009 on the following substantial questions of law:

> *"A. Whether the learned Courts below have failed to apply law on doctrine of estoppel wherein the appellant/plaintiff deserves to be permanent lessee of the land in dispute?*
>
> *B. Whether the findings recorded by the learned Courts below are sustainable in the eyes of law in view of the fact that Mark-X has been relied upon by the learned Courts below, whereas the documents Ext. PW1/A has not been relied upon?*

10. I have heard the learned counsel for the parties and have also gone through the records of the case as well as the judgments and decrees passed by both the learned Courts below.

11. Both the substantial questions of law are being taken up together for the purpose of adjudication of the matter.

12. In the present case, both the learned Courts below have returned concurrent findings against the plaintiff to the effect that the plaintiff had failed to prove on record that there was a permanent lease executed or entered upon between the plaintiff and the defendants qua the suit land and Khokha in issue. Though this Court is not oblivious of the fact that both the learned Courts below have given different reasonings for dismissing the suit and the appeal so filed by the plaintiff respectively, but yet none of the Courts have held that there was a permanent lease executed in favour of the plaintiff by the defendants as was the case put forth by the plaintiff. Now, before the doctrine of estoppel could have been pleaded by the plaintiff, it was incumbent upon him to have had pleaded and proved execution of a permanent lease, which the plaintiff has failed to prove. There is nothing on record, as has also been held by the learned Courts below, from which it can be inferred that any permanent lease was entered into between the plaintiff and the defendants, vide which any vacant land was handed over by the defendants to the plaintiff on the terms, as have been mentioned by the plaintiff in the plaint to set up a Khokha/Tea Stall.

13. A perusal of the documents proved on record by the plaintiff demonstrate that Ex. PW1/A is a certificate issued in favour of the plaintiff by the Licensing Authority to the effect that he was running a Tea Stall and Ex. PW2/B is an agreement to the effect that the plaintiff had taken on rent part of the property of Rama Devi, D/o Sh. Charenji Lal, R/o Shri Naina Devi from 25.07.2003 to 31.03.2004 for Rs.8000/- as rent with an undertaking that plaintiff would thereafter vacate the same. Now, in the present case, it cannot be said that the learned Courts below have failed to rely upon Ex. PW-1/A, because Ex. PW1/A nowhere proves that the suit land was permanently leased in favour of the plaintiff by the defendants. Ex. PW1/A only demonstrates that plaintiff was permitted by Licensing Authority to run a Tea Stall at Sndri, but nothing more can be inferred from the said certificate. In fact, renting out a Khokha to plaintiff has not been denied by the defendants also, but their contention is that the same was done on the basis of agreement Ex. PW2/B (which has been conveniently shown in the substantial questions of law as Mark-X, so as to give an impression that the learned Courts below have not relied upon an exhibited document but have relied upon a document which was not exhibited) and the said agreement was only from 25.07.2003 to 31.03.2004, but the plaintiff has failed to vacate the Khokha after the expiry of the said period. The substantial questions of law are answered accordingly.

14. In view of the above discussion, as this Court does not finds any merit in the present appeal, the same is accordingly dismissed. Miscellaneous applications, if any, also stand disposed of. No order as to costs.

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

Kashmir Singh ….Petitioner.
Versus
State of Himachal Pradesh ….Respondent.

CMPMO No.: 198 of 2017.
Decided on: 14.06.2017.

Code of Civil Procedure, 1908- Order 23 Rule 1(3)- Plaintiff filed an application for withdrawal of the suit on the ground that a formal defect had occurred on account of preparation of illegal record by the Field Staff of the Settlement Department- application was rejected by the Trial Court- held that initially suit was filed for declaration on the ground that plaintiff had become owner by way of adverse possession- suit was part and parcel of old khasra No. 31/5/1 which was in ownership and possession of the father of the plaintiff- the area of the land was disturbed and dislocated by the Settlement Staff- these facts gave sufficient reasons to the plaintiff to withdraw the suit- hence, application allowed and petitioner permitted to withdraw the suit with liberty to file a fresh suit subject to the payment of cost of Rs. 5,000/-. (Para-6)

For the petitioner Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj Vashisht, Advocate.
For the respondent Mr. Vikram Thakur and Ms. Parul Negi, Dy. AGs.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

Heard.

2. By way of this petition, the petitioner has challenged the order passed by the Court of learned Civil Judge, Court No. 3, Una, in CMA No 292 of 2016, in Civil Suit No. 61/2015, vide which learned trial Court dismissed the application filed under Order 23, Rule 1

(3) of the Code of Civil Procedure (for short 'CPC') by the present petitioner whereby the petitioner (applicant therein) had prayed that he be permitted to withdraw the suit so filed by him with liberty to institute a fresh suit on the same cause of action.

3. A perusal of the application which was filed under Order 23, Rule 1 (C) of CPC before the learned trial Court claimed that the reasons which were mentioned in the said application were that initially the suit instituted by the applicant was for declaration to the effect that petitioner/plaintiff was owner in possession of the suit land as he had perfected his ownership over the same by way of adverse possession, but in the course of preparation of the replication, the plaintiff realized that the suit land in fact was part and parcel of old khasra No. 31/5/1 which had earlier been in the ownership and possession of his father, who had purchased the same from one Mohinder and due to preparation of illegal record by the field staff of Department of Settlement, area of ownership and possession of the plaintiff barring Khasra No. 31/5/1 had been disturbed and dislocated wrongly and illegally. In this background, application was filed with a prayer that as there was a formal defect which had crept on account of preparation of illegal record by the field staff of settlement department, accordingly, he be permitted to withdraw the civil suit with liberty to file fresh on the same cause in the interest of justice.

4. Application so filed by the petitioner was resisted by the respondent-State, who in their reply took the stand that the suit land was owned and possessed by the State of Himachal Pradesh. The state was having perfect title qua the suit land and as the case of the plaintiff was likely to fail on the ground of ownership by way of adverse possession, therefore, the application was not maintainable.

5. Learned trial Court vide impugned order rejected the application so filed by the present petitioner on the ground that under Order 23 Rule 1(3) of CPC, a suit can be permitted to be withdrawn with liberty to file fresh suit if there is some '*formal defect*' in the suit. Learned trial Court on the basis of averments made in the application so filed by the present petitioner/plaintiff before it came to the conclusion that grounds pleaded therein by the applicant/plaintiff to the effect that some properties had been left out at the time of filing the suit was not a defect of "*formal nature*" but was a defect of "*material nature*". On these bases, learned trial Court dismissed the application so filed by the present petitioner.

6. I have heard learned Counsel for the parties and also gone through the averments of the petition as well as the impugned order. In my considered view, learned trial Court has erred in not appreciating that under Order 23 Rule 1(3) of CPC, a suit can be permitted to be withdrawn with liberty to file fresh on the same cause not only on the ground of formal defect which has crept in the suit, but also if the Court is satisfied that there are sufficient reasons for allowing the plaintiff to file a fresh suit for the subject matter. In my considered view, the averments which have been made in the application so filed under Order 23, Rule 1 (3) of CPC, contained sufficient grounds for allowing the petitioner/ plaintiff to withdraw the suit with liberty to institute a fresh suit on the same cause. The reasons which are mentioned in the application as to why petitioner intended to file fresh suit are that initially he had filed the suit for declaration on the ground that he had become owner in possession of the suit land by way of adverse possession but the suit land in fact was part and parcel of old khasra No. 31/5/1, which had earlier been in the ownership and possession of his father, who had purchased the same from one Mohinder and certain discrepancies had entered into in the revenue records which had acted to the prejudice of the plaintiff as on account of the preparation of illegal record by the field staff of settlement department, the area of ownership and possession of petitioner/plaintiff barring Khasra No. 31/5/1 had been disturbed and dislocated. In my considered view, the reasons which were so mentioned in the application in fact were sufficient reasons for having permitted the petitioner/plaintiff to withdraw the Civil Suit with liberty to file fresh suit on the same cause. Learned trial Court could have had compensated the respondent/defendant by imposing cost upon the plaintiff while granting the permission which was being sought by the plaintiff. However, rather than appreciating the ambit of Order 23, Rule 1(3) of CPC in its entirety,

learned trial Court has taken a myopic view of the statutory provisions contained therein, which in my considered view has resulted in miscarriage of justice. Accordingly, this petition is allowed. Order dated 21.04.2017, passed by learned Civil Judge, Court No. 3, Una, in CMA No. 292 of 2016 is quashed and set aside. Application filed by petitioner under Order 23 Rule 1(3) CPC is allowed and the petitioner is permitted to withdraw the suit with liberty as prayed for subject to his paying cost of Rs. 5,000/- to the State by way of depositing the same in the Court at the time of filing of the fresh suit.

The petition stands disposed of accordingly, so also pending miscellaneous application(s), if any.

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

Naresh Kumar …. Petitioner
Versus
State of H.P. and others …. Respondents

CWP No. 1641 of 2012.
Reserved on : 01.05.2017.
Date of decision: 21.06.2017.

Constitution of India, 1950- Article 226- Petitioner was appointed as Physical Education Teacher under PTA Grant in Aid Rules - his appointment was challenged by respondent No. 4 _ Inquiry Committee set aside the appointment of the petitioner after holding that the proper procedure was not followed and the appointment was not in accordance with the instructions of the Government- an appeal was filed, which was dismissed- a writ petition was filed, which was disposed of with a direction to re-consider the matter- a fresh Inquiry was conducted- inquiry committee prepared a fresh merit list and concluded that merit was ignored by appointing the petitioner- aggrieved from the report, present writ petition has been field- held that the criteria laid down in the letter dated 27.5.2008 cannot be applied retrospectively- it was to be determined whether the Committee had followed some reasonable criteria or not- criteria applied by earlier Selection Committee was not discussed- the record shows that Selection Committee had applied uniform criteria taking into consideration various relevant factors including respective educational qualifications of the candidates and their experience- all the three candidates were assessed on the basis of the same criteria- writ petition allowed and the order of Inquiry Committee set aside. (Para-9 to 13)

For the petitioner	Mr. Amit Singh Chandel, Advocate.
For the respondents :	Mr. Vikram Thakur and Ms. Parul Negi, Dy. AGs for respondents No. 1 to 3.
	Mr. G.R. Palsra, Advocate for respondent No. 4.

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 order dated 17.1.2012, passed by enquiry committee may kindly be quashed with all consequential benefits while issuing the writ of Certiorari.

b) 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. Brief facts necessary of the adjudication of the present case are that the petitioner was appointed as Physical Education Teacher, under PTA Grant-in-Aid Rules, in September, 2006. The selection committee comprising of Chairman/Pradhan of PTA, Subject Expert and PTA Secretary found the petitioner to be most meritorious amongst three candidates who were considered for the post of Physical Education Teacher. This is apparent from Annexure P-7 appended alongwith a supplementary affidavit filed by the petitioner. Said appointment of the petitioner was assailed by respondent No. 4.

3. Vide order dated 15th October, 2008, Annexure P-1, the Inquiry Committee so constituted to look into the complaint made against the appointment made by the PTA, set aside the appointment of the present petitioner by holding that proper procedure to select the candidate for the post in issue was not followed and adopted by the PTA. As per the said Committee, the appointment of the petitioner was not in consonance with the instructions contained in para 11 of the guidelines of notification dated 27th May, 2008, relevant extract of the order is quoted here-in-below.

"Findings:

In view of above discussions, the committee has come to the conclusion that proper procedure to select the candidate for the above said post was not followed and adopted by the PTA and hence the appointment of Sh. Naresh Kumar as PET in GSSS Baryara made by the PTA of the said school is not acceptable as per instructions contained in Para 11 of the guidelines of the notification No. EDN-A-Khat (7)3/2006, dated the 27th May, 2008. Since proper procedure has not been followed by the PTA selection committee, the claim of the complainant for appointment in place of respondent also do not succeeds. Copy of this enquiry report be sent to the Principal-cum-Chairman (PTA) GSSS Baryara and PTA of the concerned school for further necessary action."

4. In appeal, order so passed by the committee was upheld by the Appellate Authority vide order dated 24.12.2008, Annexure P-2.

5. Feeling aggrieved, the petitioner filed CWP No. 1101 of 2009 in this regard. The above referred petition was disposed of by this Court on 18th of March, 2010 in the following terms.

" 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 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."

6. Thereafter, in compliance to order so passed by this Court in CWP No. 1101 of 2009, a fresh Inquiry Committee again went into the complaint which was so made against the appointment of the petitioner by respondent No. 4 and vide order dated 17th January, 2012, Annexure P-4, after determining the merit afresh of the three candidates who had participated in the initial selection held in September, 2006, the Committee held as under:

"The record related to the appointment made by the PTA on this post was perused. It is found that there were only three candidates appeared for the interview for the said post held on 18.09.2006. In order to comply the orders of the Hon'ble High Court of H.P. dated 04.08.2009 and dated 28.07.2009 passed in the CWPs as referred to in the foregoing paras, to ensure transparency in the selection and also to arrive at a concrete conclusion on the basis of the objective analysis whether the merit has been ignored or not, the committee assess the merit on the basis of the following criteria:-

1. Matric = 10 Marks

2. Plus-Two = 10 Marks

3. BA/Graduation = 10 Marks

4. BPED/Diploma = 10 Marks

Total = 40 Marks

In view of above mentioned criteria, the merit of each candidate is calculated as under:-

Sr. No.	Name of candidate	D.O.B.	Marks obtained in Matric 10	Marks obtained in +2 10	Marks obtained in Graduation 10	Marks obtained in BPEd/ diploma 10	Total Marks 40	Merit position
1.	Sh. Khem Chand S/O Sh. Ganga	28.4. 1981	365/700 5.21	157/400 3.92	400/1000 4	855/1200 7.12	20.25	II

	Ram							
2.	Sh. Naresh Kumar S/o Sh.Hem Singh	06.03. 1983	393/700 5.61	191/400 4.77	2163/3 100 6.97	-- --	17.3 5	III
3.	Sh. Brij Lal S/o Sh. Moh- an Singh	21.9. 1978	320/700 4.57	149/400 3.72	2154/3 100 6.94	852/12 00 7.10	22.3 3	I

From the above said merit calculation it can be very safely concluded that Sh. Brij Lal has secured first position whereas respondent Naresh Kumar has secured 3rd position. Hence, Sh. Brij Lal was the most meritorious candidate for the above post. Therefore, committee come to the conclusion that the merit has been ignored in the above selection by the then PTA Committee of the GSS Baryara Sub-Tehsil Kotli, District Mandi, H.P. Accordingly, appointment of respondent Naresh Kumar as PET, GSSS Baryara made by the PTA on the said school on 18.09.2006 was not valid."

7. Feeling aggrieved by the order so passed by the Inquiry Committee, the petitioner has filed the present writ petition.

8. I have heard learned Counsel for the parties and also gone through the pleadings of the case.

9. A perusal of the impugned order so passed by the Inquiry Committee dated 17.01.2012 demonstrates that the said Committee assessed the merit of the three candidates who had participated in the initial selection which included the present petitioner as well as respondent No. 3 on the basis of following criteria:

"1. Matric = 10 Marks
2. Plus-Two = 10 Marks
3. BA/Graduation = 10 Marks
4. BPED/Diploma = 10 Marks
Total = 40 Marks"

10. By applying the said criteria, it re-determined the merit of the candidates and concluded that appointment of present petitioner made by PTA on 18.09.2006 was not valid. While doing so, it was observed by the Inquiry Committee that this Court in its order dated 18.03.2010 had directed that Inquiry Committee could consider the matter afresh in the light of observations made by this Court in CWP No. 525 of 2009, titled Ravinder Singh Vs. State, decided on 04.08.2009 and CWP No. 2632 of 2009, titled Koyal Kumar Vs. State, decided on 28.07.2009.

11. Before proceeding further, it is pertinent to refer to the judgment passed by Hon'ble Division Bench of this Court in CWP No. 525 of 2009, Ravinder Singh Vs. State. In the above mentioned judgment, it was held by this Court that notification issued by the State Government dated 27th May, 2008, lays down the parameters, which Inquiry Committee can only to look into pertaining to the appointments made on PTA basis. Hon'ble Division Bench of this Court in very unambiguous terms held that criteria cannot be applied retrospectively, that is to say that criteria laid down in notification dated 27th May, 2008 could not be applied retrospectively as it was well settled principle of law that State by executive instructions cannot take away the vested rights of any person with retrospective effect. Hon'ble Division Bench also categorically held that in such like cases, if PTA had followed some reasonable criteria, then fresh criteria cannot be applied to set aside the valid selection.

12. In the present case, the appointment of the present petitioner has been set aside by the Inquiry Committee by way of impugned order by applying fresh criteria to assess the merits of the candidates. A perusal of the impugned order demonstrates that there is no discussion made in the same that criteria which was applied by the earlier selection committee, which selected the petitioner for being appointed as Physical Education Teacher, suffered from any infirmity nor any conclusion in this regard has been arrived at in the impugned order by the Inquiry Committee. A perusal of the order of the selection committee which selected the petitioner dated 18.09.2006 demonstrates that the merit of the candidates was determined by the said committee by applying a uniform criteria by taking into consideration various relevant factors including the respective educational qualifications of the candidates and their experience etc. Therefore, it is not as if the petitioner was appointed as Physical Education Teacher in September, 2006 by adopting either an arbitrary criteria or by adopting unreasonable criteria. All the three candidates were assessed on the basis of same yardstick and the petitioner was found to be more meritorious amongst them. In my considered view, at the time of selection of the petitioner, PTA in fact had followed reasonable criteria and in this background, the new Inquiry Committee could not have applied a fresh criteria to re-assess the merits of the candidates. By doing so, the Inquiry Committee has not only done injustice to the petitioner but obviously has also done violence to the judgment passed by the Hon'ble Division Bench of this Court in CWP No. 525 of 2009, Ravinder Singh Vs. State, dated 04.08.2009. This is for the reason that before re-assessing the merit of the candidates, the executive committee erred in not appreciating that the Hon'ble Division Bench of this Court in judgment referred to above had categorically directed that the notification which stood issued by the State Government dated 27th May, 2008 was not to be applied retrospectively and in case of appointments which were made before the issuance of the said notification, if a reasonable criteria had been followed by the PTA, then the Inquiry Committees were not to apply any fresh criteria to set aside a valid selection.

13. Therefore, in view of above discussion, this writ petition is allowed. Impugned order passed by the Inquiry Committee dated 17th January, 2012, Annexure P-4 is quashed and set aside and the appointment of the petitioner made against the post of Physical Education Teacher, pursuant to the selection which took place on the basis of interviews held on 18.09.2006, is upheld with all consequential benefits.

Petition stands disposed of in above terms, so also pending miscellaneous application(s), if any. No orders as to costs.

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

Smt. Narvada Devi ....Appellant.
Versus
State of Himachal Pradesh and others ... Respondents.

RSA No. : 165 of 2004.
Reserved on: 03.05.2017.
Decided on : 21.06.2017.

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit pleading that two daughters and one son were born to her- plaintiff underwent a sterilization operation in a camp organized by Health Department – however, she conceived and gave birth to a male child- hence, she filed a civil suit for seeking damages- defendants pleaded that there are chances of failure of sterilization operation and plaintiff should have visited the hospital to avoid the birth of the child- suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that the operation was not disputed- it was also not disputed that plaintiff had given birth to a child after 11 years of operation- Medical Officer deposed that failure can occur due to

recanalisation up to 0.1 to 0.3% because of hormonal process of the body – negligence of defendant No.2 was not proved- a surgeon cannot guarantee 100% success in every case- Courts had rightly appreciated the evidence- appeal dismissed. (Para- 10 to 14)

Cases referred:

Laxman vs. Trimbak, AIR 1969 SC 128
Philips India Ltd. vs. Kunju Punju and another) AIR 1975 page 306
Ram Bihari Lal Vs. Dr. J.N. Srivastava, AIR 1985 MP 150
Jacob Mathew vs. State of Punjab and another, (2005) 6 Supreme Court Cases, 1

For the appellant Mr. Ajit Sharma, Advocate vice Mr. Rajiv Jiwan, Advocate.
For the respondents Mr. Vikram Thakur and Mr. Punit Rajta, Dy. AGs.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, appellant/plaintiff has challenged the judgment and decree passed by the Court of learned District Judge, Bilaspur, in Civil Appeal No. 109 of 2000, dated 06.10.2003, vide which learned Appellate Court while upholding the judgment and decree passed by the court of learned Senior Sub Judge, Bilaspur, in Civil Suit No. 179-1 of 1997, 12.08.1999, dismissed the appeal so filed by the appellant.

2. Brief facts necessary for the adjudication of the case are that the appellant-plaintiff (hereinafter referred to as 'plaintiff') filed a suit for damages on the ground that she was married with Shri Sita Ram about 22 years back and after marriage, she had given birth to two daughters and one son. As per the plaintiff, her husband was not having sufficient means to support the family. Government of India and the Government of Himachal Pradesh had introduced public welfare schemes like family planning operations in Government hospitals. Taking into consideration her family circumstances and on the suggestions as well as inspiration of the defendants, plaintiff got herself operated for family planning by Medical Officer, Bilaspur at Sui Sarhar on 29.12.1984 when a camp in this regard was held by the Health Department. As per the plaintiff, despite having been operated upon, she conceived and gave birth to a male child on 16.07.1996. As per the plaintiff, she was suffering loss of Rs. 50,000/- for the purpose of maintenance of said child who was born after wrong and defective family planning operation by defendants. On these bases plaintiff filed the suit praying that a decree be passed for damages to the tune of Rs. 1,50,000/- as compensation of maintenance to the newly born child, as well as for causing physical and mentally agony to her and financial loss to her.

3. In their written statement, defendants contested the claim on the ground that the plaintiff underwent sterilization operation on 29.12.1984 at Sub Centre Sui Sarhar voluntarily and after long lapse of time, the cut ends of the fallopian tube might have joined which resulted into conception after thirteen years of her operation. As per defendants there were chances of failure of sterilization operation on account of one or other reason and pregnancy after sterilization operation could occur for various reasons. It was further mentioned in the written statement that after conception of pregnancy that too after 13 years of sterilization operation, the plaintiff could had consulted/visited the hospital to avoid birth of the child but she failed to avail the said alternative. On these bases, the claim of the plaintiff was denied by the defendants.

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

> *"1. Whether the plaintiff gave birth to child on account of wrong defective family planning operation carried by defendant No. 3? OPP.*

2. *If issue No. 1 is proved inaffirmative, whether the plaintiff is entitled to recover a sum of Rs. 1,50,000/- from the defendants? OPP*
3. *Whether the suit is not maintainable? OPD.*
4. *Whether the suit is barred by limitation? OPD.*
5. *Whether the plaintiff is estopped from filing the suit by her act and conduct? OPD.*
6. *Whether the plaintiffs is not entitled to any damages on the doctrine of volenti-non-fit injuria as alleged? OPD.*
7. *Relief."*

5. On the basis of evidence produced on record both ocular as well as documentary by the respective parties, the following findings were returned by the learned trial Court on the issues so framed:-

"Issue No.1	*: No.*
Issue No. 2	*: No.*
Issue No. 3	*: Yes.*
Issue No.4	*: No.*
Issue No.5	*: No.*
Issue No.6	*: No.*
Issue No.7	*: The suit of the plaintiffs is dismissed per operative part of the judgment."*

6. Learned trial Court vide its judgment and decree dated 12.908.1999 dismissed the suit filed by the plaintiff by holding that the factum of plaintiff having undergone sterilization operation on at Sub Centre Sui Sarhar, District Bilaspur on 29.12.1984 was not in dispute, but the plaintiff who entered the witness box as PW1 was silent about any negligence on the part of the Doctor who operated her nor was there any material in her evidence to warrant that operation conducted upon her was defective. Learned trial Court concluded that from the evidence it could not be held that operation was done carelessly or the operation was defective.

7. In appeal, judgment and decree so passed by the learned trial Court was upheld by the learned first Appellate Court. While dismissing the appeal so filed before it, it was held by the learned first Appellate Court that true test of establishing negligence on the part of a doctor in diagnosis or treatment is whether the said doctor has been proved guilty of such failure, as no other doctor or ordinary skill would be guilty of while acting with reasonable care. Learned Appellate Court relying upon the judgment of Hon'ble Supreme Court passed in *Laxman vs. Trimbak, AIR 1969 SC 128*, judgment passed by Hon'ble High Court of Bombay in *Philips India Ltd. vs. Kunju Punju and another) AIR 1975 page 306* and judgment of Hon'ble High Court of Madhya Pradesh passed in *Ram Bihari Lal Vs. Dr. J.N. Srivastava, AIR 1985 MP 150* held that claim for damages against State had to be analyzed by taking in to consideration the perspective whether it stood established the that conduct of the Medical Officer of the State to be unreasonable. Learned Appellate Court held that doctor Inder Singh (DW1) was a qualified Medical Officer with more than 10 years service experience. It further held that said doctor, who had entered into the witness box as DW1, deposed that in medical science, failure of tubectomy operation stood recognized and as such the charge of negligence against the State was unfounded. Learned first Appellate Court held that it was not the case of the plaintiff that Doctor Inder Singh had performed the operation in issue in a negligent manner upon the plaintiff on 24.12.1984 and as a result of said operation the plaintiff had developed some complications. It further held that operation was successful for over 11 years and the requirement of law that Medical Officer must exercise reasonable care in the performance of tubectomy operation thus stood proved. Learned appellate Court also held in para 16 of the judgment that no steps were taken by the plaintiff to terminate the pregnancy at the earliest and her contention that she stood notified of her pregnancy when the said pregnancy was of 5 months duration was a concocted

version as in fact the plaintiff was aware of the pregnancy when her menstrual cycle stopped in October/November, 1995. It also held that if the plaintiff did not wanted to have the said child, she could have had terminated the pregnancy at the earliest which was not done. Learned Appellate Court also took into consideration the text from Clinical Obstetrics 8th Edition by A.L. Muudallar and M.K. Krishna Menan, orient Longman law publication chapter 66 at page 571, 572 and 573, in which it is stated that failure rate of tubectomy operation from 0.3% to 0.5 % stood universally recognized. It further held that learned trial Court had correctly observed that mere development of pregnancy after 11 years did not establish the charge of negligence against the Medical Officer of the State. On these bases, learned Appellate Court while concurring with the findings of the learned trial Court, dismissed the appeal.

8. Feeling aggrieved, the plaintiff filed this appeal which was admitted on the following substantial question of law.

> *"1.Whether the Courts below have illegally given the benefit of alleged plea of failure of tubectomy operation to the respondents?"*

9. 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.

10. It is not in dispute that the plaintiff was operated upon on 29.12.1984 by the concerned Medical Officer i.e. DW1 Inder Singh and she gave birth of a child post the said operation on 16.07.1996 i.e. after more than 11 years of the operation. While dismissing the plaint as well as the appeal filed by the plaintiff it was held by both the learned Courts below that the plaintiff had failed to establish medical negligence on the part of the Medical Officer who had conducted sterilization operation upon her on 29.12.1984. While arriving at the said conclusion, it was held by the learned Courts below that it is not as if immediately after the operation which was conducted upon the plaintiff in the year 1984, she developed complications and the very fact that the child was born after about 11 years of the operation proved that operation when conducted was successful. Learned Courts below by taking into consideration the written statement filed by the defendants and the testimony of the defence witnesses also held that failure of such like operations to some extent was a universally recognized feature and this *ipso facto* did not establish and prove that there was medical negligence on the part of doctor who had conducted the operation.

11. In my considered view, finding so returned by both the learned Courts below are neither perverse nor factually incorrect. It cannot be said that the Courts have illegally given the benefit of failure of tubectomy operation to the respondents. The birth of the child had taken place after more than 11 years of the operation. Defendant No. 2 i.e. Medical Officer concerned, who had operated the plaintiff in the year 1984, had entered the witness box as DW1. In his examination in chief, this witness has deposed that failure due to recanalisation up to 0.1 to 0.3 percent occurred because of hormonal process of the body and this does not reflects that the operation so conducted upon the patient was not a successful operation. Now, in his cross examination, there is no suggestion put to the said witness on behalf of the plaintiff that what the said witness was stating was incorrect. During the course of arguments, learned Counsel for the appellant could not furnish any justifiable explanation as to why the plaintiff did not take immediate recourse for termination of pregnancy if she did not wanted the 4th child. A perusal of the statement of the plaintiff in the Court as PW1 clearly and categorically demonstrates that her credibility stands impeached in the cross examination by the defendants. Besides this, as has been rightly held by both the learned Courts below in order to prove that defendant No. 2 was negligent while operating the plaintiff, it was incumbent upon the plaintiff to have had proved that at the time of operation, defendant No. 2 did not exercise skill and knowledge of reasonable degree which any other doctor in similar circumstances would have had exercised. As damages have been claimed by alleging negligence on the part of defendant No. 2, it was incumbent upon the plaintiff to have had both pleaded and proved the same which the plaintiff has failed to do.

12. Learned Appellate Court while dismissing the appeal so filed by the appellant has referred to the judgments of Hon'ble Supreme Court, Hon'ble High Court of Bombay and Hon'ble High Court of Madhya Pradesh respectively as well as the relevant medical text. Learned Counsel for the appellant could not demonstrate from the records as to how the findings so returned by the learned Appellate Court were not sustainable in the eyes of law.

13. A three Judge Bench of the Hon'ble Supreme Court in ***Jacob Mathew vs. State of Punjab and another, (2005) 6 Supreme Court Cases, 1***, has held that in the law of negligence, professionals such as lawyers, doctors etc. are included in the category of persons professing some special skill or skilled persons generally. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. Hon'ble Supreme Court in paras 21 and 22 (supra) has further held as under.

> *" 21.The degree of skill and care required by a medical practitioner is so stated in Halsbury's Laws of England (4th Edn., Vol. 30, para 35):*
>
> > *"35. The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care. Neither the very highest nor a very low degree of care and competence, judged in the light of the particular circumstances of each case, is that the law requires, and a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different treatment or operated in a different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though a body of adverse opinion also existed among medical men.*
> >
> > *Deviation from normal practice is not necessarily evidence of negligence. To establish liability on that basis it must be shown (l) that there is a usual and normal practice; (2) that the defendant has not adopted it; and (3) that the course in fact adopted is one no professional man of ordinary skill would have taken had he been acting with ordinary care."*
>
> *The abovesaid three tests have also been stated as determinative of negligence in professional practice by Charlesworth &Perry in their celebrated work on Negligence (ibid., para 8. 110).*
>
> *22. In the opinion of Lord Denning, as expressed in Hucks v. Cole a medical practitioner was not to be held liable simply because things went wrong from mischance or misadventure or through an error of judgment in choosing one reasonable course of treatment in preference of another. A medical practitioner would be liable only where his conduct fell below that of the standards of a reasonably competent practitioner in his field."*

14. Therefore, in view of above discussion, it cannot be said that learned Courts below have illegally given the benefit of failure of tubectomy operation to the respondents and the substantial question of law stands answered accordingly.

Accordingly, as there is no merit in the appeal, the same is dismissed. No orders as to costs. Pending miscellaneous application(s), if any, also stand dismissed.

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

Sh. Gurpreet Singh ….Appellant.
Versus
Sh. Kapil Dev and others … Respondents.

FAO No. : 280 of 2010.
a/w CO No. 245 of 2011.
Decided on : 22.06.2017.

Motor Vehicles Act, 1988- Section 149- Claimant suffered multiple injuries in a motor vehicle accident caused by the rash and negligent driving of the driver of the vehicle- a claim petition was filed, which was allowed- it was directed that compensation shall be paid by the owner of the vehicle – held in appeal that registration certificate of the vehicle shows that it was a heavy transport vehicle- Tribunal held that driving licence did not authorize the driver to drive heavy transport vehicle as there was no endorsement on the same to this effect- Driving licence shows that the driver was authorized to drive light motor vehicle as well as heavy transport vehicle- the vehicle being driven by the driver was a transport vehicle- heavy motor vehicle is not a distinct category in Section 10(2) of the Act- Tribunal had wrongly saddled the owner with liability- appeal allowed and Insurance Company directed to pay the compensation. (Para-9 to 15)

For the appellant Mr. Deepak Kaushal, Advocate.
For the respondents Mr. Gaurav Gautam, Advocatae for respondent No. 1.
None for respondent No. 2.
Mr. Raman Sethi, Advocate for respondent No. 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this appeal, appellant/owner has assailed the award passed by the Court of learned Motor Accident Claims Tribunal, Solan, in MAC Petition No. 17-NL//2 of 2008/07, dated 26.06.2010, vide which learned Tribunal below while allowing the claim petition, held the owner and driver of the vehicle involved in the accident jointly and severally liable to indemnify the claimant.

2. Brief facts necessary for the adjudication of the present case are that a claim petition was filed before Motor Accidents Claims Tribunal, Solan, by present respondent No. 1 on the ground that on 21.11.2006 while he was going to Baddi on a motorcycle which was being driven by his brother Navdeep, at around 10:45 a.m., when they reached near village Bhud, a vehicle bearing registration No. PB-12-9722 by came from the opposite side being driven by its driver Mohan Singh rashly and negligently which hit the motor cycle of the petitioner, on account of which, he as well as his brother fell down and suffered multiple injuries. As per the claimant, he took preliminary treatment from Civil Hospital Nalagarh and thereafter got his right leg operated upon in PGI Chandigarh and thereafter twice at Ortho Hospital, Anandpur Sahib. On these bases, he filed the claim petition mentioning therein that he was disabled on account of accident which took place due to rash and negligent driving of the offending vehicle by its driver. He claimed compensation to the tune of Rs. 5,00,000/- from the respondents.

3. Learned Tribunal vide its award dated 26.06.2010 allowed the claim petition with costs and awarded compensation in favour of claimant in the following terms.

> *"In view of my discussion and conclusions on aforesaid issues, the petition is allowed with costs assessed at Rs.1000/- and an award of Rs.1,92,800/- (Rupees one lac ninety two thousand eight hundred only) with interest at the rate of 7.5 %*

per annum from the date of petition i.e. 16-6-2007 till its deposit in this Tribunal, inclusive of the amount of interim compensation, if any paid or payable under section 140 of the Motor Vehicles Act is passed in favour of the petitioner and against respondents 1 and 2 jointly and severally. However, this account of compensation shall be paid by respondent No. 1, the owner of the offending vehicle. Memo of costs be prepared and the file after due completion be consigned to records."

4. Thus while allowing the claim petition, it was held by the learned Tribunal that the amount of compensation shall be paid by respondent No. 1, i.e. owner of the vehicle.

5. Feeling aggrieved by the award so passed by the learned Tribunal, the owner of the vehicle has filed this appeal.

6. Mr. Deepak Kaushal, learned Counsel for the appellant/owner has argued that the conclusion arrived at by the learned Tribunal that in the absence of there being any endorsement on the licence of the driver to the effect that he was entitled to drive heavy transport vehicle there was breach of the terms of the Insurance Policy and that the driver in issue was not holding valid and effective driving licence, are perverse findings because while arriving at the said conclusion, learned Tribunal has erred in not appreciating the statutory provisions of Section 10 of the Motor Vehicle Act, as they stood post amendment carried out in the same in the year 1994, as well as the endorsements in the licence of the driver which clearly and categorically demonstrated that the driver in fact was possessing a valid and effective driving licence, as on the date of the accident, to drive a "Transport Vehicle" and the vehicle which was involved in the accident happened to be a "Transport Vehicle".

7. On the other hand, Mr. Raman Sethi, learned Counsel for respondent No. 3/Insurance Company has argued that there is no infirmity in the findings so returned by learned Tribunal because in the absence of there being any endorsement on the driving licence of the driver to the effect that he was entitled to drive a 'Heavy Transport Vehicle', the Insurance Company could not have been ordered to indemnify the amount of the compensation as the offending vehicle was being driven on the date of the accident in breach of the terms of the Insurance Policy.

8. I have heard learned Counsel for the parties and also gone through the records of the case as well as the award passed by the learned Tribunal below.

9. Learned Tribunal in para 17 of the award under challenge has held that Registration Certificate of the offending vehicle demonstrated that it was a Heavy Transport Vehicle. Learned Tribunal further held that driving licence Ext. RW1/A does not reveal that the driver, by virtue of the said licence, at the relevant time, was authorized to drive heavy transport vehicle as there was no endorsement on the same to this effect. On these bases, it was further held by the learned Tribunal the driver was not holding valid and effective driving licence to drive the offending vehicle and therefore compensation was liable to be paid by the owner of the vehicle.

10. In my considered view, the findings so returned by the learned Tribunal are perverse and not sustainable either on facts or law. A perusal of the driving licence which was being possessed by driver as on the date when the accident took place demonstrates that the driver was authorized to drive both a 'light motor vehicle' as well as a 'transport vehicle'. This is *per se* evident from the perusal of the driving licence itself in which it is clearly mentioned that the licensee was licensed to driver throughout India a vehicle of the description mentioned therein i.e. "Light Motor Veh., Transport Veh."

11. Section 10 of the Motor Vehicle Act as it stands post amendment carried out in the year 1994 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 classes, 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 cycle of a specified description.

12. It is not in dispute that the vehicle involved in the accident which was being driven by the driver was in fact a transport vehicle. However, because the said vehicle was a heavy motor vehicle, therefore, as per learned Tribunal, endorsement to this effect ought to have been on the licence.

13. Subsection 2 of Section 10 of the Motor Vehicle Act stipulates that a driving licence should expressly mention that it entitles the holder of the same to drive a motor vehicle of one or more of classes mentioned therein. Now, the classes in said sub Section have already been quoted above. This does not include a heavy motor vehicle as a different and distinct category. After the amendment carried out in the year 1994 in Section 10 supra, the un-amended provisions which contained four clauses of vehicle i.e. (a) Light motor vehicle (b) Light Goods Vehicle (c) Heavy Goods vehicle and (d) Heavy passenger vehicle have been confined/converted to one class/category i.e. "transport vehicle". This very important aspect of the matter has not been taken into consideration by the learned Tribunal while fastening the liability upon the present appellant. In my considered view, as the licence possessed by the driver as on the date when the accident took place authorized him to drive the transport vehicle and admittedly the vehicle involved in the accident was a transport vehicle, the liability to pay the compensation was not that of the owner but it was for the Insurance Company to have had indemnified the said liability of the owner as no breach of conditions of the Insurance Policy was there.

14. Accordingly, in view of the discussion held hereinabove, this appeal is allowed and the impugned award is modified to the extent that the compensation so awarded by the learned Tribunal shall be paid by the Insurance Company i.e. respondent No. 3 before the learned Tribunal and as well before this Court and not by the present appellant.

15. The Registry is directed to release the amount so deposited by the appellant in the bank account of the appellant with up-to-date interest, details of which shall be furnished by the appellant to the Registry.

16 . The appeal stands disposed of in the above terms, so also pending miscellaneous application(s), if any.

Cross Objection No. 245 of 2011.

17. Primarily, by way of the cross objections, the objector has assailed the compensation awarded by the learned Tribunal on the ground that the compensation so awarded is on the lower side as learned Tribunal erred in not considering the income tax return which was filed by the claimant pertaining to the year 2009-10.

18. I have heard learned Counsel for the parties and also gone through the averments made in the cross objections as well as the award passed by learned tribunal below. A perusal of para 13 of the award passed by learned Tribunal demonstrates that learned Tribunal has not only taken into consideration the income tax return so filed by the claimant before it for

the year 2009-10, Ext. PA, but it also discussed therein as to why the same has not been made basis for determining the compensation. The reasoning which has been given by learned Tribunal for the same was that the accident took place in the year 2006 whereas the income tax return pertained to the year 2009-10 and there was no cogent material placed on record by the claimant from which it could be inferred as to what was his income as on the date when the accident took place.

19. In my considered view, the findings so returned by the learned Tribunal are duly borne out from the records of the case and the same are not perverse, neither can it therefore be said that the compensation so assessed by the leaned Tribunal is on the lower side, as has been urged by the learned Counsel for the objector. Accordingly, as there is no merit in the cross objections, the same are dismissed. No orders as to costs.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant
Versus
Bhagmal .....Respondent

Cr. Appeal No. 361 of 2006
Reserved on: 19.06.2017
Decided on: 03.07.2017

Indian Penal Code, 1860- Section 325, 504 and 506- An altercation took place between informant and the accused- accused picked up stone and hit the informant on the face causing dislocation of six teeth- accused was tried and acquitted by the Trial Court- held in appeal that no independent was examined – informant has enmity with the accused- Dental Surgeon was not examined to prove the dislocation of the teeth- Trial Court had rightly acquitted the accused in these circumstances- appeal dismissed. (Para-7 to 12)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant : Mr. Pushpinder Jaswal, Dy. AG with Mr. Rajat Chauhan, Law Officer.
For the respondent : Mr. N.K. Thakur, Sr. Advocate with Mr. Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present criminal appeal, under Section 378 of the Code of Criminal Procedure has been maintained by the appellant-State, against the judgment of acquittal, dated 12.01.2006, passed by the learned Additional Chief Judicial Magistrate, Sarkaghat, District Mandi, H.P., in Police challan No. 102-II/2001.

2. The key facts, giving rise to the present appeal as per the prosecution story are that on 21.11.2000, at about 6.00 p.m., dog of the accused was wandering into the courtyard of the complainant, when it was objected by the complainant, the parties entered into an altercation and during the course of said altercation, the accused picked up a stone and hit the complainant

on his face, which resulted into dislocation of his six teeth. The complainant after being hit by the accused was taken to CHC, Dharampur, for medical assistance, wherefrom he was referred to Regional Hospital, Sarkaghat. After medical examination, it was found that the complainant has sustained grievous injuries due to the dislocation of his teeth. Thereafter, the matter was reported to the Police and statement of the complainant, under Section 154 Cr.P.C., was recorded, on the basis of which, FIR No. 305/2000, dated 22.11.2000, under Sections 325, 504 and 506 IPC, was registered against the accused. The Investigating Officer visited the spot on 23.11.2000 and took into possession the teeth and stones, vide separate seizure memo. He also prepared the spot map and recorded the statements of the witnesses under Section 161 Cr.P.C. After completion of investigation, challan was presented before the learned trial Court.

3. Prosecution, in order to prove its case, examined as many as 9 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C, wherein he denied the prosecution case and claimed innocence. Accused did not lead any defence evidence. The learned trial Court, vide impugned judgment dated 12.01.2006, acquitted the accused.

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

5. Learned Deputy Advocate General has argued that learned Court below, ignoring the evidence which has come of record, acquitted the accused on the basis of surmises and conjectures, the learned Court below has failed to take into consideration the fact that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. He has further argued that present is a fit case where judgment of the learned Court below is required to be set aside and after re-appreciating the evidence, the accused be convicted. On the other hand learned counsel appearing on behalf of the respondent-accused has argued that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt and there is nothing on record to conclude that any injuries were caused to the complainant or there was any altercation, thus the judgment of the learned Court below is required to be upheld.

6. To appreciate the arguments of learned Deputy Advocate General and learned defence counsel, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

7. PW-3, complainant and PW-4, his wife, both have testified the involvement of the accused in the said accident and have stated that on the said day of occurrence, the altercation between the parties started, when the complainant hit the dog of the accused, who was wandering into his courtyard. The minor altercation between the parties later took the shape of scuffle, the accused picked up a stone and hit the complainant on his face, which resulted into dislocation of his six teeth, due to which, the complainant sustained grievous injuries. However, both these witnesses have also admitted the fact of personal enmity between the parties.

8. PW-2, Jai Ram, eye witness of the occurrence, has not supported the case of the prosecution and feigned his ignorance about the involvement of the accused in the said accident.

9. From the above, it is clear that there is no independent assertion qua involvement of the accused in the said accident. The only evidence which has come on record, is in the form of interested witnesses i.e., complainant and his wife. The complainant in his statement has also admitted the personal enmity between the parties and as independent witnesses have not supported the prosecution case, in these circumstances, the involvement of the accused, on account of personal enmity in the present case, cannot be ruled out. There is no unbiased evidence on record which suggests that the parties entered into an altercation when the complainant hit the dog of the accused, who was wandering into the courtyard of the accused, thus in absence of any cogent and reliable evidence, the occurrence is not established. Further to prove injury i.e., dislocation of teeth, Dental Surgeon was not examined, the same is fatal to the prosecution case, when the case is based upon dislocation of teeth.

10. In view of what has been discussed hereinabove, this Court finds that the prosecution has failed to proved the guilt of the accused beyond the shadow of reasonable doubt,

as neither the Dental Surgeon was examined to prove the grievous injuries, nor any independent witnesses have supported the version of the complainant and his wife. The complainant and his wife have also admitted old enmity *inter se* the parties, in these circumstances, it is difficult to hold that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt.

11. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

12. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

13. In view of the aforesaid decisions of the Hon'ble Supreme Court and the discussion made hereinabove, I find no merit in this appeal and the same deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

LPA's No. 208 of 2010
and 297 of 2010
Decided on July 5, 2017

1. **LPA No. 208 of 2010**

Seema ....Appellant
Versus
CSK H.P. Krishi Vishwavidyalaya and another ....Respondents

2. **LPA No. 297 of 2010**

The CSK H.P. Krishi Vishvavidalya ....Appellant
Versus
Ms. Satya Bhama and another ....Respondents

Constitution of India, 1950- Article 226- An advertisement was issued for filling up various posts by the University- petitioner and S participated in the selection process- Committee recommended the name of S- petitioner filed a petition for challenging the appointment- petition was allowed and University was directed to re-do the entire selection process in accordance with law- held in appeal that petitioner had obtained 28.10 marks while S had obtained 32.9 marks - two experts were associated from other universities - Court had taken into consideration the bio-data of the petitioner while issuing the directions - however, Selection Committee had already taken the bio-data into consideration while making selection- it cannot be said that Selection Committee had not determined the merit of the candidates in a just and fair manner- it is not permissible for a candidate to appear before the Selection Committee and thereafter to challenge the process- appeal allowed and order passed by the Writ Court set aside. (Para-8 to 18)

Cases referred:

Guman Singh versus State of Rajasthan and others, 1971(2) SCC 452
Badrinath versus Government of Tamil Nadu and others, (2000) 8 SCC 395
Ashok Kumar v. State of Bihar, (2017) 4 SCC 357

For the appellant(s)	Mr. Subhash Sharma, Advocate, for the appellant in LPA No. 208 of 2010 and for respondent No.2 in LPA No. 297 of 2010.
For the respondents	Mr. Lokender Paul Thakur, Advocate, for respondent No.1 in LPA No. 208 of 2010 and for the appellant in LPA No. 297 of 2010.
	Mr. Divya Raj Singh, Advocate, for respondent No. 2 in LPA No. 208 of 2010 and for respondent No.1 in LPA No. 297 of 2010.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

These Letters Patent Appeals have been instituted against judgment dated 20.7.2010 passed by a learned Single Judge of this Court in CWP(T) No. 13586 of 2008, whereby, writ petition having been filed by one Satya Bhama, came to be allowed and direction was issued to the respondent-University to redo the entire selection process in accordance with law.

2. LPA No. 208 of 2010 has been filed by one Seema, (respondent No.2 in the CWP(T) No. 13586 of 2008) and LPA No. 297 of 2010 has been filed by the respondent-University. Since both the appeals are against the same judgment, as such both are being decided by this common judgment.

3. Briefly stated the facts, as emerge from the record are that respondent-University, vide advertisement No. 1/2005 dated 3.2.2005(Annexure A-1) invited application for filling up various posts in the respondent-University, including that of Assistant Extension Specialist (Home Science) in the pay scale of Rs.8000-13500 (UGC), with minimum educational qualification for the same as M.Sc. having qualified NET from UGC/CSIR, ICAR or similar test accredited by UGC/State in the concerned discipline/subject. Satya Bhama (writ petitioner) as well as Seema participated in the selection process, however, the fact remains that the Selection Committee recommended name of Seema for appointment to the post of Assistant Extension Specialist (Home Science) and, accordingly, she was given appointment letter on 7.4.2006. Being aggrieved and dissatisfied with aforesaid selection of Seema, Satya Bhama preferred OA No. 1506 of 2006, before the Himachal Pradesh Administrative Tribunal, which subsequently came to be transferred to this Court, and registered as CWP(T) No. 13586 of 2008. Learned Single Judge, vide judgment dated 20.7.2010, while allowing petition of Satya Bhama, quashed and set aside appointment of Seema and directed the University to redo the entire selection process, in accordance with law. In the aforesaid background, present appeals came to be filed, one by Seema and another by the University itself.

4. Mr. Subhash Sharma, learned counsel representing the appellant in LPA No. 208 of 2010, while inviting attention of this Court to the merit list drawn by the selection committee, (available on record at page 56) stated that since his client was found to be more meritorious by the Selection Committee comprising of eight experts, there was no occasion for the learned Single Judge to set aside appointment of his client that too on the basis of bio-data made available to him during proceedings of the case. Mr. Sharma, further contended that bare perusal of merit list suggests that his client procured 32.9 marks in the selection process, whereas, Satya Bhama could only procure 28.10 marks, as such, his client rightly came to be appointed as Assistant Extension Specialist (Home Science). While referring to the aforesaid document, Mr. Sharma, contended that it is ample clear that Selection Committee was comprised of eight experts including one Professor from Department of Home Science, Extn. Education, PAU, Ludhiana. Apart from above, one member of the Selection Committee was from CCS, HAU Hisar. Learned counsel further contended that candidature of his client was considered and recommended under SC category by the Selection Committee. Mr. Sharma, further contended that there was no occasion for the learned Single Judge to take note of marks allegedly obtained by Satya Bhama in school examinations, while ascertaining correctness and genuineness of merit drawn by the Selection Committee, which had taken into consideration only academic record pertaining to B.Sc./B.B.Sc./M.Sc./M.M.Sc. and Ph.d.

5. Mr. Lokender Thakur, learned counsel representing the University, also stated that selection was carried out by the Selection Committee comprising of eight experts, strictly in accordance with advertisement. Mr. Thakur, further contended that perusal of marksheet as placed on record by appellant (Satya Bhama) itself suggests that Selection Committee had evolved its own mechanism to ascertain merit of candidates and accordingly, awarded marks to the eligible candidates as per their entitlement.

6. Mr. Divya Raj Singh, learned counsel representing the respondent-Satya Bhama, in both the appeals, vehemently opposed aforesaid submissions having been made by the learned counsel on the other side and stated that there is no illegality or infirmity in the judgment passed by learned Single Judge, rather, same is based upon correct appreciation of evidence adduced on record by the University i.e. bio-data, which certainly suggest that his client was on a better footing, so far as academic record is concerned. Learned counsel representing respondent No.-2 Satya Bhama, further contended that since his client was appointed as Research Associate on 15.5.2001, she had experience in the in the relevant field in the University with effect from 19.3.2001, whereas selected candidate i.e. Seema had no such experience. Mr. Divya Raj Singh, further contended that, by now it is settled law that decision of selection committee can be interfered with where parameters with regard to qualification and experience have been ignored by selection committee and a candidate, who is less meritorious is selected to the post in question. Since in the instant case, Seema, was unduly favoured by the Selection Committee, her selection was rightly set aside by the learned Single Judge.

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

8. Before ascertaining the correctness and genuineness of the aforesaid submissions having been made by the learned counsel representing the parties vis-à-vis impugned judgment passed by learned Single Judge, it may be taken note of that pursuant to direction issued by this Court, entire record pertaining to selection in question was made available to this Court by the University, perusal whereof certainly suggests that Seema procured 32.9 marks in total and Satya Bhama procured 28.10 marks in total. It also emerges from the merit list drawn by the selection committee that Seema was selected as SC candidate against the post of Assistant Extension Specialist (Home Science). It also emerges from record that two experts were also associated by the Selection Committee from other Universities. As has been taken note above, that as per advertisement (annexure A-1), essential qualification for the post in question was M.Sc. having qualified NET from UGC/CSIR, ICAR or similar test accredited by UGC/State in the concerned discipline/subject, as such this Court sees no force in the arguments advanced by learned counsel representing Satya Bhama (writ petitioner) that his client was better qualified than Seema, who was admittedly possessing degree of M.Sc. and had also qualified NET.

9. In the aforesaid background, we find considerable force in the arguments having been advanced by learned counsel representing Seema and University that there was no occasion for learned Single Judge to place heavy reliance upon the bio-data of Satya Bhama, which was also made available during hearing of the case by the learned counsel representing University.

10. It nowhere emerges from the impugned judgment passed by learned Single Judge that record of selection committee was perused before coming to the conclusion that selection of Seema was bad in law. Though, it emerges from impugned judgment that record of selection committee was summoned, but, unfortunately, there is no mention of perusal of record, if any, by the learned Single Judge, while determining correctness of merit drawn by the Selection Committee, rather, impugned judgment clearly suggests that learned Single Judge, with a view to ascertain merit of Satya Bhama, ventured to take into consideration her bio-data. Factum with regard to Satya Bhama having more marks in matriculation as well as her working as teacher in some school, weighed heavily with the learned Single Judge, but, interestingly, learned Single Judge instead of comparing qualifications possessed by both the candidates in M.Sc. (which was essential qualification) compared bio-data of both the candidates, wherein, admittedly, they had

given complete details of their educational qualifications starting from matriculation till M.Sc./NET.

11. After having carefully perused merit list drawn by selection committee, we are convinced and satisfied that marks obtained in B.Sc./M.Sc. were taken into consideration by selection committee, while drawing merit list. Though, there was no requirement, as such, for selection committee to take into consideration marks obtained by candidates in B.Sc., because, it was not essential qualification as prescribed in the advertisement (Annexure A-1), record suggests that marks obtained in B.Sc. were also taken into consideration. Since, Satya Bhama obtained 66.7% marks in B.Sc. and 65% marks in M.Sc., she was awarded 6.6 and 6.5 marks qua her qualification and Seema, who had obtained 64% marks in B.Sc. and 65% marks in M.Sc, was awarded 6.4 and 6.5 marks for her qualification. Though, advertisement placed on record by Satya Bhama suggests that essential qualification required for appointment as Assistant Extension Specialist (Home Science) was M.Sc. and NET, it emerges from the record of selection committee that it had evolved its own scheme/mechanism to evaluate candidates, who had applied for the post in question. It also emerges from merit list that Seema was awarded 11 marks in interview whereas, Satya Bhama was awarded 8 marks. Though, this is not the case of Satya Bhama that she was awarded lesser marks in interview, but, even if three more marks are given to Satya Bhama, even then she would score 31.10 marks. So far as marks qua publication are concerned, definitely Court can not substitute its judgment for the wisdom of the Selection Committee, which in its wisdom found Seema to be more suitable for the post in question.

12. Hon'ble Apex Court in **Guman Singh** versus **State of Rajasthan and others,** 1971(2) SCC 452, as also taken note by the learned Single Judge, has categorically held that the term 'merit' is not capable of an easy definition but it can be safely said that merit is a sum total of various qualities and attributes of an employee such as his academic qualifications, his distinction in the University, his character, integrity, devotion to duty and the manner in which he discharges his official duties. Hon'ble Apex Court has further held that objective of introducing the idea of merit in the procedure of promotion is to serve public interest and not the personal interest of the official group concerned.

13. In the instant case, as has been discussed herein above, there is nothing on record from where it can be inferred that the Selection Committee did not determine merit of candidates, who applied for the post in question, in a just and fair manner, rather, this Court, after having carefully perused record of Selection Committee, differs with the findings returned by learned Single Judge that Satya Bhama, was more meritorious than Seema. Satya Bhama may be more meritorious than Seema, who was selected by the Selection Committee, but the fact remains that she was not found suitable by the Selection Committee comprising of experts on the subject. It is well settled by now that Court can not substitute its judgment for the wisdom of the Selection Committee.

14. Hon'ble Apex Court, in **Badrinath** versus **Government of Tamil Nadu and others,** (2000) 8 SCC 395 has held that Courts and Tribunals cannot interfere with assessments made by the Departmental Promotion Committee in regard to merit or fitness for promotion unless there is a strong case for applying the Wednesbury doctrine or there are mala fides.

15. In the instant case, though Mr. Divya Raj Singh, learned counsel representing Satya Bhama (writ petitioner), while inviting attention of this Court to the records, made an attempt to persuade this Court that selection committee met with a premeditated mind to select Seema, but aforesaid argument appears to be totally baseless, because, no material, if any, has been placed on record suggestive of the fact that selection committee favoured Seema, at the time of interview. Since, it emerges from record that Satya Bhama was working as a Research Associate prior to her applying for the post, allegations, if any, of favouritism could be leveled against Satya Bhama by Seema, by stating that authorities concerned have favoured Satya Bhama in selection, since she was already working in the Institution, she had a better say in the University as compared to Seema. Moreover, Satya Bhama, in her petition, neither alleged mala fides against members of the Selection Committee nor has made them party.

16. Leaving everything aside, it is well settled that it is not open for a candidate to appear in the interview/selection process and then to challenge it later.

17. Hon'ble Apex Court in **Ashok Kumar v. State of Bihar,** (2017) 4 SCC 357 has held as under:

> 13. The law on the subject has been crystalized in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla[4], this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In Union of India v. S. Vinodh Kumar[5], this Court held that :
>
> > "18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same... (See also Munindra Kumar v. Rajiv Govil[6] and Rashmi Mishra v. M.P. Public Service Commission[7])."
>
> 14. The same view was reiterated in Amlan Jyoti Borroah (supra) where it was held to be well settled that candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.
>
> 15. In Manish Kumar Shah v. State of Bihar[8], the same principle was reiterated in the following observations :
>
> > "16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the Petitioner is not entitled to challenge the criteria or process of selection. Surely, if the Petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The Petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the Petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the Judgments in MadanLal v. State of J. and K. MANU/SC/0208/1995 : (1995) 3 SCC 486, MarripatiNagaraja v. Government of Andhra Pradesh and Ors. MANU/SC/8040/2007 : (2007) 11 SCC 522, Dhananjay Malik and Ors. v. State of Uttaranchal and Ors. MANU/SC/7287/2008 : (2008) 4 SCC 171, AmlanJyotiBorooah v. State of Assam MANU/SC/0077/2009 : (2009) 3 SCC 227 and K.A. Nagamani v. Indian Airlines and Ors. (supra)."
>
> 16. In Vijendra Kumar Verma v. Public Service Commission[9], candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.
>
> 17. In Ramesh Chandra Shah v. Anil Joshi[10], candidates who were competing for the post of Physiotherapist in the State of Uttrakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any

objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that :

> "18. It is settled law that a person who consciously takes partin the process of selection cannot, thereafter, turn around and question the method of selection and its outcome."

18. In Chandigarh Administration v. Jasmine Kaur[11], it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In Pradeep Kumar Rai v. Dinesh Kumar Pandey[12], this Court held that :

> "Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

This principle has been reiterated in a recent judgment in Madras Institute of Development v. S.K. Shiva Subaramanyam[13]."

18. In view of above, both the appeals are allowed. Judgment dated 20.7.2010 passed by a learned Single Judge of this Court in CWP(T) No. 13586 of 2008 is set aside. Pending applications are disposed of. Interim directions, if any are vacated.

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

Ram Rattan & ors. ……Appellants.
Versus
Nandu Ram & ors. …….Respondents.

RSA No. 443 of 2002.
Decided on: 12.7.2017.

Indian Succession Act, 1925- Section 63- K was the owner in possession of the suit land – plaintiff and proforma defendants were his legal heirs – the defendants starting interfering with the suit land with the plea that K had executed a Will in their favour – K had never executed any Will – the defendants pleaded that K had executed a valid Will in their favour in his sound disposing state of mind – the suit was decreed by the Trial Court – an appeal was filed, which was dismissed – held in second appeal that the execution of the Will is shrouded in the suspicious circumstances- K was aged 105-110 years and it was not expected from a person of his age to move about and visit the place of marginal witness and the scribe – marginal witness did not say that the testator had put his thumb mark after understanding and admitting the contents of the Will to be true and correct – he did not say that he had seen the testator putting the thumb mark on the Will- K used to sign the documents and no explanation has been given as to why he had put the thumb mark on the Will- K was residing in a different Village and the version of the

defendants that he was residing with the defendants is not correct – the Courts had rightly discarded the Will- appeal dismissed. (Para-13 to 19)

Case referred:

Kishan son of Shri Kundan versus Smt. Tulki Dev wd/o Shri Kundan, 2013 (1), Civil Court Cases 548 (H.P.)

For the appellant(s): Mr. Rajnish K. Lall, Advocate vice Mr. Sanjeev Sood, Advocate.

For the respondents: Mr. B.P. Sharma, Sr. Advocate with Mr. Arun Kumar, Advocate for respondents No. 1(a) & 2 to 5.
None for other respondents.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Defendants No. 1 to 4 in the suit aggrieved by the concurrent findings recorded against them by both Courts below are in second appeal before this Court. Challenge herein is to the judgment and decree dated 3.8.2002 passed by learned District Judge Bilaspur in Civil Appeal No. 53/94 whereby judgment and decree dated 28.4.1994 passed by learned Sub Judge Ist Class, Bilaspur, camp at Ghumarwin in case No. 76-1/92-89 has been affirmed and the appeal dismissed. It is the genuineness and authenticity of Will Ext. DW-4/A allegedly executed by Kanhu Ram, the predecessor-in-interest of the parties to the suit in favour of defendants No. 1 to 4 which is under challenge in the main suit.

2. The plaintiffs in the suit were Nandu, the predecessor-in-interest of respondents No. 1(a) to 1(c), Jyoti Ram respondent No. 2 and Baldev, the predecessor-in-interest of respondents No. 3 to 5. The suit was filed by them with the submission that the land measuring 17.8 bighas bearing Kh. Nos. 139, 140, 141, 142, 146, 179 and 248 situated in village Balhsina, Pargana Bachhretu, Tehsil Ghumarwin, District Bilaspur, H.P (hereinafter referred to as the suit land), is in their ownership and possession along with Dilbar (father of appellants-defendants No. 1 to 4), Rupan Devi and Durgi Devi proforma defendants No. 5 to 7 in the suit whereas respondents No. 6 & 7(a) in the present appeal. The suit land came to them by way of succession. Their predecessor-in-interest Kahnu was owner-in-possession of the suit land. Plaintiffs and proforma defendants were alone his legal heirs. After his death, they all inherited the suit land and other movable and immovable property of deceased Kahnu by way of succession in equal shares. The defendants, however, started threatening that the plaintiffs have no right, title or interest in the suit land on the plea that their father deceased Kahnu has executed Will in their favour and now by virtue of Will, they are owner-in-possession of the same. Kahnu Ram had never executed any Will in favour of defendants No. 1 to 4. If any such Will is in existence, the same was claimed to be wrong, illegal and unnatural, hence not binding on them. The Will also was sought to be declared illegal, null and void and also with the collusion of proforma defendant No. 5 Dilbar, the father of defendants No. 1 to 4. The decree for permanent prohibitory injunction was also sought against the defendants.

3. Defendants No. 1 to 4 have contested the suit on several grounds. According to them, their grandfather Kahnu Ram had executed legal and valid Will during his life time in their favour. The same was got registered with Sub Registrar, Ghumarwin on 26.11.1986 vide entry No. 608, Book No. 3/101 at page Nos. 52 and 53. On the basis of the Will, it is they who alone are the legal heirs of deceased Kahnu Ram. The same is stated to be binding on the plaintiffs and proforma defendants. On the death of Kahnu Ram on 23.3.1989, mutation No. 475 of the suit land was also attested in their favour on 7.8.1989 by Assistant Collector, Ist Grade, Ghumarwin, on the basis of the Will dated 26.11.1986. The suit, as such, was sought to be dismissed.

4. Replication was also filed. On the pleadings of the parties, the following issues were framed:

"1. Whether the plaintiff alongwith defendants No. 5, 6 & 7 are owners in possession of the suit land as alleged? OPP

2. Whether the plaintiffs and proforma defendants are entitled for the relief of permanent injunction against defendants No. 1 to 4 as alleged? OPP

3. Whether the suit is not maintainable? OPD

4. Whether the suit is time barred? OPD

5. Whether the suit is bad for mis-joinder and non-joinder of necessary parties? OPD

6. Whether the plaintiff is estopped to file the present suit by his act and conduct? OPD

7. Whether the plaintiff has no locus standi to file the suit? OPD

8. Whether the suit is not properly valued for the purpose of court fees and jurisdiction? OPD

9. Whether the civil Court has no jurisdiction to entertain and try the present suit? OPD

10. Whether Kahnu Ram has executed a registered will dated 26.11.1986 in respect of the suit property in favour of defendants Nos. 1 to 4, if so its effect? OPD

11. Relief."

5. The plaintiffs in support of their case have examined PW-1 Nandu Ram, plaintiff No. 1 (since dead), PW-2 Sohan Singh and PW-3 Niknu Ram to prove that on the death of Kahnu, the suit land was inherited by the plaintiffs and proforma defendants and that said Sh. Kahnu was being looked after and maintained by plaintiff No. 1 Nandu. On behalf of the plaintiffs, reliance was also placed on the copy of Pariwar Register Ext. P-1 qua entries pertaining to the Pariwar of Kahnu Ram. Ext. P-2 is the entries qua the Pariwar of defendant No. 5 Dilbar. Ext. P-3 is certificate issued by Pradhan Gram Panchayat Ghandir, Ext. P-4 another entry qua pariwar of deceased Kahnu Ram in the Pariwar Register and Ext. P-5 copy of Jamabandi pertaining to the suit land.

6. On the other hand Ram Rattan defendant No. 1 has stepped into the witness box as DWI. The defendants have examined registration Clerk Khushi Ram, Office of Sub Registrar Ghumarwin as DW-2. DW-3 Gorkhi Ram is one of the attesting witnesses to the Will Ext. DW-4/A. The scribe of the Will is DW-4 Shyama Nand Soni. Reliance has also been placed on the copy of Jamabandi Ext. D-1 for the year 1985-86 to prove that on the death of Kahnu Ram, mutation of suit land was sanctioned and attested in favour of defendants No. 1 to 4 and copy of mutation is Ext. D-2.

7. On appreciation of the oral as well as documentary evidence, learned trial Court has decided issues No. 1 & 2 in affirmative i.e. in favour of the plaintiffs while arriving at a conclusion that they are owners-in-possession of the suit land along with proforma defendants No. 5 to 7, hence are entitled to the decree of permanent prohibitory injunction against defendants No. 1 to 4. The remaining issues No. 3 to 9 were, however, answered in negative i.e. against the contesting defendants No. 1 to 4. Issue No. 10 was also decided against them as in the opinion of learned trial Court a legal and valid Will was not executed nor registered in favour of defendants No. 1 to 4 on 26.11.1986. The suit, as such, was decreed whereby the plaintiffs and proforma defendants No. 5 to 7 were declared joint owners-in-possession of the suit land in

equal share. The suit for the relief of permanent prohibitory injunction was also decreed against defendants No. 1 to 4.

8. Learned lower appellate Court, in appeal, has affirmed the judgment and decree passed by learned trial Court and has dismissed the appeal.

9. The legality and validity of the impugned judgment has been questioned on the grounds inter-alia that the same is against law and facts of the case. The Will Ext. DW-4/A has erroneously been declared illegal, null and void as according to the appellants-defendants, the execution thereof stands satisfactorily proved from the testimony of DW-3 Gorkhi Ram and DW-4 Shyama Nand, the attesting witness and scribe, respectively. The mere fact that the testator used to sign the documents, however, on the Will has put thumb mark has unnecessarily been given undue weightage as he allegedly did so due to his old age. The findings recorded by both Courts below are the result of mis-appreciation and misreading of oral as well as documentary evidence available on record.

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

> "1. Whether the findings of the court below relating to the execution and registration of the will Ext.DW4/A are based on misreading and misconstruction of oral and documentary evidence and the basic document of title are perverse and liable to be set-aside.
>
> 2. Whether the alleged suspicious circumstances used for discarding the will had been explained and execution thereof was established from the statements of witnesses.
>
> 3. Whether on the proper construction f Section 63 of the Indian Succession Act, the due execution of the will was established and inference about its genuineness was established on the material on record."

11. Mr. Rajneesh K. Lall, Advocate while taking this Court through the oral as well as documentary evidence available on record, has urged that the execution and attestation of the Will in terms of Section 63 of the Indian Succession Act stands satisfactorily proved from the testimony of one of the attesting witness DW-3 Gorkhi Ram and that of the scribe DW-4 Shyama Nand. The registration thereof, according to Mr. Lall is duly proved from the record produced by DW-2 Khushi Ram, Registration Clerk in the Office of Sub Registrar, Ghumarwin. With these submissions, Mr. Lall has tried to persuade this Court to take the view of the matter contrary to the one taken by the Courts below.

12. On the other hand, Mr. B.P. Sharma, Sr. Advocate assisted by Mr. Arun Kumar, Advocate, has argued that the execution of the Will Ext. DW-4/A is not at all proved from the evidence available on record, therefore, both the Courts below have rightly ignored the same and dismissed the suit.

13. The substantial questions of law detailed supra pertains to the legality and validity of the findings recorded by both the Courts below qua the execution of Will Ext. DW-4/A which as per the claim of defendants No. 1 to 4 being contrary to the evidence available on record are perverse. The substantial questions of law, which arise in this appeal, are mixed questions of facts and law. Therefore, in order to adjudicate the same, it is desirable to make reference to the provisions contained under Section 63 of the Indian Succession Act, which provides the mechanism to infer the execution of a legal and valid Will. The same reads as follows:

> i. the Will must be attested by atleast two witnesses;
>
> ii. Each of these-
>
> (a) must either see the testator sing or affix his mark to the Will or must see some other person sign the Will, in the presence and by the direction of the testator, or

(b) must receive from the testator a personal acknowledgement of his signature or mark or of the signature of such other person.

iii. Each of these must sign the Will

iv. They must sign in the presence of the testator.

15. This Court in ***Kishan son of Shri Kundan*** versus ***Smt. Tulki Dev wd/o Shri Kundan, 2013 (1), Civil Court Cases 548 (H.P.)***, after taking note of the legal position that not only the signature of the executor on the Will are required to be proved but the execution thereof should also be free from any suspicious circumstance and that if a Will is shrouded by suspicious circumstances it cannot be treated as the last testamentary disposition of the testator has held that the Will set up in that case was not the last testamentary disposition of the testator being shrouded by suspicious circumstances.

16. Applying the legal principles settled in the judgment supra in the case in hand, it would not be appropriate to conclude that the execution of the Will Ext. DW-4/A is not at all proved and the same rather being shrouded by suspicious circumstances cannot be said to be the last testamentary disposition of the testator deceased Kahnu Ram by any stretch of imagination. The testator has admittedly died at a stage when he was more than 100 years of age. PW-1 Nandu Ram has stated in his cross-examination that his father deceased Kahnu Ram has died at a stage when he was more than 100 years of age. As per the testimony of PW-2 said Sh. Kahnu Ram has died when he was 105 years of age whereas as per the evidence as has come on record by way of testimony of DW-1 Ram Rattan (defendant No.1), Kahnu Ram, his grand father has died at a stage when he was 110 years of age. The Will in question was executed in the year 1986. DW-1 in his cross-examination has further stated that in the year 1986, his grand father (the testator) must be 105 years of age or he may be 110 years old in 1986. In view of such evidence available on record, it would not be improper to conclude that the testator has died at a stage when his age was 105-110 years. It is not expected from a person of his age to move about and visit the place of marginal witness Gorkhi Ram (DW-3) and the Scribe DW-4 Shyama Nand who belong to different villages from that of the testator. Neither DW-2 nor DW-4 Shyama Nand have disclosed the name of the place where the Will was executed. As per the version of DW-3 Gorkhi Ram, in his cross-examination, the distance of Kajail from Balhsinha is not 4 km. but 2.500 km. According to him, the testator Sh. Kahnu Ram had come personally to call him at his house. It is not expected from a person of the age in between 105 to 110 years to travel up to a distance of even 2.500 km. Therefore, the execution of the Will by deceased Kahnu Ram is highly doubtful. The necessary constituents of execution of a valid Will are not also proved because only marginal witnesses of the Will DW-3 Gorkhi Ram has not stated while in the witness box that the testator on understanding and admitting the contents of the Will to be true and correct had put his thumb mark thereon and he had seen him while putting his thumb mark thereon. It has also not been stated by him that he was seen by the testator while putting his signatures on this document.

17. Interestingly enough, as per the admitted case of the parties, the testator used to put his signatures on documents. It is not understandable as to why he had not signed the Will in question and to the contrary put his thumb mark thereon. The only explanation that he was feeble and his hands used to tremble, therefore, it was not possible for him to put his signatures is neither plausible nor reasonable and rather germane of the mind of defendants.

18. The further claim of the defendants that deceased Kahnu used to live with them and was satisfied with the services they were rendering to him hence due to this reason executed the Will Ext. DW-4/A in their favour is also false for the reason that they used to reside at Village Ghandir with his father defendant No. 5 Dilbar. The plaintiffs used to reside in Village Balhsinha. The testator also used to reside in Village Balhsinha as is apparent from the Will Ext. DW-4/A. The plaintiffs also used to reside in the same village. Therefore, the case of the plaintiffs that deceased Kahnu Ram had been residing with plaintiff No. 1 Nandu (since dead) is nearer to the factual position. This aspect of their case even finds support from the copy of Pariwar Register

Ext. P-1 and certificate Ext. P-3, issued by the Pradhan Local Gram Panchayat. As per these documents, deceased Kahnu and deceased plaintiff Nandu were members of one of the same family whereas as per the entries in copy of Pariwar Register Ext. P-2 Dilbar was residing separately with his son the defendants and other members of his family. Deceased Kahnu was not residing with them. As per the entries in the copy of Pariwar Register Ext. P-4, the family of deceased Kahnu was residing in village Balhsinha. It is, therefore, difficult to believe that deceased Kahnu used to reside with the defendants and that it is due to the services they rendered to him he bequeathed the suit land in their favour vide Will Ext. DW-4/A. The plaintiffs' case that the testator had been residing in village Balhsinha and being looked after by plaintiff No. 1 Nandu finds support from the testimony of PW-2 Sohan Singh and PW-3 Niknu Ram also.

19. Even if the Will was executed and presented for attestation on 25.11.1986, it is not understandable as to why the same was not attested by the Sub Registrar on the same day because the date of its attestation is 26.11.1986. This aspect of the matter also finds support from the testimony of DW-2 Khushi Ram, meaning thereby that the execution of the Will in the manner as claimed by the defendants is highly doubtful. Both witnesses associated at the time of execution of the Will are outsiders and they do not belong to the same village. It is not understandable as to why the testator was given preference in the matter of attestation of the Will in question. The present, as such, is a case where the propounders defendants No. 1 to 4 have miserably failed to discharge the onus upon them to prove that Will Ext. DW-4/A is the last testamentary disposition of the testator. The same, as such, cannot be treated to be a legal and genuine document. Both the Courts below have rightly concluded so on re-appraisal of the evidence available on record in its right perspective.

20. In view of what has been said hereinabove, there is no merit in this appeal and the same is accordingly dismissed. Consequently, the judgment and decree under challenge is affirmed, however, no orders so as to costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Altruist Technologies Pvt Ltd. …Petitioner

versus

Deputy Commissioner of Income Tax …Respondent.

CWPs No.1576, 1577 & 1831 of 2015

Date of Decision: July 13, 2017

Income Tax Act, 1961- Section 80-IC- The petitioner is assessed to income tax- petitioner started its business in the year 2005- three separate units were established, one at Baddi and two at Shimla- assessee filed return which was scrutinized and order was passed under Section 143- Assessing Officer held theassesseeeligible for statutory deduction under Section 80-IC- deduction were allowed to the assessee for the next three successive assessment years- when the income tax return was filed for the year 2010-2011, Assessing Officer took a view that the petitioner had not obtained Central Excise 4/6 Digit classification or National Industrial Classification (NIC) Code on 1998 and the assessee was not eligible for the statutory deduction- similar, orders were passed during the subsequent years- Assessing Officer also issued a notice under Section 148 that the income had escaped assessment during earlier years- petitioner filed the present writ petition against the order- held that Code/Classification is required only for those activities which fall under the category of manufacture- assessee is running a Call Centre, which does not deal with the computer hardware- petitioner is not manufacturing/producing any articles- Assessing Officer had wrongly held that assessee was not entitled to statutory

deduction- it was not permissible to re-open the assessment after the expiry of four years from the relevant assessment year- writ petitions allowed and show cause notice quashed.

(Para-12 to 27)

Case referred:

Commissioner of Income Tax, Delhi v. Kelvinator of India Limited, (2010) 2 SCC 723

For the Petitioner(s)	:	Mr. Vishal Mohan, Advocate, in all the petitions.
For the Respondent(s)	:	Mr. Vinay Kuthiala, Senior Advocate, with Ms Vandana Kuthiala, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

Since the issue involved in these petitions is purely legal, they are being heard and disposed of by a common judgment.

2. Factual matrix is not in dispute, which we shall refer to herein later. The issue involved is only with respect to interpretation of Part-C of the Fourteenth Schedule, so prescribed under Section 80-IC of the Income Tax Act, 1961 (hereinafter referred to as the Act).

3. That the petitioner (in all the writ petitions)(hereinafter referred to as the Assessee) is assessed to income tax is not in dispute. It is neither disputed nor can it be disputed that Assessee is engaged in the business of information technology services and Call Centre. The business came to be established sometime in the year 2005 and with the passage of time three separate units came to be established, one at Baddi and two at Shimla.

4. For the Assessment Year 2006-2007, the Assessee filed return, under Section 139 of the Act, which came to be scrutinized on 29.12.2008 and order passed under Sub Section (3) of Section 143 of the Act. Noticeably, accounts of the Assessee were audited and audit reports filed, disclosing that Assessee is an undertaking/enterprise located in an area notified by the Board, for the purposes of Section 80-IC of the Act and since the Assessee is engaged in the business of information technology, by virtue of the activity of the business specified in the Fourteenth Schedule, is entitled for statutory deductions, so prescribed under the provisions of Section 80-IC of the Act. The declaration to that effect came to be made on 28.2.2008, the date prior to the passing of the order of assessment. The Assessing Officer, accepting the contention of the Assessee, assessed the income, holding the Assessee eligible for statutory deductions, referred to supra.

5. It is a matter of record that for three successive Assessment Years, i.e. 2007-2008, 2008-2009 and 2009-2010, the Returns so filed by the Assessee, seeking statutory deductions, as also pursuant to declarations so filed with respect to each year, came to be adjudicated under Section 143(3) of the Act, holding the Assessee entitled for statutory deductions.

6. However, with respect to the Assessment Year 2010-2011, the Assessing Officer, who, by that time, was a new incumbent, took a contrary view, and by interpreting clauses of the Schedule (Part-C, Fourteenth Schedule), and holding the Assessee not to have obtained Central Excise 4/6 Digit classification or National Industrial Classification (NIC) Code on 1998, stipulated at Point No.13, held the Assessee not eligible for statutory deductions.

7. It is also not in dispute that with respect to the subsequent Financial Years, the very same Officer took similar view, holding the Assessee ineligible for the statutory deductions. Appeals arising out of the orders dated 22.3.2013 (Annexure P-6) and 12.3.2014 (Annexure P-7) are pending adjudication before the competent authority.

8. So far so good. It is only subsequent to the passing of the said orders, that the Assessing Officer issued notices under Section 148 of the Act, disclosing that he had reasons to believe that with respect to previous Assessment Years 2007-2008, 2008-2009 & 2009-2010, income had escaped assessment, within the meaning of provisions of Section 147 of the Act, which stand assailed by the Assessee in the present petitions.

9. At this juncture, we deem it appropriate to reproduce the reasons so assigned by the Assessing Officer, of forming his opinion of the income having escaped assessment, in the following terms:

> "It is observed that the business activities as claimed by assessee do not fall under either under the 4/6 digit excise classification at tariff 84.71 or NIC classification on 1998 at Sub-class 30006/7.
>
> However the assessee's claim of deduction u/s 80-IC, under the head "Information and Communication Technology Industry, Computer hardware, Call Centres", is not tenable as the sub-classifications of schedule 14 are qualifying in nature. Only if the business activity of an enterprise passes the test of classification then only the benefits of the same are available. The assessee company's claim of deduction u/s 80-IC falls flat on this issue as it undoubtedly does not fall in any of the prescribed classifications/ sub-classifications. These facts are noticed during the assessments proceedings for the A.Y. 2010-11." (Emphasis supplied)

10. Objections, so filed by the Assessee, pursuant to the notices so issued under Section 148 of the Act, also stand dismissed by the Assessing Officer, holding as under:

> "Thus it can be concluded that the activities undertaken by the Assessee 'Altruist Technologies Private Limited' do not come under the purview of manufacturing as required by 'NIC code classification of 1998' in 30006 or 30007' for which he is taking the deduction u/s 80IC of the Income Tax Act' 1961. Further the deduction claimed by him for the activities being carried out by it are not covered as per Item No.13 under Part C of 14th Schedule referred under Section 80IC(2) of Income Tax Act, hence not eligible for deduction u/s 80IC(2). The Issuance of Notice under Section 148 of the Income Tax Act is based upon the material on record and I had 'Reasons to believe' that Income has escaped assessment due to wrong statement of facts and claiming the wrong deduction by the assessee." (Emphasis supplied)

11. Evidently, the opinion formed by the Assessing Officer is that information, incomplete or incorrect, came to be furnished by the Assessee; there was non-disclosure of material and relevant facts by the Assessee; and that the opinion formed by the predecessor Assessing Officers, who had passed the orders of assessment, pertaining to the years 2006-2007, 2007-2008, 2008-2009 & 2009-2010, were erroneous, illegal and not sustainable in law.

12. Since interpretation of the statute (the Act) is involved, we deem it appropriate to reproduce the relevant clauses thereof:

> "80-IC. (1) ………………….
>
> 2. This section applies to any undertaking or enterprise,-
>
> (a) which has begun or begins to manufacture or produce any article or thing, not being any article or thing specified in the Thirteenth Schedule, or which manufactures or produces any article or thing, not being any article or thing specified in the Thirteenth Schedule and undertakes substantial expansion during the period beginning-
>
> (i) …………….

(ii) on the 7th day of January, 2003 and ending before the 1st day of April, 2012, in any Export Processing Zone or Integrated Infrastructure Development Centre or Industrial Growth Centre or Industrial Estate or Industrial Park or Software Technology Park or Industrial Area or Theme Park, as notified by the Board in accordance with the scheme framed and notified by the Central Government in this regard, in the State of Himachal Pradesh or the State of Uttaranchal;"

"(b) which has begun or begins to manufacture or produce any article or thing, specified in the Fourteenth Schedule or commences any operation specified in that Schedule, or which manufactures or produces any article or thing, specified in the Fourteenth Schedule or commences any operation specified in the Schedule and undertakes substantial expansion during the period beginning-

(i) ....

(ii) on the 7th day of January, 2003 and ending before the 1st day of April, 2012, in the State of Himachal Pradesh or the State of Uttaranchal;"

13. Relevant portion of the Schedule is extracted as under:

"[***THE FOURTEENTH SCHEDULE***

[See section 80-IC(2)]

LIST OF ARTICLES OR THINGS OR OPERATIONS"

"PART C

FOR THE STATE OF HIMACHAL PRADESH AND THE STATE OF UTTARANCHAL

S. No.	*Activity or article or thing or operation*	*4/6 digit excise classification*	*Sub-class under NIC classification on 1998*	*ITC(HS) classification 4/'6 digit.*"
....				
....				
"13.	Information and Communication Technology Industry, Computer hardware, Call Centres.	84.71	30006/7"	

14. That the activity carried out by the Assessee falls in the categories specified in the category so mentioned at Sr. No.13 of the Schedule, is not in dispute. The only objection being that since the Assessee does not possess NIC code and Excise Classification, it is not entitled to the statutory deduction. It is here, we find the Assessing Officer to have committed grave illegality in correctly and completely construing the provisions of the Schedule. In fact, from the observations of the Assessing Officer, reproduced supra, it stands admitted that the code/ classification, reproduced supra, is required only for such of those activities, which fall under the category of 'manufacture'. Assessee is running a Call Centre. It does not deal with computer hardware or is in the business of manufacturing information and communication technology. It is not into the business of manufacture or production of any articles referred to in item at Sr. No.13. It carries out operation of such items, which do not require registration or necessitate obtaining permission under the provisions of the Central Excise Act or National Industrial (Activity) Classification, 1998, vis-à-vis Code 30006/7. Sub-class under NIC classification on 1998 at 30006/7 reads as under:

> "*3006: Manufacture of complete digital systems comprising a central processing unit, an input unit and an output unit; digital systems which include peripheral units such as additional input/output units, additional storage units etc.*
>
> *30007: Manufacture of computer peripherals like magnetic disc/floppy/Winchester disk drives, magnetic tape/cassette/cartridge drives; punchy tape readers, curve followers, graph plotters: serial/daisy wheel/line printers. Data entry equipment with or without visual display; magnetic or optical readers; machines for transcribing data onto data media in coded form; and so forth."*

15. Now, if the Assessee is otherwise not subjected to any of the provisions of the Statute, Rules, Notifications, circulars, under the said provisions, and when it does not relate to the activity of operations, so carried out by him, that of running a Call Centre, for which, in any event, the aforesaid provisions are not applicable, then obviously it would be incorrect and illegal to read the provisions relating to the code into the expression "Call Centre", which is an activity, totally distinct and separate from "manufacture" or "production of information and communication technology". It is in this backdrop, we find the Assessing Officer to have erred in forming its opinion/reason to believe that the Assessee, was not entitled to statutory deductions. The interpretation is perverse, resulting into travesty of justice.

16. There is yet another reason for us to interfere with the orders passed by the Assessing Officer. Proviso to Section 147 of the Act prescribes that where an assessment under sub-section (3) of Section 143 of the Act has been carried out, no action after expiry of four years from the end of the relevant Assessment Year shall be initiated under Section 147 of the Act, save and except where income chargeable to tax has escaped assessment for such Assessment Year, by reason of failure on the part of the Assessee, inter alia, to make the return under Section 139 of the Act or disclose fully and truly all material facts necessary for carrying out assessment for that Assessment Year.

17. Notices came to be issued only on 20.3.2014 and all these with respect to the Assessment Years 2007-2008, 2008-2009 and 2009-2010. For all these Assessment Years, Assessing Officer had passed orders under Section 143(3) of the Act.

18. Now, there is nothing on record to establish, much less, even prima facie showing any opinion, formed by the Assessing Officer, to the effect that with respect to these Assessment Years, the Assessee had not filed his Returns, under Section 139 of the Act or that it did not disclose material facts, either fully or truly, necessary for carrying out the Assessment. In fact, Assessee had made full disclosures. Opinion of the Assessing Officer in reopening the assessments for these years is also not on this ground, but on the ground that even though the activity carried out by the Assessee was not manufacturing of the items specified in the Schedule and was otherwise not required to obtain the code, but since it otherwise did not have the same, was not entitled to statutory deductions.

19. It is in this backdrop, we find the action initiated by the revenue in trying to reopen the assessments, beyond a period of four years, i.e. with respect to the years 2007-2008, 2008-2009, to be barred by limitation. Significantly, no such action is contemplated with respect to the assessment carried out in the first year i.e. Assessment Year 2006-2007.

20. At this point in time, we feel obliged to refer to the following observations made by the Apex Court in *Commissioner of Income Tax, Delhi v. Kelvinator of India Limited,* (2010) 2 SCC 723:

> "On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the

Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re- open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

> "7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.--A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

For the afore-stated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."

21. To this effect, a Coordinate Bench of this Court, in ITA No.22 of 2007, titled as *Commissioner of Income Tax Shimla v. M/s Ruchira Papers Ltd.,* decided on 18.6.2012, has observed as under:

"5. Another admitted fact is that the assessment proceedings in this case were conducted in accordance with the provisions of Section 143 of the Act i.e. scrutiny proceedings, which definitely entail a greater amount of scrutiny by the Assessing Officer as the term scrutiny itself postulates."

"8. Finality has to be given to assessment proceedings. These cannot be reopened at the whims and fancy of the Revenue even when mistakes may have taken place. The law provides a procedure and also prescribes the limitation for taking such action. To take benefit of a power, which essentially is very wide

power of virtually reopening the assessment, the Revenue must act within the time prescribed by the Act."

"11. It is clear that: (a) when there is full, complete and true disclosure of all material facts, the limitation is only four years from the end of the assessment year concerned; (b) when there is non disclosure of facts the limitation is four years in case the income escaping assessment is less than Rs.1,00,000/-; and (c) in case there is non-disclosure of facts and the income escaping g assessment is more than Rs.1,00,000/- the limitation is six years. This is the only interpretation which can be given to Sections 147 to 149."

22. With vehemence, Revenue has raised the jurisdictional issue of interfering with the orders passed by the Assessing Officer, more so in view of availability of alternate statutory remedy. Well, we are not inclined to agree with the submission so made by Mr. Vinay Kuthiala, learned Senior Advocate.

23. While examining the scope of jurisdiction of this Court to interfere with the orders of similar nature, passed by the authority, this Court in CWP No.3072 of 2016, titled as *Sh. Virbhadra Singh v. Deputy Commissioner, Circle Shimla, Income Tax Office & others,* and connected matters, decided on 26.12.2016, has observed as under:

"22. A three-Judge Bench of the apex Court in *The Commissioner of Income-tax, Gujarat v. M/s A. Raman and Co.,* AIR 1968 SC 49, held that:

"6. The High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147 of the Income-tax Act, 1961, <u>if the condition precedent to the exercise of the jurisdiction does not exist.</u> The Court may, in exercise of its powers, ascertain whether the Income-tax Officer had in his possession any information: the Court may also determine whether from that information the Income-tax Officer may have reason to believe that income chargeable to tax had escaped assessment. But the jurisdiction of the Court extends no further. Whether on the information in his possession he should commence a proceeding for assessment or reassessment, must be decided by the Income-tax Officer and not by the High Court. The Income-tax Officer alone is entrusted with the power to administer the Act;<u> if he has information from which it may be said prima facie, that he had reason to believe that income chargeable to tax had escaped assessment, it is not open to the High Court, exercising powers under Article 226 of the Constitution, to set aside or vacate the notice </u>for reassessment on a re-appraisal of the evidence."

(Emphasis supplied)"

"26. In *Chhabil Dass Aggarwal (supra)*, in somewhat similar circumstances, where notice issued under Section 148 of the Act and the *ex-parte* assessment proceedings came to be quashed by a writ Court, the Apex Court, by referring to its several judicial pronouncements, including that of the Constitution Bench (Five Judges) in *K.S. Rashid and Son v. Income Tax Investigation Commission,* AIR 1954 SC 207, observed that restriction of not entertaining a writ petition, when an efficacious and alternate remedy is available, <u>is self imposed. It is essentially a rule of policy, convenience and discretion, rather than the rule of law.</u> Only where an <u>exceptional case, warranting interference; existence of sufficient grounds; for invoking extra ordinary jurisdiction, is made out, power, which is discretionary in nature, must</u> be exercised. Where hierarchy of appeal is provided by a statute, party must exhaust the statutory remedies before invoking the writ jurisdiction. The right or liability created by a statute giving a special remedy for enforcing it must be availed of. The Court reiterated the principle laid

down in *Union of India Versus Guwahati Carbon Ltd.,* (2012) 11 SCC 651 and in *Munshi Ram Versus Municipal Committee, Chheharta,* (1979) 3 SCC 83, that when a statute provides for a person aggrieved, a particular remedy to be sought in a particular Forum and in a particular way, it must be sought in that manner, to the exclusion of all other modes and Forums. But it did recognize certain exceptions to this rule and that, *inter alia* being, where the action of the statutory authority is not in accordance with the statutory provisions; in defiance of fundamental principles of judicial procedure; and in total violation of principle of natural justice.

27. Justifying the action of the petitioner in bypassing the statutory remedy and directly assailing the notice for reassessment, Mr. Vishal Mohan, learned counsel, seeks reliance on the decision rendered by the Bombay High Court, in *Ajanta Pharma Ltd. (supra)*. The decision came to be rendered in the given facts and circumstances, where reason for reassessment being non-discloser of invoice/details of the purchase of the trading goods exported and failure to co-relate the trading exports with the trading goods exported was found to have been non-existent, in fact contradicted from the record rendering the reasons of the Assessing Officer to be totally "flimsy" and not "sufficient to draw conclusion about the escapement of income" and there being "no material" before the Assessing Officer, entitling him to reopen the case of assessment, the Court found the notice so issued to be *ex-facie,* bad in law. Hence it exercised its discretionary power in quashing such action. Significantly, the Court observed that a writ would lie only if the impugned action is *ex-facie* without jurisdiction or again in excess of the jurisdiction vested in the authority or the action being totally arbitrary. It cautioned that extra ordinary jurisdiction cannot be allowed to be availed as a matter of course and while deciding the issue of jurisdiction, finding of the authority on the factual aspect may be necessary, in which case, necessarily the assessee would be required to approach the Assessing Officer."

"29. Thus it cannot be said that jurisdiction of this Court, in entertaining a petition even when an equally efficacious remedy is available to a party, is totally ousted. Notwithstanding the statutory remedies available to the aggrieved party, restriction imposed by a writ Court is more in the nature of restraint. With the ever increasing and growing scope of judicial review, exercise of extraordinary writ jurisdiction cannot be circumscribed."

"31. While contending that this Court has no jurisdiction to quash the order of rejection of objections by the Assessing Officer, Mr. Vinay Kuthiala, learned Senior Advocate, seeks reliance on the decision rendered by the High Court of Madras in *Kalanithi Maran (supra)*. We are unable to persuade ourselves to agree with such submission. The procedure for filing the objections and obligation to decide the same, came to be evolved with the following observations made by the apex Court in *GKN Driveshafts (supra)*, wherein it is held as under:

> "5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years."

> 32. Since then, the practice has been in vogue. The mechanism evolved is only a safeguard, a protection from harassment of the assessee, for avoiding unwarranted harassment, from undesirable adjudicatory process, so initiated, perhaps on jurisdictional error or such material which *ex-facie* may be false or reason(s) which *prima facie* appears to be baseless or without any cause or justification. The object being, affording an opportunity to an assessee of putting across its case, by placing authentic and undisputed material, satisfying no escapement of income from assessment, enabling the authority to consider, and if so required, drop the proceedings. There can be a fact situation where out of malice or for extraneous reasons, an Assessing Officer may decide the objections, in a palpably illegal manner. What if it is against the mandate of the said decision itself? In any event, orders passed by a Statutory authority are always amenable for challenge in a writ Court which power, perhaps the Court may exercise, when warranted, in the attending facts and circumstances."

24. Significantly, the Assessing Officer himself admits that (a) petitioner is not a manufacturer, and (b) the code is not required for the activity/operations so carried out by it.

25. In the instant case, it cannot be said that the action taken is in good faith. Whether the Assessee is required to obtain sanction/permission/code, so prescribed or not, is not in dispute. It is true that notice is only subjective satisfaction and not final opinion, but then the Assessing Officer has decided the objections, already expressing an opinion on the assessee's entitlement for statutory deduction. The question is not whether the action taken is in good faith or not. What is important is that the Assessing Officer has exceeded its jurisdiction erroneously. Which, in our considered view, he has so done, rendering the action to be absolutely illegal and unsustainable in law. The impugned action cannot be said to be only in the nature of show cause notice.

26. Learned counsel have referred to several other decisions, which we need not deal with, in view of our aforesaid discussion, as we have already considered the decisions, relevant to the controversy in issue, so rendered by the Apex Court.

27. Hence, for all the aforesaid reasons, all the writ petitions are allowed, holding the action taken by the Revenue to be illegal and, as such, we quash and set aside the impugned show cause notices dated 25.3.2014 (A.Y. 2007-2008), 25.3.2014 (A.Y. 2008-2009) and 20.3.2014 (A.Y. 2009-2010) as also Communication disposing of the objections (Annexure P-10, in all the petitions).

All the petitions stand disposed of, so also pending application(s), if any.

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

Jamna Devi …….Appellant

Versus

State of Himachal Pradesh …….Respondent.

Cr. Appeal No. 218 of 2006 with
Cr. Appeal No. 261 of 2006
Reserved on: 18.04.2017
Decided on: 13th July, 2017

Indian Penal Code, 1860- Section 307, 326 and 342 read with Section 34- Informant party led plinth for the construction of the house on road side over the Government land- house of the

accused party is situated nearby to the plinth- accused came and attacked PW-1 and PW-2- accused were tried and convicted by the Trial Court- held in appeal that there is no evidence that accused had prior meeting of minds and had assaulted the victims in a prearranged and preplanned manner- there is no evidence that accused had restrained the injured from proceeding beyond certain circumscribed limits - there are contradictions regarding the persons who had inflicted the stab wound- it was admitted that 4-5 persons were present who had fled away from the place of incident – the possibility that they had inflicted injury cannot be ruled out - recovery was also not proved- Court had wrongly convicted the accused- appeal allowed- judgment passed by the Trial Court set aside and accused acquitted of the charged offences.

(Para-14 to 32)

Cases referred:

State of Maharashtra V. Balram Bama Patil and others, AIR 1983 S.C. 305
Matiullah Sheikh and others V. State of West Bengal AIR 1965 S.C. 132
Om Prakash V. State of Punjab AIR 1961 S.C. 1782

For the appellant(s): Mrs. Vandana Kuthiala, Advocate (in both the appeals).
For the respondent(s): Mr. Pramod Thakur, Addl. A.G with Mr. Neeraj K. Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge

This judgment shall dispose of both appeals arising out of the same judgment, whereby the appellants (hereinafter referred to as 'A-1 to A-4') have been convicted and sentenced for the commission of an offence punishable under Sections 307, 326, 342 read with Section 34 of the Indian Penal Code. They, however, have been acquitted of the charge under Section 201 read with Section 34 of the Indian Penal Code framed against each of them for want of evidence.

2. The appellants in these appeals are Rattan Chand (since dead hence appeal against him stands abated) and Jamna Devi, accused No. A-1 and A-2, whereas, the appellants in connected appeal Babu Ram is A-3 and Rajesh Kumar A-4. The complainant is PW-4 Prem Chand, father of the victims of occurrence, PW-1 Shonki Ram and PW-2 Prithi Chand. Admittedly, both parties are inimical to each other.

3. The complainant party laid plinth for construction of house on road side over the Government land at a place known as Bage-Da-Moar in Village Saravnati, Tehsil Khundian, District Kangra by way of making encroachment thereon. Adjoining to the plinth, a 'Palli' (shed) of the complainant party was in existence and being used for sleeping during night time to keep watch and ward of the on going construction work. The house of the accused party is also situated nearby to the plinth laid by the complainant party. As usual on 16.04.2002, around 9.30 p.m. PW-1 and PW-2 were going to the site of construction for sleeping there. When reached on road side, they raised alarm '*Bachao*' '*Bachao*'. On finding that it is PW-1 and PW-2 have raised alarm to save them, the complainant (PW-4) accompanied by his daughter-in-law Kavita (PW-8) another daughter-in-law Nimo, his wife and son Desh Raj rushed to the spot. They noticed PW-1 lying unconscious on road in a pool of blood, whereas, A-3 stabbed PW-2 Prithi Chand with sharp edged weapon on his stomach in their presence. A-1,A-2 and A-4 also administered beatings to PW-2 with kick and fist blows. They dragged him towards there house. When complainant asked them not to kill his son (PW-2), he was pushed aside by A-4. At that very time, they picked up PW-2 and put him in a vehicle bearing registration No. HP-55-2868. A-2 and A-3 had taken PW-2 to some unknown destination. After that the complainant shifted his another son PW-2 Shonki Ram in a vehicle to the hospital at Jawalamukhi. There he came to know that his son Prithi Chand was also brought there for medical check-up, however, taken by A-3 and A-4 to the hospital at Dharamshala. PW-1 Shonki Ram was also referred to the hospital at Dharamshala. When complainant reached in the hospital at Dharamshala with PW-1, he came to know that his another son PW-2 Prithi Chand was already taken to operation theatre by the

doctor for conducting surgery. Since accused persons were inimical to him, therefore, it is for this reason, they assaulted his sons PW-1 and PW-2 intentionally to do away with their lives. It is in this manner the complainant (PW-4) has disclosed the occurrence having taken place in his statement Ext. PW-4/A recorded under Section 154 of the Code of Criminal Procedure.

4. On the basis of statement Ext. PW-4/A, FIR Ext. PW-10/B came to be recorded against all the accused persons under Section 307 of the Indian Penal Code.

5. The investigation of the case was conducted partly by PW-14 ASI Kaur Chand. As a matter of fact, it is on the application he made to the Medical Officer both injured were medically examined in Community Healthy Centre, Jawalamukhi and later on when referred from Jawalamukhi in zonal hospital, Dharamshala. He had made the application Ext. PW-14/A for the medical examination of PW-2 Prithi Chand and Ext. PW-14/B for the medical examination of PW-1 Shonki Ram. After recording statement of PW-4 Ext. PW-4/A under Section 154 of the Code of Criminal Procedure, rukka was sent to police station, Jawalamukhi, on the basis whereof FIR Ext. PW-10/B was registered. He procured MLCs Ext. PW-3/A in the case of PW-2, where Ext. PW-3/C in that of PW-1 from the hospital. Since ASI Pratap Chand, who had investigated the case partly died before his statement could have been recorded during the course of trial, therefore, PW-14 has also proved the spot map Ext. PW-14/C prepared by said Pratap Chand. The recovery memo Ext. PW-4/B vide which the blood stained clothes of PW-1 Shonki Ram were taken in possession was also proved by him. He has also proved Ext. PW-7/A and Ext. PW-14/D being in the hand of said Pratap Chand. During the course of investigation, a case punishable under Sections 326, 342, 201 read with Section 34 of the Indian Penal Code was also found to be made out against the accused persons.

6. On the completion of investigation, the police filed the report under Section 173 of the Code of Criminal Procedure against all the accused persons. Learned trial Judge on appreciation of the evidence collected by the investigating agency and hearing learned Public Prosecutor as well as learned defence counsel and on finding a prima-facie case having been made out for the commission of offence punishable under Sections 307, 326, 342, 201 read with Section 34 of the Indian Penal Code against each of the accused proceeded to frame charge accordingly.

7. As discussed hereinabove, besides injured PW-1 and PW-2, the complainant, who is PW-4, Desh Raj (PW-6), PW-4 Prem Chand and his son and Kavita his daughter-in-law (wife of PW-2 Prithi Chand) were examined by the prosecution to prove its case against the accused persons. Besides them, the prosecution has also examined PW-3 Dr. Sumeet Kundu, the then Medical Officer Community Health Centre, Jawalamukhi, who had initially medically examined both injured when taken there and referred them to zonal hospital, Dharamshala for further management. PW-5 Ram Singh, is a witness to the recovery of blood stained clothes of injured Shonki Ram and Prithi Chand, which were handed over to the police by their father PW-4 Prem Chand. PW-7 Dr. Puneet Mahajan was posted as Registrar in department of surgery at the relevant time. According to him, both injured were admitted in RPMC, Tanda in surgery department. They were operated upon. The injuries on their person in his opinion could have been inflicted with a knife. PW-7 HC Pritam Singh is a witness to recovery of knife Ext. P-1, which according to him was taken into possession vide recovery memo Ext. PW-7/A. PW-9 Sunil Kumar was also associated to witness the occurrence, however, he turned hostile to the prosecution and not supported its case. PW-10 Head Constable Satpal was posted as MHC in Police Station, Jawalamukhi at the relevant time. PW-11 Sukh Ram has been examined to support the prosecution case so as to hiring of taxi by the complainant party to remove injured Shonki Ram to hospital and he also accompanied the complainant party along with injured to the hospital. PW-12 Hari Mitter has not supported the prosecution case qua recovery of knife Ext. P-1 vide memo Ext. PW-7/A in his presence. PW-13, the then SI/SHO Jasbir Singh, Police Station, Jawalamukhi is a witness to the prepration of challan and presentation thereof in the Court.

8. On the other hand, accused persons were also examined under Section 313 of the Code of Criminal Procedure. They, however, not opted for producing any evidence in their defence.

9. Learned trial Court on appreciation of the evidence available on record has held all the accused persons guilty for the commission of an offence punishable under Section 307, 326, 342 read with Section 34 of the Indian Penal Code, however, no case against them was found to be made out for the commission of an offence punishable under Section 201 read with Section 34 of the Indian Penal Code, hence were acquitted of the charge so framed against them.

10. Taking into consideration the old age of A-1 and A-2, they were sentenced to undergo rigorous imprisonment for two years each and to pay Rs.5,000/- as fine under Sections 307, 326 IPC and to undergo simple imprisonment for six months each under Section 342 IPC. A-3 and A-4, however, were sentenced to undergo rigorous imprisonment for six years each and to pay Rs.10,000/- each as fine under Sections 307, 326 IPC, whereas, to undergo simple imprisonment for six months each and to pay Rs.1,000/- as fine under Section 342 IPC. The substantive sentences imposed upon each of the accused persons, however, stand suspended consequent upon an order to this effect passed by this Court in these appeals.

11. All the four convicts-accused have questioned the legality and validity of the findings of conviction and sentence recorded against them on the grounds inter-alia that the same having been recorded on hypothesis, conjectures and surmises are not legally sustainable. Undue weightage has been given by learned trial Court to the testimony of the tutored and interested witnesses. It is doubtful that so called eye witnesses PW-4, PW-6 and PW-8 were present on the spot, hence could have witnessed the manner in which the occurrence has been claimed to be taken place. Learned trial Court has erred while placing reliance on the allegations leveled against the accused persons by PW-1, PW-2, PW-4, PW-6 and PW-8, none else but the members of same family, hence hostile and inimical to the accused persons. The recovery of knife Ext. P-1 is not at all proved in accordance with law. The prosecution story qua availability of knife Ext. P-1 with A-3, Babu Ram is highly doubtful. The prosecution story qua hearing alarm raised by PW-1 and PW-2 by the complainant (PW-4) and other members of their family from a distant place is again doubtful. As per own testimony of PW-1 and PW-2, they were fully conscious on the next day, hence capable of making statement, however, the forwarding of FIR to the Court was considerably delayed. The variance between medical and ocular version has not been taken into consideration. As per ocular version, only one knife blow was inflicted on the back of PW-1 Shonki Ram, whereas, the medical evidence reveals that he has suffered another major incised wound on his chest. How he sustained such wound, remained unexplained. The testimony of PW-2 that 4-5 other persons were noticed running from the spot is erroneously ignored. Both PW-1 and PW-2 had admitted that there was darkness on the spot, therefore, even if the bulb was there, the injured could have not identified the assailants. The testimony of PW-2 that he could not recognize the assailants is also not taken into consideration. The accused persons had no intention to kill PW-1 and PW-2, because it is they who had taken PW-2 to the hospital, this aspect has also not been taken into consideration. The testimony of hostile witnesses was not taken into consideration to arrive at a conclusion that their testimony has rendered the prosecution case doubtful. The contradictions, improvements and omissions in the statements of witnesses is also erroneously ignored. It has, therefore, been urged that no case against the accused persons is made out and as such, they are entitled to be acquitted of the charge framed against each of them. Otherwise also, in the nature of the evidence produced by the prosecution, they are entitled to the benefit of doubt and resultantly acquittal. Both the appeals have been sought to be allowed and the accused persons to be acquitted of the charge framed against each of them.

12. Mrs. Vandana Kuthiala, learned defence counsel has strenuously contended that two able bodied persons (PW-1 and PW-2) could have not been beaten up by the accused persons, out of whom deceased accused Rattan Chand and his wife accused No.2 were old and aged, hence physically feeble and weak. The remaining accused No. 3 and 4 though were young

persons, however, the injured were also young persons hence, could have not been beaten up by the said accused, that too, in the presence of their father PW-4, mother, brother Desh Raj and wife of PW-2 Prithi Chand, Kativa PW-8. One of the injured i.e. PW-2 has turned hostile to the prosecution. The own testimony of injured witnesses and also of PW-4, PW-6 and PW-8 amply demonstrate that injured Prithi Chand PW-2 found lying on road in an injured condition by the accused persons was shifted by them to the hospital. Had they noticed another injured PW-1 Shonki Ram also lying there, he would have also been shifted by them to the hospital. Such act and conduct of the accused persons, according to learned defence counsel is itself sufficient to conclude that they have been falsely implicated in this case. The recovery of clothes and knife allegedly recovered by the police is stated to be not proved at all. Above all, the clothes and knife were not sent to Seriologist for opinion. PW-4, PW-6 and PW-8 who admittedly were in their house at village Sarvnati and came to the spot on hearing alarm had no occasion to witness the occurrence because as per their testimony it took about 5 minutes for them to reach at the spot and that as per defence version, their house being situated at a distant place i.e. 700-800 meters from the place of occurrence at least 10-15 minutes time was required for them to reach at the place of occurrence. Therefore, according to learned defence counsel, the said witnesses are liar. It has also been pointed out from the evidence as has come on record by way of testimony of PW-2 that the injured witnesses themselves had no idea of the accused who had stabbed them with knife. The accused persons, as such, have been sought to be acquitted of the charge framed against each of them.

13. On the other hand, Mr. Pramod Thakur, learned Additional Advocate General while supporting the impugned judgment has argued that the evidence as has come on record by way of testimony of injured witnesses itself is sufficient to arrive at a conclusion that it is the accused alone who were the assailants and assaulted both the injured with such intention and knowledge to do away with them. The inconsistencies in the prosecution evidence pointed out by learned defence counsel are not of such a nature so as to render the prosecution case doubtful. Both the appeals, as such, have been sought to be dismissed.

14. The present is a case where the accused persons have been convicted for the commission of an offence punishable under Sections 342, 326 and 307 read with Section 34 of the Indian Penal Code. They, however, have been acquitted of the charge framed against each of them under Section 201 read with Section 34 of the Indian Penal Code. Learned trial Judge has recorded the findings of conviction against them on appreciation of the evidence oral as well as documentary. The accused persons have not opted to produce any evidence in their defence, however, their defence as emerges from the trend of cross-examination of the prosecution witnesses and in their statements recorded under Section 313 of the Code of Criminal Procedure is pure and simple that no doubt their exist litigation between them and the complainant, however, they never stabbed PW-1 and PW-2 nor administered beatings to them. As a matter of fact, accused No.1 Rattan Chand (since dead) came out of the house around 10.00 p.m. to answer the call of nature and found Prithi Chand (PW-2) lying in an injured condition out side. The said accused had informed other members (his co-accused) of his family. They arranged for a vehicle and shifted PW-2 to the hospital at Jawalamukhi and from Jawalamukhi to district hospital, Dharamshala. Accused Rattan Chand spent money from his pocket for purchasing medicines which were required to be administered to the said injured immediately. Accused No. 3 Babu Ram had even donated blood also which ultimately was transfused to injured Prithi Chand. They did so due to brotherhood and to save the life of said injured and for no other reason at all. A false case was thus stated to be engineered against them.

15. The accused persons, however, had admitted on going construction work of the complainant party on the Government land at Bage-Da-Moar and that they had also raised construction of their house on the Government land itself adjoining to the on going construction work of the house of the complainant. They also admit their enmity with the complainant party. However, according to them, the house of the complainant was in different village about one kilometer away from the place of occurrence. Rest of the prosecution case has either been denied being wrong or for want of knowledge.

16. Before coming to the adjudication of the point in issue that the prosecution has been able to prove its case against the accused persons beyond all reasonable doubt or not, it is desirable to take note as to what constitute an offence punishable under Sections 307, 326, 342 read with Section 34 of the Indian Penal Code.

17. A bare perusal of Section 307 of the Indian Penal Code reveals that if an offender intentionally or knowing fully and under such circumstances that thereby he shall cause the death and would be held guilty of murder and does any act towards it can be said to have committed the offence under the section ibid. The essential ingredients of the commission of such offence, therefore, are that; the accused did some act with such intention or knowledge that same is sufficient to cause hurt/death of the victim and thereby would have held guilty for murder. Thus, an offence under Section 307 IPC is an attempt to murder.

18. Section 307 consists of three parts. First part lays stress on intention or knowledge and on circumstances. It applies even if no injury has been inflicted which is capable of causing death. Second part provides that when no hurt, lighter punishment is to be awarded but when hurt, enhanced punishment will be imposed. Third part gives a different set of circumstances. It is an offence committed by a person who is already a life convict and hurt is caused in consequence of the act of a life convict.

19. Additionally, the prosecution is also required to prove that the offender had intended that some result will happen from the act attributed to him. It is not necessary that injury he caused to the victims are sufficient in ordinary course to cause his death. The support in this regard can be drawn from the law laid down by the Apex Court in ***State of Maharashtra*** V. ***Balram Bama Patil and others, AIR 1983 S.C. 305*** and in ***Matiullah Sheikh and others*** V. ***State of West Bengal AIR 1965 S.C. 132***. The Hon'ble Apex Court in ***Om Prakash*** V. ***State of Punjab AIR 1961 S.C. 1782*** has held that in order to constitute an offence i.e. attempt to murder, punishment under Section 307 IPC, the act towards the commission of murder need not to be a penultimate act, however, it is the knowledge, intention and circumstances under which such act is committed.

20. Now if coming to the offence punishable under Section 326 IPC, the essential ingredients are; (i) the accused has caused grievous hurt (ii) voluntarily (iii) by means of instrument of shooting, stabbing or cutting, instrument which if used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance etc. Therefore, in order to infer the commission of an offence punishable under Section 326 IPC, the hurt should have been caused voluntarily and must be grievous hurt caused by dangerous weapon or means.

21. The essential ingredients to infer commission of an offence punishable under Section 342 IPC are that the accused has wrongly confined the complainant and such restraint was to prevent the complainant from proceeding beyond certain circumscribed limits beyond which he has a right to proceed.

22. The charge with the aid of Section 34 IPC can only be framed if the members of accused are two or more and they had common intention and participation in the commission of offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted in such a situation as it involves vicarious liability, however, if participation of the accused in the commission of offence is proved but common intention is absent, Section 34 IPC cannot be invoked in that situation. It is trite that Section 34 IPC does not constitute a substantive offence and rather is in the nature of a rule of evidence. The liability can only be fastened on an offender who may have not directly involved in the commission of an offence but on the basis of a pre-arranged and plan between him and his co-accused, who actually committed the offence.

23. Now if applying the above legal principles to the facts of this case and the evidence available on record, what to speak of any evidence, there is not even whisper also that the accused had meeting of minds and assaulted the victims of occurrence in a pre-arranged and

planned manner. Also that, they had common intention to assault the victims of the occurrence and to achieve such object they all participated in the commission of offence in a manner they planned during meeting of minds. Therefore, the charge against either of the accused could have not been framed with the aid of Section 34 IPC nor accused i.e. at least Rattan Chand (since dead) and his wife Jamna Devi, accused No.2, against whom there are no allegations of stabbing could have not been charged with the commission of an offence punishable under Section 307 and 326 IPC. Any how, for want of evidence qua the meeting of minds and the common intention of the accused persons to assault the victims in a pre-arranged and planned manner, the charge against them could have been framed independent of Section 34 IPC for the substantive offence(s), they allegedly committed, of course, on the basis of evidence collected during the course of investigation.

24. It is well settled at this stage that charge against an offender can be framed only on the basis of suspicion also, therefore, in view of the investigation conducted and the police report, at the most, charge could have been framed against accused No. 1 and 2 for the commission of offence punishable under Section 342 IPC, whereas, against accused No. 3 and 4 under Section 307, 326 and 342 IPC.

25. Now comes the main controversy that the evidence available on record is sufficient to infer the commission of such offence(s) by the accused persons or not. The answer to it would be in negative. The prosecution case even if taken as it is, no case under Section 342 of the Indian Penal Code is made out against either of the accused persons because there are no allegations that they restrained injured PW-1 and PW-2 from moving ahead in a particular direction and rather as per prosecution story, the accused persons started abusing injured witnesses around 9.30 p.m at a stage when they were going to sleep in the temporary shed constructed adjoining to the house of accused persons to keep watch of the on going construction work of their house. There is not even a whisper also that the accused persons had restrained the injured from proceeding beyond certain circumscribed limits and thereby restrained them wrongfully. The impugned judgment is silent because learned trial Judge has not recorded any finding as to how the evidence available on record has proved the prosecution case qua the commission of offence punishable under Section 342 IPC by the accused persons. Since this Court has ruled-out the possibility of application of Section 34 IPC in para supra, therefore, for want of evidence as to which of the accused restrained injured from proceeding beyond a particular point and thereby confined them wrongfully, the offence punishable under Section 342 IPC against either of the accused is also not established. The conviction of the accused persons for the commission of offence under Section 342 IPC is, therefore, not legally sustainable.

26. Now if coming to the commission of offence punishable under Sections 307 and 326 IPC by either of the accused persons, there is no iota of evidence suggesting that both injured were assaulted with knife Ext. P-1 by accused No.3 Babu Ram or accused No.4 Rajesh Kumar for the reason that while as per the testimony of PW-1 Shonki Ram, knife blow in his back and in the stomach of injured PW-2 Prithi Chand were inflicted by accused No.3 Babu Ram, PW-2 Prithi Chand has expressed his inability to tell as to who had inflicted the blow of knife in the back of PW-1 Shonki Ram. As per his further version, when he came to the rescue of his brother PW-1, he was also beaten up by the accused persons and one of them inflicted blow of knife on his stomach. The said accused, as per his version, was either Babu Ram or Rajesh Kumar because there being darkness, he could not identify the assailant. He was declared hostile and cross-examined by learned Public Prosecutor on behalf of the prosecution. As per his version knife blow in the back of PW-1 was inflicted by accused No.3 Babu Ram and when he tried to save his brother, it is the same accused who inflicted knife blow in his stomach. When further cross-examined by learned defence counsel, the suggestion that due to darkness, he could not see as to who inflicted injuries on the person of Shonki Ram and also on his person has been admitted by him being correct. Though in the same breath, it was stated that one bulb was on the wall of the house of accused Rattan Chand. In the same breath, he has further stated that he has made the statement qua causing injury with knife in the back of PW-1 and on his stomach by accused Babu Ram on the basis of his statement recorded by the police. As per his further version, he

had not seen the knife in the hand of either of the accused persons. The testimony of the injured witness PW-2, as such, has caused a major dent in the prosecution story and it cannot be said beyond all reasonable doubt that blows with knife were inflicted in the back of PW-1 Shonki Ram and on the stomach of PW-2 by accused Babu Ram and none else. Interestingly enough, as per further version of PW-2, 4-5 persons were present there who ran away from the spot when they received injuries. The suggestion to this effect was given by learned defence counsel has been admitted as correct by him.

27. Admittedly, the complainant and accused party were inimical to each other. Even as per testimony of PW-1 his family had litigation with other villagers also, hence inimical to them. Therefore, such statement assumes considerable significance, that too, when as per admission on the part of PW-2 in his cross-examination that 4-5 other persons present there had fled away from the place of occurrence after they both (PW-1 and PW-2) received injuries on their person. The possibility of the said persons having inflicted injuries on their person cannot be ruled-out because PW-2 has not seen knife in the hands of either of the accused persons and even as per his own admission, had he been not shifted by Accused No. 3 and accused No.4 to the hospital, there was danger to his life. Had the injured been beaten up by accused persons or assaulted with knife by accused No.3 or accused No.4, it would not have been expected from them to have reacted so promptly as they did by shifting PW-2 to the hospital in a vehicle hired due to their anguish against the injured.

28. The defence version that accused Rattan Chand came out of his house around 10.00 p.m. to answer the call of nature and noticed PW-2 lying on the road in an injured condition and apprised other members of his family in this regard i.e. accused No.3 and accused No.4 to shift him to hospital seems to be nearer to the factual position. The recovery of knife Ext. P-1 at the instance of accused No.4 Rajesh Kumar has not been proved beyond all reasonable doubt as disclosure statement of the said accused in this regard was not at all recorded. The other witness to recovery memo Ext. PW-7/A Hari Mitter has not supported the prosecution case in this regard at all and was declared hostile. In his cross-examination, it is denied that knife Ext. P-1 was produced by accused Rajesh in his presence. The recovery of clothes of the injured PW-1 and PW-2 in the presence of PW-5 Amar Singh is hardly of any help to the prosecution case, because it is no-body's case that injured PW-1 and PW-2 had not suffered injuries, therefore, it is obvious that their clothes were blood stained. The complainant and his another son Desh Raj, PW-6, daughter-in-law Kavita, PW-8 though have supported the prosecution case qua on hearing alarm of injured witnesses in their house, they rushed to the spot and noticed all the accused administering beatings to both the injured. As per testimony of PW-4 Prem Chand, knife blow was given to PW-2 Prithi Chand by accused No.3 Babu Ram. Similar is the version of PW-6 Desh Raj. To the contrary, as per testimony of PW-8, knife blow to her husband Prithi Chand (PW-2) was inflicted by accused Rajesh. None of them has said as to who had inflicted knife blow in the back of PW-1 Shonki Ram. As noticed supra, PW-8 Kavita has made contrary statement as according to her, knife blow was inflicted to her husband by accused Rajesh Kumar. Their presence on the spot is highly doubtful for the reason that as per admission on the part of PW-2 Prithi Chand and PW-6 Desh Raj, their old house from where they came to the place of occurrence is situated at a distance of 700-800 meters. It was not possible for them to have reached in five minutes after hearing alarm, that too, when they started from the house after hearing the alarm '*Bachao*' '*Bachao*'. Meaning thereby that when they heard the alarm, the occurrence had already taken place and to reach at the place of occurrence from a place 700-800 meters away therefrom, at least 10-15 minutes were required to reach there. True it is that from the testimony of PW-1, distance of their house from the place of occurrence is 250-300 meters, whereas, PW-4 though denied that such distance is 700-800 meters, however, failed to tell as to what was the exact distance, if it was not 700-800 meters. In such a scenario, the plea of the accused that such distance was 700-800 meters seems to be nearer to the factual position. Therefore, PWs 4, 6 and 8 are liar and being the members of family of injured as their father, brother and wife of one of the injured Prithi Chand were interested in the success of the prosecution case and as such, deposed falsely.

29. The medical evidence as has come on record by way of testimony of PW-7 Dr. Puneet Mahajan though is suggestive of that injuries on the person of PW-1 and PW-2 were dangerous to life, however, on the basis of such evidence, it cannot be said that it is accused alone who had inflicted such injuries on their person. On the other hand, in the opinion of PW-7, such injuries are even possible with a broken bottle also. When as per the prosecution case itself, the knife was not seen in the hand of either of the accused persons and 4-5 other persons ran away from the spot, the injured having sustained injuries in an occurrence some what different and not on account of stab injuries allegedly inflicted by the accused persons, cannot be ruled-out.

30. The remaining prosecution witnesses are formal in nature, who in one way or the other remained associated with the investigation of the case. On the other hand, explanation as set-forth by the accused persons in their statement recorded under Section 313 of the Code of Criminal Procedure seems to be plausible because enmity is a double edged weapon and the possibility of the accused persons having been falsely implicated by the police at the instance of complainant party, cannot be ruled-out.

31. Having regard to the given facts and circumstances of this case and re-appraisal of the evidence available on record, this Court is of the considered opinion that the prosecution has miserably failed to make out a case for the commission of an offence punishable under Section 307 and 326 IPC also. As a matter of fact, the present is a case where the prosecution has failed to prove its case beyond all reasonable doubt. Learned trial Judge has failed to appreciate the evidence available on record in its right perspective and rather seems to have swayed away only due to the stab injuries, which were inflicted on the person of both injured. The prosecution has, therefore, miserably failed to bring guilt home to the accused persons. Since accused Rattan Chand has already expired, therefore, remaining accused Jamna Devi, Babu Ram and Rajesh Kumar are acquitted of the charge framed against each of them under Sections 342, 307 and 326 read with Section 34 of the Indian Penal Code.

32. In view of the foregoing reasons, both the appeals succeed and the same are accordingly allowed. Consequently, the impugned judgment is quashed and set aside and the accused persons namely, Jamna Devi, Babu Ram and Rajesh Kumar are acquitted of the charge framed against each of them under Sections 342, 307 and 326 read with Section 34 of the Indian Penal Code. The personal bonds furnished by all the accused persons shall stand cancelled and the sureties discharged.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

CMPMO No. 180 of 2017 &
CMPMO No. 181 of 2017
Reserved on 04.07.2017
Decided on: 17.07.2017

CMPMO No. 180 of 2017

Kunal Ranawat .....Petitioner
Versus
Rativa Jahan Ranawat ......Respondent

CMPMO No. 181 of 2017

Rativa Jahan Ranawat .....Petitioner
Versus
Kunal Ranawat ......Respondent

Hindu Marriage Act, 1955- Section 13(1) (i-a)- Applicant had filed a petition for divorce on account of cruelty, misbehavior and desertion – parties moved a joint application seeking divorce

on the basis of mutual consent –Court posted the matter after six months – application was filed for recalling the order stating that the parties were living separately for more than six months and, therefore, petition be decided immediately – this application was dismissed- aggrieved from the order, the present petition has been filed- held that no High Court or Civil Court can grant relief by invoking the principle of irretrievable breakdown of marriage- power to waive off period of six months is not available to any Court except the Supreme Court – District Judge had rightly dismissed the application- petition dismissed. (Para-6 to 12)

Cases referred:

Anil Kumar Jain vs. Maya Jain, 2009 (10) SCC 415
Manish Goel vs. Rohini Goel, 2010 (4) SCC 393

For the petitioner: Mr. Prashant Sharma, Advocate in CMPMO No. 180 of 2017.
Mr. Rajiv Jiwan, Advocate in CMPMO No. 181 of 2017.
For the respondent: Mr. Rajiv Jiwan, Advocate in CMPMO No. 180 of 2017.
Mr. Prashant Sharma, Advocate in CMPMO No. 181 of 2017.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

Since both the petitioners are seeking same relief, as also, common facts are involved in these petitions, hence, both these petitions were taken up together for hearing and are being disposed of by this common judgment.

2. The present petitions are maintained by the petitioners/applicants (hereinafter to be called as “the applicants”) under Article 227 of the Constitution of India, read with Section 151 of the Code of Civil Procedure, against the order dated 18.03.2017, passed in CMP No. 73-6/2017, as well as order dated 27.02.2017, passed in CMP No. 47-6/2017, wherein six months cooling off period was granted to the petitioners and the case was fixed for consideration of divorce with mutual consent on 30.08.2017.

3. Key facts, giving rise to the present petitions are that the applicant-husband had instituted a petition for grant of decree of divorce under Section 13(1) (i-a) of the Hindu Marriage Act, before learned District Judge, Bilaspur, H.P. against the applicant-wife, on account of cruelty, misbehavior and desertion, wherein it has been mentioned that marriage between the parties has been solemnized in the year 2012 at Bilaspur, H.P. and from such wedlock, no issue was born. The respondent-wife, by filing reply to the said petition admitted the strained relation between the parties and she claimed maintenance to the tune of Rs. 75,00,000/- for dissolving of marriage. Thereafter, both husband and wife preferred CMP No. 47/6/2017, under Order 23, Rule 3 CPC, read with Section 151 CPC, for converting the earlier petition (filed by the husband) under Section 13(1) (i-a) of the Hindu Marriage Act to a joint petition on the ground ‘compromise’. Accordingly, a joint application was moved under Section 13(1) (b) of Hindu Marriage Act by both the parties, wherein they averred that they were living separately from each other since February, 2016 and there have been no cohabitation between them between this period. It has been further averred in the application that a project was offered to the husband in South Pacific Asia, but due to pendency of the present case, he is unable to accept that project. Further the said application was saddled on one time settlement arrived at between the parties, whereby the wife had claimed Rs. 75,00,000/- (Rupees seventy five lac), as one time maintenance amount to dissolved the marriage with mutual consent and in view of the settlement, the wife shall forfeit all claims against her husband or his estate in future. In terms of said application, both the parties agreed to withdraw all their cases, including the complaint filed by the wife under Domestic Violence Act. Thereafter, on the above said application, the statements of the parties were recorded on 27.02.2017 **(Annexure P-4)**. Though the applicants have preferred the application for conversion

of the divorce petition into a petition for granting the divorce by mutual consent, on the grounds that the parties were living separately for more than six months, yet learned Court below has posted the matter after six months i.e, on 30.08.2017, as a cooling off period. After that the parties with a plea that the cooling off period has already been fulfilled by them, moved another application No. 73/6 of 2017, under Section 151 CPC, for recalling that order, as the matter was fixed for consideration of divorce with mutual consent after six months. However, the same was dismissed by the learned District Judge, Bilaspur, H.P. with the observations that "*there is no power with this Court to waive off the period of six months, hence, there is no substance in the application*". Hence the present petitions.

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

5. Mr. Prashant Sharma and Mr. Rajiv Jiwan, Advocates, for the petitioners have argued that both the petitioners are residing separately since February, 2016 and there is no hope of reconciliation between them. They have further argued that the marriage has broken down irretrievably, the parties have not been cohabiting with each other and living separately since February, 2016, now the parties by way of one time settlement have compromised the matter vide Compromise Deed **(Ext. PA).** As per the terms and conditions of Compromise Deed **(Ext. PA),** the petitioner-wife has mutually agreed to one time settlement and claimed Rs. 75,00,000/-(Rupees seventy five lac) as one time maintenance amount to dissolved the marriage with mutual consent and in view of the settlement, the wife shall forfeit all claims against her husband or his estate in future. Learned counsel for the parties have further argued that as there are no other issues or disputes regarding any articles, pending to be resolved between the petitioners, therefore, there is no impediment in curtailing the period of six months and granting a decree of divorce by mutual consent, hence the present petitions are required to be allowed and orders of learned Court below are required to be set aside.

6. Hon'ble Supreme Court in ***Sureshta Devi vs. Om Prakash's*** case, has discussed in detail, the legislative intent behind the waiting period from six months to eighteen months in Section 13-B (2) of the Act. The relevant extracts of the judgment are reproduced hereinbelow.

> ***"10. Under sub-section (2) the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than eighteen months after the said date. This motion enables the Court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The Court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the Court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the marriage should be dissolved, it must pass a decree of divorce.***
>
> ***13. from the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorize the Court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be party to the joint motion under sub-section (2). There is nothing in the Section which prevents such course. The Section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the***

time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties...if the petition is not withdrawn in the meantime, the Court shall... pass a decree of divorce..." What is significant in this provision is that there should also be mutual consent when they move the Court with a request to pass a decree of divorce. Secondly, the Court shall be satisfied about the bonafides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the Court gets no jurisdiction to make a decree of divorce. If the view is otherwise, the Court could make an inquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent.

14. Sub-section (2) requires the Court to hear the parties which means both the parties. If one of the parties at that stage says that "I have withdrawn my consent", or "I am not a willing party to the divorce", the Court cannot pass a decree of divorce by mutual consent. If the Court is held to have the power to make a decree solely based on the initial petition, it negates the whole idea of mutuality and consent for divorce. Mutual consent to the divorce is a sine qua non for passing a decree for divorce under Section 13-B. Mutual consent should continue till the divorce decree is passed. It is a positive requirement for the Court to pass a decree of divorce. The consent must continue to decree nisi and must be valid subsisting consent when the case is heard."

7. Now coming to the present case, the issue that arises for consideration is, whether the statutory period of six months, as envisaged under Section 13-B (2) of the Act, can be curtailed by this Court.

8. In ***Anil Kumar Jain vs. Maya Jain, 2009 (10) SCC, 415,*** the Hon'ble Supreme Court, has held that it has power under Article 142 of the Constitution of India to convert proceedings under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and grant a decree for mutual divorce without waiting for the statutory period of six months, by applying the doctrine of irretrievable breakdown of marriage. However, the Hon'ble Apex Court has categorically held, in no uncertain terms, that except for the Supreme Court, no High Court or Civil Court has the power to grant relief by invoking the doctrine of irretrievable breakdown of marriage. The Hon'ble Supreme Court has held as under :

"28. It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme Court under Article 142 of the Constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down irretrievably, the same was not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

29. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable breakdown of marriage is not one of the grounds indicated whether under Section 13 of 13-B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceedings under either of the said provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the

Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of Irretrievable breakdown of marriage is not available even to the High Courts, which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the Civil Courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955.

30. The second proposition is that although the Supreme Court can, in exercise of its extraordinary powers under Article 142 of the Constitution, convert a proceeding under Section 13 of the Hindu Marriage Act, 1955, into one under Section 13-B and pass a decree for mutual divorce, without waiting for the statutory period of six months, none of the other Courts can exercise such powers. The other Courts are not competent to pass a decree for mutual divorce if one of the consenting parties withdraws his/her consent before the decree is passed. Under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent has to subsist till the second stage when the petition comes up for orders and a decree for divorce is finally passed and it is only the Supreme Court, which, in exercise of its extraordinary powers under Article 142 of the Constitution, can pass orders to do complete justice to the parties."

9. The above principles of law are reiterated by the Hon'ble Supreme Court in ***Manish Goel vs. Rohini Goel, 2010 (4) SCC 393***, which reads thus:

"***12. In Anjana Kishore vs. Puneet Kishore, this Court while allowing a transfer petition directed the Court concerned to decide the case of divorce by mutual consent, ignoring the statutory requirement of moving the motion after expiry of the period of six months under Section 13-B (2) of the Act. In Anil Kumar Jain, this Court held that an order of waiving the statutory requirements can be passed only by this Court in exercise of its powers under Article 142 of the Constitution. The said power is not vested with any other Court.***

13. However, we have also noticed various judgments of this Court taking a contrary view to the effect that in case the legal ground for grant of divorce is missing, exercising such power tantamounts to legislation and thus transgression of the powers of the legislature, which is not permissible in law.

14. Generally, no Court has competence to issue a direction contrary to law nor the Court can direct an authority to act in contravention of the statutory provisions. The Courts are meant to enforce the rule of law and not to pass the orders or directions which are contrary to what has been injected by law."

10. In the present case, the ground taken by the petitioners is that their marriage has broken down irretrievably and the parties have not been cohabiting with each other and living separately since February, 2016, both the petitioners have mutually agreed that it be dissolved, hence the waiving period of six months ought to be curtailed.

11. It is clear from the judgments of the Hon'ble Supreme Court reproduced hereinabove that in curtailing the statutory period of six months and granting a decree of divorce by mutual consent, except Hon'ble the Supreme Court, this power is not available to any other

Court, including this Court. Such powers can be exercised only by the Hon'ble Supreme Court, under Article 142 of the Constitution of India.

12. Accordingly, in view of the law, as laid down by the Hon'ble Supreme Court in ***Anil Kumar Jain vs. Maya Jain and Manish Goel vs. Rohini Goel,*** I find no illegality in the orders passed by the learned Court below and the present petitions deserve dismissal and are accordingly dismissed. However, in the peculiar facts and circumstances of the case, parties are left to bear their own cost(s).

13. The petition(s) stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Shashi Kumar and others …Appellants.
Versus
Sunka Ram …Respondent.

RSA No.333 of 2005.
Reserved on: 03.07.2017.
Decided on : 17.07.2017.

Specific Relief Act, 1963- Section 5 and 38- Plaintiff pleaded that he is co-owner in possession of the suit land- the defendant got himself recorded in possession of the suit land as gair maurusi tenant – the defendant started interfering with the suit land after this entry and started construction work despite requests not to do so- hence, the suit was filed for seeking possession and injunction – the defendant pleaded that he is in possession of the suit land since 1972 and has a right to raise construction – the suit was decreed by the Trial court- an appeal was filed, which was allowed- held in second appeal that possession of the defendant was proved by the evidence- the correction was made after hearing the co-sharers – the proprietary rights were conferred upon the tenants on the commencement of H.P. Tenancy and Land Reforms Act- the Appellate Court had rightly allowed the appeal- appeal dismissed. (Para-10 to 15)

For the appellants Mr. G.R. Palsra, Advocate.
For the respondent Mr. Bhupender Gupta, Sr. Advocate with Ms. Rinki Kashmiri, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

By way of the present appeal, the appellants have challenged the judgment passed by the Court of learned Additional District Judge, Mandi, District Mandi, (H.P), in Civil Appeal No.48 of 1999, dated 28.3.2005, vide which, the learned lower Appellate Court has set aside the judgment and decree passed by the then learned Sub Judge 1st Class, Jogindernagar, District Mandi, in Case No.149 of 1996, dated 12.5.1999.

2. Material facts necessary for adjudication of this Regular Second Appeal are that appellants/plaintiffs (hereinafter referred to as 'plaintiffs') maintained a suit for possession and mandatory injunction against the respondent/defendant (hereinafter referred to as 'defendant') alleging that plaintiff is recorded as co-owner-in-possession of the suit land alongwith other co-sharers, whereas the defendant has no right, title or interest over the suit land. The suit land is situated in Mohal Tharu, Pargana Ahju, Tehsil Jogindernagar, District Mandi, (H.P) (hereinafter referred to as 'suit land) and is adjacent to the shop of plaintiff and the defendant. Defendant

during the year 1992, moved an application before the Assistant Collector 2nd Grade, Jogindernagar, alleging that he is in possession of the suit land and prayed that he be entered in possession of the suit land and Assistant Collector 2nd Grade, Jogindernagar, on 24.12.1992, ordered the defendant to be recorded in possession of the suit land as '*Gair Marusi'* tenant, which order of Assistant Collector, 2nd Grade, Jogindernagar, is illegal, null and void and not binding upon the plaintiff, as no relief of tenancy was claimed by the defendant and there was no evidence before Assistant Collector 2nd Grade, Jogindernagar. As such, the order passed by the Assistant Collector 2nd Grade, Jogindernagar, is against the provisions of law and is liable to be set aside. The defendants after passing of the order without any right, title or interest started interference over the suit land and the defendant now has started construction work over the suit land inspite of repeated request of the plaintiff not to do so, in such a manner has encroached upon the suit land.

3. Defendant contested the suit by raising preliminary objections qua maintainability, jurisdiction, non-joinder of necessary parties, estoppel, valuation and suit is bad for want of better particulars. On merits, it has been contended that the plaintiff is co-owner-in-possession of the suit land. It is also denied that the defendant has no right, title or interest in the suit land. It is denied that the order of Assistant Collector 2nd Grade, Jogindernagar, is illegal, null and void and not binding upon the plaintiff, but stated that the Assistant Collector 2nd Grade, Jogindernagar, ordered that the defendant is to be recorded in possession of the suit land as a tenant, which order is legal and binding upon the parties. It has been stated that the defendant has been in possession of the suit land since 1972 and the plaintiff is not in possession of the suit land. It has been contended that the defendant being in possession of the suit land has got every right to raise construction over the suit land.

4. On the pleadings of parties, the learned trial Court framed following issues on 12.9.1997 :

> "1. Whether the order dated 24.12.1992 of Assistant Collector is null and void, as alleged ? OPP.
>
> 2. Whether the plaintiff is entitled for the relief of mandatory injunction, as prayed ? OPP.
>
> 3. Whether the plaintiff is entitled for the relief of possession, as alleged ? OPP.
>
> 4. Whether the suit is not maintainable ? OPD.
>
> 5. Whether the suit is bad for non-joinder of necessary parties ? OPD.
>
> 6. Whether the plaintiff is estopped to file the suit by his act and conduct ? OPD.
>
> 7. Whether the suit is time barred ? OPD.
>
> 8. Whether the suit is not properly valued for the purpose of Court fee and jurisdiction ? OPD.
>
> 9. Relief ."

5. The learned trial Court after deciding Issue Nos.1 to 3 in favour of the plaintiff, Issue Nos.4 to 8 against the plaintiff, decreed the suit.

6. Feeling aggrieved thereby defendant maintained first appeal before the learned Additional District Judge, Mandi, District Mandi, H.P, assailing the findings of learned trial Court below being against the law and without appreciating the evidence and pleading of the parties to its true perspective. The learned lower Appellate Court set aside the findings of the learned Court below. Now, the appellant has maintained the present Regular Second Appeal, which was admitted for hearing on 18.4.2006 on the following substantial questions of law:

> **" 1. Whether the suit as filed by the appellants was not bad for non-joinder of Raghunath and Madan Lal recorded as tenants at will (Gair**

Moursi) in the jamabandi for the year 1987-88 and the finding to the contrary given by the first appellate court is erroneous ?

2. Whether the order passed by the Assistant Collector holding that the respondent-defendant held the property as tenant under the persons recorded as owners in the jamabandi is without jurisdiction, if so, to what effect?"

7. Mr. G.R. Palsra, learned counsel appearing on behalf of the appellants has argued that the learned lower Appellate Court has not appreciated the fact that Assistant Collector 2nd Grade, Jogindernagar, has no power to change the revenue entry, so the judgment and decree passed by the learned lower Appellate Court is required to be set aside.

8. On the other hand, Mr. Bhupender Gupta, learned Senior Counsel appearing on behalf of the respondent has strenuously argued that the judgment and decree passed by the learned lower Appellate Court, is as per law. He has argued that on 24.12.1992, one of the co-owner was present, when the revenue entries were corrected. He has further argued that there is no substantial question of law, which is involved in the present appeal and the same deserves to be dismissed.

9. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the record in detail.

10. Plaintiff (Baldev Singh) while appearing in the witness box as PW-1, has deposed that the defendant has encroached upon the suit land, as he has started raising construction over the suit land after obtaining an order from Tehsildar in the year 1992, in his favour. He has further stated that the defendant never remained his tenant in the suit land and never paid any rent to him qua the suit land. He exhibited on record an application, Ex.P-2, made by the defendant for correction of *girdawari* before Assistant Collector 2nd Grade, Jogindernagar, as well as order dated 24.12.1992. From the perusal of Ex.P-2, application moved by the defendant for correction of revenue entry qua the suit land in his favour, it is evident that the only claim, which the defendant has laid before Assistant Collector 2nd Grade, Jogindernagar, was that the defendant is in cultivating possession of the suit land, as he has constructed a house and a cow shed in the suit land, but *girdawari* qua the suit land is required to be corrected. On perusal of Ex.P-2, it is also evident that the defendant has no where claimed that he is in possession of the suit land, as a tenant under the plaintiff and other co-sharers, who were impleaded as respondent in an application moved by the defendant and there is no pleading of the defendant before Assistant Collector 2nd Grade, Jogindernagar, that he has been paying rent qua the suit land to its owner. However, Assistant Collector 2nd Grade, Jogindernagar, vide order, dated 24.12.1992, Ex.P-3, found defendant to be in possession of the suit land and ordered that he be recorded as tenant over the suit land on payment of ¼ of produce from rabi 1992, which order of Assistant Collector 2nd Grade, Jogindernagar, ordering the defendant to be recorded as a tenant over the suit and is wrong and illegal, as there was neither any pleading of the defendant that he is a tenant under the recorded owner of the suit land and he has been paying 1/4th of the produce as a rent to the owners of the suit land nor there was any other material before Assistant Collector 2nd Grade, Jogindernagar, on the basis of which, he came to the conclusion that the defendant is a tenant on payment of 1/4th of the produce over the suit land. There is nothing in the order passed by the Assistant Collector 2nd Grade, Jogindernagar, to show that on which basis, he came to the conclusion that the defendant is a tenant in cultivating possession of the suit land on payment of 1/4th of produce. In absence of any pleading or any other material on record to show that there was any sufficient material before Assistant Collector 2nd Grade, Jogindernagar, to come to the conclusion that the defendant was a tenant on payment of rent over the suit land, order of Assistant Collector 2nd Grade, Jogindernagar, defendant is ordered to be recorded as a tenant over the suit land cannot be sustained in the eyes of law. Other than as a tenant, however, defendant is held to be in possession of the suit land correctly and as per actual position. On the other hand, defendant has also examined Jagdish Chand (DW-2), Udho Ram (DW-3) and Hoshiar Chand (DW-4). DW-2

Jagdish Chand and DW-4 Hoshiar Chand, are concerned, their statements are of no help for the defendant, as both of them have deposed that they have no knowledge, as to who is in possession of the suit land and their statement does not prove in any manner whatsoever that the defendant is in possession of the suit land as a tenant. DW-3 Udho Ram, has deposed that defendant is in possession of the suit land and he is constructing some wall over the suit land. There is nothing in the statement of DW-3 Udho Ram, to show that defendant is in possession of the suit land as a tenant or defendant has been paying any rent qua the suit land to the plaintiff and other co-sharers, but the statement of these witnesses make it clear that defendant is in possession of the suit land. So, statement of DW-3, Udho Ram, also does not prove at all that the defendant is in possession of the suit land, as a tenant, however entire evidence shows that the defendant is in possession of the suit land, so the order of Assistant Collector 2nd Grade, Jogindernagar, is legal and binding upon the plaintiff to the extent holding defendant is in possession of suit land.

11. After analyzing the evidence hereinabove, it is clear that it is the defendant, who is in possession over the suit land. The next question arises whether the order of Tehsildar recorded the defendant is in possession of the suit land, as a tenant, is as per record. From the copy of jamabandi in the year 1992-1993, Ex.P-1, it is clear that Sunka Ram (defendant), who was cultivating in possession of the suit land as 'gair marusi' tenant on an application made by him, Assistant Collector 2nd Grade, Jogindernagar, being competent authority recorded its finding vide order dated 24.12.1992 ordering that the defendant is recorded as '*gair marusi'* tenant. The co-owner's was heard by the Assistant Collector 2nd Grade, Jogindernagar, as is evident from the record. Defendant's witnesses have categorically stated that since the year 1992, defendant is in possession over the suit land measuring 0-1-18 bighas and to this effect their testimonies are reliable and not shattered by their cross-examination. The documentary evidence have also been placed on record i.e. copy of jamabandi for the year 1992-1993, Ex.P-1, in whose column of cultivation, Sunka Ram (defendant) has been shown as 'gair marusi' tenant and Ex.P-2, application for correction of revenue entries as preferred by the defendant before the Assistant Collector 2nd Grade, Jogindernagar, with a prayer that the 'girdawari' prepared by the revenue officer with regard to the suit land having erroneously reflected Raghu Nath and Madan Lal, to be the cultivators of the suit property, the entry being not in consonance with the factual position the 'girdawari' pertaining to the suit land be set aside and 'girdawari' with regard to the suit property be recorded in favour of the applicant/defendant. On an application, as preferred by the defendant before the Assistant Collector 2nd Grade, Jogindernagar, a direction was made that the defendant be entered as 'gair marusi' with respect to the suit land, vide order, dated 24.12.1992.

12. The jamabandi for the year 1987-1988 also shows that Raghu Nath and Madan Lal, have been shown to be recorded as 'gair marusi' tenant over the suit property. Both Raghu Nath and Madan Lal are dead. The jamabandi for the year 1987-1988 showed Raghu Nath and Madan Lal, are in possession over the suit property. This entry is not rebutted by the plaintiff by leading clear and cogent evidence. From the record, it is correct that when an application for substitution of the entries in favour of Raghu Nath and Madan Lal, on the basis of earlier entries, as 'gair marusi' tenant over the suit property was preferred before the Assistant Collector 2nd Grade, Jogindernagar, Raghu Nath and Madan Lal, both were alive, however, they expired during the pendency of an application before the Assistant Collector 2nd Grade, Jogindernagar. The question, which involved, in this case, is that Raghu Nath and Madan Lal, were the tenants over the suit property at the time of coming into operation of H.P. Tenancy and Land Reforms Act, 1975. The proprietary rights vested with them automatically as per the provision of Section 104 of the H.P. Tenancy and Land Reforms Act, as they were 'gair marusi' tenant over the suit property. On the coming into force of the Act the conferment of the proprietary rights were automatic. So, it is Raghu Nath and Madan Lal, who are owner of the suit property and not the plaintiff. Mere existence of the revenue entries in the revenue record in their favour is of no consequence.

13. The learned lower Appellate Court has rightly held that the plaintiff has no right, as he was not owner of the suit property to maintain the suit against the defendant, who was in

possession of the suit property. Since the plaintiffs were not owner of the suit property, their arise no occasion to pay the rent by the defendant to the plaintiff.

14. The right to institute a suit only lies with the legal heirs of Raghu Nath and Madan Lal and not with the plaintiff. So, substantial question of law No.1, is answered holding that the suit maintained by the plaintiff is bad for non-joinder of Raghu Nath and Madan Lal or their legal heirs, who are tenants and who have legally become owner of the suit property. The suit being bad for non joinder of necessary parties is required to be dismissed. As far as substantial question of law No.2 is concerned, plaintiffs are not owner of the suit land and they have no right to maintain suit and challenge the order of Assistant Collector 2nd Grade, Jogindernagar. Admittedly, the defendant is having possession over the suit property and it is only the true owner, who can maintain the suit. Plaintiff not being owner of the suit property and in absence of the true owner, i.e. legal heirs of Raghu Nath and Madan Lal, cannot maintain the present suit. The plaintiffs were never owner of the suit land as owner of the suit land was Raghu Nath and Madan Lal, as the proprietary rights vested them automatically on coming into force the H.P. Tenancy and Land Reforms Act. The suit by stranger is not maintainable against a person in possession. This Court finds that the judgment passed by the learned lower Appellate Court, is after appreciating the facts and evidence, which have come on record to its true perspective. The documents are properly appreciated. The plaintiff, who is stranger, has no right to maintain the present suit.

15. In view of the above discussion, the appeal of the appellants is without merit and deserves dismissal, hence the same is dismissed. In the peculiar facts and circumstances of the case, parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant
Versus
Sunil Dutt & others ......Respondents

Cr. Appeal No. 304 of 2007
Reserved on: 27.06.2017
Decided on: 17.07.2017

Code of Criminal Procedure, 1973- Section 318- The informant noted that supply of water to his field was stopped- he found on inquiry that bandh was broken by accused and they were irrigating their fields- informant objected and tried to re-construct the bandh but the accused gave beatings to the informant- accused were tried and acquitted by the Trial Court- held in appeal that informant and his brother have enmity with accused- there are contradictions in the statements of prosecution witnesses- recovery of sickle was not proved- prosecution has not proved its case beyond reasonable doubt and the accused were rightly acquitted by the Trial Court- appeal dismissed. (Para-7 to 16)

Cases referred:

K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant : Mr. Pushpinder Jaswal, Dy. AG with Mr. Rajat Chauhan, Law Officer.

For the respondents : Mr. Sandeep Chauhan, Advocate, vice Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present criminal appeal, under Section 378 of the Code of Criminal Procedure has been maintained by the appellant-State, against the judgment of acquittal, dated 25.05.2007, passed by the learned Judicial Magistrate 1st Class, Rajgarh, District Sirmaur, H.P., in criminal case No. 37/2 of 2006.

2. The key facts, giving rise to the present appeal as per the prosecution story are that on 02.05.2006, at about 7.30 a.m., when Chiranjilal/complainant (hereinafter to called as "the complainant") was irrigating his fields at Halonipul, he noticed that supply of the water from the *baandh* was stopped and when he went to ascertain the same, he found that *baandh* was broken by the accused persons and they were irrigating their fields, despite the fact that it was not their turn to irrigate the fields. When complainant objected and tried to make *baandh* again, all the accused persons started giving beating to the complainant and one of the co-accused, Sunita Sharma having *darati* in her hand, torn clothes of the complainant. On receiving beatings, the complainant raised cries and on hearing his cries, his brother Vinod Kumar came on to the spot and rescued him. Ex-Pradhan, Anil Kumar has also witnesses the whole incident. Thereafter, the matter was reported to the Police, on the basis of which, FIR, Ext. PW-1/A, was registered. During investigation spot map, Ext. PW-6/A, was prepared and *darati*, Ext. P-2, was taken into possession, vide memo, Ext. PW-1/C. T-shirt, Ext. P-1, was also taken into possession, vide memo, Ext. PW-1/B. The complainant was medically examined and his MLC, Ext. PW-3/A, was obtained. The statements of the witnesses under Section 161 Cr.P.C were recorded. After completion of investigation, challan was presented before the learned trial Court.

3. Prosecution, in order to prove its case, examined as many as six witnesses. Statements of the accused persons were recorded under Section 313 Cr.P.C, wherein they denied the prosecution case and claimed innocence. Accused persons did not lead any defence evidence. The learned trial Court, vide impugned judgment dated 25.05.2007, acquitted the accused persons.

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

5. Learned Deputy Advocate General has argued that learned Court below has failed to take into consideration the fact that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. He has further argued that as the learned Court below has given findings, which are perverse, the evidence on record be re-appreciated and the accused persons be convicted for the offences they are charged with. On the other hand, learned counsel for the respondents has argued that the respondents are innocent and have been falsely implicated in this case and the findings arrived at by the learned Court below are just, reasoned and as prosecution has failed to prove the guilt of the accused persons beyond the shadow of reasonable doubt, the findings of the learned Court below are not required to be interfered with.

6. To appreciate the arguments of learned Deputy Advocate General and learned defence counsel, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

7. The complainant, while appearing as PW-1 has deposed that he is a farmer and on the day of occurrence, when he was irrigating tomatoes in his fields, suddenly supply of water was stopped and when he went to *baandh* to check the water supply, he found that the accused persons have broken the *baandh* and they were irrigating their fields without their turn. When the complainant objected the same and tried to make the *baandh* again, accused persons attacked him and started beating him. One of the co-accused, Sunita Sharma, has also torn his

clothes with *darati* and he was rescued by Vinod Kumar. In his cross-examination, he deposed that Vinod Kumar is the son of his uncle. He further deposed that the villager of Dhar Panjara uses the *baandh* for irrigation on Friday, Saturday and Sunday, whereas villagers of Halonipul uses the *baandh* on Monday, Tuesday, Wednesday and Thursday. He has admitted that accused, Sunil Dutt, has also registered FIR No. 25, dated 02.05.2006, against him.

8. PW-2, cousin brother of the complainant, has deposed that he went to the spot after hearing noise. In his cross-examination, he deposed that on the day of occurrence, he was working in his fields. He further deposed that his fields were at a kilometer away from the spot of occurrence and he reached there within 10 minutes. He further testified that at the place of occurrence, there are four residential houses, which are about 30 meters away from the spot.

9. PW-3, Doctor, Shruti Sharma, has examined the injured and issued MLC, Ext. PW-3/A and opined that injuries No. 1 & 2 can be caused by nails scratches, whereas injuries No. 3 to 7 can be caused by any sharp edged weapon like *darati*. She also suggested that the injuries, as mentioned in MLC, Ext. PW-3-A, can be self inflicted.

10. PW-4, Anil Kumar, has deposed that on the day of occurrence, he was working in his fields and on hearing noise, he went to the spot. He further deposed that when he reached on the spot, the quarrel has already taken place. In his cross-examination, he has deposed that after the occurrence, he went to the Police Station with the complainant. He has further deposed that he reached on the spot about half an hour later to the occurrence. He has also admitted that there are 4-5 residential houses near the spot of occurrence. He feigned ignorance, where recovery memo, Ext. PW-1/A, was prepared.

11. PW-5, Devraj, has not supported the case of the prosecution with respect to recovery of *darati*.

12. PW-6, ASI Salim Kureshi, Investigation Officer of the case, has deposed that he went to the spot on 03.05.2006. He has further deposed that when he reached on the spot, the complainant was not bleeding, however there were marks of scratches on his chest.

13. DW-1, MHC, Som Dutt, has proved on record the FIR of the same incidence which was recorded by Sunil Dutt.

14. In the present case, the statements of the complainant and his brother cannot be taken as truth as they have enmity with the accused persons and FIR to this effect was also lodged against them by the accused persons. There are also contradictions in the statements of the complainant and PW-2, as to where T-shirt of the complainant was recovered. Further the recovery of *darati* has not been proved, PW-5, Devraj, in his examination-in-chief, has specifically denied the recovery of *darati* from the accused persons. As per the prosecution, there are 4-5 residential houses at the place of occurrence, however no independent witnesses from these house were examined. In these circumstances, the mere statements of the complainant and his brother cannot be relied upon, as they are interested witnesses. In these circumstances, it is difficult to hold that the prosecution has proved the guilt of the accused persons beyond the shadow of reasonable doubt.

15. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

16. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

17. In view of the aforesaid decisions of the Hon'ble Supreme Court and the discussion made hereinabove, I find no merit in this appeal and the same deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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

Bhupinder Singh Thakur ....Appellant.
Versus
Kanwar Singh and Ors. ....Respondents.

RSA No. 334 of 2005
Date of Decision: 18.7.2017.

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that the suit land was earlier owned by his father- no mutation of inheritance was attested on his death- defendants are trying to raise construction in front of the ancestral house of the plaintiff, which would impair the light, air and sun shine of the house- defendants have no right to raise construction over the joint land- suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that parties are shown to be joint owners in possession of the suit land in the revenue record- Court had held in the earlier litigation that a family partition had taken place in the year 1983- land was allotted to the defendants in the family partition and they have a right to raise construction over the same- Courts had correctly appreciated the evidence- appeal dismissed.
(Para-11 to 18)

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

For the appellant: Mr. Jeevesh Sharma, Advocate.
For the respondents: Mr. Bhupinder Gupta, Senior Advocate, with Mr. Ajeet Jaswal, Advocate, for respondents No.1 and 2.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant regular second appeal filed under Section 100 of the CPC, is directed against the judgment dated 4.6.2005, passed by the learned District Judge, Shimla, H.P., in Civil Appeal No. 106-S/13 of 2002, affirming the judgment and decree dated 31.10.2002, passed by the learned Sub Judge, Ist Class, Court No.3, Shimla, in Case No. 485/1 of 96/95, whereby suit for permanent prohibitory injunction having been filed by appellant/plaintiff came to be dismissed.

2. Briefly stated facts as emerge from the record are that the (appellant herein after referred to as the plaintiff) filed suit for permanent prohibitory injunction against the respondents (defendants for the sake of brevity), averring therein that he is co-owner in possession of the land comprising khasra No. 51, Khata Khatauni No. 1 min/1 min, measuring four bighas and fifteen biswas (in short "the suit land") situated in village Neri, Tehsil & District Shimla, H.P. Plaintiff further alleged in the plaint that his father namely Bhagat Ram expired on 15.2.1995 and thereafter, he and other LRs of his father, succeeded to his estate, however, no formal mutation of inheritance was attested by the revenue authorities in their name. As per the plaintiff, he as well as other co-sharers have their ancestral house situated over the suit land and are residing alongwith their family members in the same. As per the plaintiff, courtyard is situated just in front of their said ancestral house, whereupon defendants are trying to raise construction and

also thereby trying to change nature of the suit land. Plaintiff averred before the court below that in case, defendants succeed in raising structure on the aforesaid courtyard of the ancestral house, light, air and sunshine of the house, shall be adversely affected, as the premises, which is in possession of the plaintiff in the ancestral house, shall become dark, dingy and inhabitable. Plaintiff further alleged that adjacent to cow shed in the ground storey of the ancestral house, there is a place for keeping cattle and in case, defendants succeed in raising construction of the court yard of the ancestral house, it will obstruct the passage specifically left for the cattle on the spot. As per the plaintiff, he and other co-sharers are keeping their cattle on the spot, from time immemorial. Lastly, plaintiff averred in the plaint that the suit land is joint between the plaintiff, defendants and other co-sharers and defendants have no right whatsoever, to change the nature of the suit land and raise construction that too on the best portion of it till its regular partition among all the co-sharers. With the aforesaid pleadings, plaintiff sought decree for permanent prohibitory injunction against the defendants to the effect that they be restrained from raising any construction over the suit land till the regular partition of the same.

3. Defendants specifically pleaded before the Court below that the plaintiff has not approached the Court with clean hands as he has suppressed the material information with regard to the partition of the suit land already effected inter-*se* the parties on 4.9.1983. On merits, defendants denied the claim of the plaintiff by stating that the plaintiff is not the co-owner in possession of the suit land with them because land stands partitioned between the plaintiff and the defendants vide family settlement dated 4.9.1983. As per the defendants, parties to the lis have been occupying their respective shares and they are in possession of it and they have divided their respective shares without any interruption of the other parties and as such, plaintiff has no right, title or interest over the suit land. The defendants further alleged that family partition was executed in the presence of other co-sharers and with their respective consents and instant suit has been filed by the plaintiff solely with a view to harass other co-sharers. While admitting that there is ancestral house situated over the suit land, defendants claimed that by virtue of aforesaid family partition, ancestral house alongwith vacant land in front of the house as well as courtyard, was granted to them in the family settlement and as such, they have every right, title or interest, to raise construction over it. Defendants specifically denied that they are trying to change the nature of the suit land by raising construction and it will adversely affect light and air of ancestral house. The defendants further stated in the written statement that the aforesaid family settlement was reflected in the revenue record and in terms of same, all the co-sharers are in physical possession of the suit land. The defendants also denied that they are trying to grab the best portion of the suit land.

4. Plaintiff by way of replication refuted all claims of the defendants and reasserted and reaffirmed the averments contained in the plaint. Learned trial court on the basis of pleadings adduced on record by the respective parties framed following issues:

> ***"1. Whether the plaintiff is entitled for the relief as prayed for? OPP.***
>
> ***2. Whether the suit of the plaintiff is not maintainable? OPD.***
>
> ***3. Whether the suit is bad for non-joinder of necessary parties? OPD***
>
> ***4. Whether the plaintiff is estopped from filing the present suit? OPD***
>
> ***5. Whether the plaintiff has no cause of action? OPD***
>
> ***6. Relief."***

Subsequently, vide judgment dated 31.10.2002, learned Sub Judge, 1st Class, Court No. 3, Shimla, H.P, dismissed the aforesaid suit having been filed by the plaintiff.

5. Being aggrieved and dis-satisfied with the dismissal of the suit, the plaintiff preferred an appeal under Section 96 of the CPC, before the learned District Judge, Shimla. However, fact remains that learned District Judge, dismissed the appeal having been preferred by the plaintiff, as a result of which, judgment and decree dated 31.10.2002, passed by the learned trial Court, came to be upheld. In the aforesaid background, plaintiff (appellant) approached this

Court by way of instant proceedings, praying therein for quashing and setting-aside of the impugned judgments and decrees, passed by the learned courts below.

6. This Court vide order dated 7.6.2006, admitted the instant appeal on following substantial question of law:-

> ***"1. Whether the threatened construction will affect the passage of cattle to the ancestral house of the plaintiff and also light, air and sunshine to the said ancestral house?"***

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

8. While exploring answer to the substantial question of law, this Court had an occasion to peruse pleadings as well as evidence adduced on record by the respective parties, perusal whereof, certainly does not persuade this Court to agree with the contentions/submissions having been made by learned counsel for the appellant-plaintiff that the impugned judgments and decrees passed by the courts below are result of misreading, misinterpretation and mis-construction of pleadings as well as evidence adduced on record by the respective parties. Rather, this Court after having carefully perused impugned judgments and decrees passed by the courts below, vis-à-vis, evidence adduced on record by the respective parties, has no hesitation to conclude that the courts below, have dealt with each and every aspect of the matter meticulously and there is no scope, whatsoever, of interference by this court, especially, in view of the concurrent finding of fact as well as law, recorded by the courts below. Otherwise also, this Court was unable to lay its hand to the evidence, if any, led on record by the plaintiff, suggestive of the fact that in the event of construction, if any, carried out by the defendants on the suit land, passage of cattle and light, air and sunshine to the said ancestral house, would be materially affected.

9. Mr. Jeevesh Sharma, Advocate, representing the plaintiff, while referring to the impugned judgments passed by the courts below vehemently argued that the courts below have not at all discussed in any manner the evidence and pleadings brought on record of the case by the plaintiff with regard to the fact that light, air and sun-shine to the ancestral house shall be adversely affected and also with regard to the effect that there shall be no other place for other co-sharers for tethering their cattle, in case defendants succeed in raising the construction in the present manner.

10. Mr. Bhupinder Gupta, learned Senior Advocate, duly assisted by Mr. Ajeet Jaswal, Advocate, contended that this court has very limited jurisdiction to re-appreciate the evidence in the instant proceedings, especially in view of the concurrent findings recorded by the courts below. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by the Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264.***

11. It clearly emerges from the pleadings that there is no dispute that the parties to the lis were joint owner in possession of the suit land. It also emerges from Ext.PW1/A i.e. Jamabandi for the year, 1991-92 that the suit land is jointly recorded in the names of parties to the lis. In the instant case, defendants specifically denied the claim of the plaintiff with regard to their joint ownership qua the suit land by specifically taking plea of private family partition having taken place between them in the year, 1983.

12. Though, PW1 Bhupinder Singh Thakur, denied the factum of family partition, if any, allegedly took place in the year, 1983 but PW2 Shri Devi Singh, who happened to be uncle of PW1, specifically admitted the factum with regard to the family partition arrived *inter-se* the parties. It has come in his statement that the suit land after partition came in possession of the predecessors-in-interest of the defendants. He also admitted that the suit land of village Neri is cultivated by the defendants. He also admitted that the parties are cultivating the land as per family arrangement. PW2, who also happened to be one of the co-sharers of the suit land, also

stated that after the partition, he built his house 9-10 years ago and plaintiff also built his own house. Apart from above, it also emerge from the statement of PW1 that he has also raised construction over the suit land, which is recorded in joint ownership and possession of the parties.

13. PW3, Amar Singh, who is another co-sharer in suit land though, stated that suit land was never partitioned but it has specifically come in his cross-examination that he has constructed a separate house adjoining to the suit land and plaintiff has also built a separate house. On the other hand, DW-1 Kanwar Singh re-iterated his stand taken in the written statement that land in question was partitioned by way of private partition in the year, 1983 i.e. Mark-A dated 4.9.1983, whereby the suit land was divided amongst all the three co-owners, who have built their separate houses on the suit land.

14. Similarly, DW2 Deep Ram Sharma, further corroborated the version put forth by DW1 with regard to private partition of the suit land in the year, 1983. He deposed before the court below that suit land was partitioned by way of family partition in the year, 1983 and in such partition, suit land fell to the share of the defendants. He also stated that after the aforesaid partition, all the parties built their separate houses. It has also come in his statement that pursuant to partition Ext.DW1/A, memo was prepared on which, he identified his as well as signatures of another witness Durga Dass.

15. This Court after having carefully perused the evidence, be it ocular or documentary, adduced on record, sees no reason to differ with the findings returned by the court below that defendants by way of cogent, definite and satisfactory evidence, successfully established on record the factum with regard to private partition between the parties in the year, 1983. DW-1 categorically admitted that he has raised construction over the suit land. Similarly, both the PWs (PWs 2 & 3) also admitted that they have built separate houses adjoining to the suit land. It has also come in their statements that the plaintiff has also built separate house over the suit land, which is mustarika. It clearly emerges from the family partition dated 4.9.1983 (Ext.DW1/A) that the suit land had come to the share of the defendants. While shifting the evidence adduced on record, this Court could also lay its hand to the judgment passed by the learned trial Court i.e. Mark-B in civil Suit No. 93/I of 1995 having been filed by the appellant-plaintiff against the defendants in the Court of learned Sub-Judge, Shimla, H.P., whereby prayer for decree of permanent prohibitory injunction restraining the defendants permanently from raising any construction over the suit land till regular partition between the co-sharers was made. In the suit referred above, specific issue No. 2 *"Whether there is family partition between the parties and predecessor of plaintiff? OPP"* came to be framed. Learned trial Court vide judgment dated 20.8.1999, dismissed the suit (supra) and decided aforesaid issue with regard to the family partition against the appellant-plaintiff. Plaintiff being aggrieved and dissatisfied with the aforesaid judgment and decree preferred an appeal before the learned District Judge, which was dismissed, as a result of which, judgment and decree came to be upheld, whereby admittedly, issue with regard to the family partition effected interse the parties, in the year, 1983 was decided against the plaintiff. It emerge from the record of learned first appellate Court that during the pendency of the appeal, dependants moved an application under Order 41, Rule 27 praying therein for taking on record the judgment and decree passed by the District Judge, Shimla, dated 1.1.2003 in CS No. 61-S/13 of 99. Aforesaid application was contested by the appellant by way of filing reply to the same, but it appear/ emerge from the record that learned first appellate Court taking note of the evidence adduced on record by defendants qua the factum of private family partition effected *inter-se* the parties, deemed it fit not to take into consideration the additional evidence proposed to be led on record by the defendants. Though, this Court after having carefully perused the evidence originally adduced on record by the respective parties, agrees with the finding returned by the learned first appellate Court that there is no need to take additional evidence to prove the factum of private family partition effected inter-se the parties but there was no harm in taking judgment of learned District Judge, Shimla, in Civil Appeal No. 61-s/13 of 2000-99 on record in the appeal having been preferred by the appellant-plaintiff, wherein admittedly plea of family partition having been effected *inter-se* the parties raised on behalf of

defendants was accepted by the court below. Since factum with regard to the family partition having been effected *inter-se* the parties in the year, 1983 stands duly proved in CS 93-1/1995 admittedly having been filed by the plaintiff, plaintiff cannot be allowed at this stage to state that family partition allegedly effect *inter-se* the parties in the year, 1983, is not valid. Though, this Court is in agreement with the argument having been made by Mr. Jeevesh Sharma, learned counsel for the appellant-plaintiff that possession of one co-sharer is possession of all till the land is partitioned inter-se them in accordance with law but since it stands duly proved on record that all the co-sharers including plaintiff and defendants are in exclusive possession of the separate parcels of the land in terms of family arrangement, there is no illegality and infirmity in the finding recorded by the court below that defendants have only right to raise construction over the suit land, which admittedly fell in their share in the family partition.

16. Leaving everything aside, this Court was unable to find something specific in the statements of plaintiff's witnesses from where, it could be inferred that in the event of construction by the defendants on the suit land, passage of cattle to the ancestral house of the plaintiff and also light, air and sunshine to the said ancestral house, shall be adversely affected, rather this Court after having carefully perused the pleadings as well as evidence, sees substantial force in the argument of Sh. Bhupinder Gupta, Senior Advocate, representing the defendants that it stands duly proved on record that prior to family partition, plaintiff as well as defendants were residing together in their ancestral house but thereafter all of them have raised separate construction over the land, which fell in their share. While referring to the statement of plaintiff, Mr. Gupta, contended that house constructed by the defendants is at a distance of one furlang from the ancestral house. Otherwise also, apart from above, plaintiff has not been able to prove on record that at present, he as well as other co-sharers reside in the ancestral house which admittedly at one point of time, was owned and possessed jointly by their ancestor and as such, substantial question of law is answered accordingly.

17. This Court is fully satisfied that both the courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in **Laxmidevamma's** case supra, wherein the Court has held as under:-

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

18. Consequently, in view of the above, this Court sees no reason to interfere with the well reasoned judgments and decrees, passed by the courts below, which otherwise appear to be based upon proper appreciation of evidence adduced on record, and as such, same are upheld. Present appeal fails and dismissed accordingly.

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

Dr. Anil Bansal ……Petitioner.
Versus
Shri Dinesh Kohli ……Respondent.

CR No. 61 of 2010.
Date of decision: July 19, 2017.

H.P. Urban Rent Control Act, 1987- Section 15- Landlord filed a rent petition seeking eviction of the tenant on the ground that the premises are required bonafide by the landlord for residence – it was pleaded that the landlord was employed as Ortho specialist in zonal hospital, Solan - he sought voluntarily retirement to look after his old mother and to run multi specialty Hospital – the tenant had not vacated the premises despite requests – the tenant opposed the petition by pleading that the mother of the petitioner had inducted him as a tenant and the petitioner had no locus standi to seek eviction – the petition was dismissed by the Rent Controller- held that Rent Controller concluded that only residential premises can be got vacated under Section 15 by specified landlord - demised premises is non-residential and the provision of Section 15 is not applicable to the same- however, Section 15(2) provides that a specified landlord can recover possession of the premises rented out to the tenant to reside or to start the business, which means that the provision is applicable to residential as well as non-residential building – the petitioner is running a clinic on the 1st floor of the building – the patient suffering from various type of ailments can have easy access to the building in case the same is situated in the ground floor as it would be difficult to them to climb the stairs – petitioner is one of the co-owners of the premises and therefore he is entitled to file a petition for eviction of the tenant – merely because the rent was being collected by another co-sharers, it cannot be said that he is not entitled to seek eviction- the rent was being deposited in the joint account – the version of the petitioner that demised premises fell into his share in family settlement is duly supported by his testimony and the testimony of his mother - the Rent Controller had wrongly dismissed the petition- revision allowed – order of Rent Controller set aside- the petitioner held entitled to recover the possession of the premises from the tenant immediately. (Para- 7 to 16)

Cases referred:

Biswanath Agarwalla versus Sabitri Bera and Others, (2009) 15 Supreme Court Cases 693
Rishab Chand Bhandari (dead) by LRs and Another versus National Engineering Industry Limited, (2009) 10 Supreme Court Cases 601

For the petitioner	Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.
For the respondent	Mr. Naresh Kumar Gupta, Advocate.

The following judgment of the Court was delivered:

<u>Dharam Chand Chaudhary, J. *(Oral)*</u>

Order dated 16.3.2010 passed by Learned Rent Controller, Solan, District Solan in a petition filed under Section 15 of the H.P. Urban Rent Control Act (hereinafter referred to as 'Act' in short) registered as Rent Petition No. 5/2 of 2005 is under challenge in this petition.

2. The petitioner herein is the landlord. He was employed as Ortho Specialist in Zonal Hospital, Solan. On account of adverse family circumstances as well as to look after his old mother he had decided to seek voluntary retirement and to run Multi Speciality Hospital with super speciality in Orthopedic. Since neither he nor his wife and children were owner in possession of any other suitable accommodation except the demised premises within the

municipal area Solan, he being a co-sharer and in possession of the demised premises i.e. ground floor of the building known as "Dev Building" situated near District Employment Exchange building, Ward No. 11, Solan, which was rented out to the respondent, hereinafter referred to as the 'tenant', asked him to vacate the same being required by the petitioner-landlord for his personal bonafide requirement. The respondent-tenant continued seeking extension of time from the petitioner-landlord from time to time with the assurance that he will vacate the demised premises, but of no avail. In the meanwhile, the petitioner after seeking pre-mature retirement stood retired from government job on and w.e.f. 8.3.2004. The demised premises was rented out to the respondent. The rent initially was being received by the mother of the petitioner on his behalf through cheque in view of he being in government job at that time, however, was being deposited in account joint with his mother. On finding that the respondent was not willing to vacate the premises, a petition under Section 15 of the Act came to be filed before learned Rent Controller, Solan, District Solan.

3. The respondent-tenant on entering appearance and seeking permission to contest the petition filed for his eviction has denied the relationship of landlord and tenant inter-se them as according to him it is Smt. Nirmala Bansal PW5, the mother of the petitioner, who inducted him as tenant in the demised premises. It is she who had been receiving rent from him. Apart from this, the question of maintainability of the petition was also raised as according to him the demised premises being commercial/non-residential in nature is not covered under Section 15(2) of the Act.

4. The petitioner-landlord has filed the rejoinder. Out of the pleadings of the parties, the following issues were framed:

1. Whether petitioner is entitled for vacation of demise premises being landlord which is alleged required by the petitioner for bonafide use for establishing hospital as alleged? OPP.
2. Whether the petition is not maintainable. OPR
3. Whether there is no relationship of the land lord and tenant between the parties as alleged? OPR
4. Relief.

5. The petitioner-landlord in support of his case has himself stepped into the witness box as PW1 and has examined patients visiting his Clinic PW2 Rajnish Gupta, PW3 Amrit Lal Aggarwal and PW4 Madan Singh. He has also placed reliance on documentary evidence i.e. his service record Ext.P1 to Ext.P5. On the other hand, the respondent-tenant has himself stepped into the witness box as RW1.

6. Mr. Bhupender Gupta, learned Senior Advocate assisted by Mr. Neeraj Gupta, Advocate has drawn the attention of this Court to the provisions contained under Section 15 of the Act and also the evidence available on record as well as the law applicable to a proposition as is under consideration in the present *lis*. On the other hand, Mr. Naresh Kumar Gupta, Advocate appearing on behalf of the respondent-tenant has supported the impugned order as according to him the petitioner has failed to prove a case within the meaning of Section 15 of the Act for seeking eviction of the tenant.

7. In the nature of the controversy involved the provisions contained under Sub Section (2) of Section 15 are relevant for the purpose of just decision of this petition. The same reads as follows:

> "(2) Where a specified landlord, at any time within one year prior to or within one year after the date of his retirement or after his retirement but within one year of the appointed day whichever is later, applies to the Controller along with a certificate from the authority competent to remove him from service indicating

the date of his retirement and his affidavit to the effect that he or his spouse does not own and posses any other suitable accommodation in the local area in which he intends to reside or to start his own business, to recover possession of one residential building for his own occupation, there shall accrue, on and from the date to such application to such specified landlord, notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force or in any contract (whether expressed or implied), custom or usage to the contrary a right to recover immediate possession of such residential building or any part or parts of such building if it is let out in part or parts."

8. The bare perusal of Sub Section (2) of Section 15 of the Act *ibid* make it crystal clear that a specified landlord within one year prior or within one year after the date of his retirement or even after his retirement may apply to the Controller along with his certificate issued by the Competent authority qua his removal from service i.e. by way of retirement to recover possession of one residential building for his own occupation, of course, on filing an affidavit to the effect that he or his spouse does not own or possess any other suitable accommodation in the local area in which he intends to reside or to start his own business.

9. In the case in hand learned Rent Controller has decided the question of maintainability of the petition raised under Issue No.2 first. Learned Rent Controller while interpreting the provisions contained under Sub Section (2) of Section 15 of the Act has concluded that a specified landlord can apply only for the recovery of the demised premises, if it is residential and not that of non-residential premises. Admittedly, the demised premises is commercial, hence non-residential. The close scrutiny of the provisions contained under Sub Section (2) of Section 15 of the Act, however, make it crystal clear that a specified landlord can recover immediate possession of premises rented out to the tenant subject to he or his spouse is not having any other premises to reside or to start his own business, meaning thereby that a specified landlord within one year before his retirement or within one year thereafter can recover the possession of the demised premises rented out to a tenant not only for residential purpose but also to start his/her own business.

10. In the case in hand as per the evidence which remained uncontroverted, the petitioner is an Orthopedic Surgeon. After his retirement on and w.e.f. 8.3.2004 he opened a Clinic under the name and style 'Bansal Orthopedic Centre' Dev Building near Sainik Rest House, the Mall Solan. The proposed layout of the clinic in the ground floor is Ext.P4 whereas that of first floor Ext.P5. At present he is running the Centre in first floor of the building. The patients suffering from various types of ailment connected with Locomotor function of the various parts of body can have easy access to the Centre in case situated in ground floor. Therefore, it can reasonablly be believed that for the patients with such type of disease/ailment, it is difficult to climb up to first floor through stairs.

11. The respondent-tenant while in the witness box has himself admitted such type of difficulties being faced by the patients visiting the Centre opened by the petitioner-landlord. The documentary evidence i.e. Ext.P1 and Ext.P2 reveal that the petitioner-landlord was working as Orthopedic Surgeon in Zonal Hospital, Solan and stand retired under the provisions of Rule 3 of the Himachal Pradesh Civil Services (Pre-mature Retirement) Rules, 1976 on and w.e.f. 8.3.2004. The present, as such, is a case which squarely falls in the domain of the provisions contained under Sub Section 2 of Section 15 of the Act. Learned Controller below has failed to appreciate and interpret the same in its right perspective. The findings as recorded on Issue No. 2 that the petition is not maintainable are, therefore, neither legally nor factually sustainable, hence, quashed and set aside.

12. The issue of relationship as landlord and tenant inter-se the parties has also been contested on both sides. Admittedly, the petitioner is one of the co-sharer of the demised premises. There is again no quarrel so as to the respondent was inducted as tenant in the demised premises by the mother of the petitioner Smt. Nirmala Bansal PW5. It is she who used

to collect the rent from the respondent-tenant. Before coming to the disputed question qua this aspect of the matter, it is desirable to take note of the law applicable in a situation as in the present case. The Apex Court in ***Biswanath Agarwalla*** versus ***Sabitri Bera and Others, (2009) 15 Supreme Court Cases 693*** has held that in a case where even if the relationship of landlord and tenant inter-se the parties not proved, however, the landlord plead and prove his title over the demised premises, he may obtain a decree on the basis thereof. The relevant extract of this judgment reads as under:-

> *"17. The landlord in a given case although may not be able to prove the relationship of landlord and tenant, but in the event he proves his general title, may obtain a decree on the basis thereof. But in a case of this nature, a defendant was entitled to raise a contention that he had acquired an indefeasible title by adverse possession. In Radha Devi* v. *Ajay Kumar Sinha the Patna High Court accepted that landlord is entitled to obtain a decree of eviction on the basis of his general title, though he could not prove the relationship of landlord and tenant. It was opined: (BLJR p.1064, para9)*
>
> *"9. ….In other words, where there is relationship of landlord and tenant, order of eviction be passed on the existence of any one of the grounds mentioned in Section 11 of the said Act. It is, therefore, clear that proof of relationship of landlord and tenant gives right to a landlord to get an order of eviction under the provisions of the aforesaid Act."*
>
> *18. In Champa Lal Sharma* v. *Sunita Maitra it was held: (BLJR pp.273-74, paras 21-22 and 30)*
>
> *"21……..It is also well settled that once such a relationship is admitted or established, a tenant would be stopped and precluded from challenging the title of the landlord and if he does so, under the general law, makes himself liable for eviction on that ground alone.*
>
> *22. It, therefore, logically follows that a finding of existence of relationship of landlord and tenant is a sine qua non for passing a decree for eviction against a tenant except in a case, as mentioned hereinbefore, the plaintiff on payment of ad valorem court fee may obtain a decree for eviction on the basis of his general title.*
>
> *30. It is, therefore, evident that the court has to ultimately decide the question as to whether the plaintiff in case his title is in dispute, would be entitled to withdraw the rent so deposited by the tenant or not. It, therefore, makes the position, in my opinion, absolutely clear that before the said question is decided finally so as to enable the court to come to a decision whether the plaintiff landlord is entitled to a decree for eviction or not must come to the finding that there exists a relationship of landlord and tenant by and between the plaintiff and the defendant, if such an issue is raised. In absence of any such finding the court will have no jurisdiction to pass a decree of evidence as against the defendant in such a suit."*

13. The Apex Court has held again ***in Rishab Chand Bhandari (dead) by LRs and Another*** versus ***National Engineering Industry Limited, (2009) 10 Supreme Court Cases 601*** that natural landlord of a premises is ordinarily the owner thereof. Sometimes he may not be in a position to collect the rent, hence may appoint an agent or authorize any other person to collect rent on his behalf. It does not mean that the meaning of word 'landlord' who is the owner of the premises would disappear. This judgment also reads as follows:

> *"4. Under the Rajasthan Premises (Control of Rent and Eviction) Act, 1950, under Section 3(iii) the word "landlord" has been defined as under:*

"3.(iii) 'landlord' means any person who for the time being is receiving or is entitled to receive the rent of any premises, whether on his own account or as an agent, trustee, guardian or receiver for any other person, or who would so receive or be entitled to receive the rent, if the premises were let to a tenant; it includes a tenant in relation to a sub-tenant;"

5. Learned counsel for the appellant submitted that there were no arrears of rent as rent was being paid to Ram Das Modani, who was collecting rent on behalf of the Trust. Hence, he submitted that there was no default in payment of rent. On the other hand, learned counsel for the respondent submitted that the respondent Company was the landlord and hence rent should have been paid to it and thus there was default in payment of rent. He further submitted that it was the respondent who had let out the premises and accordingly in terms of the Act it was entitled to receive rent.

6. We have heard learned counsel for the parties. We are required to interpret the word "landlord" as provided under the Act. In our opinion a purposive, and not literal interpretation has to be given to the definition of "landlord" in the Act.

7. The natural landlord of a premises is ordinarily the owner. However, an expanded definition has been given in various rent statutes of many States for the reason that sometimes the owner may not himself be in a position to collect the rent and may hence appoint an agent or authorize any person to collect rent on his behalf because he may be abroad or is unable to do so for any other reason. This does not mean that the natural meaning of the word "landlord", who is the owner of the premises, would disappear and that the owner goes out of the picture altogether. This is the view taken by the Delhi High Court in Madan Lal vs. Hazara Singh. We approve of the view taken in the said decision.

8. If we interpret the definition of "landlord" in the Act literally it will result in strange consequences. It will mean that even if the owner, who is the natural landlord, does not want to evict a tenant, his agent may do so. Surely this is an absurd situation. It is well settled that if a literal interpretation leads to absurd consequences, it should be avoided and a purposive interpretation be given."

14. Now if disputed questions are examined in the light of the legal proposition settled by the Hon'ble Apex Court in the aforesaid pronouncements, there is ample evidence suggesting that the mother of the petitioner had been collecting rent from the respondent at a stage when the petitioner was in government service. It can reasonably be believed that while in government service it may have not been possible for him to collect the rent and also to attend to other affairs connected with the tenancy. The rent received by the mother of the petitioner through cheque was being deposited in their joint account i.e. of the petitioner and his mother. The petitioners' case that in family settlement the demised premises fell in his share is also proved from his own testimony and also from that of his mother PW5 Smt. Nirmala Bansal. The respondent-tenant has not produced any evidence in rebuttal thereto meaning thereby that on partition the petitioner has become absolute owner of the demised premises. His mother while in the witness box has stated in so many words that she had been receiving the rent on behalf of the petitioner. The petitioner, therefore, has been proved to be a specified landlord within the meaning of Section 15 of the Act. Issue No. 3, as such, should have been answered in negative and against the respondent-tenant. Learned Rent Controller however, has failed to appreciate this part of the controversy also in its right perspective. The fact remains that the relationship between the petitioner and respondent as landlord and tenant stand satisfactorily established on record. Therefore, the findings to the contrary recorded on issue No. 3 are neither legally nor factually sustainable, hence quashed and set aside.

15. Now if coming to the controversy covered under issue No. 1, learned Rent Controller having not found the relationship of landlord and tenant proved inter-se the parties and the petition also not maintainable has answered issue No. 1 on this score alone against the

petitioner. This Court, however, is not in agreement with the findings so recorded for the reasons that the petitioner and landlord after seeking premature retirement due to adverse family circumstances and with a view to run his own Orthopedic Centre in the demised premises was bonafidely in need of the same. On account of the failure of the respondent to vacate the demised premises the petitioner was compelled to open the Centre in the first floor of the building as a result thereof the patients with different type of Locomotive ailment visiting the Centre have faced lot of difficulty, particularly to climb-up stairs and reach the Centre on the first floor. When the petitioner-landlord has satisfactorily pleaded and proved that due to adverse family circumstances he sought voluntary retirement and to open Orthopedic Centre in the demised premises was as such in need of the same for establishing the Centre there. The petitioner-landlord is, therefore, entitled to recover the possession of the demised premises immediately from the respondent-tenant who has no legal right to remain in possession thereof any further.

16. For all the reasons hereinabove, the impugned order is neither legally nor factually sustainable and the same, as such, deserves to be quashed and set-aside. This petition is accordingly allowed. The impugned order is quashed and set aside. Consequently, the petitioner-landlord is entitled to recover the possession of the demised premises from the respondent-tenant immediately.

17. The petition is accordingly disposed of. Pending application(s), if any shall also sand disposed of.

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HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Karam Chand ………Appellant

Versus

The Secretary (PWD) and others ………Respondents

LPA No. 475 of 2011
Reserved on: July 5, 2017
Decided on July 20, 2017

Constitution of India, 1950- Article 226- Petitioner was appointed as work charge mason in PWD- rules provide for promotion of work charge mason to work mistry- post of work mistry was abolished and the persons holding the posts were re-designated as road inspector- petitioner claimed that promotional avenue should have been provided to him by carrying out necessary amendments in the rules- petition was dismissed by the Writ Court- held in appeal that it is not disputed that there was a provision of promotion to work charge mason to post of work mistry at the time of appointment of the petitioner, which was abolished subsequently and the cadre of mason was divided into mason Grade-I, Grade-II and Grade-III- petitioner became mason Grade-II and was promoted as mason Grade-I - promotional avenues have been provided to the petitioner and similarly situated persons- writ petition was rightly dismissed in these circumstances- appeal dismissed. (Para-6 to 12)

Case referred:

Food Corporation of India and others v. Parashotam Das Bansal and others, (2008) 5 SCC 100

For the appellant	Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.
For the respondents	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant Letters Patent Appeal is directed against judgment dated 12.5.2011, passed by learned Single Judge of this Court in CWP(T) No. 13730 of 2008, whereby writ petition having been preferred by the appellant-petitioner, has been dismissed.

2. Briefly stated the facts, as emerge from the record are that the appellant was appointed as a Work Charge Mason in Public Works Department, in the year 1979. R&P Rules prevalent then, provided for promotion of Work Charge Mason to the post of Work Mistry. The post of Work Mistry was abolished in 1986 and persons holding that post were re-designated as Road Inspector. In nutshell, case of the appellant is that after abolition of the post of Work Mistry, Work Charge Mason should have been provided promotional avenue by making necessary changes to the Rules and post, to which they could be promoted. Appellant further claimed that Work Charge Mason ought to have been considered by the respondents for promotion to the post of Road Inspector. In the aforesaid background, petitioner being aggrieved with the action of the respondents, whereby despite several requests, allegedly made by him to the respondent, promotional channel was not provided, he preferred an Original Application being OA No. 1901/2006 before the Himachal Pradesh Administrative Tribunal, which subsequently came to be registered as CWP(T) No. 13730/2008. Respondents by way of reply, stated that appellant was initially appointed as Work Charge Mason and at that time, there was a provision in the Rules for the promotion of Work Charge Mason to the post of Work Mistry. Respondents further stated that post of Work Mistry was subsequently abolished but, consequent upon abolition of post of Work Mistry, relevant Rules were amended, whereby Masons, were bifurcated into two cadres, one that of Mason Grade II and Grade III, and another of Mason Grade I. As per respondents, appellant after bifurcation, became Mason Grade II and was further promoted as Mason Grade I with effect from 1.1.1996. Respondents further claimed that since appointment to the post of Mason Grade I, was by way of promotion based on seniority from the cadre of Mason Grade II and Grade III, there is no force in the submission having been made by the appellant that he has not been provided with promotional avenues after abolition of post of Work Charge Mason. Learned Single Judge, taking note of the reply having been filed by respondent-State as well as Rules, for the post of Work Charge Mason Grade II, in the Public Works Department, dismissed the petition having been preferred by the appellant. In the aforesaid background, appellant has come before this Court, by way of instant appeal.

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

4. There is no dispute that at the time of appointment of the appellant as Work Charge Mason, there was a provision for promotion to the post of Work Mistry, from the post of Work Charge Mason, but, since the post of Work Mistry was abolished, cadre of Mason was bifurcated into two cadres, as has been taken note of above i.e. one of Mason Grade II and Grade III and, another of Mason Grade I. It is not in dispute that after aforesaid bifurcation, appellant became Mason Grade II in the pay scale of Rs.950-35-1160-40-1320-45-1500-50-1800, as per Rules contained in Annexure R-5. It is also not in dispute that appellant was further promoted to the post of Mason Grade I in the pay scale of Rs.1200-40-1320-45-1500-50-2000-60-2130, in terms of Rules as contained in Annexure R-6 i.e. R&P Rules for the post of Work Charge Mason Grade I in the Department of Public Works, Himachal Pradesh.

5. Mr. Sanjeev Bhushan, learned Senior Advocate duly assisted by Ms. Abhilasha Kaundal, Advocate, while refuting submissions made on behalf of the respondent-State, that promotion from the post of Mason Grade II to Mason Grade I, is a promotion, vehemently argued that no such promotion was ever made, rather, on account of bifurcation of Cadre, merely designation of Mason Grade I was conferred upon the appellant, that too, without there being any financial benefits. Mr. Bhushan further contended that the appellant, who had been performing same and similar duties since 1979, without there being any change, was not provided with any

promotion, as such, finding returned by learned Single Judge to the effect that appellant has availed promotional avenues, is totally contrary to the record. Learned counsel further contended that the learned Single Judge, failed to take note of the fact that since appellant was appointed as Work Charge Mason, next promotional channel was to the post of Work Mistry, which was later on redesignated as Road Inspector/Supervisor. Had the R&P Rules been amended, appellant would have been promoted to the post of Foreman/Junior Engineer, before 2000. But, aforesaid submission having been made by the learned counsel representing the appellant, appears to be ill-founded, because, there is nothing on record, suggestive of the fact that, after abolition of the post of Work Mistry, appellant could be promoted to the post of Foreman/Junior Engineer, rather, this Court, after having carefully perused Annexure R-5, i.e. Recruitment and Promotion Rules for the post of Work Charge Mason Grade II in the Department of Public Works and Annexure R-6, i.e. Recruitment and Promotion Rules for the post of Work Charge Mason Grade I in the Department of Public Works, is of the view that appointment to the post of Mason Grade I is by way of promotion based on seniority from the Cadre of Mason Grade II and Grade III. Careful perusal of Recruitment and Promotion Rules, Annexure R-5 clearly suggests that Mason Grade II have been provided promotional avenue by way of promotion to the post of Mason Grade I. Similarly, perusal of annexure R-6, suggests that Mason Grade II having five years continuous service, can be promoted to the post of Mason Grade I, by way of promotion.

6. After having carefully perused, Recruitment and Promotion Rules as referred above, this Court sees substantial force in the arguments of Mr. Anup Rattan, learned Additional Advocate General, that the promotional avenues have been provided to the appellant as well as similarly situate persons, on account of abolition of post of Work Mistry, qua which, Work Charge Mason used to be promoted earlier.

7. In the instant case also, it emerges from the record that appellant has already been promoted to the post of Mason Grade I. After having carefully perused pleadings adduced on record by the respective parties vis-à-vis impugned judgment passed by learned Single Judge, we are unable to agree with the contention of the appellant that appellant is stagnating and no promotional avenues have been provided to him, after abolition of post of Work Mistry. At this stage, we deem it fit to take note of judgment having been relied upon by Mr. Sanjeev Bhushan, learned Senior Advocate in support of his case i.e. (2008) 5 SCC 100 (**Food Corporation of India and others** v. **Parashotam Das Bansal and others)**. Mr. Bhushan, learned Senior Advocate, while placing reliance upon aforesaid judgment, strenuously argued that introduction of selection grade, if any, does not amount to promotion, rather it is available to a limited number of employees and as such, he further contended that though employees of State have no fundamental right of promotion, but Court can direct creation of avenues of promotion in the absence of promotional avenues.

8. After having carefully perused aforesaid judgment passed by Hon'ble Apex Court, we are of the view that the same is not applicable to the facts of the present case. In the case before Hon'ble Apex Court, respondents were Engineering Staff in the appellant Corporation and the did not have any promotional avenues. During the pendency of the writ petition in the High Court, Scheme of Selection Grade was framed and some of respondents were given benefit under the same. In the aforesaid background Hon'ble Apex Court has held as under:

> "23. So far as introduction of grant of selection grade is concerned, the same does not provide for a promotional scheme. It is available to a limited number of employees. By reason thereof a promotional scheme cannot be said to have been framed. The scheme of Accelerated Career Progression is distinct and different from grant of selection grade. We have noticed hereinbefore that although such a provision has been made for the unionized employees but even then they are also entitled to grant of selection grade as well."

9. But, in the instant case, as has been discussed above, appellant was not provided selection grade, rather he was promoted to the post of Mason Grade I, in terms of Recruitment and Promotion Rules as contained in Annexure R-5 and Annexure R-6.

10. True it is, in the aforesaid judgment, Hon'ble Apex Court has held that though the employees of State have no fundamental right of promotion, but, definitely, he /she has a right to be considered. It would be profitable to take note of following portions of the aforesaid judgment passed by Hon'ble Apex Court:

> “9. Appellant is a 'State' within the meaning of Article 12 of the Constitution of India. An employee of a State although has no fundamental right of promotion, it has a right to be considered therefor. What is necessary is to provide an opportunity of advancement; promotion being a normal incidence of service.
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> 10. This Court in Dr. Ms. O.Z. Hussain v. Union of India [1990 Supp. SCC 688], opined :
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>> "7. This Court, has on more than one occasion, pointed out that provision for promotion increases efficiency of the public service while stagnation reduces efficiency and makes the service ineffective. Promotion is thus a normal incidence of service. There too is no justification why while similarly placed officers in other ministries would have the benefit of promotion, the non-medical 'A' Group scientists in the establishment of Director General of Health Services would be deprived of such advantage. In a welfare State, it is necessary that there should be an efficient public service and, therefore, it should have been the obligation of the Ministry of Health to attend to the representations of the Council and its members and provide promotional avenue for this category of officers. It is, therefore, necessary that on the model of rules framed by the Ministry of Science and Technology with such alterations as may be necessary, appropriate rules should be framed within four months from now providing promotional avenue for the 'A' category scientists in the no n-medical wing of the Directorate."
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> 11. The question also came up for consideration in M/s. Ujagar Prints etc. etc. v. Union of India & Ors. [AIR 1989 SC 972] and Council of Scientific and Industrial Research & Anr. v. K.G.S. Bhatt & Anr. [(1989) 4 SCC 635]. In the latter decision, this Court held :
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>> "9. ...It is often said and indeed, adroitly, an organisation public or private does not 'hire a hand' but engages or employees a whole man. The person is recruited by an organisation not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a requirement for progress of any organisation. It is an incentive for personnel development as well. (See : Principles of Personnel Management by Flipo Edwin B. 4th Ed. p. 246). Every management must provide realistic opportunities for promising employees to move upward. "The organisation that fails to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale, and ineffectual performance, among both non-managerial employees and their supervisors". (See : Personnel Management by Dr. Udai Pareek p.277). There cannot be any modern management much less any career planning, man-power development, management development etc. which is not related to a system of promotions."
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> 12. When employees are denied an opportunity of promotion for long years (in this case 30 years) on the ground that he fell within a category of employees excluded from promotional prospect, the Superior Court will have the jurisdiction to issue necessary direction.

13. If there is no channel of promotion in respect of a particular group of officers resulting in stagnation over the years, the Court although may not issue any direction as to in which manner a scheme should be formulated or by reason thereof interfere with the operation of existing channel of promotion to the officers working in different departments and officers of the Government but the jurisdiction to issue direction to make a scheme cannot be denied to a Superior Court of the country.

14. This Court in State of Tripua & Ors. v. K.K. Roy [(2004) 9 SCC 65], upon taking into consideration some of the earlier decisions of this Court, held :

> "6. It is not a case where there existed an avenue for promotion. It is also not a case where the State intended to make amendments in the promotional policy. The appellant being a State within the meaning of Article 12 of the Constitution should have created promotional avenues for the respondent having regard to its constitutional obligations adumbrated in Articles 14 and 16 of the Constitution of India. Despite its constitutional obligations, the State cannot take a stand that as the respondent herein accepted the terms and conditions of the offer of appointment knowing fully well that there was no avenue for promotion, he cannot resile therefrom. It is not a case where the principles of estoppel or waiver should be applied having regard to the constitutional functions of the State. It is not disputed that the other States in India/Union of India having regard to the recommendations made in this behalf by the Pay Commission introduced the Scheme of Assured Career Promotion in terms whereof the incumbent of a post if not promoted within a period of 12 years is granted one higher scale of pay and another upon completion of 24 years if in the meanwhile he had not been promoted despite existence of promotional avenues. When questioned, the learned counsel appearing on behalf of the appellant, even could not point out that the State of Tripura has introduced such a scheme. We wonder as to why such a scheme was not introduced by the appellant like the other States in India, and what impeded it from doing so. Promotion being a condition of service and having regard to the requirements thereof as has been pointed out by this Court in the decisions referred to hereinbefore, it was expected that the appellant should have followed the said principle."

11. In the aforesaid judgment, Hon'ble Apex Court has held that it is necessary to provide opportunity of advancement: promotion being a normal incidence of service. There can not be any quarrel with respect to aforesaid law, having been laid down by the Hon'ble Apex Court whereby duty has been cast upon State to provide opportunity of advancement/promotion to its employee, but, in the instant case, it is ample clear from the record that primarily, promotional avenues have been provided to the appellant as well as similarly situate persons, after abolition of post of Work Mistry. At the cost of repetition, it is stated that after abolition of post of Work Mistry, cadre of Mason has been bifurcated into two cadres, one of Mason Grade II and Grade III, and another that of Mason Grade I. It is also not in dispute that appellant, after bifurcation, has been promoted as Mason Grade I, with effect from 1.1.1996 in the pay scale of Rs.1200-2130. Recruitment and Promotion Rules, as have been taken note of, clearly suggest that provision has been made by the respondents for promotion of Work Mason Grade II and Grade III to that of Mason Grade I.

12. In view of above, the appeal is dismissed being devoid of any merits. Pending applications, if any, are also disposed of.

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

The Secretary Education and others ....Petitioners

Versus

Smt. Jayabanti Devi wife of late Sh. Desh Raj deceased through his legal heirs:- ....Respondents

CMPMO No. 13 of 2017
Decided on: 21st July, 2017

Limitation Ace, 1963- Section 5- Suit was decreed by the Trial Court - District Attorney forwarded the copy of judgment and decree to the State with his opinion that the case was a weak one - Law Department also concluded that the decree of the Trial Court was reasonable one- Office of the Accountant General (A & E), Himachal Pradesh returned the pension case with the remarks that family pension cannot be authorized as per the direction of the Trial Court for want of a qualifying service of 10 years – opinion of Law Department was sought and Law Department advised that appeal should be filed against the judgment and decree- hence, appeal was filed along with an application for condonation of delay- application was dismissed by the Appellate Court – held that term sufficient cause needs liberal construction to advance substantial justice – initially a bonafide decision was taken not to agitate the matter but when it was found that the pensionary benefit cannot be released in accordance with the law, appeal was filed- there was a sufficient cause as the judgment could not have been implemented in view of the specific objection of the Accountant General - application for condonation of delay allowed and delay in filing of first appeal condoned. (Para-10 to 16)

Cases referred:

State (NCT of Delhi) V. Ahmed Jaan, (2008) 14 SCC 582

Collector, Land Acquisition, Anantnag and another Vs.Mst. Katiji and Others, A.I.R. 1987 S.C.1353

For the petitioners: Mr. Shrawan Dogra, A.G with Mr. Pramod Thakur and Mr. Varun Chandel, Addl. A.Gs.

For the respondents: Mr. R.K. Gautam, Sr. Advocate with Mr. Gaurav Gautam, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Order under challenge in this petition is dated 24.09.2016, whereby learned Additional District Judge-I, Kangra at Dharamshala has dismissed the application under Section 5 of the Limitation Act filed by the petitioners (hereinafter referred to as the 'defendants') for seeking condonation of delay as occurred in filing appeal against the judgment and decree dated 29.03.2012 passed by learned Civil Judge (Junior Division), Indora, District Kangra, H.P. in Civil Suit No. 117/2010 and as a result thereof the appeal so preferred was also dismissed being time barred.

2. The original plaintiff is Jayabanti. She died during the pendency of this case before learned lower appellate Court and substituted by the present respondents (hereinafter referred to as the 'plaintiffs'). The predecessor-in-interest of plaintiffs is Desh Raj, who was working as Teacher in a privately managed school, which was taken over by the State Government on 21.4.1971. His services were not taken over. He approached the respondents for his appointment as JBT Teacher on the basis of his meritorious record in the school. He, as such, was appointed as JBT Teacher. After attaining the age of superannuation i.e. 58 years, he

stood retired on and w.e.f. 10.07.1975, however, without payment of retiral benefits such as pension, gratuity and PF etc. The matter remained under consideration with the defendants. Consequently, he was appointed as JBT/SV Teacher vide letter No. 269 dated 18.09.1981 and his services were taken over on and w.e.f. 21.04.1971, on getting new post of SV Teacher created in the school from that date. The retiral benefits, however, not released at the pretext that deceased Desh Raj had rendered less than five years of service; therefore, as per Rules, he was not entitled to pensionary benefits or other retiral benefits. In this backdrop, deceased plaintiff had filed the suit for declaration to the effect that her husband Desh Raj was entitled to all pensionary benefits on his superannuation and the defendants were sought to be directed to release GPF subscription and other pensionary benefits in her favour being his widow.

3. The suit was tried and decreed vide judgment and decree dated 29.03.2012, Annexure P-6 to this petition.

4. Learned District Attorney has forwarded the copy of judgment and decree to the defendant-State with the opinion that for appeal, it was a weak case. The matter was also examined by the administrative department i.e. Education and Law Department, however, Law Department also opined in its opinion dated 8.2.2013 that the judgment and decree passed by learned trial Court being just and reasonable was not required to be assailed further by way of filing an appeal.

5. The defendants in order to show sufficient cause has come forward with the version that after obtaining such opinion, the functionaries of the respondent-State at different levels had dealt with the matter to implement the judgment and decree passed by the trial Court. The defendants even were about to release the monetary benefits in terms of judgment, however, it is in December, 2014, the office of Accountant General (A&E), Himachal Pradesh returned the pension case of deceased Desh Raj with the remarks that he had less than five years of service, hence family pension cannot be authorized as directed by the trial Court for want of qualifying service i.e. 10 years. The pension papers were sought to be re-submitted after seeking prior approval of the sanctioning authority qua the amendment of Rule 49 of CCS (Pension) Rules, 1972. The matter thereafter remained under consideration in the Education Department at various levels. The opinion of the Law Department was again sought. The Law Department in its opinion conveyed to the Administrative Department somewhere in April, 2015 found the present a fit case for agitating the judgment and decree passed by learned trial Court further by way of filing an appeal. The appeal, as such, came to be filed in the District Courts, Kangra at Dharamshala on 28.04.2015 along with an application under Section 5 of the Limitation Act, dismissed vide order under challenge in these proceedings.

6. Learned lower appellate Court has dismissed the application vide order under challenge in this petition with the following observations:

> "9. Be it stated that from the evidence on record, it is transpired that the suit filed by the respondent in the year 2010 was decreed on 29.3.2012 by the ld. Civil Judge (Junior Division), Indora. After obtaining the copy of judgment and decree the ld. Assistant District Attorney submitted the complete case file to ld. District Attorney on 7.4.2012 with his opinion that the case is weak for appeal and thereafter the ld. District Attorney further submitted the matter to Deputy Director of Elementary Education with the direction to consult the Law Department. The case file went through various channels and finally on 16.8.2013 the Secretary Education conveyed the opinion of the law Department that the case is not fit for appeal. When the benefits were about to be released to the respondent, the case took U-turn and on 16.4.2015 the Additional Chief Secretary (Education) to the Govt. of H.P. conveyed the Director of Elementary Education to file appeal along with the instant application for condonation of delay and accordingly applicants filed the appeal along with the instant application on 28.4.2015 after about three years. The day to day delay has not been at all explained in the application though PW1 Deepak Kanayat, Deputy

Director Elementary Education, Kangra at Dharamshala has tried to explain such delay by leading evidence but it is well settled principle of law that evidence beyond pleadings cannot be looked into. The application is absolutely silent about the delay in filing the appeal. No explanation has been afforded for the delay in the application.

10. Further it has been alleged that the matter was delayed in official routine and in this behalf various abstracts of official files have been brought on record by the applicants vide which matter regarding filing of appeal was processed in the office of the applicants. It is transpired from the Clause (xvi) of Para 3 of the affidavit of PW1 that on 16.8.2013 the Secretary Education conveyed that case is not fit for appeal. Thus, it is transpired that at the first instance the applicants were not at all keen to file appeal as per the opinion of the Law Department. As discussed above when the benefits were about to be released to the respondent, the case took U-turn and the applicants were asked to file appeal along with the instant application for condonation of delay. Thus, it is not a case where there is delay on account of official routine. Firstly the applicants decided not to file appeal in the year 2013 and thereafter changed their mind to file the appeal in the year 2015 and this shows how the government machinery functions at various levels. It is not in dispute that the persons concerned were not well aware or conversant with the issues involved including prescribed period of limitation for taking up the matter by way of filing appeal. There is utter inaction on the part of the applicants despite knowledge. The law of limitation undoubtedly binds everybody including the Government. Section 5 of the Indian Limitation Act envisages explanation of delay to the satisfaction of the court and in matters of limitation makes no distinction between the State and citizen. The Hon'ble Apex Court in case P.K. Ramchandran-Vs-Sate of Kerala and another, AIR 1998 SC 2276 wherein the State sought condonation of delay in filing the appeal has held as follows:

> "6. Law of Limitation may harshly affect a particular party but it has to be applied with all its rigor when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the High Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained...."

11. The transaction of the business of the government was being done leisurely by the officers who had no or evince no personal interest at different levels. No one takes personal responsibility in processing the matters expeditiously. As a fact at several stages, they take their own time to reach a decision. Even in spite of pointing at the delay, they do not take expeditious action for ultimate decision in filing the appeal. This case is one of such instances.

12. Though the court is conscious of the fact that in matter of condonation of delay when there is no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice but in the facts and circumstances the applicants cannot take advantage of rulings cited in rejoinder especially when the application is absolutely silent about the satisfactory explanation of day to day delay.

13. Hon'ble apex Court in ***Office of the Chief Post master General-Vs-Living Media India Ltd., AIR 2012, Supreme Court 1506*** has held that in our view, it is the right time to inform all the Government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The Government

departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as anticipated benefit for Government departments. The law shelters everyone under the same light and should not be swirled for the benefit for a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to given any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay."

7. The defendants-State has assailed the legality and validity of the impugned order on the grounds inter-alia that the documentary evidence produced in evidence by way of affidavit Ext. PW-1/X by PW-1 Deepak Kinayat, Deputy Director of Elementary Education, Kangra at Dharamshala has been misconstrued, misunderstood and misinterpreted. This has resulted in recording wrong findings. The judgment and decree was absolutely wrong and illegal as deceased Desh Raj had rendered less than five years of service as Teacher in the school under rule 49 of the CCS (Pension) Rules, 1972. He was not entitled to the payment of retiral benefits i.e. pension and gratuity etc. The service gratuity due and admissible to deceased Desh Raj was withdrawn by the Principal of the school on 16.07.2015 and paid together with interest. The settled legal principles that "decisive factor in condonation of delay is not the length of the delay, but sufficiency of a satisfactory explanation" has been ignored. The impugned order has, therefore, been sought to be quashed and set aside.

8. Mr. Shrawan Dogra, learned Advocate General assisted by Mr. Pramod Thakur and Mr. Varun Chandel, Additional Advocates General has drawn the attention of this Court to the given facts and circumstances and also the evidence available on record and urged that in view of opinion of Law Department obtained initially, the department has bonafidely started dealing with the matter to implement the impugned judgment and decree. It was at a stage when the matter was submitted for sanction of pensionary benefits to the Accountant General (A&E) Himachal Pradesh, transpired that for want of qualifying service, he was not entitled to pensionary benefits. The matter, as such, was re-examined and as the Law Department in its opinion obtained by the administrative Department subsequently recommended filing of an appeal against the judgment and decree passed by learned trial Court, the memorandum of appeal was presented along with an application under Section 5 of the Limitation Act without any further delay.

9. On the other hand, Mr. R.K. Gautam, learned Senior Advocate assisted by Mr. Gaurav Gautam, Advocate while pointing out various acts of omission and commission attributed to the defendants and also that during the execution proceedings a statement was made in the trial Court that the monetary benefits accrued to the plaintiffs will be released now cannot be permitted to turn around and to claim that the judgment and decree is illegal.

10. Before coming to the merits of the case, it is desirable to take note of the legal principles settled by the Apex Court and also various High Courts, applicable in a case of this nature:-

> "Hon'ble the Apex Court in P.K. Ramchandran Vs.State of Karela and others. AIR. 1998 Supreme Court, 2276, has held that law of limitation may harshly effect a particular party, but it has to be applied with all rigor when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds. Hon'ble the High Court of Rajasthan has also held in Union of India Vs.Brij Lal Prabhu Dayal and others A.I.R. 1999 Rajasthan, 216, that a party seeking condonation of delay must place before court facts constituting "sufficient cause', failing which the delay cannot be condoned. The reference can also be made to the judgment of Hon'ble Apex Court in Collector, Land Acquisition, Anantnag and another Vs.Mst. Katiji and Others, A.I.R. 1987 S.C.1353 in which it has been held that the expression "sufficient cause'

employed by the legislature is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of justice".

11. The Apex Court in ***State (NCT of Delhi)*** V. ***Ahmed Jaan, (2008) 14 SCC 582***, after taking note of the law laid down by way of various judicial pronouncements including in ***Collector, Land Acquisition*** V. ***Mst. Katiji***, cited supra has held as under:

"7. The proof by sufficient cause is a condition precedent for exercise of the extraordinary discretion vested in the court. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. In N. Balakrishnan v. M. Krishnamurthy (AIR 1998 SC 3222) it was held by this Court that Section 5 is to be construed liberally so as to do substantial justice to the parties. The provision contemplates that the Court has to go in the position of the person concerned and to find out if the delay can be said to have been resulted from the cause which he had adduced and whether the cause can be recorded in the peculiar circumstances of the case is sufficient. Although no special indulgence can be shown to the Government which, in similar circumstances, is not shown to an individual suitor, one cannot but take a practical view of the working of the Government without being unduly indulgent to the slow motion of its wheels.

8. What constitutes sufficient cause cannot be laid down by hard and fast rules. In New India Insurance Co. Ltd. v. Shanti Misra (1975 (2) SCC 840) this Court held that discretion given by Section 5 should not be defined or crystallised so as to convert a discretionary matter into a rigid rule of law. The expression "sufficient cause" should receive a liberal construction. In Brij Indar Singh v. Kanshi Ram (ILR (1918) 45 Cal 94 (PC) it was observed that true guide for a court to exercise the discretion under Section 5 is whether the appellant acted with reasonable diligence in prosecuting the appeal. In Shakuntala Devi Jain v. Kuntal Kumari (AIR 1969 SC 575) a Bench of three Judges had held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.

9. In Concord of India Insurance Co. Ltd. v. Nirmala Devi (1979 (4) SCC 365) which is a case of negligence of the counsel which misled a litigant into delayed pursuit of his remedy, the default in delay was condoned. In Lala Mata Din v. A. Narayanan (1969 (2) SCC 770), this Court had held that there is no general proposition that mistake of counsel by itself is always sufficient cause for condonation of delay. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose. In that case it was held that the mistake committed by the counsel was bona fide and it was not tainted by any mala fide motive.

10. In State of Kerala v. E. K. Kuriyipe (1981 Supp SCC 72), it was held that whether or not there is sufficient cause for condonation of delay is a question of fact dependant upon the facts and circumstances of the particular case. In Milavi Devi v. Dina Nath (1982 (3) SCC 366), it was held that the appellant had sufficient cause for not filing the appeal within the period of limitation. This Court under Article 136 can reassess the ground and in appropriate case set aside the order made by the High Court or the Tribunal and remit the matter for hearing on merits. It was accordingly allowed, delay was condoned and the case was remitted for decision on merits.

11. In O. P. Kathpalia v. Lakhmir Singh (1984 (4) SCC 66), a Bench of three Judges had held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay. Delay was

accordingly condoned. In Collector Land Acquisition v. Katiji (1987 (2) SCC 107), a Bench of two Judges considered the question of the limitation in an appeal filed by the State and held that Section 5 was enacted in order to enable the court to do substantial justice to the parties by disposing of matters on merits. The expression "sufficient cause" is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of justice - that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. This Court reiterated that the expression "every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational common sense pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the State which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-motherly treatment when the State is the applicant. The delay was accordingly condoned.

12. Experience shows that on account of an impersonal machinery (no one in charge of the matter is directly hit or hurt by the judgment sought to be subjected to appeal) and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. The State which represents collective cause of the community, does not deserve a litigant-non-grata status. The courts, therefore, have to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression of sufficient cause. Merit is preferred to scuttle a decision on merits in turning down the case on technicalities of delay in presenting the appeal. Delay as accordingly condoned, the order was set aside and the matter was remitted to the High Court for disposal on merits after affording opportunity of hearing to the parties. In Prabha v. Ram Parkash Kalra (1987 Supp SCC 339), this Court had held that the court should not adopt an injustice- oriented approach in rejecting the application for condonation of delay. The appeal was allowed, the delay was condoned and the matter was remitted for expeditious disposal in accordance with law.

13. In G. Ramegowda, Major v. Spl. Land Acquisition Officer (1988 (2) SCC 142), it was held that no general principle saving the party from all mistakes of its counsel could be laid. The expression "sufficient cause" must receive a liberal construction so as to advance substantial justice and generally delays in preferring the appeals are required to be condoned in the interest of justice where no gross negligence or deliberate inaction or lack of bona fides is imputable to the party seeking condonation of delay. In litigations to which Government is a party, there is yet another aspect which, perhaps, cannot be ignored. If appeals brought

by Government are lost for such defaults, no person is individually affected, but what, in the ultimate analysis, suffers is public interest. The decisions of Government are collective and institutional decisions and do not share the characteristics of decisions of private individuals. The law of limitation is, no doubt, the same for a private citizen as for governmental authorities. Government, like any other litigant must take responsibility for the acts, omissions of its officers. But a somewhat different complexion is imparted to the matter where Government makes out a case where public interest was shown to have suffered owing to acts of fraud or bad faith on the part of its officers or agents and where the officers were clearly at cross-purposes with it. It was, therefore, held that in assessing what constitutes sufficient cause for purposes of Section 5, it might, perhaps, be somewhat unrealistic to exclude from the consideration that go into the judicial verdict, these factors which are peculiar to and characteristic of the functioning of the Government. Government decisions are proverbially slow encumbered, as they are, by a considerable degree of procedural red-tape in the process of their making. A certain amount of latitude is, therefore, not impermissible. It is rightly said that those who bear responsibility of Government must have "a little play at the joints". Due recognition of these limitations on governmental functioning - of course, within reasonable limits - is necessary if the judicial approach is not to be rendered unrealistic. It would, perhaps, be unfair and unrealistic to put Government and private parties on the same footing in all respects in such matters. Implicit in the very nature of Governmental functioning is procedural delay incidental to the decision-making process. The delay of over one year was accordingly condoned.

14. It is axiomatic that decisions are taken by officers/agencies proverbially at slow pace and encumbered process of pushing the files from table to table and keeping it on table for considerable time causing delay-intentional or otherwise - is a routine. Considerable delay of procedural red-tape in the process of their making decision is a common feature. Therefore, certain amount of latitude is not impermissible. If the appeals brought by the State are lost for such default no person is individually affected but what in the ultimate analysis suffers, is public interest. The expression "sufficient cause" should, therefore, be considered with pragmatism in justice-oriented approach rather than the technical detection of sufficient cause for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of the governmental conditions would be cognizant to and requires adoption of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause. The Government at appropriate level should constitute legal cells to examine the cases whether any legal principles are involved for decision by the courts or whether cases require adjustment and should authorise the officers to take a decision or give appropriate permission for settlement. In the event of decision to file appeal needed prompt action should be pursued by the officer responsible to file the appeal and he should be made personally responsible for lapses, if any. Equally, the State cannot be put on the same footing as an individual. The individual would always be quick in taking the decision whether he would pursue the remedy by way of an appeal or application since he is a person legally injured while State is an impersonal machinery working through its officers or servants."

12. As per the ratio of the judgment cited supra, the delay may howsoever long, the same can be condoned, however, in a case where the party seeking condonation of delay is able to show sufficient cause. The expression 'sufficient cause' in terms of above legal position needs

liberal construction so as to advance substantial justice and not to thwart it. In a case of this nature where one of the party is State Government, the Apex Court has held that if appeals prefer by the Government are lost on technical grounds or any other default, no person will be affected thereby individually but ultimately sufferers in such cases is the larger public interest.

13. Now adverting to the present case, true it is that learned trial Court has decreed the suit on 29.03.2012. Learned District Attorney after obtaining certified copy of the judgment and decree forwarded the same to Deputy Director of Elementary Education, Kangra at Dharamshala vide letter dated April 16, 2012, Ext. RW-1/A-1 with the opinion that for agitating the same further by way of filing an appeal, it was a weak case. Any how, the defendants examined the matter at various levels, as is evidence from the perusal of official correspondence Ext. AW-1/A-2, dated 20.04.2012, AW-1/A-3 dated 25.04.2012, AW-1/A-4 dated 26.04.2012, AW-1/A-5 dated 8.8.2012, AW-1/A-6 dated 16.8.2012, AW-1/A-7 dated 18.8.2012, AW-1/A-9 dated 8.08.2012, AW-1/A-10 dated 1.9.2012, AW-1/A-11 dated 28.9.2012, AW-1/A-12 dated 7.6.2013, AW-1/A-13 dated 24.6.2013, AW-1/A-14 dated 31.7.2013, AW-1/A-15 dated 16.8.2013 and AW-1/A-16 dated 22.8.2013. It was on AW-1/A-16, a decision was taken not to file an appeal against the judgment and decree in question after obtaining the opinion of the Law Department. The remaining correspondence Ext. AW-1/A-17 onwards to Ext. AW-1/A-29 reveals that same pertains to the correspondence between the defendants to release the monetary benefits payable to the plaintiffs under the judgment in question. Even her pension papers were also sent to the office of Accountant General (A&E), Himachal Pradesh. It is, however, the office of Accountant General (A&E), which has returned the pension papers vide letter dated 23rd December, 2014, Ext. AW-1-A-30, with a query that for want of qualifying service i.e. 10 years, pensionary benefits cannot be released in favour of the plaintiffs unless the provisions contained under Rule 49 of CCS (Pension), Rules, 1972 are relaxed/amended by the competent authority. The pension papers were, therefore, sought to be re-submitted after doing the needful. It is this letter which has compelled the defendants to re-examine the matter. The subsequent correspondence Ext. AW-1/A-31 dated 9.1.2015, AW-1/A-32 dated 21.1.2015, AW-1/A-33 dated 13.2.2015, AW-1/A-34 dated 16.2.2015, AW-1/A-35 dated 20.1.2015, AW-1/A-36 dated 11.3.2015, AW-1/A-37 dated 8.4.2015, AW-1/A-38 dated 16.4.2015, AW-1/A-39 dated 17.4.2015, AW-1/A-40 dated 16.4.2015 and AW-1/A-41 dated nil, fresh legal opinion obtained from the Law Department. Ext. AW-1/A-42 dated 18.04.2015 and again Ext. AW-1/A-42 dated 18.04.2015 lead to the only conclusion that after obtaining the legal opinion afresh i.e. Ext. AW-1/A-41 supra, a decision was taken to file an appeal against the impugned judgment and decree. Consequently, vide letter Ext. AW-1/A-42 dated 18.04.2015, the District Attorney was directed to draft the appeal and also an application for condonation of delay at the earliest. Consequently, along with the appeal, an application under Section 5 of the Limitation Act was drafted and filed in the Court on 28.04.2015.

14. It is worth while to mention here that initially a bonafide decision was taken not to agitate the judgment and decree further by way of filing an appeal and the defendants rather proceeded to implement the same by releasing the monetary benefits due and admissible to the plaintiffs thereunder. Though during this period, it transpired that for want of qualifying service, the plaintiffs are not entitled to the pensionary benefits, however, taking into consideration the long service carrier of deceased Desh Raj in privately managed school, which ultimately was taken over on 21.04.1971 by the defendants-State coupled with the factum that less than five years services he rendered after taking over the school by the defendants till his superannuation on 10.07.1975, the defendants seems to have taken a lenient view of the matter and to implement the impugned judgment. However, in view of the specific objection raised by the office of Accountant General, Himachal Pradesh, as is apparent from the perusal of Ext. AW-1/A-30 dated 23.12.2014 that for want of qualifying service i.e. 10 years under Rule 49 of CCS (Pension), Rules, 1972, the pensionary benefits cannot be released in favour of the plaintiffs unless such provisions in the Rules are relaxed or amended by the competent authority, the defendant-State was compelled to give second thought to the entire matter and a conscious decision was taken expeditiously and without any further loss of time in between 31.12.2014 and 16.04.2015. After

two days i.e. on 18.04.2015, the District Attorney was also directed to draft the appeal along with application for condonation of delay under Section 5 and file the same in the Court. The appeal and application both were drafted and instituted in learned lower appellate Court on 28.04.2015 after getting the grounds of appeal approved and signed by the competent authority. The appeal, as such, was filed within 10-12 days from the date when a decision was taken to prefer an appeal against the impugned judgment and decree.

15. The facts and circumstances of this case and overwhelming documentary evidence produced by the defendants leads to the only conclusion that they have succeeded in showing sufficient cause to condone the delay. As pointed out hereinabove till 23.12.2015, there was no intention of the defendants to challenge the impugned judgment and decree further by way of filing an appeal. Since in view of the query raised by the office of Accountant General, Himachal Pradesh, it become difficult for them to implement the impugned judgment and decree, therefore, a decision was taken thereafter to re-examine the matter afresh for filing an appeal, which ultimately was filed expeditiously in a period less than four months after obtaining the opinion of Law Department on compliance of other codal formalities. It would, therefore, not be improper to conclude that learned lower appellate Court has failed to appreciate the facts of the case and the evidence available on record in its right perspective. The impugned order, as such, is not legally and factually sustainable.

16. This petition, as such, is allowed and the impugned order dated 24.09.2016 passed by learned Additional District Judge-I, Kangra at Dharamshala in CMA No. 48 of 2015 is quashed and set aside. The parties through learned counsel representing them are directed to appear before learned lower appellate Court on 21st August, 2017. The record of Court below be sent back forthwith so as to reach there well before the date fixed.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Ravinder Kumar Kansal (Dead) Through LRs & another ...Appellants.
Versus
Vinod Goel ...Respondent.

LPA No.128 of 2009
Date of Decision: July 24th, 2017

Code of Civil Procedure, 1908- Order 2 Rule 2- R had agreed to sell the property to V- when sale deed was not executed - V filed a suit seeking injunction pleading that R had refused to receive the sale consideration and had threatened to alienate and encumber the property – another suit was filed for seeking specific performance- earlier suit was withdrawn after filing a suit for specific performance - an application was filed for seeking dismissal of the suit which was rejected by the Court holding that some of the property and some of the parties to the lis are common but causes of action are not identical, hence, the application is liable to be dismissed – held in appeal that before subsequent suit can be held to be barred, it has to be shown that causes of action in the two suits are similar – the causes of action in the two suits are different and the Court had rightly dismissed the application- appeal dismissed. (Para-7 to 24)

Cases referred:

Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited, (2013) 1 SCC 625

Coffee Board v. Ramesh Exports Private Limited, (2014) 6 SCC 424

Kamal Kishore Saboo v. Nawabzada Humanyun Kamal Hasan Khan, AIR 2001 Delhi 220

Amar Singh v. Shiv Dutt & others, 2014(3) Him.L.R. 1560
Rathnavathi & another v. Kavita Ganashamdas, (2015) 5 SCC 223
Inbasagaran & another v. S. Natarajan (Dead) through LRs, (2015) 11 SCC 12
Mohammad Khalil Khan & others v. Mahbub Ali Mian & others, AIR (36) 1949 Privy Council 78
Gurbux Singh v. Bhooralal, AIR 1964 SC 1810
Deva Ram & another v. Ishwar Chand & another, (1995) 6 SCC 733
Bengal Waterproof Limited v. Bombay Waterproof Manufacturing Company & another, (1997) 1 SCC 99
Kunjan Nair Sivaraman Nair v. Narayanan Nair & others, (2004) 3 SCC 277

For the Appellants Mr. Arjun Lall & Mr. Sanjeev Kumar, Advocates.
For the Respondents Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

In the present appeal, filed by the defendants, under the provisions of Section 10 of the Letters Patent, we are called upon to decide the correctness of findings returned by the learned Single Judge, in disposing of two applications, being OMPs No.237 of 2008 & 290 of 2008 (in Civil Suit No.48 of 2008), so decided by a common judgment dated 12.8.2009, passed in the case tiled as *Vinod Kumar Goel v. Ravinder Kumar Kansal & another*.

2. Insofar as dismissal of application for grant of interim injunction (OMP No.237 of 2008) is concerned, there is no challenge laid by the defendant. Also, plaintiff has not filed any appeal. As such, we are not deciding correctness of dismissal thereof.

3. Insofar as OMP No.290 of 2008 is concerned, it is an application, filed by defendant No.1, seeking dismissal of the suit, for being barred under the provisions of sub-rule (3) of Rule 2 of Order 2 of the Code of Civil Procedure (hereinafter referred to as CPC. Holding that even though property and some of the parties to the *lis* are same, but since causes of action disclosed in the plaints are not identical, keeping in view the principle of law that not only abandonment of a right, but also relinquishment with the knowledge of existence of such a right, was necessary, learned Single Judge rejected the application.

4. While contending that the cause of action, in both the suits, being same and similar, and the plaintiff having omitted to claim the relief sought for in the subsequent suit, the same being barred under the provisions of Order 2 Rule 2 CPC, learned counsel for the defendants (appellants herein), seeks reliance upon the following decisions:

1. *Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited,* (2013) 1 SCC 625;
2. *Coffee Board v. Ramesh Exports Private Limited,* (2014) 6 SCC 424;
3. *Kamal Kishore Saboo v. Nawabzada Humanyun Kamal Hasan Khan,* AIR 2001 Delhi 220; and
4. *Amar Singh v. Shiv Dutt & others,* 2014(3) Him.L.R. 1560.

5. On the other hand, in support of the judgment, learned counsel for the plaintiff (respondent herein), seeks reliance upon the following decisions:

1. *Rathnavathi & another v. Kavita Ganashamdas,* (2015) 5 SCC 223; and
2. *Inbasagaran & another v. S. Natarajan (Dead) through LRs,* (2015) 11 SCC 12.

6. Let us first examine the facts.

7. Ravinder Kumar Kansal (defendant No.1) is the owner of the suit property. Vide agreement dated 19.4.2008, he agreed to sell the same to plaintiff Vinod Goel. As per the agreement, sale was to be executed on or before 19.7.2008.

8. On 12.5.2008, plaintiff presented a plaint, praying for a decree of permanent prohibitory injunction, restraining the defendant from alienating the suit property. In the said plaint, it stood specifically recorded that since cause of action to file the suit for specific performance of the agreement, subject matter of the suit, has not arisen, for the sale deed was to be executed upto 19.7.2008, the suit is being filed with a limited prayer.

9. Now significantly, in the very same plaint, on which much emphasis is laid by the defendants, reference is also made of the fact that on 14.5.2008, defendant No.1 had refused to receive the sale consideration and threatened to alienate and encumber the suit property.

10. It is a matter of record that notice in the suit came to be issued and order passed in the plaintiff's application for grant of interim injunction.

11. It cannot be disputed that on 12.5.2008, Ravinder Kumar Kansal (defendant No.1) executed Release Deed. By virtue of the said Release Deed, all rights stood transferred in favour of Bharat Bhushan.

12. Resultantly, on 31.5.2008, plaintiff filed the subsequent (instant) suit, seeking specific performance of agreement dated 19.4.2008 against Ravinder Kumar Kansal (defendant No.1), impleading Bharat Bhushan as defendant No.2 (he is not a party in the earlier suit). It is a matter of record that factum of filing of earlier suit is not disclosed in the subsequent suit. But however, the cause of action, so disclosed in the subsequent plaint, is the execution of (a) agreement dated 19.4.2008, (b) deed of relinquishment dated 12.5.2008, (c) and issuance of notice dated 10.5.2008 by the defendant.

13. It is also a matter of record that in view of subsequent suit, on 27.6.2008, plaintiff withdrew the earlier suit pending in the Court of Civil Judge (Senior Division). It is in the subsequent suit, pending before this Court, that defendant No.1 has filed the instant application.

14. It is a matter of record that earlier suit came to be withdrawn, for the plaintiff being *dominus litis,* has all rights to pursue the matter, in the manner best advised.

15. Sub-rule (3) of Rule 2 of Order 2 CPC prescribes that a person entitled to more than one relief in respect of the same cause of action, may seek for all or any of such reliefs, but if he so omits, to do so, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

16. Whether the claim in the new suit is founded on the same or distinct cause of action is for the Court to adjudge, on the following principles, summarized by the Hon'ble Judges of the Privy Council, in *Mohammad Khalil Khan & others v. Mahbub Ali Mian & others,* AIR (36) 1949 Privy Council 78, in the following terms:

> "61. The principles laid down in the cases thus far discussed may be thus summarized:
>
> (1) The correct test in cases falling under O.2, R.2, is "whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit". *Moonshee Buzloor Ruheem v. Shumsunnissa Begum,* (19=867.11 M.I.A. 551 : 2 Sar. 259 P.C.) *(supra).*
>
> (2) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. *Read v. Brown,* (1889-22 Q.B.D. 128: 58 L.J.Q.B. 120) *(supra).*
>
> (3) If the evidence to support the two claims is different, then the causes of action are also different. *Brunsden v. Humphrey,* (1889-14 Q.B.D.141 : 53 L.J.Q.B. 476 *(supra).*

> (4) The causes of action in the two suits may be considered to be the same if in substance they are identical. *Brunsden v. Humphrey,* (1889-14 Q.B.D.141 : 53 L.J.Q.B. 476 *(supra).*
>
> (5) The cause of action has no relation whatever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers … to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. *Muss. Chandkour v. Partap Singh,* (15 I.A. 156 : 16 Cal. 98 P.C.) *(supra).* This observation was made by Lort Watson in a case under S. 43 of the Act of 1882 (corresponding to O.2, R.2), where plaintiff made various claims in the same suit."

17. It is also a settled principle of law that before the subsequent suit of the plaintiff can be held to be barred, it must be shown by the applicant that the said suit is based on the same cause of action, on which the earlier suit was based and if the cause of action is same in both the suits and if in the earlier suit plaintiff had not sued for any one of the reliefs so available, on the basis of that cause of action, the reliefs which it had failed to press into service in that suit, cannot be subsequently prayed for, except with the leave of the court. What is significant is that the suits must be based on the same cause of action. This is a settled position of law, as emerging from the decisions rendered by the Apex Court in *Gurbux Singh v. Bhooralal,* AIR 1964 SC 1810, Constitution Bench (Five Judges); *Deva Ram & another v. Ishwar Chand & another,* (1995) 6 SCC 733; *Bengal Waterproof Limited v. Bombay Waterproof Manufacturing Company & another,* (1997) 1 SCC 99; and *Kunjan Nair Sivaraman Nair v. Narayanan Nair & others,* (2004) 3 SCC 277.

18. In the instant case, in our considered view, cause of action, so pleaded by the plaintiff in both the suits, is distinct and separate. No doubt in the first suit, plaintiff does mention refusal on the part of Ravinder Kumar Kansal (defendant No.1) to accept the money. But then, it is also averred, rather categorically, that time for getting the sale deed executed, has not expired and only on reasonable apprehension, emanating out of the alleged threats of the property being alienated, the suit stands filed. It is not the case of the defendant that as on the date of filing of the subsequent suit, plaintiff was aware of defendant No.1 having transferred interest in the property in favour of defendant No.2. Cause of action, thus, in our considered view, for filing the subsequent suit, arose with defendant No.1 transferring the property in favour of defendant No.2, as also not executing the sale deed on the date so stipulated in the agreement for sale, which undisputedly was subsequent to the date of filing of the earlier suit. Thus, cause of action being distinct and separate, it cannot be said that plaintiff omitted to seek the relief which he was entitled to, at the time of presentation of the first plaint.

19. We find, on almost similar facts, the Apex Court, in *Rathnavathi (supra),* to have decided the issue as under:

> "25.1. So far as the suit for permanent injunction is concerned, it was based on a threat given to the plaintiff by the defendants to dispossess her from the suit house on 2.1.2000 and 9.1.2000. This would be clear from reading Para 17 of the plaint. So far as cause of action to file suit for specific performance of agreement is concerned, the same was based on non performance of agreement dated 15.2.1989 by defendant No.2 in plaintiff's favour despite giving legal notice dated 6.3.2000 to defendant no.2 to perform her part.
>
> 25.2. In our considered opinion, both the suits were, therefore, founded on different causes of action and hence could be filed simultaneously. Indeed even the ingredients to file the suit for permanent injunction re different than that of the suit for specific performance of agreement."

20. On similar facts is the decision rendered by the Apex Court in *Inbasagaran (supra).*

21. Reliance by the defendants on *Virgo Industries (supra)*, as also *Coffee Board (supra)*, is misplaced, for the facts being totally different. As already observed, in the instant case, in the first plaint, it came to be averred that the cause of action for claiming relief for specific performance had not arisen, in view of the time stipulated in the agreement and the suit for injunction was filed only on the basis of threats extended and there being reasonable apprehension of the property being alienated. Noticeably, such apprehension turned out to be true with the execution of Release Deed, which led to the filing of the subsequent suit. Thus, the essential ingredient pointed out in *Coffee Board (supra)* of the foundation of the subsequent suit, being on same and similar cause of action, is missing in the instant case. In the earlier suit, it was not mentioned that defendant No.1 had threatened to alienate the property in favour of defendant No.2 or that any such steps were taken in that direction. Plaintiff was not even aware of such fact. Also, for the very same reason, we do not find the decisions rendered in *Kamal Kishore Saboo (supra)* and *Amar Singh (supra)* to be applicable.

22. With vehemence, Mr. Arjun Lall, learned counsel for the defendants, invites our attention to the decision rendered in CWP No.364 of 2016, titled as *Pratap Singh Verma v. State of H.P. & others,* wherein this court deprecated the practice adopted by dishonest litigant, in instituting *lis* on false claims and defences, by abusing the process of law, more so by suppressing material facts.

23. Issue of suppression, in our considered view, stands considered by the learned Single Judge, while dismissing the application for grant of interim injunction. We notice the learned Single Judge to have clarified, not to have expressed any opinion on merits, leaving all facts to be considered and decided, while deciding the settled issues.

24. As such, we find no reason to interfere with the order passed by the learned Single Judge in OMPs No.237 of 2008 & 290 of 2008 (in Civil Suit No.48 of 2008), so decided by a common judgment dated 12.8.2009, passed in the case tiled as *Vinod Kumar Goel v. Ravinder Kumar Kansal & another.*

Hence, the appeal is dismissed. Pending application(s), if any, stand disposed of and interim order vacated.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Roshan Lal deceased through LRs Lalita Devi & ors …..Appellants

Versus

Ramesh Chand & another ……Respondents

RSA No. 454 of 2007
Reserved on: 18.07.2017
Decided on: 24.07.2017

Specific Relief Act, 1963- Section 34- Plaintiffs filed a civil suit for declaration that they have become the owners on the commencement of H.P. Tenancy and Land Reforms Act and order passed by Assistant Collector 1st Grade is null and void as it was passed behind the back of the plaintiffs – suit was dismissed by the Trial Court- an appeal was filed, which was allowed and the suit was decreed- held in second appeal that entries were changed in the year 1976, however, order was not produced on record- entries were corrected after the commencement of H.P. Tenancy and Land Reforms Act- proprietary rights were conferred automatically on the date of notification of the Act- mere entries in the revenue record will not help the defendants- appeal dismissed. (Para-8 to 14)

For the appellants Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

For the respondents. Mr. Dushyant Dadwal, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present regular second appeal is maintained by the appellants, who were the defendants before the learned Trial Court (hereinafter referred to as "the defendants"), challenging the judgment and decree, dated 26.07.2007, passed by learned District Judge, Kangra at Dharamshala, H.P., in Civil Appeal No. 146-P/XIII of 2005, whereby the judgment and decree, dated 23.09.2005, passed by learned Civil Judge (Senior Division) Palampur, District Kangra, H.P., in Civil Suit No. 96 of 2002, was set aside.

2. Tersely, the key facts, which are indispensable for determination and adjudication of the present appeal, are that the plaintiffs, maintained a suit for declaration to the effect that they, being non-occupancy tenants of the suit land, comprised in Khata No. 8 min, Khatauni No. 17, Khasra No. 451, measuring 0-61-25 hectares, situated at Mohal Rathan, Mouza Maniara, Tehsil Palampur, District Kangra, H.P. (hereinafter to be called as the "suit land") by operation of H.P. Tenancy and Land Reforms Act (hereinafter to be called as "the Act"), have now become owners of the suit land and now in possession of the same, hence the order, dated 02.08.1976, passed by learned Assistant Collector 1st Grade, Palampur, implemented by Rapat No. 299, dated 14.05.1980, be declared illegal, null and void and also claimed a decree for permanent prohibitory injunction, restraining the defendants from interfering in the suit land. The said relief has been claimed on the ground that the father of the plaintiffs was a tenant over the suit land and by operation of H.P. Tenancy and Land Reforms Act has become owner of the suit land. It was further been averred in the suit that the defendants have no right, title or interest over the suit land, however the defendants, in connivance with the revenue staff, have procured entry of correction in their favour in respect of the land, measuring 0-34-60 hectares, out of the suit land, illegally and against the procedure, whereas the plaintiffs or their predecessor-in-interest were neither served nor associated in the proceedings of correction and all such proceedings were performed behind their back. It has been further alleged that on inquiry, it was found that no such missal or file pertaining to the correction application is on record and the entry of the remarks column, showing 0-34-60 hectares out of the total land, in favour of the defendants is illegal, null and void. It has been further averred that cause of action accrued in the year, 1980, when the order of correction was passed without the knowledge of plaintiffs and in May, 2002, when the defendants started encroachment over the suit land.

3. The defendants, contested and resisted the suit of the plaintiffs by taking preliminary objections, viz., maintainability, jurisdiction, cause of action, non-joinder of necessary parties, limitation, valuation, estoppels and locus standi. On merits, it has been averred that the entries showing the predecessor-in-interest of the plaintiffs, namely Prabhu and the plaintiffs as tenants of the defendants, qua the suit land, are wrong and incorrect, as neither they were inducted by the defendants as tenants, nor they remained in possession of the suit land and, so, the Assistant Collector 1st Grade, Palampur, has rightly passed the order on the basis of actual possession over the suit land. It has been further averred that the plaintiffs and their forefather were wrongly shown in possession of the suit land, upon which the defendants filed an application for correction of revenue entries before the Assistant Collector 1st Grade, Palampur, who after conducting the detailed inquiries, has rightly ordered for correction of the revenue entries and order passed by the Assistant Collector 1st Grade, Palampur, is legal and the suit of the plaintiffs deserve dismissal.

4. The learned Trial Court on 20.07.2004 framed the following issues for determination and adjudication:

"1. Whether the plaintiffs have become owners of the suit land, as alleged? OPP

2. Whether the order of correction dated 02.08.1976 and its implementation vide Rapat No. 299, dated 14.05.1980, by A.C. 1St Grade, is illegal, wrong, null and void, as alleged? OPP

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

4. Whether the suit is not maintainable? OPD

5. Whether this Court has no jurisdiction to try this suit? OPD

6. Whether the plaintiffs have no cause of action and locus standi to file the present suit? OPD

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

8. Whether the suit is time barred? OPD

9. Whether the suit is not properly valued for the purpose of Court fees and jurisdiction? OPD

10. Whether the plaintiffs are estopped by their acts and conduct to file the present suit? OPD

11. Relief."

5. After deciding issues No. 1 to 5, 7, 9 & 10 in negative and issued No. 6 & 8 in affirmative, the suit of the plaintiffs was dismissed. Subsequently, the plaintiffs preferred an appeal before the learned Lower Appellate Court which was allowed and the suit of the plaintiffs was decreed. Hence the present regular second appeal, which was admitted for hearing on the following substantial questions of law:

"1. Whether presumption of truth is attached to the Revenue entries and these entries does not support the claim of plaintiffs on the point of tenancy.

2. Whether the claim of the plaintiff is belied by the entries in Jamabandies Ext. P-1 and Ext. P-2, which are contradictory."

6. Learned counsel for the appellants has argued that the as per the plaintiffs, cause of action arose in the years 1976, 1980 and 2002, but if cause of action arose in the above said years, the suit is much beyond the limitation. He has further argued that Civil Court has no jurisdiction to adjudicate the present case, as it was a tenancy dispute of agricultural land. On the other hand learned counsel for the respondents has argued that cause of action accrued only in the year, 2002, when the defendants started interfering in the suit land. He has further argued that plaintiffs were having no knowledge with respect to the change of revenue entries and the order regarding change in revenue entries has been passed behind their back. In rebuttal, learned counsel for the appellants has argued that suit is time barred and without any cause of action, hence the same may be dismissed.

7. In order to appreciate the rival contentions of the parties, I have gone through the record carefully.

8. At the very outset, it is observed that earlier the suit land was under tenancy of the predecessors of the plaintiffs and it is only in the year, 1976, when allegedly some order was passed, on the basis of which, in the year 1980, entries in the revenue record were changed. As per the plaintiffs, they only came to know about these entries in the year, 2002 and immediately thereafter they filed the suit. As far as the limitation is concerned, the same is of one year from the date of passing of the order, however in the instant case, no order has ever been produced by the defendants and they only state that some order was passed in the year, 1976. At the same point of time, the plaintiffs, being sons of late Shri Prabhu, have claimed decree for declaration to the effect that they be declared as owners-in-possession of the suit land, as no order was never

passed by Assistant Collector 1st Grade, Palampur, hence implementation of the said order by Rapat No. 299, dated 14.05.1980, is null and void. The plaintiffs also sought decree for permanent prohibitory injunction, restraining the defendants from interfering in the possession of the suit land, on the premise as their father was a tenant over the suit land and they have now become owners after coming into force the Act. On the other hand, this fact has been opposed by the defendants by setting up a case that neither Prabhu, nor the plaintiffs were ever inducted as tenants, thus they are not in possession of the suit land and the order passed by Assistant Collector 1st Grade, is legal and valid.

9. One of the plaintiffs, Sh. Ramesh Chand, has stepped into the witness box as PW-1 and deposed that earlier the suit land was being cultivated and possessed by his father and thereafter they are cultivating the suit land and possessing the same, as non-occupancy tenants on payment of rent. This witness, in his cross examination, has denied that the defendants are not receiving the rent.

10. PW-2, Joginder Singh, has deposed that the defendants are the owners of the suit land and Prabh Dayal, father of the plaintiffs, was in possession of the same. He has further deposed that previously the suit land was being cultivated by Prabh Dayal, and thereafter by the plaintiffs, who cultivated the suit land till, 2002 and thereafter the defendants have started interference in the suit land. In his cross-examination, he has completely denied the possession of the defendants over the suit land.

11. As per the entries made in the copy of *Missal Haqiyat Instemal* (Ext. P-3), land comprised in Khasras No. 284, 285, 286, 287, 299, 300 & 302, measuring 13 kanals, 7 marlas has been recorded in the ownership of Atma Ram, father of the defendants and Prabhu, father of the plaintiffs, as non occupancy tenant, on payment of rent in the shape of one third share of the produce as rent. However, in the copy of Jamabandi, for the year 1966-67 (Ext. P-2), land comprised in Khasras No. 286 & 287, measuring 2 kanals, 7 marlas, shown to be recorded in the ownership and possession of Atma Ram, whereas the land comprised in Khasras No. 284, 285, 299, 300 and 302, measuring 11 kanals, shown to be recorded in possession of Prabhu, father of the plaintiffs, as a non occupancy tenant on payment of one third share of the produce.

12. As per the copy of *Missal Haqiyat Instemal* for the year 1960-61 (Ext. P-3), the rent has been shown one third of the share of the produce and the same was changed and came to be recorded against the payment of one and half share of the produce in the copy of Jamabandi (Ext. P-2) and *Missal Haqiyat Bandobast Jadid* (Ext. P-1). In the copy of Jamabandi for the year 2000-01, one fourth of the share of the produce has been shown as rent, however no such order showing the change in the amount of rent has been produced or proved on record, hence the said entries regarding the change of rent in column No. 9 of copy of Jamabandi (Ext. P-2), *Missal Haqiyat Bandobast Jadid* (Ext. P-1) and in copy of Jamabandi for the year 2000-01 (Ext. P-4), are without there being any basis and, therefore, such change in the amount of rent seems to be fictitious. Even, as per the note given in the remarks column of the copy of *Missal Haqiyat Bandobast Jadid* (Ext. P-1), no change in the rent, which was being paid by Prabhu, in favour of the landlord, has been shown to exist. Further the defendants have also not placed on record the copy of alleged order passed by the Assistant Collector, dated 02.08.1976. The order, dated 02.08.1976 is shown to have been passed after coming into effect the provisions of the Act. Thus, after enactment of the said Act, Prabhu, non occupancy tenant has automatically became owner of the suit land, however, it was not explained, as to why the entries to this effect are not updated. Further the defendants have neither pleaded the relinquishment or abandonment of the tenancy, nor such abandonment or relinquishment of tenancy could be done by the tenant in favour of the land owner, after coming into force the said Act. In the rent column of all the documents i.e., Ext. P-1 to Ext. P-4, the payment of rent has been shown in favour of the landlord by Prabhu (father of the plaintiffs), however learned trial Court without appreciating the said revenue entries, has erroneously held that no rent was shown to be paid by the plaintiffs in favour of the defendants. The defendants, in their evidence, were bound to produce and prove the order, passed by the Assistant Collector, however no such order was produced or proved. After

coming into force the Act, the landlord was egible to apply for resumption of the tenancy, but no document has been placed on record by the defendants to prove that they made any resumption application before the Land Reforms Officer. As per Section 29 of the Himachal Pradesh Tenancy and Land Reforms Rules, 1975, if dispute regarding the entries of the land records arises, the Land Reforms Officer, in his capacity as Assistant Collector 1st Grade, shall decide the dispute under Sub-section (4) of Section 104, in accordance with the relevant provisions of the Punjab Land Revenue Act, 1887, or the Himachal Pradesh Land Revenue Act, 1954, as the case may be, in a summary manner. However, no such order, which was passed by the Assistant Collector 1st Grade, in the capacity of Land Reforms Officer, has been produced in evidence. Even, in the note given with red ink in remarks column of *Missal Haqiyat Bandobast Jadid* (Ext. P-1), the alleged order has not been shown to have been passed by the Assistant Collector 1st Grade, in the capacity of Land Reforms Officer, but the same has shown to have been passed by the Assistant Collector. Prabhu, father of the plaintiffs, is being recorded in possession of the suit land since the year 1960-61 till the *Missal haqiyat Bandobast Jadid* (Ext. P-1) was prepared. Accordingly, it is safe to hold that Prabhu, father of the plaintiffs is in possession of the suit land as a non occupancy tenant on payment of rent and by virtue of the provisions of Act, the plaintiffs shall be deemed to have become the owners of the suit land automatically.

13. It is a matter of fact that the proprietary rights vested in the plaintiffs, when the Act was notified and the predecessor-in-interest of the plaintiffs became owner of the suit land automatically, being non occupancy tenant and the order, which was neither produced by the defendants nor the plaintiffs were associated in the proceedings of correction makes it evidently clear that the entries were without any basis, accordingly, substantial question of law No. 1 is answered holding that though the presumption of truth is attached to the revenue entries, but in the present case the revenue entries came into existence without knowledge of the plaintiffs, as the change has come on a day when the proprietary rights vested in the predecessor of the plaintiffs without any oder. Why the change came into existence at that time, is un-explained, so the presumption of truth attached to the revenue entries in the present case is rebutted and the presumption of truth to the revenue entries existing in favour of the defendants is not there, rather the presumption is with the revenue entries existing in favour of the father of the plaintiffs, as non occupancy tenant. The revenue entries existing in favour of the defendants are of no consequence, as the change is not explained by the defendants.

14. At the same point of time, there is nothing on record to show that at any point of time the proceedings of correction remained pending with the authorities, or the plaintiffs were having any knowledge with respect to correction of the revenue entries. So, the suit maintained by the plaintiffs is within limitation from the date of the knowledge, i.e., 2002, immediately whereafter the suit was filed. However, there is nothing on record to show that the plaintiffs were having knowledge, with regard to Ext. P-1 & P-2, entries in Jamabandi, which were incorporated behind the back of the plaintiffs and their father, as the plaintiffs, were recorded as non occupancy tenant and there is no order of the competent authority regarding change of revenue entries and the said entries were changed immediately after coming into operation of the Act, which automatically vests ownership rights in the tenants i.e., plaintiffs. In these circumstances, when the plaintiffs have become owners of the suit land automatically, the entries in Jamabandies, Ext. P-1 & P-2, are of no help to the defendants. Therefore, substantial question of law No. 2 is answered accordingly.

15. The net result of the above discussion is that the instant appeal, sans merits, deserves dismissal and is dismissed. However, in view of peculiar facts and circumstances of the case, the parties are left to bear their own costs.

16. Pending miscellaneous application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of H.P. & another …Petitioners.
Versus
Raju Ram …Respondent.

CWP No.1498 of 2017
Decided on : 24.7.2017

Constitution of India, 1950- Article 226- State has filed a writ petition against the orders passed by the Administrative Tribunal – Tribunal had issued direction to consider the case of the original applicant in accordance with the direction issued in the case of a similarly situated person – the State has framed a litigation policy to avoid litigation whenever possible – hence, direction issued to the Chief Secretary to convene a meeting of the Principal Secretaries of Government of Himachal Pradesh, to apprise them of the importance, significance, advantages and benefits of adhering to litigation policy in letter and spirit – Principal Secretaries expected to convene a similar meeting for sensitizing the stock holders - further, direction issued to review all the cases periodically in terms of litigation policy. (Para-5 to 12)

For the Petitioners Mr. Shrawan Dogra, Advocate General, with Mr. M.A. Khan, Mr. Anup Rattan, Additional Advocates General, and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ

Impugned orders, passed by the Himachal Pradesh Administrative Tribunal, in OA No.995/2016, titled as *Raju Ram v. State of Himachal Pradesh & another,* dated 1.4.2016; and in Rev. Pet. No.12 of 2016, titled as *State of Himachal Pradesh & another v. Raju Ram,* dated 21.12.2016, assailed by the State do not adjudicate the rights inter se the parties. The only direction being, consideration of original applicant's case, in accordance with law and more specifically, in terms of directions issued in the case of a similarly situated person.

2. The direction is only for consideration of the case of the original applicant, without returning finding as to whether the original applicant is actually similarly placed with that of the petitioner in CWP No.811 of 2011, titled as *Ashwani Kumar v. Himachal Pradesh State Electricity Board & others*, in whose case, directions earlier came to be passed by this Court. What surprises us is the fact that the State sought review of such orders, which action also did not find favour with the Tribunal.

3. Yet the State has filed the present petition, assailing these orders.

4. State of Himachal Pradesh has formulated a Litigation Policy, which it is duty bound to follow.

5. The said Litigation Policy came to be introduced, acknowledging that:-

(a) litigation is generally believed to be an unproductive investment both in time and money;

(b) Government has to conserve the resources, determine priorities of expenditure by a judicious approach so that unproductive litigation does not eat away a large chunk of the scarce resources;

(c) The officer who initiates litigation is so much involved into it that his work as an employee suffers;

(d) litigation contributes to the docket explosion; and

(e) avoidable litigation pursued relentlessly, discloses managerial failure.

6. The object of the Litigation Policy reads as under:

> "The Policy outlines the broad guidelines on litigation strategies to be followed by the State Government or its agencies with a view to reduce litigation, saving avoidable costs on unproductive litigation, reducing avoidable load on judiciary with respect to government induced litigation and thus realising the promise of Article 39A of the Constitution, which obligates the State to promote equal justice and provide free legal aid."

7. By virtue of clause 1.4 (d to h), the State is under an obligation to avoid litigation, wherever possible and not to file appeal unless the State or its agency believes that it has reasonable prospects for success or the appeal is otherwise justified in public interest, which in the instant case, we have found none.

8. In fact clause (2) of the Litigation Policy mandates formulation of Committees for monitoring the litigation. A High Powered Committee, at the highest level, is under an obligation to monitor the implementation of the Policy and hold the delinquent accountable and responsible.

9. Clause (4) lays down the practices to be adopted for achieving the object of the Policy, in the following terms:

> "(iii) Litigation between government departments/ agencies is to be avoided at all costs. For amicable settlement of disputes between departments, a suitable mechanism for resolution will be established under the Chairpersonship of the Chief Secretary who will settle these inter departmental issues/ disputes after hearing the concerned departments/agencies.
>
> (iv) Employees Grievance Redressal Mechanism with respect to grievances of the employees will be set up in every department which ensures that employees do not have to resort to litigation, as far as possible. The decisions of this mechanism shall be binding upon the government in so far as individual grievances, not having a larger implication for other employees of the department/other departments, are concerned."

10. It is in this backdrop, we find that the instant petition came to be filed, without due and proper application of mind and dehors the State Litigation Policy.

11. Under these circumstances, we direct the Chief Secretary to the Government of Himachal Pradesh to convene a meeting of the Principal Secretaries of the Government of Himachal Pradesh, in apprising them of the existence, importance, significance, advantages and benefits of adhering to the Litigation Policy, in letter and spirit. In turn, it is expected of the Principal Secretaries to convene a meeting in their respective Departments, sensitizing the stakeholders with regard thereto. This would only help curtail the problem of docket explosion and prevent cause any unnecessary inconvenience and expenditure by innocent persons.

12. We further direct the Chief Secretary as also the Principal Secretaries to the Government of Himachal Pradesh to have all the cases reviewed, periodically, in terms of the H.P. State Litigation Policy. This alone would generate lot of good will to the State.

With these directions, present petition is disposed of, so also pending application(s), if any.

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

State of H.P. & ors. ……Petitioners.
Versus
Bhaskar Ram …….Respondent.

CWP No. 1894 of 2016.
Decided on: 24.7.2017.

Constitution of India, 1950- Article 226- Respondent/original applicant claimed that he has acquired a right of regularization after the completion of eight years of service on daily wage basis as per the policy framed by the State Government – the Tribunal ordered the regularization and consequent benefits – held that the plea of the respondent that the services of the respondent could have been regularized only on the availability of the post is not in accordance with the judgment of High Court in Gian Singh Versus State of H.P. and others, CWP No. 7140 of 2012 decided on 24.9.2014 upheld by a Division Bench of this Court in LPA No. 194 of 2015 vide judgment dated 3.12.2015- the Tribunal had rightly held the respondent to be entitled for regularization and consequential benefits- writ petition dismissed. (Para-3 and 4)

Case referred:
Mool Raj Upadhyaya's case (1994 Supp.(2) SCC 316)

For the petitioners: Mr. Parmod Thakur, Addl. AG.
For the respondent: Mr. C.N.Singh, Advocate.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Aggrieved by the order dated 24.9.2015 (Annexure P-3) passed by a Division Bench of H.P. Administrative Tribunal in OA No. 1806/2015 whereby the respondent (hereinafter referred to as the original applicant) has been ordered to be regularized as Beldar w.e.f. 1.1.2000 and to allow him to continue in service up to the age of 60 years, the respondents in the original application have preferred this writ petition with a prayer to quash and set aside the same on the grounds inter alia that in view of the judgment of the Apex Court in ***Mool Raj Upadhyaya's case (1994 Supp.(2) SCC 316***), the original applicant was required to be brought on work charge establishment of the respondent-department and as regards his regularization, the same in terms of the judgment ibid should have been on the basis of seniority and subject to availability of post(s). The original applicant, as such, was rightly regularized vide office order No. 12 dated 3.5.2007 w.e.f. 11.4.2007 on availability of post created by the Government pursuant to policy circulated vide letter No. PER (AP)-C-B(2)-1/2006 Vol. II, Dated 9.6.2006. The original applicant was neither entitled for regularization w.e.f. 1.1.2000 nor to continue in service up to the age of 60 years.

2. The original applicant on the other hand claims that he having acquired 8 years of continuous service on daily wage basis on 1.1.2000 was entitled for regularization from the said date under the policy framed by the State Government and also the law laid down by this Court.

3. Admittedly, the original applicant was inducted on daily wage basis in Karsog Division of the Forest Department in the year 1991. He, however, completed 8 years of service with 240 days in each calendar year from 1.1.1992 onwards. As per the policy dated 26.9.2005 framed by the State Government read with High Court orders dated 3.4.2000 and 6.5.2000, issued by the Government for regularization of daily waged Beldars, the original applicant who

had already completed 8 years of service on daily wage basis as on 1.1.2000, was entitled to be regularized as Beldar accordingly. The stand of the respondent-State that his services could have been regularized only on the availability of post(s), however, is not tenable as a Coordinate Bench of this Court in ***Gian Singh vs. State of H.P & ors, CWP No. 7140 of 2012*** decided on 24.9.2014 upheld by a Division Bench of this Court in LPA No. 194 of 2015 vide judgment dated 3.12.2015, has taken similar view of the matter and not only directed the respondent-State to regularize the services of the original applicant, a similarly situated person with effect from 1.1.2000, but also to allow him to continue in service till he attains the age of 60 years. Similar is the ratio of the judgment of a Division Bench of this Court in CWP No. 1 of 2008 titled ***Chunni Lal vs. State of H.P***. decided on 24.6.2015.

4. In this view of the matter, learned Tribunal has not committed any illegality or irregularity while allowing the original application since the entitlement of the original applicant for regularization w.e.f. 1.1.2000 allow him to continue in job up to the age of 60 years for the reason that as per FR 56, a Class-IV employee in regular service of the State Government as on 10.5.2001 is also entitled to continue in service up to the age of 60 years. The original applicant in the present case was retired from service on 31.7.2014 on attaining the age of 58 years. He however, was retired from service on 31.3.2015, therefore, for the period from 31.7.2014 to 31.3.2015, he has to be treated on duty for all intents and purposes, of course notionally and as such, entitled to all monetary benefits. Therefore, learned Tribunal has appreciated this aspect of the matter also in its right perspective. The impugned order, as such, calls for no interference.

5. In view of what has been said hereinabove, this Writ Petition fails and the same is accordingly dismissed.

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

Mast Ram (deceased) through LR's ....Appellants
Versus
Subhash Chand and others ....Respondents

RSA No. 337 of 2005
Decided on: July 25, 2017

H.P. Consolidation of Holdings (Prevention and Fragmentation) Act, 1971- Section 7- Plaintiff filed a civil suit for declaration that suit land is owned and possessed by him- defendant has no right and title over the same- suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that a specific plea regarding the jurisdiction of the Civil Court was raised before the Court- however, the Appellate Court had not considered this plea- the Appellate Court is required to address itself to all the issues and decide the case by giving reasons in support of such findings- appeal allowed and case remanded to the Appellate Court for a fresh decision in accordance with law. (Para- 6 to 17)

Cases referred:
Laliteshwar Prasad Singh v. S.P. Srivastava, (2017) 2 SCC 415
Shasidhar and others versus Ashwini Uma Mathad and another, (2015) 11 SCC 269

For the appellants Mr. Rajnish Lal, Advocate, vice Mr. Sanjeev Sood, Advocate, for the appellants.
For the respondents: Mr. N.K. Thakur, Senior Advocate with Mr. Nitish, Advocate, for respondents No. 1 and 2
Mr. R.P. Singh, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Having regard to the nature of order this court proposes to pass, after having carefully perusing impugned judgment and decree, passed by learned first appellate Court vis-à-vis pleadings adduced on record, by the appellants, it may not be necessary to give facts and circumstances of the case, save and except that the respondent-plaintiff, filed a suit for declaration to the effect that suit land is owned and possessed by him and defendant has no right, title or interest over the suit land. Plaintiff, by way of suit referred to above, prayed for injunction restraining the defendant from interfering in the suit land and, in the alternative, for possession in case, defendant succeeds in taking possession of suit land or if otherwise found in possession of suit land.

2. Aforesaid suit having been filed by the plaintiff came to be decreed, whereby he was held to be owner in possession of the suit land. Learned trial Court, while holding plaintiff to be owner-in-possession of the suit land also held that defendant has no right, title or interest over the suit land. Entries in favour of defendant are wrong, illegal, hence set aside. Defendant being aggrieved and dissatisfied with aforesaid judgment and decree, preferred an appeal under Section 96 CPC, before the Additional District Judge, Fast Track Court, Una, District Una, which came to be registered as CA No. 21/98 RBT No. 80/04/98. However, the fact remains that the aforesaid appeal was dismissed, as a result of which, judgment and decree passed by learned trial Court came to be upheld. In the aforesaid background, appellants have approached this Court by way of instant proceedings, praying therein for setting aside the judgments and decrees passed by learned Courts below.

3. Appeal at hand was admitted on 8.7.2005, on the following substantial questions of law:

> "(1) Whether the civil Court has no jurisdiction to entertain the suit in view of the provision of Section 7 of the H.P. Consolidation of Holdings (Prevention and Fragmentation) Act?
>
> (2) Whether the findings of the Courts below are dehors the evidence on record?"

4. Before this Court adverts to the records for exploring answer to the aforesaid substantial questions of law, Mr. Rajnish Lal, learned counsel representing the appellants invited attention of this Court to the grounds of appeal filed before first appellate Court, laying therein challenge to the judgment and decree passed by learned trial Court, to demonstrate that no findings, if any, qua issue of jurisdiction of civil court, while entertaining suit against order of Consolidation officer, have been returned, as such, judgment passed by first appellate Court is not sustainable in the eyes of law and same deserves to be set aside.

5. Before ascertaining the merits of the aforesaid submissions having been made by the learned counsel representing the appellants, it would be appropriate to take not of the ground No. 5 of the appeal preferred before the learned Additional District Judge, which is reproduced as under:

> "5. That the order for correction of entries in the record has been made by the competent court on the admission of the plaintiff and that order has not been challenged by the plaintiffs moreover the order of the Consolidation Officer is final and that cannot be challenged in the civil court. The ld. Lower court below has acted without any power and jurisdiction."

6. Perusal of averments contained in the aforesaid ground of appeal, clearly suggests that specific plea with regard to jurisdiction of civil court vis-à-vis order of Consolidation Officer was raised by the appellant before the first appellate Court and as such, it was bound to decide the same in accordance with law.

7. After having carefully perused impugned judgment and decree passed by first appellate Court, this Court sees substantial force in the arguments having been made by Mr. Rajnish Lal, that there is no discussion at all in the judgment passed by first appellate Court, qua issue of jurisdiction of civil court. In the case at hand, first appellate Court after recording brief facts of the case as well as submissions having been made by the learned counsel representing the parties, has proceeded to decide the appeal without caring to take note of specific grounds taken in the appeal. Perusal of the impugned judgment passed by first appellate Court, nowhere suggests that it had taken note of ground No. 5, as reproduced above, while deciding appeal having been preferred by appellants.

8. By now, it is settled law that first appeal is a valuable right of parties and parties have a right to be heard, both on the question of law and facts and first appellate Court is required to address itself to all the issues and decide the case by giving reasons in support of such findings.

9. True, it is that it is always open for the first appellate Court to take a different view on question of facts after adverting to the reasons given by trial Court in arriving at findings in question. It has been repeatedly held by Hon'ble Apex Court as well as this Court that court of first appeal being the last court of facts, must address all the questions involved in the case and, by no means, they should be general and vague. Similarly, it is well settled by now that whenever, appellate court intends to reverse the 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. As has been observed above, first appeal is a valuable right of parties and unless restricted by law, the whole case therein is open for re-hearing on questions of law and facts, as such, judgment of first appellate Court must therefore reflect its conscious application of mind and must record findings supported by reasons on all the issues arrived from pleadings of the parties.

10. In this regard, reliance is placed upon judgment of Apex Court in **Laliteshwar Prasad Singh** v. **S.P. Srivastava** reported in (2017) 2 SCC 415, wherein Hon'ble Apex Court has held as follows:

> "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:-
>
> > "12. In Santosh Hazari v. Purushottam Tiwari (2001) 3 SCC 179, this Court held as under: (SCC pp. 188-89, para 15)
> >
> > > "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.

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."

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)

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)

> "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 reasonings of the trial court are erroneous."

11. In the instant case, as has been noticed above, no findings, if any, qua issue of jurisdiction of civil court, specifically raised in grounds of appeal by appellant(s) have been returned by first appellate Court, rather, first appellate Court proceeded to agree with the findings returned by learned trial Court, reiterating reasoning given by learned trial Court while decreeing suit of the plaintiff. Needless to say that if first appellate Court agrees with the findings of trial Court, it need not re-state effect of evidence or reiterate reasons given by trial Court, expression of general agreement with reasons given by trial Court, would ordinarily suffice, but while agreeing with the judgment passed by trial Court, it is incumbent upon first appellate Court to take into consideration all the issues raised before it by the parties.

12. But, in the instant case, this Court, after having carefully perused impugned judgment passed by first appellate Court, is in agreement with the arguments having been made by Mr. Rajnish Lal, learned counsel representing the appellants that first appellate Court failed to take into consideration specific grounds with regard to jurisdiction having been raised by the appellants while agreeing with the judgment passed by learned trial Court. Keeping in view of controversy involved in the case, it was all the more important for the first appellate Court to consider specific plea of jurisdiction raised in appeal and then record its findings, regarding maintainability, if any, of the suit having been filed by the plaintiff.

13. In this regard, reliance is placed upon judgment of Hon'ble Apex Court in **Shasidhar and others** versus **Ashwini Uma Mathad and another**, (2015) 11 SCC 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:

"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 (Deceased) by L.Rs. (2001) 3 SCC 179, this Court held (at pages 188-189) as under: ".........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 (at p.244) stated as under:

"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 & Anr., (2005) 12 SCC 303, while considering the scope of Section 96 of the Code this Court (at pp. 303-04) observed as follows:

"2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion........."

16. Again in B.V Nagesh & Anr. 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:

> "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.
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> 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.)
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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."

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, 2014(12) Scale 171.

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:

> "1. The appellants are defendants in the suit. The plaintiffs are the respondents. The respondents are the children of 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 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, the 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, the 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 the appellants 2 to 4 would not claim any independent share in item Nos.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 appeal nor took note of cross objections filed by 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?

14. Though Mr. N.K. Thakur, learned Senior Advocate, duly assisted by Mr. Nitish, Advocate, on behalf of respondents No.1 and 2, made an attempt to persuade this Court, to agree with his contention that in light of the finding returned by trial Court, there was no requirement as such for the learned first appellate Court to return specific finding with regard to jurisdiction raised by appellants, but aforesaid argument having been made by Mr. N.K. Thakur, learned Senior Advocate can not be accepted in light of aforesaid law laid down by the Hon'ble Apex Court as well as this Court.

15. Consequently, in view of detailed discussion made herein above, as well as salutary principles, as have been laid down by Hon'ble Apex Court in judgments referred to above, as well as judgments passed by this Court, this Court is of the view that first appellate Court has failed to discharge its obligation being a court of first appeal.

16. Accordingly, without going into merits of the claims of both the parties, impugned judgment and decree passed by first appellate Court, are set aside and matter is remanded back to the first appellate Court, with the direction to decide the same afresh, in accordance with law. It may be observed that observations, if any, made by this Court, while passing instant order/judgment, may not be considered as opinion of this Court, especially qua issues involved in the present case, rather, first appellate Court may proceed to decide appeal afresh, without being influenced by any of the observations made in this judgment.

17. Parties through their counsel are directed to remain present before first appellate Court on **30.8.2017**. Since parties are litigating in the courts of law since 1981, this Court hopes and trusts that first appellate Court shall decide the matter preferably on or before **31.12.2017**.

18. Registry is directed to send a copy of instant order alongwith records of the case forthwith to the learned Court below, enabling it to do the needful within stipulated period.

19. That appeal stands disposed of accordingly. Pending applications, if any, are disposed of. Interim directions, if any, are also vacated.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Mohinder Kumar …Appellant.

Versus

Himachal Pradesh Road Transport Corporation & another …Respondents.

LPA No. 373 of 2011
Date of Decision: July 25, 2017

Constitution of India, 1950- Article 226- Petitioner was engaged as Transport Multipurpose Assistant (Conductor)- his services were terminated- he filed a writ petition, which was dismissed- held in appeal that appointment of petitioner was made on contractual basis- State has formulated a policy that if a person is found guilty of having committed misconduct five times, the contract is to be cancelled- petitioner was found guilty of corruption- petitioner has committed serious acts of misconduct on more than 5 occasions during his six years service- petition was rightly dismissed- appeal dismissed. (Para-3 to 6)

For the Appellant: Ms. Ranjana Parmar, Sr. Advocate with Mr.Karan Singh Parmar, Advocate, for the appellant.
For the Respondents: Mr. Adarsh K. Sharma, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice (oral).

On 18.02.2010, services of the petitioner (appellant herein), who was engaged as a Transport Multipurpose Assistant (Conductor), were terminated.

2. Such order of termination came to be assailed but not finding favour with the submission of the petitioner, CWP No. 2358 of 2010, titled as *Mohinder Kumar Versus Himachal Pradesh Road Transport Corporation & Anr.,* came to be dismissed by the learned Single Judge, in terms of the impugned order dated 25.05.2011.

3. It is the Policy of the State that if a person is found guilty of having committed misconduct five times, the contract is to be cancelled. That petitioner's appointment was on contractual basis, is not in dispute.

4. What is alleged by the petitioner is that such acts of misconduct resulting into imposition of penalty, necessarily have to be within the same contractual period and not the entire period of service, though contractual in nature, for which the petitioner came to be engaged.

5. The learned Single Judge, in our considered view, rightly repelled such contention. There cannot be any premium on misconduct more so when dishonesty and

impropriety is an issue. In fact, with the very first instance of misconduct, petitioner's contract ought not to have been renewed. There cannot be any premium for dishonesty. Petitioner was found guilty of corruption. His initial appointment was w.e.f. 23.09.2004. After expiry of one year, it came to be renewed till the time the authorities, finding the petitioner to be incorrigible, removed him from service vide order dated 18.02.2010. In six years, petitioner had committed serious acts of misconduct on more than five occasions.

6. In view of the above, we see no reason to interfere with the impugned order dated 25.05.2011, passed by learned Single Judge in CWP No.2358 of 2010, titled as *Mohinder Kumar Versus Himachal Pradesh Road Transport Corporation & Anr.*

As such, present appeal stands dismissed, so also pending application(s), if any.

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

State of Himachal Pradesh ....Appellant
Versus
Mohinder Singh ....Respondent

Cr. Appeal No. 373 of 2009
Decided on: July 25, 2017

Indian Penal Code, 1860- Section 323 and 325 read with Section 34- Accused gave beatings to the informant and PW-4- accused was tried and acquitted by the Trial Court- held in appeal that the incident had taken place over the cycle but the ownership of the cycle was not ascertained by the police- cycle was also not taken in possession – no independent witness was associated by the police- the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-6 to 18)

Cases referred:
C. Magesh and others versus State of Karnataka (2010) 5 Supreme Court Cases 645
State of UP versus Ghambhir Singh & others, AIR 2005 (92) Supreme Court 2439
Pawan Kumar and Kamal Bhardwaj versus State of H.P., latest HLJ 2008 (HP) 1150

For the Appellant: Mr. P.M. Negi and Mr. M.L. Chauhan, Additional Advocates General.
For the Respondent: Mr. Sunny Modgil, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. (Oral)

Instant criminal appeal filed under Section 378 CrPC is directed against impugned judgment of acquittal dated 8.5.2009 passed by Judicial Magistrate 1st Class Court No.3, Una, District Una, Himachal Pradesh, in Criminal Case No. 79-II-07, whereby respondent-accused, came to be acquitted of the charges framed against him under Sections 323 and 325 read with Section 34 IPC.

2. Briefly stated the facts as emerge from record are that complainant namely Taro Devi, PW-3, got her statement recorded under Section 154 CrPC, Ext. PW-5/A, on the basis of which, formal FIR No. 190/07 dated 4.6.2007, came to be registered, alleging therein that on 22.4.2007, at around 2.50 pm, at Village Jhalera, District Una, accused gave beatings to her as well as PW-4 Raj Kumar, by way of fist blows, as a result of which Taro Devi PW-3 sustained

injuries on her face, which were termed to be simple as well as grievous in nature, vide MLC Ext. PW-2/A and PW-1/A. After completion of investigation, police presented Challan in the competent Court of law. Learned trial Court, being satisfied that prima facie case exists against respondent-accused, framed charges under aforesaid sections, to which he pleaded not guilty and claimed trial. Statement of accused was recorded under Section 313 CrPC, wherein he denied the case of the prosecution in toto, however, the fact remains that he did not lead any evidence in his defence. Learned trial Court, vide judgment dated 8.5.2009, acquitted the accused of the charges framed against him. In the aforesaid background, respondent State being aggrieved and dissatisfied with judgment of acquittal recorded by learned Judicial Magistrate 1st Class, court No.3, Una, has approached this Court, by way of instant proceeding praying therein for conviction of accused, after setting aside judgment of acquittal recorded by the learned Court below.

3. Mr. M.L. Chauhan, learned Additional Advocate General, while referring to the impugned judgment of acquittal recorded by the Court below, vehemently argued that same is not sustainable in the eyes of law as the same is not based upon correct appreciation of evidence adduced on record by the prosecution. Mr. Chauhan, while inviting attention of this Court to impugned judgment contended that bare perusal of same suggests that the learned Court below has not appreciated the evidence adduced on record by the prosecution in its right perspective, as a result of which erroneous findings have come on record and accused has been let off on very flimsy grounds. With a view to substantiate his aforesaid arguments, Mr. Chauhan, made this Court to travel through evidence led on record by prosecution to suggest that all the material prosecution witnesses categorically deposed before the Court below that the victims namely Taro Devi PW-3 and Raj Kumar, PW-4, were given beatings by the accused and in this incident, PW-3 Taro Devi sustained simple as well as grievous injuries. While concluding his arguments, Mr. Chauhan, contended that since case was proved beyond reasonable doubt by the prosecution, there was no occasion for the learned Court below to acquit the accused, by extending benefit of doubt.

4. Mr. Sunny Modgil, learned counsel representing the accused while refuting aforesaid submissions having been made by Mr. M.L. Chauhan, Additional Advocate General, invited attention of this Court to the statements made by PW-3 and PW-4, to suggest that no reliance, if any, could be placed on their version, by the learned Court below, while examining correctness of the story put forth by the prosecution because of material contradictions in their statements. Mr. Modgil, further contended that apart from statements having been made by PW-3 and PW-4, who are admittedly related to each other, no independent witness was associated by the prosecution, to prove its case and as such there is on illegality or infirmity in the judgment passed by learned Court below, which otherwise is based upon correct appreciation of evidence adduced on record.

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

6. While hearing submissions having been made by the learned counsel representing the parties, this Court had an occasion to go through the judgment passed by learned Court below, vis-à-vis evidence adduced on record by the prosecution, perusal whereof certainly does not suggest that the learned Court below has misread, mis-interpretted or mis-construed evidence led on record by the prosecution, rather, this Court, after having carefully perused entire evidence led on record, by prosecution has no hesitation to conclude that the prosecution has not been able to prove its case beyond reasonable doubt, as such, there is no reason for this Court to disagree with the findings returned by the trial Court. Though, in the instant case, prosecution, with a view to prove its case, examined as many as six witnesses but perusal of the record suggests that only statements of three witnesses are material to ascertain whether accused gave beatings to PW-3 and PW-4 on 22.4.20107. At this stage, it may be noticed that PW-3 Taro Devi and PW-4 Raj Kumar, are closely related to each other, being mother and son. Apart from the statements having been made by the aforesaid witnesses, there is no

independent witness associated on record by the prosecution to support the prosecution story. PW-3, while proving case of the prosecution, reiterated that accused gave beatings to her and her son Raj Kumar. But, interestingly, altogether new story with regard to lifting of cycle by accused, came to be introduced by the prosecution during examination of these witnesses. In her statement before the court, she stated that accused came to the adjoining shop and started lifting cycle, to which PW-4 Raj Kumar objected and claimed that the cycle was his and he was stealing it. Accused started giving beatings to Raj Kumar. She further stated that she rushed out thereafter and asked accused as to why he was beating Raj Kumar but accused also started giving beatings to her. Interestingly, in the cross-examination, this witnesses admitted that she had informed entire incident with regard to lifting of cycle by accused to the police, but there is nothing as such in the statement given under Section 154 CrPC, to the police by this witness.

7. Similarly, it has come in the cross-examination of PW-3 that when she was trying to rescue PW-4 from the clutches of accused, she fell down. In cross-examination, she feigned ignorance whether her son PW-4 Raj Kumar, received injuries, in the alleged incident or not? PW-4 Raj Kumar, also corroborated version put forth by PW-3 with regard to alleged beatings given by accused to him. He also, in his cross-examination claimed that he alongwith Taro Devi had gone to the police to get the complaint lodged. He also stated that the police after writing the report, read over the same to them and they put their signatures having accepted the same to be correct. He also contended that PW-3 Taro Devi had disclosed to the police that fighting started due to lifting of cycle, but, as has been noticed above, there is no mention as such in the Rapat, Ext. PW-5/A, which was initially, registered by the police at the behest of PW-3, with regard to lifting of cycle, if any, by the accused.

8. PW-5, Head Constable, Paramjit, who was Investigating Officer, while stating that he prepared spot map after visiting the spot, categorically admitted that PW-3 and PW-4 had stated that cycle was main cause of fight. But, in his cross-examination, he specifically admitted that he did not make attempt to inquire as to who was actual owner of the cycle. He also admitted that fight took place between accused and PW-3 Raj Kumar. He also admitted the suggestion put to him that during investigation, it emerged that PW-3 Taro Devi had entered fight at a later stage.

9. After having carefully perused statements made by these prosecution witnesses, it clearly emerges from record that the cause of dispute, if any, inter se parties was alleged lifting of cycle by accused. But, interestingly, in the instant case, there is no attempt, if any, on the part of the police to take into custody cycle, which was allegedly stolen by accused. PW-5 HHC Paramjit categorically admitted in his cross-examination that he did not inquire as to who was the actual owner of the cycle. Similarly, there is no evidence led on record by the prosecution, from where it could be inferred, that who was real owner of cycle, which was alleged to be stolen by accused. Similarly, no definite opinion can be formed with regard to infliction of injuries on the body of the PW-3 Taro Devi because of alleged fist blows having been given by accused. It has specifically come in the statement of PW-3 Taro Devi that when she was trying to pull away Raj Kumar from the clutches of accused, she fell down and as such, possibility of Taro Devi having received injuries by way of falling on the ground, can not be ruled out.

True it is, that it has come in the medical evidence led on record by prosecution that PW-3 Taro Devi received simple as well as grievous injuries, but same may not be sufficient to conclude that accused is guilty of having committed offence punishable under charged sections.

10. Since prosecution has not been able to connect accused beyond reasonable doubt, with commission of alleged offence, medical evidence, if any, led on record, may not be of any help to the prosecution. Otherwise also, it emerges from record that even there is conflicting opinion of doctors, qua the injuries allegedly received by Taro Devi in the alleged incident. As per PW-1 Dr. Yogeshwar Ravi, who issued MLC Ext. PW-1/A, Taro Devi received simple injuries, whereas Dr. Vipin Chaudhary, PW-2 termed injuries to be grievous.

11. Leaving everything aside, this Court finds from record that alleged incident admittedly occurred in the Bazaar, that too at 2.50 pm, meaning thereby that there were a number of people available, who could be associated by prosecution as independent witnesses to give strength to the story of prosecution. It has specifically come in the statement of PW-3 that she runs a tea stall in the shop owned by Ram Swaroop. Similarly, it has come in the statement of prosecution witnesses that there were a number of shops, but, unfortunately, there appears to be no attempt on the part of prosecution to associate any independent witnesses.

12. True it is, that version put forth by interested witnesses can not be brushed aside merely on the ground that they are related to the complainant, but, it is well settled that version put forth by interested witnesses is required to be dealt with cautiously and carefully by the Courts, while ascertaining guilt, if any, of accused. In the instant case, there is no evidence, save and except that of PW-3 and PW-4, who are mother and son, to support the prosecution story.

13. Otherwise also, if statements having been made by these witnesses i.e. PW-3 and PW-4 are read in their entirety, it can be said that no reliance, if any could be placed upon their statements, for holding accused guilty of offence punishable under aforesaid sections, because of inconsistency in their statements. There is no consistency at all in the statements of these prosecution witnesses, as such learned trial Court has rightly ignored their version while acquitting the accused of the charges framed against him.

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

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

15. After perusing the statements of the prosecution witnesses as well exhibits placed on record, two views are possible in the present case and as such, the petitioner-accused is entitled to the benefit of doubt. The learned counsel for the accused has placed reliance on the judgment passed by Hon'ble Apex Court reported in **State of UP** versus **Ghambhir Singh &**

others, AIR 2005 (92) Supreme Court 2439, wherein the Hon'ble Apex Court has held that if on the same evidence, two views are reasonably possible, the one in favour of the accused must be preferred. The relevant paragraph is reproduced as under:-

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

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

> "25. Moreover, when the occurrence is admitted but there are two different versions of the incident, one put forth by the prosecution and the other by the defence and one of the two version is proved to be false, the second can safely be believed, unless the same is unnatural or inherently untrue.
>
> 26. In the present case, as noticed hereinabove, the manner of occurrence, as pleaded by the defence, is not true. The manner of the occurrence testified by PW-11 Sandeep Rana is not unnatural nor is it intrinsically untrue, therefore, it has to be believed.
>
> 27.Sandeep Rana could not be said to have been established, even if the prosecution version were taken on its face value. It was pleaded that no serious injury had been caused to PW-11 Sandeep Rana and that all the injuries, according to the testimony of PW-21 Dr. Raj Kumar, which he noticed on the person of Sandeep Rana, at the time of his medical examination, were simple in nature.

17. Evidence discussed herein above is sufficient to hold that in given facts and circumstances, two views are possible in the present case and as such present, accused is entitled to the benefit of doubt. In the present case, prosecution story does not appear to be plausible/ trustworthy and as such same cannot be relied upon.

18. Consequently, in view of discussion made herein above and law laid down by Hon'ble Apex Court, this Court sees no reason to interfere with well reasoned judgment of learned trial Court, which otherwise appears to be based upon correct appreciation of evidence adduced on record by the prosecution. The appeal is accordingly, dismissed. Bail bonds, if any, furnished by accused are cancelled. Pending applications, if any, are also disposed of.

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

Sh. Vibhu Benal ....Appellant.
Versus
State of H.P. and others. ......Respondents

LPA No. 195 of 2016
Decided on: 25.07.2017

Constitution of India, 1950- Article 226- **Arms Act, 1959-** Section 44- The writ petitioner pleaded that he is an advocate and has to travel outside the State in discharge of his official duties – a prayer was made by him to carry pistol throughout India which was declined – the petitioner filed a writ petition which was dismissed by the Writ Court – held that the petitioner is an Advocate by profession - possibility of visiting various places in connection with his professional activities cannot be ruled out- a reference should have been made to ministry of Home Affairs, Govt. of India in view of the fact that the case of the petitioner is a deserving case – writ petition allowed- direction issued to consider the application for issuance of armed license within two months. (Para- 4 to 8)

For the appellant: Mr. Sudhir Thakur and Mr. Anirudh Sharma, Advocates.
For the respondents: Mr. D.S. Nainta and Mr. Virender Verma, Addl. A.Gs.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

The judgment under challenge has been passed by learned Single Judge in CWP No. 3610 of 2011 on May 27, 2016, whereby the writ petition has been dismissed and the prayer to allow him to carry his pistol to any place in India declined.

2. He being an Advocate by profession submits that in discharge of his professional duties and obligations, had to travel outside the state. In support of his case documentary evidence i.e. Annexure P-15 (Colly.) to the writ petition and railway tickets have been pressed into service. The order, Annexure P-10 (Colly.) passed by the Secretary (Home) to the Government of Himachal Pradesh on 2.8.2010 on the basis of instructions dated 31.3.2010 by the Ministry of Home Affairs, Government of India has also been sought to be quashed and set aside.

3. Learned Single Judge after having considered the case of the parties on both sides and taking into consideration the instructions so referred to in the order, Annexure P-10 (Colly.) and also the provisions contained under the Arms Act, 1959 has dismissed the writ petition with the observations that Central Government has framed the rules known as Arms Rules, in exercise of its statutory powers under Section 44 of the Act. It is these rules which empower the Central Government to impose restrictions with regard to the validity of the licenses outside the territorial limits of the State qua which it is granted. The issuance of the instructions referred to in the order, Annexure P-10, therefore, in the opinion of learned Single Judge, was not *ultra vires* nor unreasonable. Learned Single Judge has further observed that request for issuance of all India license has rightly been rejected by the respondents as there is no threat perception to the petitioner nor does the non-issuance thereof affect his right of livelihood in any manner whatsoever.

4. On going through the impugned judgment and also the material available on record, the petitioner admittedly, is an Advocate. The possibility of he has to visit several places in connection with his professional activities cannot be ruled-out. This part even is supported by the documents, Annexure P-13 (Colly.) i.e. cause lists etc. to the writ petition.

5. Now if coming to the instructions referred to in the order, Annexure P-10, in the matter of Arms license, all India validity is permissible only in the cases of (i) Sitting Union Minister/M.P's (ii) Personnel of Military, Para-Military, (iii) Officers of All India Services and (iv) Officers with liability to serve anywhere in India and (v) Sports Persons. The cases which are not covered under either of category; the Government is required to seek prior concurrence of the Ministry of Home Affairs, Government of India by making a reference with full justification in deserving cases.

6. It is emphasized on behalf of the petitioner that he being an Advocate is Officer of the Court and covered by Clause 4 supra. Be it stated that the Advocates are the Officers of the Court. They are required to travel throughout the country and sometime to abroad also in connection with the duties attached to their profession.

7. Otherwise also, even if the petitioner's case for grant of all India license was not covered under category (iv) supra, in our considered opinion, the respondent-State should have sought the concurrence of Ministry of Home Affairs, Government of India, in view of the present a deserving case for issuance of a license with all India validity as the nature of petitioner's professional obligations and duties justifies issuance of such license. On the ground of parity also, the petitioner is entitled to the issuance of all India validity license. The information he obtained under the Right to Information Act amply demonstrates that during the year 2007 to 25.11.2010, out of 14 arms licenses, 9 were issued having all India validity. The explanation as set-forth qua this aspect of the matter in para 14 of the reply to the writ petition is that the licenses to nine persons having all India validity were issued prior to 31.03.2010, the day when the above-said instructions were issued. Whereas, in the case of remaining two namely, Praveen Kumar and Colonel Vijay Kumar Patyal, they being army personnel were covered under the policy for issuance of armed licenses having all India validity. The explanation so set-forth may be correct, however, the petitioner who has applied on 12.03.2007 vide application, Annexure P-3 should have also been considered along with those seven persons to whom all India validity licenses were issued prior to coming into force the instructions i.e. 31.03.2010, especially when vide judgment dated 13.10.2009 passed by a Division Bench of this Court in CWP No. 2555/09, instituted by the petitioner previously, the respondent-State was directed to re-consider his case within a period of three weeks. Therefore, in our opinion, the petitioner has been discriminated against the similarly situated persons in the matter of issuance of all India validity license.

8. In view of the above position, we allow this appeal. The impugned judgment is quashed and set aside. Consequently, the writ petition is allowed. There shall be a direction to the 1st respondent to consider the application, Annexure P-3 of the petitioner for issuance of armed license, uninfluenced by the instructions issued on 31.03.2010 by the Central Government within two months from today, as per instructions prevalent at the relevant time.

9. The appeal is accordingly allowed and stands disposed of. Pending application(s), if any, shall also stand disposed of.

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

Champa Devi ….Petitioner.
Versus
State of H.P. and Others …Respondents.

CWP No.: 865 of 2012.
Decided on: 26.07.2017.

Constitution of India, 1950- Article 226- Appointment letter was issued in favour of respondent No.4 on 14.8.2007- appointment can be challenged within 15 days by filing an appeal before Deputy Commissioner- a period of 15 days cannot be condoned by the Appellate Authority- in the

present case, result was declared on 14.8.2007 and the appeal was filed on 30.8.2007 beyond the period of limitation- appeal was rightly dismissed as barred by limitation - petition dismissed. (Para-2 to 5)

For the petitioner Mr. R.L. Chaudhary, Advocate.
For the respondents Mr. Vikram Thakur, and Ms. Parul Negi, Dy. AGs for respondents No. 1 to 3.
Mr. Raju Ram Rahi, Advocate for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

The sole ground on which impugned order so passed by Deputy Commissioner, Mandi, dated 16.03.2011, stands assailed before this Court by way of this petition is that the learned Appellate Authority erred in dismissing the petition by holding that the same was barred by limitation rather than adjudicating the same on merit.

2. I have heard learned Counsel for the parties and perused the records of the case. It is not in dispute that appointment letter was issued in favour of the selected candidate i.e. respondent No. 4, **on 14.08.2017.** Para 12 of the Policy pertaining to appointment of Anganwari Workers provides that any person aggrieved by appointment of Anganwari Worker can within 15 days of declaration of the result assail it by way of filing an appeal before the Deputy Commissioner. It is also not in dispute that this Court in number of cases has held that the 15 days period so mentioned in the policy for filing the appeal cannot be relaxed by condoning the delay, if any, in filing the appeal. In *CWP No. 1096 of 2010*, titled as **Raksha Devi** vs. **State of H.P. and others and the connected matters**, decided on **17.05.2010**, this Court has held as under.

> *"Another legal contention is as to whether the Appellate Authority has power to condone delay in filing appeal. The guidelines provide a period of 15 days for filing an appeal. Being a statutory authority, in terms of the Policy Guidelines, the Appellate Authority does not have the power under Section 5 of the Limitation Act. No power is conferred also in the guidelines for condonation of delay. Therefore, he cannot enlarge the time, by condoning delay in filing the appeal. In other words, if an appeal is not filed within the prescribed time, it has only to be dismissed, since the Appellate Authority has no power to condone the delay in filing the appeal."*

3. A perusal of the order passed by the learned Appellate Authority demonstrates that said Authority dismissed the appeal by holding the same to be time barred on the ground that the result under challenge was declared on 14.08.2007 whereas appeal was filed on 30th of August, 2007 i.e. beyond the period of limitation.

4. In my considered view, findings so returned by the learned Appellate Authority cannot be faulted with. It is not in dispute that result qua appointment of respondent No. 4 as Anganwari Worker was declared on 14.08.2007. Appeal admittedly to assail the same was to be filed within the period of 15 days from the date of declaration of the result. Now if limitation of 15 days is to be counted from 15th of August, 2007, then the same expires on 29th of August, 2007.

5. The contention of Mr. R.L. Chaudhary, learned Counsel for the petitioner that appeal was filed on 29th of August, 2007 and not on 30th of August, 2007 is not supported by any document on record. Petitioner has not placed on record anything, from which it could be inferred that the appeal in fact was filed on 29th of August, 2007 and not on 30th of August, 2007, as has been held by the learned Appellate Authority. In the absence of there being any contrary material on record, there is no occasion for this Court to disbelieve the finding returned by learned Appellate Authority that the appeal in fact was filed on 30th of August, 2007. In view of law declared by this Court that no appeal beyond the period of 15 days as prescribed in the policy can be entertained by the Appellate Authority, there is no merit in the contention of Mr. R.L.

Chaudhary, learned Counsel for the petitioner that the impugned order is not sustainable in the eyes of law. It cannot be said that learned Appellate Authority erred in dismissing the appeal on the ground of limitation.

In view of discussion above, as there is no merit in the petition, the same is dismissed, so also pending miscellaneous application(s), if any. No orders as to costs.

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

Sunanda Sharma …….Petitioner.

Versus

Shri D.P. Sood & anr. ……Respondents.

CR No. 28 of 2017.
Date of decision: July 26, 2017.

Code of Civil Procedure, 1908- Order 9 Rule 7- The tenant filed an application for setting aside ex-parte order passed by Rent Controller pleading that she was never served with the notice issued for her service by way of publication- the application was opposed by filing a reply pleading that mother and brother of the tenant were duly served and the tenant had a knowledge of the proceedings – the application was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held that reply was filed by the Advocate on behalf of respondents No. 1, 2 and 4- however, power of attorney was filed only on behalf of respondents No.1 and 2- therefore, it cannot be said that the reply was filed on behalf of respondent No. 4 as well- service of respondents No. 1 and 2 does not mean the knowledge on the part of the respondent No. 4 – the possibility that newspaper was not circulating in the area where she was residing cannot be ruled out- petition allowed and ex-parte order passed by Rent Controller set aside. (Para-5 to 9)

For the petitioner Mr. Raju Ram Rahi, Advocate.
For the respondent Ms. Seema Sood, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

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

This petition is directed against the order dated 28.9.2016 passed by learned Appellate Authority in Rent Appeal No. 26-S/14 of 2016, whereby the order dated 13.6.2016 passed by learned Rent Controller, Shimla in an application under Order 9 Rule 7 read with Section 151 CPC filed by the petitioner herein (respondent No. 4 before learned Rent Controller) registered as CMA No. 125/6 of 2015 has been dismissed along with another application filed under Section 5 of the Limitation Act. The petitioner-respondent claims that she was never served with the notice issued for her service by way of publication for 3.8.2007. She was proceeded against exparte on 3.8.2007 in the rent petition. This order reads as follows:

> *"Case called twice but none appeared. None appeared in the morning also for respondent No. 4. She is duly served by way of publication in daily News paper 'Himachal Time, but not present. It appears that she is no interested in contesting the petition. Hence, she is proceeded against exparte. Put up for rejoinder if any, and issues on 29.8.2007."*

2. She filed the application registered as CMA No. 125/6 of 2015 as aforesaid on 4.12.2015 with a prayer to set aside the exparte order on the grounds, inter alia, that she was never served by way of publication of notice in the News paper "Himachal Times" which according

to her has no circulation in the area to which she belongs. Also that, the notice was not published for her service properly. The Process Server of Process Serving Agency, Dehra at Kangra had never visited her matrimonial house to serve her with the notice issued by ordinary mode.

3. The application filed by her was resisted and contested on behalf of the respondent, hereinafter referred to as the 'petitioner-landlord'. Her mother respondent No. 1 Kamlesh Lakhanpal (since dead) and brother respondent No. 2 Arvind Lakhanpal were duly served with notice issued in the rent petition, hence respondent No. 4 being their daughter/brother respectively can be reasonably believed to have the knowledge of the institution of the rent petition and also that she was duly served by way of publication. Since she failed to put in appearance, therefore, the application was sought to be dismissed by the petitioner-landlord.

4. Learned Rent Controller on completion of the pleadings in the application has disposed of the same vide order dated 13.6.2016. As noticed at the outset, that learned Appellate Authority has affirmed the order passed by learned Rent Controller vide judgment under challenge before this Court in this petition.

5. The perusal of the orders under challenge make it crystal clear that factum of filing of the reply to the rent petition by Shri Neeraj Gupta, Advocate, on behalf of respondents No. 1, 2 and 4 in the year 2008 is heavily weighed with learned Rent Controller and also the Appellate Authority. True it is, that Shri Neeraj Gupta, Advocate has filed reply on behalf of respondents No. 1, 2 and 4 on 7.9.2007. However, he has filed power of attorney on 9.5.2007 only on behalf of respondents No. 1 and 2. How the reply could have been filed on behalf of respondent No. 4 without she having authorized Shri Neeraj Gupta, Advocate remained unexplained. Above all, the reply has only been signed by Shri Arvind Lakhanpal. Similarly, it is he who alone has signed the power of attorney. True it is, that the reply/written statement is filed jointly on behalf of more than one respondent/defendant is not required to be signed and verified by all of them and signature/verification by one of them is sufficient. However, the authorization to file reply by way of signing power of attorney in favour of the Counsel should be there.

6. This Court has checked the entire record and is unable to lay its hand on the power of attorney signed by respondent No. 4 in favour of Shri Neeraj Gupta, Advocate and thereby authorising him to file reply to the rent petition. Merely mention in the head note that the reply has been filed on behalf of respondent No. 4 also without authorizing learned Counsel by her to do so should not be taken to form an information that the reply was filed on behalf of respondent No. 4 also. I am, therefore, not in agreement with the findings to the contrary recorded by learned Rent Controller and learned Appellate Authority below.

7. Interestingly enough the reply was filed on 7.9.2007 i.e. after the respondent No. 4 was proceeded against exparte on 3.8.2007. In the subsequent order i.e. dated 29.8.2007 she was shown exparte. Even in the order dated 7.9.2007 the day when the reply was filed, on one hand she was shown to be represented by Shri Neeraj Gupta, Advocate, however, in the next line exparte. In the subsequent orders also, either she has been shown to be exparte or represented by Counsel. True it is, that she was served by way of publication for 3.8.2007 and failed to put in appearance on that day, hence was proceeded against exparte. The fact, however, remains that she never engaged Shri Neeraj Gupta, Advocate to defend herself in the rent petition nor he could have file reply on her behalf. Whether she is a necessary party in the rent petition or not is a question which has to be decided in the main petition after affording her an opportunity of being heard. However, in the opinion of this Court, she has satisfactorily pleaded and proved that publication of notice in 'Himachal Times' an English daily for her service was not in her knowledge because the possibility of the circulation of the said News Paper in the area where she resides cannot be ruled out. The service of her mother (since dead) respondent No. 1 and brother respondent No. 2 in the rent petition should have also not been construed as her valid

service because it is not always necessary that the co-respondent or any other relation may inform the unserved respondent(s) about the pending litigation.

8. This Court, as such is also not in agreement with the observations made by both Courts below that since respondents No. 1 and 2 were duly served with the notice issued to them in the Rent petition, respondent No. 4 may have also come to know about the institution of the rent petition and the date(s) on which the same remained listed before learned Rent Controller. In the totality of the circumstances and the explanation offered by respondent No. 4 qua her absence on 3.8.2007 learned Rent Controller and for that matter learned Appellate Authority below should have quashed the exparte order passed against her on that day and allowed her to contest the petition. Failure to do so, on the part of learned Rent Controller and the Appellate Authority has definitely resulted in miscarriage of justice to respondent No. 4 who in the considered opinion of this Court is condemn unheard. The judgment under challenge, as such, cannot be said to be legally and factually sustainable.

9. For all the reasons hereinabove, this petition succeeds and the same is accordingly allowed. Consequently, the impugned judgment is quashed and set aside. As a result thereof the exparte order dated 3.8.2007 passed by learned Rent Controller, Shimla is also quashed and set aside and the petitioner-respondent No. 4 is permitted to contest the petition by filing reply etc. thereto.

10. However, keeping in view the petition is old one, she is granted one month's time and that too by way of last opportunity for the purpose. She, therefore, is directed to file reply on the next date to be fixed for the presence of the parties before learned Rent Controller below. On her failure to file the reply on the date to be so fixed, her defence shall stand automatically struck off. In the event of the reply is filed by her, the petitioner-landlord, if so, advised may file rejoinder within two weeks thereafter. Learned Rent Controller shall thereafter consider the matter for settlement of additional issue(s), if any, and record the evidence, if any, is produced by her on her own responsibility and in the event of the assistance of learned Rent Controller required by taking steps and ensuring the service of the witnesses for the date fixed. Any other and further opportunity shall not be granted to her in this regard. The rebuttal evidence, if any, required to be produced by the petitioner-landlord will also be produced thereafter within one month on his own responsibility and in case the assistance of learned Rent Controller required for the purpose by taking requisite steps and ensuring the service of the witness(s). On completion of the record, learned Rent Controller shall dispose of the rent petition at the earliest.

11. The parties through learned counsel representing them are directed to appear before learned Rent Controller on *11.8.2017.*

12. The petition is accordingly disposed of. Pending application(s), if any shall also sand disposed of.

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

Shri Ashok Kumar and others ....Appellants.
Versus
Shir Subhash Sharma and others ....Respondents.

RSA No. 193 of 2009.
Reserved on 12.05.2017.
Decided on: 27.07.2017

Specific Relief Act, 1963- Section 34- Plaintiffs pleaded that defendants No.2 and 3 were the owners of the suit land- plaintiffs had constructed a hotel after taking approval from the

Assistant Town Planner, Kullu – plaintiffs constructed a septic tank and a pollution treatment plant upon the land owned by defendants No.2 and 3- plaintiffs had become owners by way of adverse possession- defendants No.2 and 3 executed a sale deed in favour of defendant No.1- defendant No.1 is interfering with the possession of the plaintiffs on the basis of sale deed - suit was opposed by defendants pleading that plaintiffs never remained in possession- sale deed was validly executed – plaintiff No.1 had demolished the boundary wall constructed by the defendant No.1 for which a criminal case was registered- suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that plaintiff cannot seek a decree for declaration on the basis that they have become owners on the basis of adverse possession in view of judgment of Supreme Court in ***Gurdwara Sahib versus Gram Panchyat (2014) 1 SCC 669***– suit was rightly dismissed by the courts - appeal dismissed. (Para-12 to 17)

Case referred:

Gurdwara Sahib versus Gram Panchayat Village Sirthala and Another, (2014) 1 Supreme Court Cases 669

For the appellant	Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K. Vashisht, Advocate.
For the respondents	Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, the appellants/plaintiffs have challenged the judgment and decree passed by the Court of learned Additional District Judge, FTC, Kullu, H.P., in Civil Appeal No. 43 of 2007, dated 28.02.2009, vide which learned Appellate Court while dismissing the appeal so filed by the present appellants upheld the judgment and decree passed by the Court of learned Civil Judge (Jr. Divn.) Manali, in Civil Suit No. 82 of 2006, dated 22.11.2007, whereby learned trial Court had dismissed the suit filed by the present appellants/plaintiffs for declaration that they had become owners in possession of the suit property by way of adverse possession and further that sale deed No. 131, dated 01.04.2006 was null and void.

2. Brief facts necessary for the adjudication of this case are that the appellants/plaintiffs (hereinafter referred to as the 'plaintiffs') filed a suit for declaration to the effect that they had become owners of the land comprised in Khata Khatauni No. 67/87 min, Khasra No. 1181, old Khasra No. 2170 min, measuring 0-01-50 Hects., situated in Up Mohal Simsa, Phati Nasogi, Tehsil Manali, District Kullu, H.P. (hereinafter referred to as 'suit property') and sale deed executed by defendants No. 2 and 3 in favour of defendant No. 1 registered at Sr. No. 131, dated 01.04.2006 was null and void and not binding on the plaintiffs and in the alternative decree of injunction restraining the defendants from interfering in the suit land was prayed for. As per plaintiffs, they were owners in possession of land comprised in Khata Khatauni No. 163/219, Khasra No. 1175, measuring 0-06-94 hectares, Khata Khatauni No. 165/121, Khasra Nos. 1167, 1168, 1171, 1175, 1174, 1173, 1176, 1177, 1175, 1174 and 1179, which was purchased by them vide sale deeds executed on 26.04.1983 and 27.11.1987. It was further their case that they had constructed a hotel known as Hotel Preet thereupon. As per plaintiffs, defendants No. 2 and 3 were owners of land bearing Khata Khatauni No. 67/87 min., Khasra No. 1181, Sabka Khasra No. 2170 min., measuring 0-01-50 hectares, however, the same was not in possession of defendants No. 2 and 3 as plaintiffs had constructed a septic tank and also installed a pollution treatment plant upon the said khasra number. These constructions were carried out at the time of the construction of the Hotel Preet constructed by them after plan of the hotel was approved by Assistant Town Planner, Kullu. As per the plaintiffs, they were coming in peaceful possession of the same continuously without any interruption from any quarter to the knowledge of the defendants as well as owners of adjoining land and thus they had perfected

their title by way of adverse possession and defendants had no right to interfere over the same or to demolish construction so carried out by the plaintiffs over the same. As per the plaintiffs, defendants No. 2 and 3 had executed a sale deed in favour of defendant No. 1 on 01.04.2006 qua the suit land alongwith one other khasra number and on the strength of said sale deed, defendant No. 1 was trying to interfere with the suit land. As per plaintiffs, sale deed so executed dated 01.04.2006 by defendants No. 2 and 3 in favour of defendant No. 1 was null and void and had no binding effect on the plaintiffs as defendants No. 2 and 3 were in the knowledge of the fact that suit land which they had sold to defendant No. 1 was not in their possession but was in possession of plaintiffs over which plaintiffs had constructed a septic tank and pollution treatment plant. As per plaintiffs, their possession over the suit land was hostile, peaceful, continuous, since the year 1987. It was in this background that the suit was filed by the plaintiff with the prayers already mentioned above.

3. Suit so filed by the plaintiffs was contested by defendant No. 1, who by way of his written statement denied the claim of the plaintiffs. It was mentioned in the written statement that plaintiffs were never in possession of the suit land as alleged and plea raised in this regard by plaintiffs was faulty and afterthought with intention to grab the land which stood so purchased by defendant No. 1 from defendants No. 2 and 3 through a registered and valid sale deed after obtaining the permission to purchase the same from the Government of Himachal Pradesh. It was further mentioned in the written statement that peaceful possession of the suit land was handed over by defendants No. 2 and 3 to defendant No. 1 at the time of execution of registered sale deed and since then suit land was in possession of defendant No. 1, which stood developed and levelled by him by spending money upon the same. It was further mentioned in the written statement that defendant No. 1 had constructed a septic bank over the same. It was denied in the written statement that the plaintiffs had become owners of the suit property by way of adverse possession as alleged or any septic tank or pollution treatment plant stood constructed by plaintiffs over the suit property. It was further mentioned in the written statement that on the intervening night of 13/14.10.2006, plaintiff No. 1 had demolished the boundary wall which was so constructed by defendant No. 1 with intention to take possession of same in illegal manner and in this regard, FIR No. 245, dated 15.10.2006, under Sections 447, 427 and 379 of IPC was registered against him. It is also mentioned in the written statement that demarcation of land in question was conducted in the presence of Patwari Halka, field Kanungo, Up Pradhan, Gram Panchayat Nasogi, Ward Panch Lalu Ram, additional SHO Roop Singh and defendant No. 1 as part of investigation by the police and plaintiffs chose not to remain present at the site at the time of demarcation despite information sent to them in this regard by the police. It was also mentioned that after the demarcation was conducted by revenue officials on 01.11.2006, plaintiff No. 1 pelted bricks on Smt. Jai Shree Sharma (wife of defendant No. 1) and had used abusive, obscene and filthy language and had threatened her as well as defendant No. 1. It was further mentioned in the written statement that plaintiff were bent upon unnecessarily to drag him in the litigation with the intention of grabbing the suit land simply because he was an outsider belonging to State of Rajasthan. On these bases, the claim as put forth by the plaintiffs in their plaint was denied by defendant No. 1.

4. By way of replication, the plaintiffs while denying the averments made in the written statement reiterated the stand as was taken by them in the plaint.

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

"1. Whether the plaintiffs have become owners of the suit land as alleged ? OPP.

2. Whether the sale deed dated 01.04.2006 executed by defendants No. 2 and 3 in favour of defendant No. 2 is null and void as alleged ? OPP.

3. Whether the plaintiffs are entitled for relief of injunction as alleged? OPP.

4. Whether the suit of plaintiffs is not maintainable in the present form? OPD-1.

5. Whether the plaintiffs have no locus standi to file the present suit as alleged? OPD-1

6. Whether the plaintiffs are estopped from filing suit by their acts and conduct as alleged? OPD-1

7. Whether the plaintiffs have suppressed the material facts from this court as alleged? OPD-1.

8. Relief."

1(a). Whether the plaintiffs are entitled for a decree of adverse possession qua the suit land against the defendants as alleged?

7(a). Whether the plaintiffs has no cause of action to file the present suit? OPD-1.

6. On the basis of evidence adduced by the respective parties both oral as well as documentary, learned trial Court decided the issues so framed as under:-

"Issue No.1	*: No..*
Issue No. 2	*: No.*
Issue No. 3	*: No.*
Issue No.4	*: Yes*
Issue No.5	*: Yes.*
Issue No.6	*: Yes*
Issue No. 7	*: Yes*
Issue No. 1(a)	*: No.*
Issue No. 7(a)	*: No..*
Relief	*: The suit is dismissed as per the operative part of judgment."*

7. While dismissing the suit it was held by learned trial Court that it was an admitted fact that defendants No. 2 and 3 were owners in possession of the suit land and the factum of plaintiffs having constructed a septic tank and installed pollution treatment plant on the suit land after purchasing contiguous land vide sale deeds dated 26.04.1983 and 27.11.1987 stood denied by the contesting defendants. Learned trial Court held that plea of defendant No. 1 was that the suit land was purchased by him from defendants No. 2 and 3 by way of a registered and valid sale deed dated 01.04.2006 for consideration after obtaining permission to purchase the said land from the Government and after the purchase of the same, he was in possession of the suit land alongwith other land which was delivered to him comprising in Khasra No. 1204, total 0-03-00 hectares by defendants No. 2 and 3 at the time of execution of the sale deed. Learned trial Court held that as per defendant No. 1, after taking possession of the suit land, he developed the same and constructed a septic tank thereupon after seeking demarcation of the suit land. It was also held by the learned trial Court that the factum of sale deed having been executed between defendant No. 1 and defendants No. 2 and 3 was not disputed even by the plaintiffs but their contention was that said sale deed was null and void and was not binding upon them as they have perfected their title over the suit land by way of adverse possession. Learned trial Court further held that a person who claims adverse possession has to demonstrate and prove the following:

"a) On what date he come into possession.

b) What was the nature of his possession.

c) Whether the factum of his possession was known to the other party.

d) How long his possession had continued and,

e) Whether his possession was open and undisturbed."

It is further held that perusal of pleadings of plaintiffs as well as evidence led by them demonstrated that ingredients of adverse possession were not established by them on record. Learned trial Court held that plaintiffs could not be said to have had been proved their possession over the suit land as claimed by them by perfecting their title by way of adverse possession. It was held by the learned trial Court that defendant No. 1 had successfully proved on record that he had obtained necessary permission from the Government to purchase suit land from defendants No. 2 and 3 and thereafter sale deed was executed in his favour by defendants No. 2 and 3. It was also held by the learned trial Court that as plaintiffs had failed to prove their possession over the suit land, therefore, there was no question of defendants causing any interference over the same. On these bases, it was further held by the learned trial Court that plaintiffs were not entitled for relief of permanent prohibitory injunction. Learned trial Court thus dismissed the suit of the plaintiffs.

8. In appeal, learned Appellate Court while upholding the judgment and decree so passed by learned trial Court held that specific stand that had been taken by the plaintiffs in para 4 of the plaint was to the effect that they were in peaceful possession of the suit land to the knowledge of the defendants, in hostile manner since 1987. By referring to the statement of PW1 Ashok Kumar it was held by learned Appellate Court that whereas pleadings of the plaintiffs were to the effect that they were in adverse possession of the suit land since 1987, however, deposition of PW1 Ashok Kumar in the Court was contrary to the pleadings wherein he stated that the plaintiffs were in possession of the suit land since 1983 and he was instructed by previous owners Rewati and Indra to take possession of the suit land in the year 1983. Learned Appellate Court held that there was a clear variance in the pleadings and evidence led by the plaintiffs to prove their case. Learned Appellate Court further held that PW2 Chaman Thakur placed on record site plan of the suit land, in which septic tank and pollution treatment plant were shown, however, his cross examination indicated that he was not aware as to who was the owner of the suit land on which septic tank stood constructed. Learned Appellate Court further held that PW3 Nawang Dorje stated that Ashok Kumar had constructed the septic tank over the suit land with the aid of mason Sohan Lal in the year 1984-85, however, in his cross examination, he stated that he was not aware about ownership of the land on which septic tank was constructed. It was further held by learned Appellate Court that Sohan Lal (mason) had deposed in the Court that he had constructed septic tank of the plaintiffs over the land which was purchased by the plaintiffs. Learned Appellate Court while referring to the statement of PW5 Sansar Chand, Junior Engineer, Town and Planning Officer, Kullu, held that map of the Hotel which was placed on record as Ext. PW5/A by the said witness and further his statement do not reflect that septic tank and treatment plant stood constructed over the suit land by the plaintiffs in the year 1997. It was further held by learned Appellate Court that the report of the Local Commissioner Ext. PW7/A was also of no assistance to the plaintiffs as though this report demonstrated construction of septic tank on the spot with broken chambers, however, the report did not demonstrate that the septic tank was constructed over the suit land i.e. Khasra No. 1181. On the basis of the statement of PW9 Lalu Ram it was held by learned Appellate Court that his testimony demonstrated that demarcation of the suit land was conducted on the spot by Kanongo and Patwari but plaintiffs had withheld the said evidence from the Court and that it appeared that statement of PW9 was just his figment of imagination. On these bases, learned Appellate Court while upholding the judgment and decree passed by learned trial Court, dismissed the appeal of the plaintiffs.

9. Feeling aggrieved, the plaintiffs/appellants have filed this appeal.

10. The present appeal was admitted by this Court on 30.04.2009 on the following substantial questions of law.

> *"1. Whether the findings of the Courts below are a result of complete misreading of pleadings, evidence and the law as applicable to the facts of the case and particularly documents Ex. PW2/B, PW5/A, PW7/A and Ex. PW6/A to PW6/F and as such palpably erroneous and illegal and if so to what effect?*

2. What is the effect on the judgments and decrees in case both the Courts relied upon inadmissible evidence contrary to the provisions of the Indian Evidence Act, 1872?."

11. I have heard the learned counsel appearing for the parties and also gone through the records of the case as well as the judgments and decrees passed by both the learned Courts below.

12. In the plaint so filed by the plaintiffs, the following reliefs were prayed for.

a) Decree for declaration to the effect that the plaintiffs have become owner and in possession of the suit land by way of adverse possession.

b) Decree for declaration to the effect that the sale deed bearing No. 131 dated 1.04.2006 be declared null and void to the extent of Khasra No. 1181 i.e. the suit land.

c) And in the alternative a decree for Permanent Prohibitory Injunction restraining the defendant from interfering in the suit land without any right title or interest.

d) *Any other relief which this Hon'ble Court deems fit may also be granted in favour of the plaintiffs and against the defendants and the suit of the plaintiffs may be decreed with cost in the interest of justice."*

Plaintiffs thus sought a decree for declaration to the effect that they had become owners in possession of the suit land by way of adverse possession.

13. Hon'ble Supreme Court in ***Gurdwara Sahib*** versus ***Gram Panchayat Village Sirthala and Another,*** *(2014) 1 Supreme Court Cases 669*, has held as under.

"There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can used this adverse possession as a shield/defence."

14. As per law declared by Hon'ble Supreme Court in abovementioned judgment, a plaintiff even if found to be in adverse possession cannot seek a declaration that such adverse possession of his has matured into ownership.

15. Relying upon the said judgment of the Hon'ble Apex Court, this Court in *Roop Lal and others versus Bhup Singh and others, RSA No. 91 of 2004,* decided on *16th March, 2016*, has held that plea of adverse possession can only be used as a shield and not as a sword. Similarly, in *Roshan Lal versus Briji, RSA No. 42 of 2006,* decided on *10.03.2016*, this Court again relying on judgment of Hon'ble Supreme Court in ***Gurdwara Sahib*** versus ***Gram Panchayat Village Sirthala and Another,*** (*supra)* has held that plaintiff cannot claim title in suit land by way of adverse possession.

16. In the present case, the suit filed by the plaintiffs was for declaration that they had become owners of the suit land by way of adverse possession. Both the learned Courts below have concurrently held against the plaintiffs that they failed to prove that their title over the suit land had matured into ownership by way of adverse possession. In fact, I have in detail elaborated the findings returned by the learned Courts below in this regard, though there was no necessity to do so in view of law laid down by Hon'ble Supreme Court in *Gurdwara Sahib* versus *Gram Panchayat Village Sirthala and Another* (supra). Law as it exists today, does not entitles the plaintiff to seek declaration to the effect that he has become owner in possession of the suit land by way of adverse possession. Plea of adverse possession is available to a party only if the said party is arrayed as defendant and plea of adverse possession can be used as a shield/defence. In the present case, the findings returned by both the learned Courts below are to the effect that

plaintiffs had failed to prove that they had perfected their title over the suit land by way of adverse possession. In fact both the learned Courts below have concurrently held against the plaintiffs that they are not in possession of the suit land. Findings recorded to this effect by both the learned Court below are duly borne out from the records of the case, as is evident from the reasonings given by both the learned Courts below, which I have dealt in detail in above part of the judgment and with which I concur. Substantial questions of law primarily aim to the fact that findings arrived at by both the learned Courts below are to the effect that the plaintiffs had not perfected their title over the suit land by way of adverse possession are erroneous findings, which is not so. However, as I have already held above, findings returned by both the learned Courts below that plaintiffs have failed to prove their possession over the suit land are duly borne out from the records of the case and in the absence of the plaintiffs being not in possession of the suit land, even otherwise there was no question of their having perfected their title over the same by way of adverse possession. Dehors this, keeping in view the fact that prayer as made by plaintiffs in Civil Suit can otherwise also not be granted to them in view of law laid down by Hon'ble Supreme Court in *Gurdwara Sahib* versus *Gram Panchayat Village Sirthala and Another,* supra, therefore also, there is no merit in the present appeal. Substantial questions of law are answered accordingly.

17. Accordingly, this Court while upholding the judgment and decrees passed by both the learned Courts below dismisses this appeal being devoid of merit. Pending application(s), if any, also stands disposed of.

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

The New India Assurance Company Limited .. Appellant
Versus
Babu Ram and others .. Respondents

FAO No. 161 of 2017
Decided on : 27.7.2017

Employees Compensation Act, 1923- Section 4- D died during the course of employment on 14.9.2009 – Commissioner awarded compensation of Rs.10,26,400/- and fastened the liability upon the insurer – it was contended that compensation was assessed on the basis of notification issued by Central Government deleting Explanation-II in Section 4 w.e.f. 10.1.2010, which was not permissible as the accident had taken place in the year 2009 when the Explanation-II was in force - held that the deletion was not retrospective – the rights of the parties would be governed by the law prevailing on the date of incident – the compensation becomes payable as soon as it falls due – thus, any subsequent amendment will not have any effect on the same – in view of un-amended provisions, the salary of workman has to be taken Rs. 4,000/- even if it exceeds the same- 50% of the statutory wages have to be taken for the application of the factor- hence, compensation of Rs. 4,30,560/- (2000 x 215.28) awarded along with interest @ 12% per annum from one month elapsing since the date of accident till realization. (Para-2 to 8)

Cases referred:

New India Assurance Co.Ltd versus Nand Lal and another, Latest HLJ 2006 (HP) 456

Mohandeolal Kanodia versus The Administrator General of West Begal, AIR 1960 Supreme Court Cases (V 47 C 166) 937

Ram Dulari Kalia versus H.P. State Electricity Board and another, ILR 1986 (15) 842

For the petitioner : Mr. Praneet Gupta, Advocate.

For the respondent(s) : Mr. Dhairya Sushant and Mr. Prashant Chaudhary, Advocates, for respondent No.1.
None for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The insurance company is aggrieved by the award of 7.10.2016, recorded by the learned Commissioner under Employee's Compensation Act , 1923, Jawali, District Kangra, H.P. in claim petition No. 157 of 2011, whereby he assessed upon the claimant/respondent No.1 herein, compensation amount borne in a sum of Rs. 10,26,400/-, also fastened the apposite liability in respect of its liquidation upon the insurer. Uncontrovertedly, the demise of one Dalbir Singh, son of the appellant occurred during the course of his performing employment under his employer. It is also not disputed that the claimant was dependant upon the earnings of his deceased son. The relevant mishap which begot his demise evidently occurred on 14.9.2009. The learned counsel for the appellant contends that the learned Commissioner while computing compensation upon the claimant had proceeded to irrevere the mandate of the applicable hereat statutory tenet borne in Explanation-II occurring in sub-Section (4) of the Workmen's Compensation Act, hereinafter referred to in short as "the Act", Act whereof given its prevalence at the time of occurrence of the ill-fated mishap warranted its application hereat, than application of the mandate(s) borne in the Employees' Compensation Act, legislative enactment whereof came subsequently into force in the year 2010. He further espouses that the learned Commissioner, inaptly on anvil of a notification issued by the Central Government in exercise of statutory powers conferred upon it under Section 4(1)(b) of the Act, whereby explanation-II borne in Section 4 of the "Act" stood deleted, unbefittingly proceeded to assess compensation, whereas with the apposite notification issued by the Central Government evidently coming into force on 10.1.2010, hence, obviously subsequent to the demise of one Dalbir Singh rendered any reliance thereon besides application vis-à-vis the petition at hand, to be grossly inappropriate.

2. Tritely, the legal conundrum which warrants an answer being meted thereto, is, of the respective applicability(s) hereat of explanation-II borne in Section 4 of the Act or applicability of a notification subsequent thereto issued by the Central Government, whereby the aforesaid explanation stood deleted. Any answer to the aforesaid conundrum would hold a bearing upon the validity of the quantum of compensation amount assessed in the impugned award. Significantly also, the date of demise of one Dalbir Singh during the course of his performing employment under his employer, is also of utmost importance, for gauging therefrom whether explanation-II which was evidently in prevalence thereat or the subsequent thereto notification issued by the Central Government, whereby it stood deleted, are respectively applicable, for thereupon fathoming the validity of the quantum of compensation assessed under the impugned award. Undisputedly, the notification issued by the Central Government, whereby Explanation-II occurring in Section 4 of the Act was apparently not given any retrospective effect, wherefrom its inevitable to conclude that the Central Government in exercise of powers of delegated legislation hence issuing, it had not intended to explicitly cover the period whereat the demise of one Dalbir Singh occurred. In a like situation, this Court in a judgment reported in Latest HLJ 2006 (HP) 456, **New India Assurance Co.Ltd versus Nand Lal and another**, relevant paragraph 7 whereof is extracted hereinafter:

> "7. This Court has also consistently taken the view that the rights of the parties are governed by law as its exists on the date of the accident. The above view has also been taken in a judgment titled as **United Insurance Company Ltd. v. Smt. Nako alias Naiku Devi, 1996 (1) Sim.L.C. 370** wherein it is held as follows:
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> > "8. We may refer to Maxwell on interpretation of statutes. Twelth Edn.P. 215, regarding retrospective operation of statures in the following terms:

> " Upon the presumption that the legislature does not intend that is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary distinct implication."
>
> 9. Applying the above settled law of interpretation, we hold that as the accident took place prior to the amendment of the Schedule IV of the Act, the compensation has to be assessed according to unamended Schedule. We say so as if retrospective operation is given to the amended Schedule, it will take away the rights of the parties, namely, the owner as well as the Insurance Company, in this regard. Therefore, the Commissioner erred in law in assessing the compensation under the amended Schedule IV",

also a firm conclusion exists therein that rights of the parties are governed by law as it is existed on the date of accident. Meting deference to the aforesaid legal proposition propounded by this Court in the aforesaid citation, begets an inevitable conclusion that the date of demise of one Dalbir Singh, is of singular utmost relevance in determining whether explanation-II borne in Section 4 of the Act or subsequent thereto notification issued by the Central Government, whereby it stood deleted, hence hereat hold(s) sway or prevalence. Corollary of the aforesaid is that when evidently the demise of one Dalbir Singh occurred during the operation besides prevalence thereat, of explanation-II borne in Section 4 of the Act, thereupon the mandate occurring therein enjoined reverence being meted thereto rather than reverence being meted by the learned Commissioner vis-à-vis the subsequent thereto notification issued by the Central Government whereby explanation-II stood deleted. Contrarily, the learned Commissioner proceeded to inaptly revere the mandate of the apposite notification issued by the Central Government on 18.1.2010, whereat the demise of one Dalbir Singh had not evidently occurred, significantly also when the aforesaid date does not constitute the relevant date for making any determination in respect of the respective applicability(s) hereat of explanation-II borne in the "Act" or of the apposite notification, which stood issued subsequent thereto. Also, when operation of the apposite notification was not explicitly given any open retrospective effect, thereupon also any compliance meted thereto by the learned Commissioner, cannot be held to be holding any legal tenacity.

3. However, at this stage, Mr. Dhairya Sushant and Mr. Prashant Chaudhary, Advocates appearing on behalf of the respondent/claimant, vehemently contend that the subsequent notification issued on 18.1.2010 by the Central Government whereby benefits stood bestowed upon the claimants' also whereby explanation-II occurring in the "Act" stood deleted, thereupon the bestowal of benefits thereunder upon the claimants "dehors" no explicit retrospectivity being accorded thereto, yet warranting their imperative ensuel vis-à-vis the claimants', beneficiaries thereto, conspicuously when it would hence facilitate the salutary beneficent purpose of the benevolent subsequent thereto apposite notification issued by the Central Government. Also, they contend that the Rules of interpretation in respect of beneficent benevolent provisions held in the apposite notification, enjoin(s) retrospectivity being accorded thereto "dehors" no explicit retrospective effect thereto being openly pronounced in the apposite rules/notification(s). In making the aforesaid submission, the learned counsel appearing for the respondent/claimant relies upon a judgment of the Hon'ble Apex Court reported in AIR 1960 Supreme Court Cases (V 47 C 166) 937, **Mohandeolal Kanodia versus The Administrator General of West Begal** relevant paragraph whereof stands extracted hereinafter:

> "Mr.Pathak has repeatedly stressed this and has asked us to construe S.1(2) in a way that would retain the benefits of S.28 to tenants whose applications remained to be disposed of on the crucial date. He has in this connection

emphasized the fact that the amendment Act itself is a piece of beneficent legislative and that the amendments made by Ss. 2, 3,5 and 9 all extend to tenants benefits to which they would not have been entitled under the original Act. This extension of further benefits to tenants, he says, is a guiding principle of the amending legislation. He points out also that except as regards such pending applications under Section 28 the effect of Section 1(2) of the amending Act will be to give the extended benefits to tenants in pending proceedings. It will be incongruous, he argued, that while all tenants stand to benefit by the amending legislation only those whose applications under Section 28 have, for no fault of theirs, remained pending would be deprived of the benefit in the amending Act of Section 28. It is difficult not to feel sympathy for these tenants. As rule of interpretation of beneficent legislation that incases of ambiguity the construction should be accepted in preference to the one to advance the beneficent purpose of legislation courts must not however yield to the temptation of seeking ambiguity when there is none. On a careful consideration of the language used by the Legislature in S.1(2) ambiguity. The language used here has one meaning only and that is that the Act in its new shape with the added benevolent provisions, and minus the former benevolent provisions in Section 28 has to be applied to all pending proceedings, including execution proceedings and the proceedings pending under Section 28 of the original Act on October 21, 1952. There is therefore no scope for applying in this case the principles of interpretation which are applicable in cases of ambiguity."

4. The afore-referred extracted paragraph of the judgment(supra) voices a legal proposition that where the object of any legislative enactment is to confer benefit(s) upon a particular class of persons also when the apposite legislative enactment holding therein benevolent beneficent provisions "when" manifestly discloses ambiguity in respect of a construction vis-v-vis retrospectivity or prospectivity thereto being imputed by the legislature, thereupon the sound rule of interpretation enjoins purveying an interpretation thereto holding leanings vis-à-vis preserving the apposite benefit(s) besides preserving the beneficent purpose(s) of the enactment, rather than defeating the salutary object of the subsequent enactment, also therein a pronouncement occurs that for ensuring the preservation of the benefit(s) of the benevolent provision(s) held in the apposite subsequent enactment, warrants benefits thereto being vested upon or ensuing vis-a-vis pending proceedings. However, the aforesaid conclusion(s) drawn by the Hon'ble Apex Court obviously stand confined within the ambit of the facts with which it stood beset thereat, significantly the visible fact prevailing thereat unfolds, that no ambiguity being noticeable in respect of the benefit(s) of benevolent provisions meted in the apposite subsequent thereat legislative enactment being not afforded any retroactive effect by the legislature, rather the Hon'ble Apex Court on facts available thereat also on its closely reading the language of the apposite legislative enactment hence concluded that its language unfolded that hence it vividly bestowing benefit(s) of its benevolent provisions upon the litigants concerned "embroiled" in pending litigations, also benefit(s) thereof traveling upto execution proceedings. The aforesaid factual scenario prevailing thereat does not unveil that the Hon'ble Apex Court in the judgment (supra) had propounded a legal proposition that despite the apposite legislative enactment not explicitly bestowing its benefits retroactively, thereupon too, its apposite beneficent provisions being amenable to an interpretation of theirs' being meted retroactive effect. While applying the aforesaid ratio *decidendi* embodied therein, inasmuch as only on an evident ambiguity being palpably borne in the relevant notification, significantly in respect of it being given retroactive or only prospective effect, thereupon dehors no retroactive effect being meted thereto, yet only for preserving all the benefits bestowed therein, thereupon the apposite benefits held therein being meted retroactive effect. Nowat, it is evident from the plain language of the apposite notification issued by the Central Government, notification whereof stood issued subsequent to the demise of one Dalbir, whereby explanation-II occurring in Section 4 of the "Act" stood deleted, of its visibly not holding any noticeable palpable ambiguity, significantly in respect of the Central Government, in the exercise of its delegated legislation

hence issuing it, it giving it only prospective effect and not retrospective effect. Moreover, on a reading of the notification, it is evidently clear that the Central Government never intended to confer its benefit(s) upon claimants' concerned or the successors-in-interest of the deceased concerned, even when respectively the disabling injuries or the demise of the workman concerned occurred prior thereto. In sequel, any relieance placed thereon by the learned counsel for the respondent, for theirs thereon concerting to scuttle besides erode the effect of the judgment (supra) delivered by this Court, is wholly inapt besides the force of the contention aforesaid is also enfeebled by theirs' remaining oblivious to the provisions borne in Section 4(A) of the Act, Sub- Section 1 of statutory provisions whereof, stands extracted hereinafter:

> "4-A Compensation to be paid when due and penalty for default—Compensation under Section 4 shall be paid as soon as it falls due".

wherein a statutory liability is fastened upon the employer/insurer to pay compensation to the workman concerned or to the successor(s)-in-interest of the deceased workman concerned "as soon as it falls due". This Court in a judgment reported in ILR 1986 (15) 842, **Ram Dulari Kalia versus H.P. State Electricity Board and another**, relevant paragraph-8 whereof is extracted hereinafter:

> "Against the backdrop aforesaid, it is manifest that in the present case duty to pay the compensation at the rate provided in Section 4 arose under sub-section (1) of Section 4-A of the Act as soon as the accident resulting in the injury to the deceased workman and in his consequential death occurred and that the respondents being in default in paying the compensation due under the Act within one month from the said day, the discretion conferred on the Commissioner under sub-Section (3) of Section 4-A to award interest on the compensation amount in accordance with law was required to be exercised reasonably and in a judicial manner after taking into consideration all the relevant factors and that if, in her considered opinion, there was no justification for the delay, the penalty was also required to be ordered to be recovered. The Commissioner has held, as earlier pointed out, that since the respondents had admitted the liability to pay the compensation whatever is to be awarded" and that they had also deposited the amount of compensation in the Court, the claim with regard to the payment of interest was not justified. The question of imposition of penalty does not appear to have been considered at all presumably on the same ground. The question for determination is whether the award suffers from any error of law based, inter-alia, upon the misconstruction of the relevant statutory provision,

has propounded a legal expostulation, that the signification borne by the statutory parlance "as soon as it falls due" occurring in Section 1 of Section 4(a) of the Act "being of" the employer or in case he holds the relevant insurance cover from the insurer concerned qua both being jointly and severably liable "to" immediately on occurrence of the ill-fated mishap, liquidate the compensation amount vis-à-vis the injured workman concerned or vis-à-vis successor(s)-in-interest of the deceased workman concerned. The effect of the aforesaid pronouncement, is of the relevant statutory liability(s) warranting theirs being fastened upon the employer concerned or upon the insurer concerned "immediately" on demise of one Dalbir Singh, who as aforestated died on 14.9.2009, whereat explanation-II existed on the statute book, obviously when thereat the apposite notification issued subsequent thereto was not borne on the statute book, thereupon the beneficent benevolent provision(s) held therein is rendered inapplicable hereat nor the apposite notification deleting apposite explanation-II from the statute book, holds any consequence in computing compensation amount payable to the claimant.

5. In aftermath, the mandate of explanation-II warranted deference being meted thereto by the learned Commissioner in the latters' computing compensation amount vis-à-vis the claimant, than his contrarily proceeding to inaptly apply the mandate of the subsequent thereto issued apposite notification, whereby the aforesaid explanation stood deleted. In his making an

inapt reliance upon the apposite notification also his hence miscomputing compensation amount vis-à-vis claimant he has committed a gross illegality. Substantial question No.2 is answered in favour of appellant. The impugned award is modified accordingly.

6. Consequently, while revering the mandate of Section 4 of sub-Section (II) of the workmen's Compensation Act, wherein it is postulated that where the monthly wages of a deceased workman exceed 4,000/- thereupon the wages drawn by the deceased from his relevant employment for the purpose of applying thereon, the relevant statutory factor, warranting theirs being pegged in a statutory sum of Rs. 4000/-.

7. Besides consequently by also revering the mandate of clause (a) of sub-Section 1 of Section 4 of the Act, wherein it is postulated that where death ensues from an injury befalling a workman, thereupon 50% of the statutory wages comprising the relevant sum(s) whereon the relevant factor is to be applied, thereupon:

430560= (2000x 215.28) is computed as compensation amount payable to the claimant.

8. In aftermath, the impugned award is modified and the claimant is held entitled to compensation amount of Rs. 430560 along with interest @ 12 % per annum from one month elapsing since the date of accident till, its realization. All pending application(s), if any are also disposed of.

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

Anil Kanwar .....Appellant/Plaintiff.

Versus

The Registrar Dr. B.R. Ambedkar Regional Engineering College, Jalandhar .....Respondent/Defendant.

RSA No. 568 of 2005.
Reserved on : 19.07.2017
Decided on : 28th July, 2017.

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit pleading that he is appointed as a lecturer in Computer Science by the defendant – the post was temporary and his services could be terminated by giving one month's notice or payment of salary in lieu of the notice period – plaintiff submitted his resignation after giving one month notice- he was relieved – the defendant issued a letter demanding Rs. 67,200/- in lieu of the training imparted by the defendant for electrosoft certification course – the defendant threatened to recover the amount through the police – defendant is not entitled for the money – the defendant pleaded that plaintiff had applied for training with an undertaking to serve the college for at least one year- the defendant had paid a training fee of Rs. 33,600/- and had a right to recover the amount – the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that the defendant is located in Jalandhar – one letter was received at Una but subsequent letter were addressed to the subsequent employer at its Head Office located at New Delhi – the suit was not maintainable at Una in these circumstances- Appellate Court had rightly reversed the decree – appeal dismissed. (Para-8 to 10)

For the Appellant: Mr. Dheeraj K. Vashistha, Advocate
For the Respondent: Mr. Dhiraj Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff instituted a suit against the defendants for declaration and for permanent prohibitory injunction. The suit of the plaintiff stood decreed by the learned trial Court. In an appeal carried therefrom by the aggrieved defendant before the learned First Appellate Court, the latter Court allowed the appeal, whereupon, it disconcurred with the verdict recorded by the learned trial Court. In sequel thereto, the plaintiff/appellant herein is driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiff Anil Kumar filed a suit for declaration that the letter No. PF/REC/6251 dated 20.03.1998 and subsequent letter NO. nil of May, 1998 issued by the defendant to recover Rs.67,200/- to mentally harass and to lower the plaintiff in the estimation of present employer and others are illegal and have no binding upon the right, title and interest of the plaintiff to work anywhere with decree for permanent injunction restraining the defendant not to issue such letter to injure the good will and reputation of the plaintiff and in the alternative suit for damages. There are averments that the plaintiff was appointed as lecturer in Computer Science land Engineering Department by the defendant vide reference No. PF/REC/1921 dated 31/1/1996 and post was purely temporary and his services could be terminated by giving one month notice or payment of salary in lieu of notice period. The plaintiff was on probation for a period of two years and the period of probation could be extended under the rules and regulations by the defendant. The plaintiff joined as Lecturer on 8.2.1996 after acceptance of the offer at Una. The plaintiff submitted his resignation on 5.2.1998 by giving one month's notice and he was relieved after completion of one month's notice on 6.3.1998. Even otherwise the plaintiff was never informed about the non-acceptance of the resignation till 6.3.1998 as plaintiff is no more in service under the defendant. Lateral, the defendant issued letter No. PFG/REC/6251 dated 20.03.1998 to the plaintiff through his present employer demanding Rs.67,200/- from the plaintiff in lieu of the training imparted by the defendant for Electrosoft certification course in May, 1997. The defendant also issued reminder in the third week of May, 1998 threatening to recover the amount of Rs.67,200/- through the police. The plaintiff received the above letter at Una as directed by the present employer and the defendant also rang up to the plaintiff at Una either to deposit Rs.67,200/- or to face police action. The plaintiff underwent training w.e.f. 5.5.1997 for eight weeks. As per letter two surety bonds along with personal bond are to be executed by the plaintiff to pay double the amount in case he did not serve the college for one year after the training. The training fee was Rs.33,600/-. According to the plaintiff, the defendant is not entitled for any kind of payment from the plaintiff as no bond has been executed by him in this respect, therefore, the letter dated 20.03.1998 and subsequent letters have been issued by the defendant with malafide intention to spoil the career of the plaintiff on false, frivolous and vexatious grounds. The plaintiff visited the defendant's office in the last week of March, 1998 and requested not to act arbitrarily and in unlawful manner, but the defendant refused to accede to the request of the plaintiff. Hence the suit.

3. The defendant contested the suit and filed written statement, wherein, preliminary objections have been taken inter alia maintainability of the suit, jurisdiction, cause of action, estopple, suppression etc. On merits, the appointment of the plaintiff on probation for two years in the defendant department is admitted. The probation period is alleged to be extended under the rules. It is averred that the plaintiff joined the service on 8.7.1996 at Jalandhar. It has been alleged that in fact the plaintiff applied on 1.5.1997 for undergoing Microsoft Engineering training with an undertaking to serve the college for at least one year. The defendant vide letter dated 12.5.1997 accepted the offer for Microsoft certification course w.e.f. 5.5.1997 for eight weeks with the conditions which are fully enunciated in para 2 of the written statement. It has also been admitted that the plaintiff underwent training for eight weeks and plaintiff was required to serve the college for one year as defendant had paid the training fee of Rs.33,600/-.

The defendant has legal right to recover the said amount by filing the suit at Jalandhar. Despite reminders the plaintiff did not execute the bond.

4. The plaintiff/appellant herein filed replication to the written statement of the defendant/respondent wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the letter NO. PF/REC/6251 dated 20.3.1998 and subsequent letters issued by the defendant are illegal, null and void, as alleged? OPP

2. Whether the suit is not maintainable? OPD.

3. Whether Civil Court has got no jurisdiction to try the present suit?OPD

4. Whether plaintiff is estopped by his act and conduct to file present suit? OPD.

5. Whether plaintiff has suppressed the material facts, if so, to what effect? OPD

6. Whether plaintiff has not come to the court with clean hands as alleged, if so, its effect? OPD.

7. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/appellant herein. In an appeal, preferred therefrom by the defendant/respondent before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

7. Now the plaintiff/appellant herein, has instituted the instant Regular Second Appeal before this Court wherein he assails the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 31.05.2006, this Court, admitted the appeal instituted by the plaintiff/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

a) Whether the first Appellate Court has acted with illegality and irregularity in returning findings that the Court at Una did not have the jurisdiction to try and decide the suit?

Substantial questions of Law No.1.

8. The reason which prevailed upon the learned Appellate Court to reverse the judgment and decree pronounced by the learned trail Court, whereby, it decreed the suit of the plaintiff, imminently, rested upon the factum of none of the conditions encapsulated in Section 20 of the Code of Civil Procedure (hereinafter referred to as the CPC), provisions whereof extracted hereinafter, begetting satiation, thereupon, it concluded that the suit of the plaintiff warranted dismissal.

> **"20. Other suits to be instituted where defendants reside or cause of action arises .-** Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—
>
> (a) The defendant, or each of the defendants where there are more than one, at the time of the commencement of the Suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises."

9. The plaintiff's suit for declaration anvilled upon letter dated 20.03.1998 borne in Ex.DW1/J and upon subsequent letter embodied in Ex. PA, was concerted to be maintainable before the learned trial Court, on anchor of the plaintiff receiving the aforesaid letters at Una, wherefrom, he contended that with hence a part of cause of action accruing and arising within the territorial limits of the jurisdiction of the learned trial Court, thereupon, his suit was properly constituted also was maintainable. Significantly, also when the afore extracted provisions of Section 20 of the CPC, empower the plaintiff to institute a suit within the territorial limits of the Civil Court concerned, within whose jurisdiction cause of action in part or in whole arises, cause of action in part or in whole whereof is espoused to arise within the local limits of the jurisdiction of the learned trial Court, on anvil of his receiving the aforesaid communications at Una. Even if, assumingly, the aforesaid contention raised before this Court by the learned counsel appearing for the appellant, that hence the plaintiff's suit was maintainable before the learned trial Court also his concomitant impugning contention qua the verdict pronounced by the learned First Appellate Court that the suit is not maintainable before the learned trial Court, given no part of cause of action arising within the local limits of its territorial jurisdiction, hence lacking vigour, is imbued with some strength, thereupon, it was imperative for the plaintiff to adduce cogent evidence in support of the aforesaid contention displaying that the communications, respectively comprised in Ex.DW1/J and in Ex.PA standing received by him at Una. However, a perusal of the aforesaid communications, though unveil that Ex.PA stood addressed to the subsequent employer of the plaintiff at its head office located at New Delhi besides a perusal of Ex.DW1/J reveals that it alike Ex.PA stood addressed to the subsequent employer of the plaintiff at its office located at New Delhi, yet the effect of the aforesaid exhibits is of theirs evidently not standing received by the plaintiff at Una, thereupon, he cannot contend that either in whole or in part the relevant cause(s) of action accruing vis-a-vis him within the territorial jurisdictional limits of Civil Courts concerned located at Una nor he can contend that his suit was maintainable before the learned trial Court located at Una. Even though Ex.DW1/F stood received by the plaintiff at Una, yet with his in succession thereto joining his duties under the defendant at its College located at Jalandhar also hence effect thereof stood effaced besides when the declaratory decree claimed by the plaintiff is not with respect to Ex.DW/1F rather is with respect to the aforesaid exhibits, exhibits whereof evidently stood not received by him at Una, renders his suit to be not maintainable before the learned trial Court.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Accordingly, substantial question of law No.1 is answered in favour of the respondent and against the appellant.

11. In view of the above discussion, there is no merit in the instant appeal, which is accordingly dismissed. The impugned judgment and decree rendered by the learned First Appellate Court is affirmed and maintained. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Bhagwan Dass …..Appellant/defendant No.1.

Versus

Roshan Lal (since deceased) through his legal heirs and another …..Respondents.

RSA No. 263 of 2005.
Reserved on :25.07.2017.
Decided on : 28th July, 2017.

Specific Relief Act, 1963- Section 34 and 38- Plaintiff filed a civil suit for declaration and injunction that he got 1/3rd share in the suit land by way of registered gift deed from R – he became the owner of the share of R- the revenue entries to the contrary are wrong and illegal – hence, the suit was filed – the defendants pleaded that plaintiff is not in possession- the suit is not maintainable – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that the mutation of the gift deed was not attested regarding the share of R in the Shamlat land – the Revenue Officer had erred in not including the share of R in the Shamlat land – the Courts had rightly decreed the suit – appeal dismissed. (Para-7 to 9)

For the Appellants: Mr. O.C. Sharma, Advocate.
For Respondent No.1(a) to 1(e): Mr. Ajay Sharma, Advocate.
Respondents No.2 and 3 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the concurrently recorded verdicts of both the learned Courts below, whereby, they decreed the suit of the plaintiff, wherein, he claimed a declaratory decree in respect of the suit land being pronounced upon the defendants. In sequel thereto, defendant No.1/appellants herein is driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiff claims himself owner in possession to the extent of 1/3rd share of the suit land of Khata No. 74 min, Khatauni No.113, Khasra No.1390/1350, Tika Ropari, Mouza Lohdar, Tehsil Barsar, District Hamirpur, H.P. and challenged contrary revenue entries not showing him in possession as owner to be illegal, null and void and not binding on him. Also sought injunction against the defendants from dispossessing him from the suit land qua his 1/3rd share. It was claimed by the plaintiff that he got 1/3rd share in the suit land by way of registered gift deed dated 18.11.1974 from owner Radhan Devi widow of Shri Milkhi Ram including share in the Shamlat. After gift, he became owner of the share of said Radhan Devi including her share in the Shamlat and became owner with other co-sharers, but the revenue entries reflecting him as such, are wrong.

3. The defendants contested the suit and filed written statement, wherein, it was claimed that defendant No.1 had sold his share in the suit land to defendants No.2 and 3 and plaintiff is bound by the same. However, execution of gift deed dated 18.11.1974 by Smt. Radhan in favour of the plaintiff is admitted to be correct,but averred that the plaintiff is out of possession of the suit land which is in [possession of the defendants. As the plaintiff is out of possession so his suit is not maintainable. Defendant No.1 being legal heir of Radhan Devi was competent to sell land to defendants No.2 and 3 which is valid and binding upon the plaintiff. Possession of defendants NO.2 and 3 is continuous. After purchasing, defendants No.2 and 3 constructed shops on the suit land. Objections qua maintainability, cause of action, locus standi, limitation and valuation were also raised.

4. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the plaintiff is the owner in possession of the suit land, as alleged? OPP.

2. Whether the entries showing defendants No.2 and 3 in the column of possession as vendees in the revenue record are wrong, illegal, null and void, as alleged? OPP.

3. Whether the plaintiff is entitled to the relief of injunction, as prayed for?OPP.

4. In case, the plaintiff is not found in possession of the suit land, whether he is entitled to possession of the same by way of alternative relief, as alleged?OPP.

5. Whether the suit is not maintainable in the present form? OPD.

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

7. Whether the plaintiff has no locus standi to sue? OPD.

8. Whether the suit is barred under limitation Act? OPD.

9. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? OPD.

10. Whether the defendants No.2 and 3 are the bonafide purchasers as alleged, if so, its effect? OPD.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom by the defendant(s)/appellant herein before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

6. Now defendant No.1/appellant herein, has instituted the instant Regular Second Appeal before this Court, for assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 25.05.2006, this Court, admitted the appeal instituted by defendant No.1/appellant against the impugned judgment and decree, on the hereinafter extracted substantial questions of law:-

a) Whether the two Courts below have misread and misconstrued the gift deed executed by Radhan Devi in favour of respondent-plaintiff?

Substantial question of Law No.1:

7. One Radha Devi under a gift deed borne on Ex.PW1/A, gift deed whereof was executed on 18.11.1974, proceeded to thereunder bestow her share in the joint land she held with the defendants vis-a-vis the plaintiff also thereunder she bestowed her share in Shamlat land upon the plaintiff. The validity of execution of gift deed remains not contested by the defendants, rather the validity of apposite bestowment(s) by the aforesaid donor of her share in shamlat land is under contest. The mutation attested by the revenue officer concerned, in sequel to execution of Ex.PW1/A, mutation whereof is borne on Ex.D-5, though unravels, of it, therein recording the factum of mutation standing attested in respect of the land owned and possessed by Radha Devi in the joint holdings, in respect whereof she executed Ex.PW1/A vis-a-vis the plaintiff, yet it does not therein record the fact of the share of Radhan Devi held in the Shamlat land, share whereof also she under Ex. PW1/A bestowed it upon the plaintiff, being hence also sanctioned to be mutated in his favour. Consequently, with the revenue record omitting to make a display in respect aforesaid, thereupon, the plaintiff was led to institute a suit for a declaratory decree being pronounced upon the revenue officers, for theirs making incorporation(s) in the revenue record(s) appertaining to the suit land, with reflections therein of 1/3rd share held by Radhan Devi in Shamlat land, in respect whereof, she conferred bestowments under Ex.PW1/A upon the plaintiff, hence being borne therein.

8. As aforestated with the validity of execution of Ex.PW1/A not being contested by the defendants, thereupon, it was incumbent upon the revenue officers concerned to while in Ex.D-5, attesting mutation on anvil of Ex.PW1/A also record a recital therein in respect of sanction being also accorded vis-a-vis 1/3rd share of Radhan Devi in Shamlat land, being

mutated vis-a-vis the plaintiff. Contrarily, the revenue officers concerned while under Ex.D-5, attesting mutation on anvil of Ex. PW1/A, omitted to hence mete the fullest reverence to the recitals borne in the undisputed validly executed gift deed comprised in Ex.PW1/A. The aforesaid omission(s), in the revenue records appertaining to Shamlat land, wherein Radha Devi held 1/3rd share remained palpably unrectified, though, Radhan Devi as divulged by Jamabandi prepared in respect of the suit land, jamabandi whereof is comprised in Ex.P-1, is reflected therein to along with other co-owners in Shamlat land (s) hence hold possession thereof. The gross error committed by the Revenue Officers concerned comprised in theirs omitting to mete the fullest reverence to Ex.PW1/A, comprised in theirs not in Ex. D-5, incorporating the recitals aforesaid, displaying of sanction being accorded in respect of 1/3rd share of Radhan Devi in Shamlat land, share whereof also she had under Ex.PW1/A bestowed vis-a-vis the plaintiff, when apparently has sequeled concomitant non reflection(s) of the name of the plaintiff in the apposite jamabandi appertaining to Shamlat land, thereupon this Court is inevitably constrained to order for an apposite correction of the revenue records. Also reflections, if any, in the revenue record pertaining to the Shamlat land, wherein, there is omission of display of the name of the plaintiff in substitution of Radhan Devi, though enjoy a presumption of truth, yet in the awake of the undisputed valid execution of Ex.PW1/A, thereupon the presumption attached to the reflections occurring in the revenue record appertaining to Shamlat land, hence stands eroded. Furthermore, with the validity of execution of Ex.PW1/A remaining not contested also with no evidence being adduced that at the time contemporaneous to the execution of Ex.PW1/A, the plaintiff along with the land owned by the donor not taking possession of the share of the donor in Shamlat land besides with no evidence being adduced that during her life time, the donor rather bestowing possession of Shamlat land upon the defendants, thereupon, it is to be concluded that the plaintiff at the time contemporaneous to the execution of Ex.PW1/A, his along with the land owned by the plaintiff, bestowment(s) whereof upon him occurred under Ex.PW1/A also taking possession of the share of Radhan Devi in Shamlat land, land(s) whereof along with the share of the donor in the joint holdings stood under Ex.PW1/A gifted to him.

9. The above discussion unfolds the fact that the conclusions as arrived at by both the learned Courts below being based upon a proper and mature appreciation of evidence on record. While rendering their findings, both the learned Courts below have not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the plaintiff/respondent(s) herein and against defendant No.1/appellant herein.

10. In view of the above discussion, the present Regular Second Appeal is dismissed and the impugned judgment(s) and decrees are maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Daya Ram (since deceased) through his LRs Het Ram and others
.....Appellants/Plaintiffs.

Versus

Thakaru Ram (since deceased) through his LRs Smt. Gita Devi & another
.....Respondents/Defendants.

RSA No. 133 of 2005.
Reserved on : 06.07.2017.
Decided on : 28th July, 2017.

Specific Relief Act, 1963- Section 38- Plaintiff(s) filed a civil suit for seeking permanent prohibitory injunction pleading that suit land is in possession of the plaintiff as per the

agreement between the parties – the plaintiff had advanced a loan of Rs.70,000/- and the possession was delivered with an understanding that plaintiff was to remain in possession till the repayment of loan – the defendant is threatening to take forcible possession without any right to do so- defendant pleaded that he had accompanied the plaintiff to execute a Will and put his thumb mark on a document believing it to be Will – the document is the result of fraud and misrepresentation – no loan was ever taken by the defendant nor the possession was handed over to the plaintiff – the Trial Court dismissed the suit- an appeal was filed, which was also dismissed- held that the document set up by the plaintiff is in the nature of mortgage deed – it is required to be registered by law – the document was not registered and is not enforceable- the Courts had rightly dismissed the suit – appeal dismissed. (Para-7 to 10)

For the Appellants: Mr. Prashant Sharma, Advocate vice to Mr. Rajeev Jiwan, Advocate.
For Respondent No.1(a): Mr. T.S. Chauhan, Advocate.
For Respondent No.1(b): Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff(s) instituted a suit against the defendants, claiming therein a decree for permanent prohibitory injunction. The suit of the plaintiff(s) stood dismissed by the learned trial Court. In an appeal carried therefrom by the plaintiff(s) before the learned First Appellate Court, the latter Court dismissed the appeal, whereupon, it concurred with the verdict recorded by the learned trial Court. In sequel thereto, the plaintiff(s)/appellant(s) herein is driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiff filed a suit for permanent injunction as against the defendant. It has been averred that the suit land comprised in khasra Nos. 53, 79, 80 and 97, measuring 24-9 bighas is in possession of the plaintiff as per the agreement executed in between the parties. It has been further averred that the defendant, who is of the age of 70 years was in need of money and he approached the plaintiff to give him a sum of Rs.70,000/- as loan which was given by the plaintiff and defendant gave possession of the suit land to the plaintiff for its cultivation and maintenance. It was alleged that an agreement was executed in between the parties on 19.03.1993 which was signed by plaintiff and thumb marked by defendant in presence of witnesses and was also attested by the Notary. It was alleged that the plaintiff was to remain in possession till the amount was repaid and as the defendant is threatening to take possession of the suit land from the plaintiff, hence, the suit filed by the plaintiff.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections inter alia maintainability, jurisdiction, cause of action etc. On merits, it is pleaded that the plaintiff is the real son-in-law of the defendant. Defendant had accompanied the plaintiff to execute a Will at Bilaspur which was got prepared by the plaintiff and believing the document as a Will, he thumb marked the same in good faith and in case any agreement has been got executed by the plaintiff, it is the result of fraud and misrepresentation. He also pleaded that he never took any loan of Rs.70,000/- from the plaintiff nor gave the possession of the suit land to the plaintiff.

4. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the suit is not maintainable in the present form? OPD.
2. Whether the plaintiff has cause of action? OPP
3. Whether the suit is not valued properly, as alleged? OPD.

4. Whether the court has no jurisdcition to try the suit? OPD.
5. Whether the plaintiff is entitled to the relief of injunction? OPP.
6. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff(s)/appellant(s) herein. In an appeal, preferred therefrom by the plaintiff(s)/appellant(s) before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

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

a) Whether the findings of the learned Courts below are adverse to oral as well as documentary evidence available on record?

b) Whether the learned Courts below have misconstrued and mis-appreciated the Ext. PA i.e. the agreement arrived at between the parties on 19.3.1993?

Substantial questions of Law No.1 and 2:

7. Dehors the factum of evidence adduced in respect of Ex. PA being proven to be validly or not validly executed by the defendant, the prime reason which rips apart its vigour, is comprised in the factum of its closest circumspect reading making a disclosure that in lieu of a sum of Rs.70,000/-, the defendant creating a mortgage with possession in respect of the suit land upon the plaintiff. Consequently, Ex.PA as enshrined by the mandate of clause (b) of sub section (1) of Section 17 of the Indian Registration Act, was hence compulsorily registrable, conspicuously when thereunder a contingent interest stood created in the suit property in a mortage sum of Rs.70,000/-, relevant provisions thereof stand extracted hereinafter:-

> **"Section 17 - Indian Registration Act, 1908**
>
> (1) The following documents shall be registered, if the properties to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, of the Indian Registration Act 1866, or the Indian Registration Act 1871, or the Indian Registration Act 1877, or the this Act came or comes into force, namely:-
>
> (a) instruments of gift of immoveable property;
>
> (b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees, and upwards, to or in immovable property;
>
> (c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and
>
> (d) leases of immoveable property from year to year, or for any term exceeding one year, or reserving a yearly rent; (e) non-testamentary instruments transferring or assigning any decree or order of a court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property (Added by Act No. 21 of 1929); PROVIDED that the State Government may, by order published in Official Gazette, exempt from the operation of this sub-section any leases executed in any district, or part of a district, the terms granted

> by which do not exceed five years and the annual rent reserved by which do not exceed fifty rupees."

whereas with Ex.PA being evidently not registered, no leverage can be derived therefrom by the plaintiff to contend that, thereupon, any legally enforceable right in respect of the suit land standing bestowed upon him.

8. With this Court holding that Ex.PA being in respect of the suit land hence not enforceable by the plaintiff, the plaintiff may yet succeed to secure a decree of permanent prohibitory injunction in respect of the suit land being pronounced upon the defendant, if formidable evidence stood adduced by the plaintiff in respect of his holding possession of the suit land. However, the best documentary evidence in respect of the defendant or the plaintiff holding possession of the suit land, is comprised only in the relevant revenue records prepared in respect of the suit land, yet with Ex. PD, exhibit whereof is a jamabandi in respect of the suit land appertaining to the year 1991-92 besides with Ex.PE, which is a copy of khasra girdawari(s) in respect of the suit land appertaining to the year 1993 to 1996, both making displays therein of the defendant holding possession of the suit land also with the plaintiff not adducing evidence for rebutting the presumption of truth enjoyed by the aforesaid reflections occurring in the aforesaid exhibits, thereupon, the reflections occurring therein in respect of the defendant holding possession of the suit land hence hold conclusivity. Corollary whereof is that the plaintiff is not entitled to a decree of permanent prohibitory injunction being pronounced in respect of the suit land upon the defendant.

9. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court being based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the defendant(s)/respondent(s) and against the plaintiff(s)/appellant(s).

10. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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

Devi Singh & others .....Appellants/defendants.
Versus
Rama Devi & others .....Respondents/Defendants.

RSA No. 198 of 2005.
Reserved on : 24.07.2017.
Decided on : 28th July, 2017.

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit for injunction and damages pleading that he is owner in possession of the suit land – the defendants started interfering in the suit land and damaged the maize crop sown in it – the defendants pleaded that the land was previously owned by K who had sold it to R, predecessor-in-interest of defendants No. 1 to 8 for consideration of Rs. 17,200/- - the possession was also delivered to R in part performance of the agreement – plaintiff had filed a civil suit earlier regarding the suit land, which was dismissed and the present suit is barred by the principle of res-judicata – the suit was dismissed by the Trial Court- an appeal was filed, which was allowed and the decree passed by Trial Court was set aside- held in second appeal that the land is recorded in possession of plaintiff and one P- no evidence was led to rebut the presumption of correctness- the Khasra numbers in previous

litigation were different- hence, the plea that the suit was barred is not acceptable – the Appellate Court had rightly decreed the suit – appeal dismissed. (Para-8 to 12)

For the Appellants: Mr. Vinod Gupta, Advocate.
For the Respondents: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff instituted a suit against the defendants, claiming therein that a decree for permanent prohibitory injunction being pronounced against the defendants. The suit of the plaintiff stood dismissed by the learned trial Court. In an appeal carried therefrom by the plaintiffs before the learned First Appellate Court, the latter Court allowed the appeal, whereupon, it dis-concurred with the verdict recorded by the learned trial Court. In sequel thereto, the defendants/appellants herein are driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that plaintiff, Parma Nand, who was predecessor in interest of the respondents herein, filed a suit against the defendants/appellants herein for permanent prohibitory injunction and also for damage to the tune of Rs.2,000/-. It is averred that the plaintiff was owner in possession of the land comprised in Khata No.40 min, Khatauni No. 48 min, old khasra numbers 655 and 669, new khasra Nos. 677 and 683, kitas 2 measuring 4-11-19 bighas, situated in Muhal Nandi, Illaqua Tilli, Tehsil Chachioit, District Mandi, H.P. along with Parwati Devi defendant No.11, whereas, the contesting defendants have no right, title or interest in the suit land. It is further averred that on 1.7.1994, the defendants started unlawful interference in the suit land and when they were requested not to do so, they trespassed into the suit land on 3.7.1994 and damaged the maize crop sown in it. Hence the suit.

3. The defendants contested the suit and filed written statement. It is averred that since the plaintiff is not in possession of the suit land, the suit is not maintainable. According to the defendants, previously the suit land along with other land was possessed by Kura Ram, who sold the suit land along with other land to Shri Ram Dass, predecessor-in-interest of defendants No.1 to 8 for a consideration of Rs.17,200/- in the year 1969 and thereafter Ram Dass took possession of the suit land in part performance of the agreement for sale. It is further averred that the sale deed could not be registered as Kura Ram was demanding a sum of Rs.8,000/- more for executing the sale deed. Thereafter, the plaintiff had filed a suit qua the suit land against the defendants, which was dismissed and then the plaintiff agitated the same upto the Hon'ble High Court but the same was dismissed and as such this suit is barred by the principle of resjudicata. The defendants denied of having caused any damage to the crop sown by the plaintiff thereby causing him loss to the tune of Rs.2,000/-. The suit is also stated to have been barred under the provisions of Order 2, Rule, 2 of the CPC. They have also referred to some order of consolidation authorities and has alleged that the same is without jurisdiction and is under appeal. According to the defendants, previously Kura Ram was in possession of the suit land and thereafter they got its possession and as such, the suit deserves dismissal.

4. The plaintiff/respondents herein filed replication to the written statement of the defendants/appellants, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the plaintiff and proforma defendants are owners in possession of the suit land, as alleged? OPP.

2. Whether the defendants are interfering by entering into the suit land, as alleged? OPP.

3. If issue No.1 and 2 are proved in affirmative, whether the plaintiff is entitled for the relief of prohibitory injunction, as prayed for? OPP.

4. Whether the plaintiff is entitled to recover Rs.2000/- by way of damages, as alleged? OPP

5. Whether the plaintiff is estopped from filing the present suit on account of his act and conduct? OPD.

6. Whether the suit is barred as per provision of order 2, rule 2 CPC, as alleged? OPD.

7. Whether the suit is not maintainable? OPD.

8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/respondents herein. In an appeal, preferred therefrom by the plaintiffs/respondents herein, before the learned First Appellate Court, the latter Court allowed the appeal and reversed the findings recorded by the learned trial Court.

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

1. Whether splitting of claims and splitting of remedies is available under the provisions of Order, 2, Rule 2, CPC, moreover, in the present case, whether the plaintiffs/respondents having failed in getting injunction in respect of the part of the suit land could have agitated the matter afresh by splitting the claims in view of the Order 2, Rule 2, CPC?

2. Whether the former proceedings on the same cause of action results in defendants favour a second proceedings on the same cause of action is barred, moreso of the issue framed is specifically answered against the plaintiffs in earlier suit?

Substantial questions of Law No.1 and 2:

8. One Kura Ram, a co-sharer alongwith the plaintiffs purportedly upon the suit land, alienated under an agreement to sell, his share in the purported undivided suit land he held with the plaintiff. Also he received the sale consideration of Rs.17,200/- besides he in sequel thereto handedover possession of his share in the purportedly undivided suit land, he held along with the plaintiff. The conclusive binding judgment and decrees comprised respectively in Ex. DE and in Ex.DG, judgments whereof validate the factum of one Kura Ram under an agreement to sell, after receiving the sale consideration of Rs.17,200/- from the predecessor-in-interest of the defendants, his in part performance thereof delivering possession of the property comprised in khasra No. 660, 661 and 657 measuring 3-7-16 bighas, stood relied upon by the learned trial Court, to conclude that the extant suit khasra bearing numbers 677 and 683, also holding the apt connectivity with old khasra Nos. 660, 661 and 657, in respect whereof arose a previous litigation inter se one Parma Nand and the defendants, litigation whereof stood comprised in a suit for permanent prohibitory injunction instituted by one Parma Nand, suit whereof stood concurrently dismissed, thereupon, it concluded that the instant suit in respect of the aforesaid analogous therewith new khasra numbers, being barred by the principle of resjudicata also by the principle engrafted in Order 2, Rule 2 of the CPC, arising from the factum, of, with the plaintiff previously not rearing pleas in respect of a decree for permanent prohibitory injunction being pronounced in respect of the extant suit khasra numbers, alongwith his rearing a plea in

respect of khasra numbers 660, 661 and 657, thereupon also his claim for injunction in respect of the extant suit khasra numbers being barred. The aforesaid pronouncements recorded by the learned trial Court, in Civil Suit No. 92/98(94) wherein on anvil of concurrent previous judgments and decrees comprised in Ex.DE and Ex.DG, pronouncements whereof are evidently in respect of khasra numbers 660, 661 and 657, it concluded that the pronouncements borne in the aforesaid exhibits also barring the institution of the instant suit by the plaintiff besides attracting thereon the principle of resjudicata, as also, the institution of the instant suit in respect of the extant suit khasra numbers attracting the bar of estoppel enjoined in Order 2, Rule, 2 of the CPC, is apparently meritless, emphatically when with a gross evident distinctivity upsurging inter se the suit khasra numbers borne in Ex.DE and Ex.DG vis-a-vis the extant suit khasra numbers, thereupon, any attraction on anvil(s) thereof, the principle of resjudicata in respect of the extant suit is rendered, grossly improper besides warrants its being discountenanced.

9. Be that as it may, the principle enshrined in Order 2, Rule 2 of the CPC, provisions whereof stand extracted hereinafter, though enjoined the plaintiff, to, at the stage contemporaneous of his instituting the previous suit, in respect of khasra numbers 660, 661 and 657 also, rear a claim in respect of the extant suit khasra number(s) also his omission in regard aforesaid, attracting vis-a-vis the extant suit, the aforesaid interdictory statutory principles engrafted in Order 2, Rule 2 of the CPC. Nonetheless, the attraction vis-a-vis the extant suit the principle of estoppel, engrafted in Order 2, Rule 2 of the CPC, is grossly inappropriate, given no evidence standing adduced by the defendants, in display of the causes of action in respect of extant suit khasra number arising contemporaneously along with the causes of action which accrued at the time of institution of the previous suit. Contrarily, when the plaintiff has cogently proven that the apposite causes of action HENCE driving him to institute the extant suit for permanent prohibitory injunction arose in contemporaneity, thereof, thereupon, with the accrual of causes of action in respect of the extant suit khasra numbers being proven, to arise in contemporaneity of its institution also, renders the attraction of the principle of estoppel engrafted in Order 2, Rule 2 of the CPC to be unattractable vis-a-vis the instant suit. Provisions of Order 2 of the CPC read as under:-

> **"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."

10. Dehors the aforesaid answers being meted by this Court upon the afore extracted substantial question of law whereon the instant appeal stood admitted by this Court, renders further reliance by the learned trial Court upon the pronouncement(s) respectively borne in Ex. DE and Ex. DG to be wholly inapt, especially when it on anvil thereof makes an emphatic aplomb conclusion qua thereupon the possession of the defendants upon the suit land also standing ipso facto proven. Uncontrovertedly, the conclusion borne in pronouncement(s) respectively occurring in Ex.DE and in Ex. DG, of one Ram Dass, the predecessor-in-interest of the defendants under an agreement to sell, purchasing the share of one Kura Ram in the undivided land, the latter held along with the plaintiff also Kura Ram in part performance thereof, delivering possession of khasra numbers 660, 661 and 657 vis-a-vis one Ram Dass also does not facilitate any inference that the predecessor-in-interest of the defendants and thereafter on his demise, the defendants also taking possession of the extant suit khasra numbers. Contrarily, the revelations borne in Ex.PA, exhibit whereof is a jamabandi apposite tot he extant suit khasra numbers appertaining to

the year 1993-94, making a disclosure of the extant suit khasra numbers standing recorded in possession of the plaintiff and one Parwati Devi. Consequently, when the aforesaid reflections borne in Ex.PA enjoy a presumption of truth, given the preparation thereof occurring during the course of consolidation proceedings which were underway in the Halqua concerned, whereat, the suit khasra numbers are located, besides hence when the aforesaid reflections borne in Ex.PA, are to be concluded to stand preceded by apposite valid orders recorded by the authorities concerned, whereas, only in absence thereof the reflection(s) borne in Ex. PA may be concluded to be nonest , sequel whereof, is that the presumption of truth enjoyed by entries borne in EX. PA, entries whereof, are all reflective of the extant suit kahsra numbers being possessed by the plaintiffs and by one Parwati, hence, warrant imputation of conclusivity thereto. Conclusivity whereof marshals additional strength from the factum of one of the defendants' witness, namely, Dumnu in his cross-examination acquiescing to the factum of one Parma Nand sowing his maize crop on the extant suit land. In sequel, with the plaintiffs proving theirs holding possession of the extant suit khasra numbers, hence, warranted the learned trial Court to pronounce a decree for permanent prohibitory injunction against the defendants, decree whereof it inaptly failed to render.

11. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has not excluded germane and apposite material from consideration. Accordingly, both the substantial questions of law are answered in favour of the respondents and against the appellants.

12. In view of above discussion, there is no merit in the instant appeal, which is accordingly dismissed. Consequently, the impugned judgment and decree rendered by the learned First Appellate Court in Civil Appeal No. 29 of 2003 on 14.01.2005 is maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Himachal Pradesh Horticultural Produce Marketing and Processing Corporation .....Plaintiff.

Versus

Rakesh Awasthi .....Defendant.

Civil Suit No.12 of 2011.
Reserved on : 21.07.2017.
Date of Decision: 28th July, 2017.

Code of Civil Procedure, 1908- Order 7 Rule 1**-** Plaintiff filed a civil suit for the recovery of Rs.31,61,110/- along with interest @ 12% per annum till realization – plaintiff pleaded that defendant was engaged as Junior Accountant at H.P.M.C. Head Office, Nigam Vihar, Shimla – defendant submitted a proposal to manage sale shop-cum-store at Baijnath for the sale of processed products of H.P.M.C., food/fertilizer/cattle feed and other input items – the proposal was accepted by the plaintiff- it was made clear that in case of any loss, the same would be borne by the defendant – the defendant started managing sale-cum-store at Baijnath – plaintiff suffered a loss of Rs. 36,90,000/- on account of lapses on the part of the defendant- departmental inquiry was initiated against the defendant and he was dismissed from services – defendant executed an affidavit acknowledging his liability to the extent of Rs. 35,87,301/- - defendant only paid a sum of Rs. 4,86,191/- - cheques issued by the defendant were dishonoured and proceedings under Section 138 were initiated against him – the suit was opposed by the defendant pleading that no reasonable opportunity was given to him to settle his liabilities – he denied that he was liable to

pay any amount to the plaintiff- held that the version of the plaintiff that the defendant had not prepared any statement of account and had not got the accounts audited from internal statutory auditor is duly proved by the evidence- when the audit was subsequently conducted, a loss of Rs. 36,90,000/- was detected – the version of the defendant that all items in the shop were not considered by the plaintiff was not proved - the suit decreed for the recovery of Rs. 31,01,110/- along with interest @ 12% per annum. (Para-7 to 19)

For the Plaintiff: Mr. Anuj Gupta, Advocate.
For the Defendant: Mr. Adarsh K. Vashistha, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The plaintiff instituted a suit seeking a decree for recovery of Rs.31,61,110/- along with interest @ 12 % per annum till realization of the principal amount being pronounced upon the defendants.

2. In the suit, the plaintiff has cast averments in respect of the defendant standing engaged as Junior Accountant at HPMC head office, Nigam Vihar, Shimla. The defendant had submitted a proposal to manage sale shop-cum-store at Baijnath, for the sale of processed products of HPMC, food/fertilizer/cattle feed and other input items. The aforesaid proposal made by the defendant upon the plaintiff was accepted by the latter in January, 2000. The plaintiff conveyed to the defendant that in case any loss(es) arose during the execution of the said proposal, the same shall be borne by the defendant. In sequel to the plaintiff accepting the relevant proposal of the defendants, the defendant commenced management of sale-cum-store at Baijnath. The said sale-cum-store at Baijnath was kept under the control of Regional Manager, Kangra. In the year 2003-2004, the statements of accounts in respect of branch office Baijnath showed a marginal profit of Rs.0.51 lac also in the years in succession thereto, the aforesaid branch showed marginal profits respectively in a sum of Rs.0.73 lacs and in a sum of Rs. 0.73 lacs. The defendant, however, did not prepare statement of accounts in respect of the sale-cum-store at Baijnath appertaining to the year 2005-2006 and appertaining to the year 2006-2007 nor got the statement)s) of account certified from internal/statutory auditors. During the aforesaid period, the defendants was also noticed to be trading in medicines, commercial activity whereof was not covered within the ambit of the object(s) clause of the corporation, whereupon, he was directed to discontinue the aforesaid commercial activity from the sale-cum-store at Baijnath. It is also averred in the plaint that a loss of Rs.36,90,000/- has been encumbered upon the plaintiff corporation, on account of various aforestated lapses on the part of the defendant. The quantification of financial losses in the aforesaid sums arising from the relevant lapses of the defendant, stand averred in the plaint to be detected during the course of an audit conducted by the corporation. In sequel to the audit memo of 10.03.2007, copy whereof is appended with the plaint, a departmental inquiry was initiated against the defendant. In the report furnished by the Inquiry Officer concerned, a disclosure is made in respect of the misconducts alleged against the delinquent defendant being proven, whereupon, the Disciplinary authority was constrained to dismiss the defendant from service(s). Furthermore it is averred in the plaint that under an affidavit executed by the defendant, he had acknowledged his liabilities comprised in a sum of Rs. 35,87,301/- besides it is averred that for liquidating the aforesaid liability acknowledged by the defendant, he had issued cheque(s) No. 695046 of 25.12.2008, cheque No.695049 of 31.03.2009 and cheque No.695048 of 30.09.2009 in favour of the plaintiff. All the aforesaid cheques were to drawn at SBI, Palampur. However, the defendant despite admitting his liability vis-a-vis the plaintiff in the sums aforesaid, he is averred to liqudiate only a sum of Rs.4,86,191/-. Also it is averred that cheque bearing No. 695048 embodying a sum of Rs.13,55,667/- and cheque No.695049 embodying a sum of Rs.13,50,000/-, on respectively being presented before the bank concerned, being refused to be encahsed sequelling initiation of proceedings under Section 138 of

the Negotiable Instruments Act against the defendant. It is also averred that the cause of action arose in favour the plaintiff against the defendant, firstly in the year 2006 when the defendant failed to submit the annual accounts for the year 2005-06 and further in the year 2007 when the accounts for the year 2006-2007 were not submitted by the defendant. The cause of action further arose in the year 2008 when the acts of misappropriation committed by the defendant came to light in the annual audit report. The cause of action further arose on 23rd December, 2008, when the defendant admitted his liability vis-a-vis an amount of Rs.36,91,926/- and undertook to pay the same vide his affidavit of even date. The cause of action further arose when cheques of 30.09.2009 and of 31.03.2009 issued for the discharge of his liabilities were on their presentation dishonoured and the same is still continuing since the defendant has not paid the entire acknowledged amount to the plaintiff.

3. The defendant contested the averments constituted in the plaint by instituting a written statement thereto, wherein, he has taken preliminary objections inter alia maintainability of the suit, cause of action, suppressions of facts, estoppel , limitation and valuation etc. In the written statement, the defendant does not deny the factum of his being permitted by the plaintiff to manage the sale-cum-store at Baijnath. He contends that in the year 2007, the plaintiff directed him to immediately handover the possession of the shop. He proceeds to contend that despite his requesting the plaintiff to take possession of the stocks lying in the shop, it failed to take possession thereof. He espouses in the written statement that no reasonable opportunity was given to him by the plaintiff to settle his liability(ies) in respect of the medicine shop rather he contends that pressure was exerted upon him by the plaintiff, to make payments in respect of the stocks of medicine despite theirs suffering expiry, arising from closure of the relevant shop. He contends that the affidavit wherein he acknowledges his liability, is a sequel of exertion of pressure or undue influence upon him, hence, the recitals borne therein being not binding upon him. On merits, he denied that he did not prepare accounts in respect of the shop appertaining to the years 2005-2006 and 2006-2007. He denies that he failed to get the accounts pertaining to the aforesaid years, audited by the Statutory auditor besides he denied that he did not obtain certification in respect thereto from the statutory auditor. He vehemently denied that he committed any act of omission during the aforesaid financial years, whereupon, loss in the sum of Rs. 36,32,000/- stood encumbered upon the plaintiff corporation. He has contended that issuance of cheques bearing Nos. 695046 of 25.12.2008, cheque No. 695049 of 31.03.2009 and Cheque No. 695048 of 30.09.2009 by him vis-a-vis the plaintiff corporation being a sequel of exertion of coercion upon him, thereupon, no reliance for any purpose being amenable to be placed thereon by this Court.

4. The plaintiff herein filed replication to the written statement of the defendant, wherein, it denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the contentious pleadings of the parties, this Court on 24th July, 2012, struck the following issues inter-se the parties at contest:-

1. Whether the plaintiff is entitled for recovery of the suit amount along with interest? OPP

2. Whether the suit is not maintainable? OPD.

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

4. Whether the plaintiff is estopped from filing the present suit on account of his own acquiescences? OPD.

5. Whether the amount claimed by the plaintiff relates to the stocks of the medicines, tea and wine? OPD.

6. Whether the undertaking given by the defendant has been entertained under coercion and mis representation? OPD.

7. Relief.

6. For the reasons to be recorded hereinafter, my findings on the aforesaid issues are as under:-

Issue No.1…….Yes.

Issue No.2…….No.

Issue No.3…….No.

Issue No.4…….No.

Issue No.5…….No.

Issue No.6…….No.

7. Relief……. The suit of the plaintiff is decreed as per the operative portion of the judgment.

Reasons for the findings.

Issues No.1, 5 and 6.

7. All the aforesaid issues are taken together for discussion and decision as they are interlinked with each other besides when common evidence upon the aforesaid issues stands adduced by the contesting parties.

8. In proof of the relevant issues whereupon onus is cast upon the plaintiff corporation, the plaintiff corporation led into the witness box one Dinesh Kumar, Accountant, who testified as PW-1. During the course of his examination-in-chief, he tendered Ex.PW1/B, exhibit whereof comprises a copy of the original letter brought by him in Court, wherewithin occurs a proposal made by the defendant to the plaintiff corporation, in respect of establishment of its branch office at Baijnath. He also tendered into evidence Ex.PW1/D and Ex.PW1/E, under exhibits whereof the proposal of the defendant comprised in Ex.PW1/B was accepted by the plaintiff corporation. He has testified that the defendant in respect of financial years 2005-2006 and 2006-2007 failing to prepare accounts in respect of the shop-cum-store at Baijnath nor his transmitting them to the Head Office of the plaintiff corporation concerned, located at Shimla, whereafter, under Exts. PW1/F and Ex.PW1/G, the plaintiff corporation was enjoined to make apposite correspondences with the defendant. He continued to testify that in departure of the permissible trading activities of the plaintiff corporation, the defendant proceeded to trade in medicines from the shop-cum-store at Baijnath besides he has testified that a sum of Rs.36,90,000/- is recoverable by the plaintiff corporation from the defendant, sum whereof comprising the pecuniary loss(es) encumbered upon the plaintiff corporation, in sequel to all the aforesaid acts of commission(s) and omissions on the part of the defendant. He has also tendered into evidence Ex.PW1/H, exhibit whereof is a copy of the audit memo of 10.03.2008, prepared by the officials of the Comptroller and Auditor General (CAG), revealing therein the quantum of pecuniary loss encumbered upon the plaintiff corporation in respect of the shop-cum-store at Baijnath. He also tendered into evidence Ex.PW1/J, exhibits whereof comprises the comments of CAG, in its 34th Annual report appertaining to the year 2007-08, in respect of the plaintiff corporation. He deposes that in sequel to Ex.PW1/j, departmental action was initiated against the defendant which culminated into his dismissal from service under Ex.PW1/K. He has tendered into evidence Ex.PW1/L, exhibit whereof is an affidavit executed by the defendant on 23.12.2008, wherein, he acknowledged his liabilities in the sums disclosed therein besides tendered Ex.PW1/H, wherein also he undertook to liquidate the aforesaid sums of money vis-a-vis the plaintiff corporation. He has continued to depose that the defendant respectively on 25.12.2008, on 31.03.2009 and on 30.09.2009 issued cheques respectively in the sum(s) of Rs.4,86,191/-, Rs.13,50,000/- and 13,55,667/-, for liquidating his liabilities disclosed in Ex.PW1/H. He has deposed that out of the aforesaid three cheques, one cheque holding an amount of Rs.4,86,191/- was encashed whereas the other two cheques were dischonoured. Consequently, he has deposed that the suit of the plaintiff claiming a decree in a sum of Rs.31,01,110/- being pronounced against the defendant being hence decreed. PW-1 was subjected to an exacting cross-examination by the learned counsel appearing for the defendant, wherein, he admitted that under Ex.DB, the Deputy General Manager (Marketing) of the plaintiff

corporation had intimated the Medical Superintendent, H.P. Government Institute of PG Education and Research and Ayurveda, Paprola, District Kangra H.P., that since the plaintiff corporation was no more engaged in the business of selling medicines, hence the aforesaid outlet was being closed and possession thereof may be taken over immediately. PW-1 denied the suggestion put to him by the learned counsel appearing for the defendant, that while closing the aforesaid outlet, the defendant was not given any time to dispose off, the existing stock of medicines also denied that the same was lifted by the plaintiff corporation, rather he voluntarily deposed that the stock was lifted by the defendant himself. He admitted the suggestion put to him by the learned counsel appearing for the defendant, that a sum of Rs.36,90,000/- comprises the value of stock(s) lying in the branch office at Baijnath and in the aforesaid outlet, at Paprola meant for sale of medicines. He has also admitted the suggestion put to him by the learned counsel appearing for the defendant that when the branch office at Baijnath was closed, they had not lifted any stock of wine and processed foods etc, lying thereat. He voluntarily deposed that stocks of tea, wine and medicines is not lifted. He feigned ignorance that at the time of closer of Baijnath branch, the defendant had handed over stocks to the Assistant Manager (F&A), HPMC, Kangra vide letter dated 31.07.2008, rather he voluntarily deposed that no such letter is available in the record of the plaintiff corporation.

9. In support of the contentions reared by the defendant in his written statement, he relied upon the testimony of DW-1, Shashi Pal Katna, wherein, he has deposed that he was posted in Kangra from theyear 2002-2006 and again from 2008 to 2012. He has also deposed that while he was posted at Kangra, he conducted the physical verification of the stocks at Baijnath Branch, in sequel whereof, he had found stocks of tea, juices, medicines and apart therefrom fixture(s) and furniture being available thereat.

10. DW-2, Shri Prince Rana, has testified that the defendant had not been afforded any time or opportunity to sell the stocks which were lying the shop also he has testified that the plaintiff before closing the shop had not lifted the stocks lying thereat.

11. The averments cast in the plaint, in respect of the defendant, in respect of the financial years 2005-2006 and 2006-2007, not preparing statement(s) of account(s) in respect of mercantile activity(ies) carried by the defendant in the shop-cum-store at Baijnath also his not getting the account(s) audited by any internal statutory auditor, stand proven by PW-1. Though, the defendant in his written statement contested the aforesaid averments, yet in respect thereto, he has not been able to adduce any befitting best documentary evidence comprised in the reports of auditors, who appertaining to the years 2005-2006 and 2006-2007, hence, audited the accounts of the shop-cum-store at Baijnath. Consequently, it is to be concluded that the defendant had failed to get audited the accounts in respect of the aforestated financial years, despite his for the financial years prior thereto getting accounts in respect of the mercantile activities carried in the shop-cum-store at Baijnath, hence audited by statutory auditors. The further effect of the aforesaid omission, is that it casts suspicion about the manner of his handling the stocks lying in the shop-cum-store at Baijnath, besides with the report of the auditor comprised in Ex.PW1/H, as also the apposite comments comprised in Ex.PW1/J,cumulatively consensually disclosing therein that, on an audit being held of the records maintained in the shop-cum-store at Baijnath by the defendant, unearthings emanating therefrom in respect of defalcation(s) in a sum of Rs.36,90,000/-, occurring thereat, thereupon, for want adduction of satisfactory rebuttal evidence thereto, warrants imputation of credence thereon.

12. The execution by the defendant of an affidavit borne on Ex.PW1/L, with a disclosure therein in respect of his acknowledging the liabilities displayed therein, though is concerted to be rid of its tenacity, on score of its execution spurring from exertion being exerted or exercised upon him, yet the aforesaid effort on the part of the defendant, to bely the voluntarily execution of Ex.PW1/L, is undermined by the factum of one of the cheque(s), in sequel thereto, issued by the defendant vis-a-vis the plaintiff corporation, embodying a sum of Rs. 4,86,191/-, standing encashed, on its presentation before the bankers concerned. Also the effect of

encashment of one of the cheques holding a sum of Rs.4,86,191/- is of the defendant acknowledging the correctness besides veracity of the recitals borne in Ex.PW1/H, as also of the recitals borne in Ex.PW1/J, wherein a graphic display occurs in respect of the defendant vis-a-vis financial years 2005-2006 and 2006-2007, embezzling sums of Rs.36,90,000/-.

13. PW1 in his cross-examination conducted by the learned counsel for the defendant, was purveyed an affirmative suggestion holding echoings therein, that sums of money in respect whereof, the decree is claimed against the defendant being in respect of stocks lying in the shop-cum-store at Baijnath, suggestion whereof evinced a reply in the affirmative from PW-1, besides the further suggestion put to PW-1 by the defendant's counsel while holding PW-1, to cross-examination, that when the branch office at Baijnath was closed, the officials of the plaintiff corporation had not lifted any stock(s) of wine and processed foods etc., lying thereat, also evinced a reply in the affirmative from PW-1, wherefrom an inference is galvanized that thereupon the defendant acquiesces to the factum of at the time of closure of the shop-cum-store at Baijnath, the officials of the plaintiff corporation not lifting the stocks of wine and processed foods etc., lying thereat, with a further concomitant effect of the entire defence reared by the defendant in his written statement that at the time of closure of the shop-cum-store at Baijnath, the officials of the plaintiffs lifted the stock lying therein, stock whereof holds a value in the sum borne in Ex.PW1/H, hence, the suit being not maintainable against him, to be hence wanting in any truth or veracity.

14. Be that as it may, the defendant has also espoused that stocks of medicines, if any, lying at the shop-cum-store at Baijnath at the time of its closure suffering expiration, hence, liability(ies) in respect of value(s) thereof, being not amenable to be fastenable upon him. However, in support of the aforesaid contention, he has not adduced on record any documentary or befitting oral evidence, whereupon, the aforesaid espousal is rendered rudderless. The defendant's evidence comprised in the deposition of DW-1, of the latter during the course of his conducting physical verification of the relevant premises, his discovering stocks of tea, juices, medicines and apart therefrom fixture and furniture being available thereat, is not sufficient to dispel the effect of the aforesaid inference(s), given his not adducing any best documentary evidence in respect thereto. Even though DW-1, during the course of his cross-examination conducted by the learned counsel for the defendant, has admitted the factum of the defendant submitting an inventory comprised in Ex.DX in respect of the articles, available in the shop-cum-store at Baijnath, yet no reliance can be placed thereupon, it being merely a photo copy also it being unilaterally prepared besides with the defendant not adducing evidence of potent vigour for dispelling the worth of the report of auditor comprised in Ex.PW1/H as also for undermining the veracity of the comments of the CAG, comprised in Ex.PW1/J, thereupon, the aforesaid Ex. DX does not erode either the effect of either Ex.PW1/H or of Ex.PW1/J nor the effect of his acquiescing to his liabilities under his sworn affidavit, comprised in Ex.PW1/L, is eroded. Moreover, the oral deposition of DW-2, an employee of the defendant, in respect of the defendant not being afforded any time or opportunity to sell the stocks lying at the shop at Baijnath, given its being forthwith ordered to be closed, likewise does not rip apart the effect of the aforesaid inference(s) drawn by this Court, it being unsupported by credible best documentary evidence.

15. Consequently, issues No.1, 5 and 6 are decided in favour of the plaintiff and against the defendant.

Issue No.2.

16. In view of my findings rendered on issues No.1, 5 and 6 above, the suit of the plaintiff is maintainable, hence, issue No.2 is decided in favour of plaintiff and against the defendant.

Issue No.3.

17. In view of my findings on issues No.1, 5 and 6 above, the plaintiff has cause of action, hence, issue No.3 is decided in favour of the plaintiff and against the defendant.

Issue No.4.

18. In view of my findings on issues No.1, 5 and 6 above, the plaintiff has failed to prove as to how the plaintiff is estopped from filing the present suit on account of his own acquiescences. Consequently, issue No. 4 is decided in favour of the plaintiff and against the defendant.

Relief.

19. In sequel to findings on issues aforesaid, the suit of the plaintiff is decreed and the plaintiff is held entitled to recover a sum of Rs.31,01,110/- (Rs. Thirty one lacs, one thousand and one hundred ten only) along with interest at the rate of 12% per annum from the date of filing of the suit till its realization, from the defendant. Decree sheet be prepared accordingly. All pending applications also stand disposed of.

****

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

Rattan Chand & others ….Appellants/defendants.

Versus

Karam Singh & ors. …..Respondents/Plaintiffs.

RSA No. 220 of 2006.
Reserved on : 13.07.2017.
Decided on : 28th July, 2017.

Specific Relief Act, 1963- Section 34 and 36 - Plaintiffs filed a civil suit pleading that they are owners in possession of the suit land – the defendants in connivance with the revenue staff procured a false and frivolous entry showing themselves to be tenants at will behind the back of the plaintiffs – the defendants are threatening to interfere with the possession of the plaintiffs on the basis of wrong entry – the suit was opposed by the defendants pleading that they are in possession of the suit land for more than 35 years on the payment of Chakota – the entries were recorded after proper inquiry – hence, it was prayed that the suit be dismissed- the suit was decreed by the Trial Court - an appeal was filed, which was also dismissed – held in second appeal that the plaintiffs were recorded to be the owners of the suit land in the copies of Khasra Girdwari and Jambandi - mutations were attested in favour of defendants conferring proprietary rights upon them – however, there is no record that procedure prescribed by law was followed before changing the entries – the bar of jurisdiction of the civil court will also not be attracted due to the violation of mandatory provision of law – further there is no evidence of the compliance of the principles of natural justice – the Courts had properly appreciated the evidence – appeal dismissed. (Para- 7 to 14)

Cases referred:

Chuhniya Devi versus Jindhu Ram, 1991(2) S.L.J. 1082,
Azhar Hasan and others versus District Judge, Saharanpur and others, (1998)3 SCC 246
Brij Bihari Lal versus Smt. Sarvi Devi and others, 2011(3) Him.L.R. 1515
Malkiat Singh and another versus Hardial Singh, 1994(Suppl.)Sim.L.C. 77

For the Appellants: Ms. Megha Kapoor Gautam, Advocate.
For the Respondents: Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stand directed against the concurrently recorded judgments and decrees by both learned Courts below, whereby, they decreed the suit of the plaintiffs, wherein, they claimed a decree for declaration and consequential relief of injunction with respect to the suit land being pronounced upon the defendants. In sequel thereto, the defendants/appellants herein are driven to institute the instant appeal herebefore.

2. Briefly stated the facts of the case are that the plaintiff are owners of the land measuring 23 kanals 18 marlas bearing Khewat No.374, 375, 375/1, Khatauni No.483, 484, 485, Khasra Nos. 1285, 1287, 1329, 1330, 1332, 1384, 1286, 1327 as entered in the jamabandi for the year 1983-1984, situated in Village Rampur, H.B. No.209, Tehsil and District Una, H.P. The defendants in connivance with the revenue staff procured a false and frivolous entry showing themselves to be tenant at will since Rabi 1976 at the back of the plaintiffs. Since, the plaintiffs are in the continuous physical possession of the suit land this entry has no effect on the right, title and interest of the plaintiffs. The defendants are threatening to interference in the suit land on the basis of the wrong entry. Hence this suit.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections inter alia cause of action, maintainability, bar to try the suit and limitation. On merits, the defendants have alleged that they are coming in possession of the suit land as tenants for the last about 35 years on payment of Chakota Saal Tamam of Rs.15/- and the entries in revenue record were coming earlier against the spot situation which were entered int the names of defendants on 2.11.1975 qua the land of Khasra No.1384 and on 26.4.1976 qua the land of khasra No.1332 at the time of Khasra Girdawari in the presence of the village Pradhan and other right holders. The entire suit land is owned and possessed by defendant No.3 as Smt. Rattan Kaur who was having 1/7 share in the ownership has also died and after the passing of The H.P. Tenancy and Land Reforms Act, defendant No.3 has become owner of the suit land vide mutation No.2959. Hence prayed for dismissal of the suit.

4. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the plaintiffs are the owners in possession of the suit land? OPP.
2. Whether the Civil Court has got no jurisdiction to try the suit? OPD.
3. Whether the plaintiffs have no locus standi to file the suit, as alleged? OPD
4. Whether the suit is not maintainable in the present form? OPD.
5. Whether the defendants were tenants over the suit land and have become owners after the enforcement of H.P. Tenancy and Land Reforms Act, as alleged? OPD.
6. Whether the plaintiffs are estopped by their acts and conduct to file this suit? OPD
7. Whether the suit is barred by time? OPD.
8. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs/respondents herein. In an appeal, preferred therefrom by the defendants/appellants before the learned First Appellate Court, the latter Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

6. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal before this Court wherein they assail the findings recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission on 24.04.2007, this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether the issue regarding limitation has been wrongly and illegally decided by the Courts below?

b) Whether the courts below have wrongly and illegally decided the issue regarding jurisdiction?

Substantial question of Law No.1 &2.

7. Prior to the contested reflections occurring in Ex.P-2 and in Ex.P-3, exhibit(s) whereof respectively comprise a copy of khasra Girdawari appertaining to the year 1974 to 1979 and a copy of jamabandi appertaining to the year 1975-1976, the plaintiffs were continuously reflected in the apposite revenue records to be owners of the suit khasra numbers. Since at the time contemporaneous to the making of Ex.P-2 in the year 1974, the provisions of Section 104 of the H.P. Tenancy and Land Reforms Act came into force, whereunder non occupancy tenants were bestowed with automatic vestment of proprietary rights upon the suit land, thereupon under mutations respectively comprised in Ex. D-5 and in Ex. D-6, the defendants were conferred proprietary rights upon the suit land. The plaintiffs' on the score of theirs being void ab initio hence instituted the instant suit for ripping apart their tenacity. Apparently, as aforestated the revenue records prior to the making of all the aforesaid contested exhibits, make a graphic depiction therein in respect of the plaintiffs being reflected therein to be owners in possession of the suit land. However, all the aforesaid reflections borne therein would stand eroded of their tenacity, if all the subsequent contested entries recorded in the contentious exhibits aforesaid, stand proven by cogent evidence to be recorded therein, in accordance with law or if formidable evidence makes evincings of the authorities concerned in making entries in all the aforesaid contested exhibits, theirs adhering to the procedure prescribed by law besides also no infraction standing begotten of the principles of natural justice. In case the aforesaid evidence is amiss, thereupon, with the revenue entries existing in the relevant records prior to coming into being of the contested entries, hence enjoying a statutory presumption of truth, they would thereupon acquire conclusivity, rendering worthless any espousal of the defendants that they hold no tenacity or are uncreditworthy. Contentious exhibits P-2 and Ex. D-1 stood prepared subsequent to 1973 whereupto the plaintiffs were recorded in the apposite revenue records, to be owners in possession of the suit land. Ex. P-2 comprises a copy of the khasra girdawari appertaining to the suit land, in respect of years 1974-1979, wherein, the defendants are shown to be tenants over the suit land, reflections whereof sequelled recording of mutations respectively comprised in Ex.D-5 and in Ex. D-6, whereunder, proprietary rights in respect of the suit land stood conferred upon the defendants. The aforesaid exhibits borne on Ex. P-2 and on Ex. D-1, for hence withstanding the test of legal scanning, were enjoined to, from the record contemporaneous to their preparation, unravel of the Patwari concerned in preparing them, had prior thereto ensured that compliance(s) by all concerned stood meted vis-a-vis the mandated procedure prescribed under clause 9.8, page 197 of the H.P. Land Records Manual, provisions whereof stand extracted hereinafter, whereupon alone the relevant contentious entries would acquire solemnity also would hence efficaciously rebut the efficacy of entries borne in the prior thereto revenue records :-

> "The crops will be entered in the khasra girdwari, as the inspection proceeds, in the column provided for the purpose. The change in rights, rents and possession will be noted in the appropriate column in pencil. And, where the boundaries or area of a field have changed in such a manner as to require a correction of the field map, the patwari will make a rough measurement, sufficient for the crop entries. All changes in rights, rents and possession shall be recorded by the Patwari in pencil and by putting a cross in pencil in column 12, 16, 20, 24 and

28 of khasra girdawari in accordance with Govt. instructions issues vide letter No. 10-5/73-II, dated 4.9.1980. As per these instructions, the Patwari will give information of such changes to the Tehsildar/Naib Tehsildar as the case may be. The Tehsildar/Naib Tehsildar will inquire and give reasonable opportunity of being heard to the parties. The inquiry should be completed within three months and the entires will be made in Khasra girdawari according to the orders passed by the Revenue Officers after entering in his diary."

In the afore extracted provisions of clause 9.8 occurring at page 197 of the H.P. Land Records Manual, a peremptory mandate is cast upon the Revenue Officer concerned, to before permitting incorporation in the relevant record(s), any change(s) in respect of the person(s) cultivating the suit property, theirs making an inquiry, during course whereof, a reasonable opportunity is evidently afforded to all the aggrieved vis-a-vis the change(s) being ultimately ordered to be incorporated in the apposite revenue records. The relevant revenue records contemporaneous to the preparation of contested Ex. P-2 and Ex.D-1, holding therein all the aforesaid evincings, are neither existing hereat nor obviously any echoings occur therein in respect of the Revenue Officers concerned begetting compliance therewith, comprised in theirs prior to theirs ordering for the apposite change(s) being made with respect to the suit land, theirs holding an in-depth inquiry, during course whereof, a reasonable opportunity of being heard stood afforded to the aggrieved. Absence of apt records contemporaneous to the making of the apposite contested subsequently prepared revenue records with occurrence(s) therein of the aforesaid bespeakings, renders any incorporation in any record (s) of any entry reflective of the defendants holding possession of the suit land, in the capacity of theirs being tenants under the plaintiffs, to be hence wanting in legal sanctity. In aftermath, infraction of the mandatory procedure held in the aforestated canons existing in the H.P. Land Records Manual, renders the relevant contentious incorporation(s) aforesaid therein being construable to be void ab initio also renders the attestation(s) subsequent thereto, of mutations, respectively comprised in Ex. D-5 and D-6, whereunder proprietary rights stood conferred upon the defendants, being likewise construable to stand ingrained with a gross infirmity. The further concomitant effect of the aforesaid inference, is that the presumption of truth enjoyed by contested Exts. P-2, Ex.D-1, Ex. D-2, Ex.-3, Ex.D-4, Ex. D-5 and Ex. D-6 stands eroded. Contrarily, the presumption of truth enjoyed by the apt revenue records prepared prior to 1974, wherein, the plaintiffs are reflected to be owners in possession of the suit land, can tenably be imputed a sacrosanct aura of validity.

8. The aforesaid inference(s) apparently fall within the ambit of exceptions carved out by the Hon'ble Full Bench of this Court in a case titled as ***Chuhniya Devi versus Jindhu Ram, 1991(2) S.L.J. 1082***, vis-a-vis the ouster of jurisdiction of civil Courts in respect of matters falling within the domain of Section 112 of the Himachal Pradesh Tenancy and Land Reforms Act, exceptions whereof stand extracted hereinafter:-

"64. ....

(a) that an order made by the competent authority under the H.P. Land Revenue Act, 1954, is open to challenge before a civil court to the extent that it relates to matters falling within the ambit of section 37(3) and section 46 of the Act; and

(b) the civil court has no jurisdiction to go into any question connected with the conferment of proprietary rights under section 104 of the H.P. Tenancy and Land Reforms Act, 1972, except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with." (p...1098)

9. Conspicuously, also when within the ambit of the afore extracted relevant portion of the decision of the Full Bench of this Court rendered in ***Chhuhniya Devi's case (supra),*** the preparation of the contested exhibits aforestated is evidently stained with a vice of theirs infracting the statutory mandate of the afore extracted provisions held in the Himachal Pradesh Records Manual, thereupon, with the apt statutory procedure being evidently infracted also with

the principles of natural justice being also transgressed, concomitantly renders both the aforesaid contested exhibits to be nonest besides fillips an inevitable inference of the Civil Court concerned holding within the ambit of Section 37(3) and of Section 46 of the H.P. Tenancy and Land Reforms Act, 1972, the apposite jurisdiction to test the legality of all the aforesaid contested exhibits also its holding jurisdiction to test the legality of the reflections inconsonance therewith occurring in the revenue records prepared by the Revenue Officer(s) concerned in respect of the suit khasra number(s). Moreover, with all the aforesaid contested exhibits, for reasons aforestated, standing stained with an infirmity of theirs respectively grossly infracting the mandatory statutory provision(s) encapsulated in the H.P. Land Records Manual, thereupon, any reliance placed thereon by the Revenue Officer(s) concerned, while theirs in the exercise of powers conferred under Section 104 of the Himachal Pradesh Tenancy and Land Reforms Act, hence proceeding to record mutations comprised in Ex. D-5 and D-6, whereunder proprietary rights in respect of the suit land, stood conferred upon the defendants, is rendered vitiated, especially when in the proceedings appertaining to the recording of the aforesaid mutation(s), no bespeakings occur in respect of the Revenue Officer(s) concerned while attesting mutations conferring proprietary rights upon the defendants, theirs determining the legality of the recording of the aforesaid contested exhibits by the Revenue Officer(s) concerned, besides thereupon with the bedrock of exhibits D-5 and of Ex. D-6, whereunder proprietary rights in respect of the suit land stood conferred upon the defendants standing, as a natural sequel thereof hence eroded, concomitant sequel thereof is of the entries incorporated in consonance therewith in the revenue records, also likewise acquiring stains of vitiation. The effect of the aforesaid discussion, is that the bar of jurisdiction encapsulated in Section 112 of the H.P. Tenancy Land Reforms Act, provisions whereof stand extracted hereinafter, against any orders or proceedings held under the provisions of the H.P. Tenancy Land Reforms Act, being unquestionable in any Civil Court or before any other authority, being unattractable vis-a-vis the plaintiffs' suit. Provisions of Section 112 of the H.P. Tenancy and Land Reforms Act read as under:

> "112. Bar of jurisdiction.- Save as otherwise expressly provided in this Chapter, the validity of any proceedings or orders taken or made under this Chapter shall not be called in question in any Civil Court or before any other authority."

10. At this stage, the learned counsel appearing for the appellants by placing reliance upon a judgment of the Hon'ble Apex Court, rendered in a case titled as ***Azhar Hasan and others versus District Judge, Saharanpur and others, (1998)3 SCC 246***, wherein it is postulated that any question(s) relating to conferment of proprietary rights under the U.P. Zamindari Abolition and Land Reforms Act, 1950, or any question(s) relating to fictitiousness of execution of any sale deed, falling within the domain and jurisdiction of revenue Courts concerned, rather than within the jurisdiction of Civil Court(s) concerned, makes an espousal before this Court that the plaintiffs' suit challenging contested exhibits P-2, D-1, D-2, D-3 and D-4, in sequel whereto, mutations comprised in Ex. D-5 and Ex. D-6 stood attested, when thereupon attracts the bar encapsulated in Section 112 of the H.P. Tenancy and Lands Reforms Act, hence, warranted its dismissal. However, in making the aforesaid submission, the learned counsel appearing for the appellants has slighted the effect of the afore extracted binding/conclusive exceptions thereto carved by a Full Bench of this Court, in a verdict pronounced in ***Chhuhniya Devi's case (supra)*** also has slighted the effect of the evidence aforestated, in consonance therewith evidently existing on record, corollary whereof is that the judgment of this Court pronounced in ***Chhuhniya Devi's case (supra)*** hereat acquiring conclusive and binding effect, besides it holds force vis-a-vis the judgment of the Hon'ble Apex Court reported in **Azhar Hasan's** case (supra), especially when unlike in ***Chhuhniya Devi's case (supra)*** wherein stand carved certain exceptions to the rigour of the ousting mandate enshrined in Section 112 of the H.P. Tenancy and Land Reforms Act, also with evident satiations upsurging vis-a-vis exceptions carved therein in respect of ouster of jurisdiction of Civil Courts in respect of "dispute" falling with the domain of Section 112 of the H.P. Tenancy and Land Reforms Act, thereupon, with an ensuing validatory effect being bestowed upon the ultimate testing by the Civil Court(s) of the legality of the apposite orders pronounced by the Revenue Officer(s) concerned,

while exercising powers under the provisions of the H.P. Tenancy and Land Reforms Act, whereas, with no delineations occurring in the judgment supra of the Hon'ble Apex Court, that the verdict of the Hon'ble High Court concerned with which it stood beset, had alike this Court in ***Chhuhniya Devi's case (supra)*** hence carved exceptions to the rigour of the play thereat of the statutory provisions ousting the jurisdiction of Civil Courts concerned, for facilitating the latter to hence test the legality of the statutory orders or proceedings made by the statutory authorities concerned. In aftermath, the verdict of the Hon'ble Apex Court rendered in Azhar Hasan's case (supra) is both distinguishable besides inapplicable vis-a-vis the factual scenario available hereat, also is unattractable or inapplicable hereat, conspicuously in the face of the verdict pronounced by this Court in ***Chhuhniya Devi's case (supra)*** wherein the aforesaid exceptions to the relevant jurisdictional ouster of Civil Court(s), garnering enlivened force, in the face of it standing not shown to be reversed by the Hon'ble Apex Court.

11. The learned counsel appearing for the appellants by placing reliance upon verdicts recorded by this Court in cases titled as ***Brij Bihari Lal versus Smt. Sarvi Devi and others, 2011(3) Him.L.R. 1515*** and ***Malkiat Singh and another versus Hardial Singh, 1994(Suppl.)Sim.L.C. 77,*** canvasses that with no evidence existing on record in portrayal of the exceptions to the rigour of the mandate of Section 112 of the H.P. Tenancy and Land Reforms Act, hence, begetting satiation, thereupon with the exceptions engrafted in ***Chhuhniya Devi's case (supra)*** not concomitantly begetting compliance renders per incuriam, the verdict recorded by the learned courts below. However, the aforesaid submission lacks vigour, as the aforesaid discussion does evidently bring forth the graphic fact of the records contemporaneous to the preparation of contested Ex. P-2, Ex. D-1, Ex. D-2 and of Ext. D-3 in sequel whereto mutations, comprised in Ex. D-5 and in Ex. D-6 stood attested, neither standing adduced on record nor obviously any bespeakings emanating therein in respect of relevant compliance(s) being meted by the Revenue Officer(s) concerned vis-a-vis the mandate of clause 9.8 of the H.P. Land Records Manual, also when absence of the aforesaid evidence has visited all the aforesaid contested exhibits with a vice of vitiation besides with a vice of theirs infracting the principles of natural justice, thereupon, dehors any specific pleadings in respect thereof nor direct evidence in respect of compliance in respect of exceptions carved in ***Chhuhniya Devi's case (supra)*** vis-a-vis the rigour of the ousting mandate held in Section 112 of the H.P. Tenancy and Land Reforms Act, respectively being not prevalent hereat, rather inferential evidence being prevalent hereat, yet the vigour of the aforesaid vitiation(s) staining them remains uneffaced.

12. The mutations comprised in Ex. D-5 and Ex.D-6, whereunder proprietary rights qua the suit land stood conferred upon the defendants, stood attested in the year 1982. Also the suit of the plaintiff assailing the apposite revenue entries/mutations aforesaid, whereby, proprietary rights qua the suit land stand conferred upon the defendants, stood instituted before the learned trial Court in the year 1991. The learned counsel appearing for the appellants has contended with vigour that the fact "of" the apposite period of limitation warranting attraction hereat, for hence the declaratory suit of the plaintiff claiming a decree that all contested entries/orders be quashed and set aside, being construable to fall within the apposite statutorily enjoined period of limitation, standing, comprised in the provisions of Article 100 of the Limitation Act, wherein, a period of three years stands prescribed, period whereof commencing since the conferment of proprietary rights qua the suit land upon the defendants under contentious order(s) made by the Authority(ies) concerned, whereas, with the suit of the plaintiffs standing instituted inordinately, therefrom, hence, much beyond the aforesaid apposite period of limitation, thereupon, the suit of the plaintiff being barred by limitation. However, the aforesaid submission addressed before this Court by the learned counsel appearing for the appellants lacks vigour, as evidently the apposite entries qua conferment of proprietary rights upon the defendants qua the suit land exist much prior to the filing of the suit or say in the year 1982, yet thereupon, the mere factum of their existence thereat would not thereat engender any cause of action, vis-a-vis the aggrieved plaintiff, nor thereupon the belatedly therefrom instituted suit of the aggrieved plaintiff, attracts the bar of limitation nor hence the date of attestation of the relevant mutations, comprise(s) the commencement of accrual of cause of action vis-a-vis the

aggrieved, rather the commencement of the period of limitation prescribed therein stands engendered "on" occurrence of rearing(s) of cause of action(s) vis-a-vis the aggrieved plaintiffs, "occurrences whereof", taking place in contemporaneity of evident threatenings, for dispossessing the plaintiffs from the suit land being meted by the defendants, especially when thereby they concerted to enforce the apposite orders. Moreover, the period qua limitation commences when the right to sue accrues, nowat in the instant case the said right to sue, evidently accruing to the plaintiffs in the year 1991, whereat the defendants threatened to forcibly dispossess them from the suit land, also hence concerted to enforce the contentious orders, on accrual whereof the suit standing promptly instituted by the plaintiffs against the defendants, renders it to fall within limitation, significantly when thereat the contentious orders were concerted to be enforced.

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as well as by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Consequently, the substantial questions of law are answered in favour of the plaintiffs/respondents and against the defendants/appellants.

14. In view of the above discussion, there is no merit in the instant appeal, which is accordingly dismissed. The impugned judgments and decrees are maintained and affirmed. All pending applications also stand disposed of. No order as to costs. Records be sent back.

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

Surinder Singh Alias Jatu ………Appellant.

Versus

State of Himachal Pradesh ……….Respondent.

Cr. Appeal Nos. 123 to 126 of 2008
Reserved on 10.07.2017
Date of Decision: 28.7.2017

Indian Penal Code, 1860- Section 353, 332, 333 and 506 read with Section 34- **Prevention of Damage to Public Property Act, 1984-** Section 3- The Informant is driver in HRTC- he was driving the bus towards Kaza- he stopped the bus near Kufri for dropping the passengers- first accused threw a beer bottle on the wind screen of the bus- second accused pelted the stone on the wind screen- windscreen was damaged in the incident - third accused hit the driver's window with beer bottle causing damage to the glass- accused pulled the informant out of the bus and gave him beatings- accused were tried and convicted by the Trial Court- held in appeal that investigation were not fair – statements of prosecution witnesses were not satisfactory and there are material contradictions in their statements- presence of the accused at the spot was suspect- the Trial Court had wrongly convicted the accused- appeal allowed and judgment of Trial Court set aside- accused acquitted. (Para-9 to 27)

Cases referred:

C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645
Harbeer Singh v. Sheeshpal and Ors., (2016) 16 SCC 418

For the appellant(s): Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate.

For the respondent(s): Mr. M.L. Chauhan, learned Additional Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Since in all the aforesaid criminal appeals, challenge has been laid to common judgment dated 25.2.2008, passed by the learned Additional Sessions Judge, Fast Track Court, Shimla, HP in Criminal Appeal No. 17-S/7 of 2007, as such, they are being taken up together and disposed of by a common judgment.

2. Instant criminal appeals filed under Section 374 of the Cr.PC, are directed against the judgment/order of conviction dated 25.2.2008, passed by the learned Additional Sessions Judge, Fast Track Court, Shimla, HP in Criminal Appeal No. 17-S/7 of 2007, whereby the learned court below while holding appellant(s)-accused guilty of having committed offences punishable under Sections 353/34, 332/34, 333/34 and 506 (II)/34 of the Indian Penal Code, as well as under Section 3 of the Prevention of Damage to Public Property Act, 1984, convicted and sentenced them to undergo as under:-

> ***"Section 333/34 of the IPC***
>
> ***Rigorous imprisonment for a period of three years each and fine of Rs. 10,000/- each. In case of default, payment of fine, to undergo rigorous imprisonment for a period of one year more.***
>
> ***Section 353/34, 332/34 and 506 (II)/34 of the IPC and Section 3 of the Act***
>
> ***Rigorous imprisonment for a period of one year and fine of Rs. 2,000/- each. For want of payment of fine, rigorous imprisonment for a period of three months."***

3. Briefly stated facts as emerge from the record are that on 3rd July, 2006, at 9:00pm, police of police station Dhalli, received a telephonic message from the Police Assistance Room, The Mall, Shimla, that the window panes of Himachal Road Transport Corporation (HRTC) bus No. HP-25-7507, of Reckong Peo Depot, have been broken at Kufri, as a result of which, driver of the said bus has received injuries. On the basis of aforesaid information, rapat No. 31, came to be entered in Dhalli Police Station (Ext.PW11/A), and ASI Sato Kumar, the then Investigating Officer, along with staff proceeded to the spot and recorded statement of the complainant namely Ramji Dass, who in his statement under Section 154 of the Cr.PC stated that he is employed as driver in the HRTC Recong Peo Depot and his duty is to drive the night bus en-route Hamirpur to Kaza. The aforesaid complainant alleged that on 3.7.2006, he was on the wheels of the bus which was bound for Kaza. He left Shimla main bus stand at 8 pm and Shri Khojeshwar Singh was deputed as a conductor with him. As per the complainant, around 8:40 pm, when bus reached Kufri, he stopped the bus to alight the passengers, when the complainant was about to move the bus, three persons stood in front of the bus and one of those persons was brother of Shri Dinesh, who is/was also serving HRTC Recong Peo and whom he /complainant recognizes. The complainant further stated in the complaint that he does not know the name of the brother of Shri Dinesh Kumar (person named above), who threw a beer bottle on the front driver side wind screen of the bus, whereas second person pelted a stone on the front wind screen of the conductor side, which developed cracks. Complainant further stated in the complaint that another person carrying a beer bottle was standing near his window and who later on struck the bottle against the driver's window, as a result of which, the glass was broken. He further stated in the complaint that the pieces of the broken glass hit his face and in the meanwhile, brother of Sh. Dinesh Kumar came towards the driver window and opened the same and started pulling him out of the bus. Companion of the aforesaid person gave blow with the stone on the person of the complainant, as a result of which, he sustained injury on his right ankle. The complainant further reported that he saved himself from the clutches of the accused with great difficulty and fled away along with bus towards Galu side. The complainant specifically reported in the complaint that when he was being beaten and beer bottles and stones were thrown on the bus, brother of Dinesh Kumar was saying that he (complainant) had made to

disembark his brother (Dinesh Kumar) from the bus. In the complaint, the complainant specifically stated that he does not know the names of the assailants but recognizes them, who abused and threatened to kill him. Complainant further stated that when he moved the bus in the forward direction, all the wrong doers pelted the stones due to which, one of the window panes in the middle of the bus also gave a way. He, the complainant parked the bus at some distance towards Galu. The accused followed the bus and then went away after threatening him. The complainant suffered injuries on his lip, lower jaw, right eye and ankle etc. because of the beatings administered to him by the accused. The complainant specifically complained in the complaint that brother of Sh. Dinesh Kumar and his associates obstructed him when he was discharging his official duties and also inflicted the injuries. Complainant further alleged that the accused damaged the public property by breaking the windscreen etc., and as such, action be taken and the culprits be brought to book. Police after completion of investigation of the case, presented challan before the competent court of law.

4. Learned Additional Sessions Judge, FTC, Shimla H.P., on being satisfied that prima-facie case exists against the accused, charged the accused under Sections 353/34, 332/34, 333/34 and 506 (II)/34 of the Indian Penal Code, as well as under Section 3 of the Prevention of Damage to Public Property Act, 1984, to which they pleaded not guilty and claimed trial. Subsequently, the learned Court below on the basis of material adduced on record, held the appellants- accused guilty of the offences and convicted them as per description given herein above. In the aforesaid background, present criminal appeal(s) has/have been filed by the appellants-accused seeking therein their acquittal after setting aside judgment(s) of conviction recorded by the court below.

5. Mr. Satyen Vaidya, Senior Advocate, duly assisted by Mr. Vivek Sharma, Advocate, vehemently contended that the impugned judgment(s) of conviction passed by the learned court below is not sustainable in the eye of law as the same is not based upon the correct appreciation of the evidence adduced on record and as such, same deserves to be quashed and set-aside. While referring to the impugned judgment of conviction, Mr. Vaidya, contended that bare perusal of the same suggests that evidence led on record by the respective parties, has not been read in its right perspective, as a result of which erroneous findings have come on record to the detriment of the appellant accused, who are innocent persons and have been falsely implicated in the instant case. With a view to substantiate his aforesaid argument, Mr. Vaidya made this Court to travel through the statement of PW1 i.e. complainant, PW2 Conductor of the bus and PW3, Shri Darshan Kumar (one of the passengers) to demonstrate that there is no consistency in their statements and as such, no reliance, if any could be placed by the Court below on their versions while holding the accused guilty of having committed offence under the aforesaid sections. While referring to the statement of PWs, Mr. Vaidya, contended that bare perusal of the statements made before the court below suggests that they have altogether given different versions in the court with regard to alleged incident. Mr. Vaidya contended that since the complainant did not support the prosecution version in toto, he was declared hostile but bare perusal of cross examination conducted upon this witness by the learned public prosecutor itself suggests that no reliance, if any, could be placed by the court below on his statement while holding accused guilty of having committed offence.

6. While referring to the submissions of PW2 and 3 , learned counsel contended that it clearly emerge from their statements that no proceedings were recorded by the police at the spot of alleged occurrence, immediately after the alleged incident, rather, statements of witnesses came to be recorded on subsequent dates that too at police station. Mr. Vaidya, contended that it has specifically come in the statement of PW2 that he did not know the names of the accused and for the first time, he came to know about their names on 7.7.2007, when the statement was recorded in the Police Station. Learned senior counsel while inviting attention of this court to the statement of PW3, Shri Darshan Kumar, who is/was one of the passenger of the bus, stated that as per his own statement, he immediately left for Recong Peo in another bus sent by the HRTC and as such, there was no occasion for the Investigating Officer to record his statement on the spot. It has come in the statement of all the aforesaid witnesses that it takes

40-45 minutes to reach Kufri from Dhalli, where the alleged incident took place at 9pm and police reached at stop at around 10 pm as admitted by the official witnesses. While referring to the statements of PW10 Pawan Kumar and PW11 ASI Sato Kumar, learned senior counsel contended that it clearly emerges from the statements made by these official witnesses that FIR came to be lodged on 4th July, 2006, i.e. one day after the alleged incident and spot map as well as photographs were prepared/clicked on 4th July, and as such, it is not understood how statement of PW3 could be recorded on 3rd July, who admittedly after 15-20 minutes of the alleged incident left for Recong Peo in another bus sent by the HRTC. While concluding his arguments, Mr. Vaidya, contended that in the teeth of the material contradictions in the statements of these so called eye witnesses (PWs 1 to 3), no conviction could be recorded against the accused, who in their statements recorded under Section 313 of the Cr.PC, specifically stated that they were standing in Kufri Bazar and complainant spotting them tried to crush them underneath the bus and in that process, he struck the bus against the wall, as a result of which the bus got damaged and the complainant suffered injury. All the accused categorically stated that complainant is a man of criminal instinct and he is inimical towards them. Mr. Vaidya while referring to the statement of the complainant recorded under Section 154 of the Cr.PC submitted that bare perusal of the averments contained in the statement suggests that there was a prior animosity of the complainant with one Shri Dinesh Kumar, who happened to be brother of the accused Rajinder Singh alias Raju. With the aforesaid submissions, Mr. Vaidya, contended that the prosecution has not been able to prove its case beyond reasonable doubt and as such, conviction recorded against the accused deserves to be quashed and set-aside and accused persons be acquitted of the charges framed against them after setting aside the judgment of conviction recorded against them.

7. Mr. M.L. Chauhan, learned Additional Advocate General representing the respondent–State, supported the impugned judgment of conviction passed by the learned Court below. He while refuting the aforesaid submissions having been made by the learned senior counsel representing the appellants/accused, strenuously argued that bare perusal of impugned judgment suggests that there is no illegality and infirmity in the same as the impugned judgment is based upon the correct appreciation of the evidence available on record and the same deserves to be upheld. While inviting attention of this Court to the impugned judgment of conviction, learned Additional Advocate General, contended that court below has dealt with each and every aspect of the matter very meticulously and there is no scope of interference, whatsoever, of this Court, especially, in view of the fact that material prosecution witnesses have categorically stated that appellants-accused gave beatings to the complainant on the relevant date and caused damage to the public property and also obstructed the complainant from discharging his official duty. While refuting the aforesaid submissions with regard to the contradictions in the statements of aforesaid prosecution witnesses, Mr. Chauhan, contended that if statements made by these aforesaid witnesses are read in its entirety, it certainly proves beyond reasonable doubt that at that relevant time, the accused forcefully stopped the bus being driven by the complainant and thereafter gave beatings to the driver/complainant, as a result of which, he suffered grievous injuries. While concluding his arguments, Mr. Chauhan, contended that prosecution has proved its case beyond reasonable doubt and, as such, no leniency, if any, could be shown to the accused at this stage, rather, they need to be dealt with severely for their alleged act.

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

9. During the proceedings of the case, this Court had an occasion to peruse statements of prosecution witnesses vis-à-vis impugned judgment of conviction recorded by the court below, perusal whereof certainly suggests that both the courts below have failed to appreciate the evidence in their right perspective, as a result of which, erroneous findings have come on record.

10. In the instant case, prosecution with a view to prove its case, examined as many as 11 witnesses but only PWs 1, 2 and 3, can be termed as spot witnesses, who had an occasion

to see the alleged incident with their own eyes. The appellants accused in their statement recorded under Section 313 of the Cr.PC, denied the case of the prosecution in toto and contended that the complainant is a man of criminal instinct and he is inimical towards them. The accused further stated that at that relevant time, they were standing in Kufri Bazar and complainant spotting them tried to crush them underneath his bus and in that process, he struck the bus against the wall, as a result of which, wind screen etc., were got damaged and complainant sustained injuries.

11. After having carefully perused the statements made by the PWs, this Court finds that depositions made by the PWs 1 to 3 are relevant for determining whether complainant was given beatings or not. Apart from above, statements of these three witnesses (PW10 and 11) are also relevant. It is undisputed that PW-1 complainant did not support the case of the prosecution in toto, as a consequence of which, he was declared hostile. Even cross-examination conducted on this witness by the defence counsel clearly suggests that the complainant did not disclose the true facts to the court below while making his statement, which if read juxtaposing his statement recorded under Section 154 of the Cr.PC, it certainly compels this Court to agree with the contentions made by the learned senior counsel for the appellants-accused as well as defence taken by the accused in their statements recorded under Section 313 of the Cr.PC that there was a prior animosity of the complainant with one Shri Dinesh Kumar, who happened to be the brother of the accused Rajinder Singh alias Raju. It clearly emerge from the statement of PW1 that he took altogether contrary stand to what he initially stated to police while getting his statement recorded under Section 154 of the Cr.PC. Even cross-examination conducted on this witness clearly suggests that accused namely Raju, was of his acquaintance and at one point of time, he had compelled the accused Raju to dis-embark from his bus near Hasan Valley. When aforesaid witness was confronted with his statement Ext.PA, where it was recorded that he had forced the accused Raju to dis-embark near Hassan Valley, he stated that accused Rajinder was saying as to why PW1 complainant forced him to get down from the bus. Similarly, in cross-examination conducted by the defence counsel, complainant PW1 stated that he is not aware of the fact that Dinesh Kumar is posted at Recong Peo and he never told the police that he recognizes one of the accused as he was brother of the Dinesh Kumar. Similarly, he refuted that accused used to travel in the bus frequently to meet his brother at Recong Peo and he had met the accused several times in the office. Most importantly, the court below failed to take note of the candid statements/admission having been made by PW1 and PW2 that accused Raju had alighted from the bus before Kufri i.e. the place of occurrence. It is own case of the prosecution that alleged incident occurred at Kufri Bazar, as per statement of PW1, when he was all set to leave Kufri after making passengers alight from the bus, few boys suddenly appeared in front of the bus carrying beer bottles and stones in their hands. It is not understood that when accused had alighted from the bus before Kufri as is stated by PW1 and PW2 in their cross-examination, how he could reach Kufri bus stop ahead of the bus and cause obstruction as alleged by the prosecution. The aforesaid candid admission having been made by PWs 1 and 2 certainly creates doubt with regard to the genuineness and correctness of the story put forth by the prosecution.

12. PW2, Conductor of the bus corroborated the story of the prosecution that on the alleged date of incident, accused stopped the bus in question at Kufri and pelted beer bottles and stones on the wind screen of the bus, as a result of which, PW1 (complainant) suffered injuries on his face and ankle. But if statement of this witness is read in its entirety, it also creates doubt with regard to the correctness of the story put forth by the prosecution. This witness categorically admitted in his cross-examination that he knows Dinesh Kumar brother of the accused. He admitted in his cross-examination that Dinesh Kumar worked in HRTC at Recong Peo. Though he stated that he did not know that Raju is a brother of the Dinesh but he nowhere specifically named accused, especially, Raju in his statement while deposing that bus in question was obstructed by the accused at Kufri. PW2 in his cross-examination admitted/stated that police remained at spot for 45 minutes. This witnesses further stated that police only took into possession stones and thereafter, took injured to the hospital and apart from this, did nothing on the spot at that time. PW2 also admitted in his cross-examination that he intimated the Regional

Manager, HRTC, Recong Peo about the alleged incident, who later on contacted the control room to send another bus for carrying passengers to Recong Peo. It has also come in his statement that during night, none of the passengers stayed with him in the bus. He along with one HC stayed in bus, whereas all other passengers went to Recong Peo in another bus. He specifically stated that he visited the Police Station on 4.7.2006, at Dhali. While denying that police did not conduct any proceedings at the spot on 3.7.2006, he specifically stated that police got photographs clicked on 4.7.2006, at 9 am. He also stated that it is wrong to suggest that bus was parked half a K.M. away from Kufri at Galu. Most importantly, this witness in his cross-examination stated that he inquired about the names of the accused in Police Station on 7.7.2006, when his statement was recorded. It clearly emerge from the statement having been made by this witness that after alleged incident, another bus was provided by the HRTC and all the passengers were sent to the Recong Peo in that bus. It also emerge from his statement that police did not record the statements of any of the witnesses in the night of 3.7.2006 and on that date, it only took into custody stones allegedly used by the accused for breaking wind screen of the bus. Similarly, it also emerges from the statement of this witness that names of accused were not known to him, rather he came to know about the names of the accused on 7.7.2006, in the Police Station.

13. Another so called spot witnesses PW3, though stated that he was travelling in bus bearing No. HP 25 7507 on 3.7.2006, but his presence is also doubtful for a simple reason that no attempt, whatsoever, was made by the prosecution to place on record traveling ticket possessed by this witness at that relevant time.

14. In normal circumstances, this Court would have lent some credence to the version put forth by this prosecution witness but in view of the specific statement given by PW2 that all the passengers left the spot of occurrence after some time in another bus provided by the HRTC, no much importance can be given to the version of this witness i.e. PW3. PW3 himself stated that he remained at spot of occurrence only for 10-15 minutes. Once as per the own admission of this witness (PW3), he remained at spot for 10-15 minutes, It is not understood that how PW11 i.e. Investigating Officer, could record his statement, who himself reached the spot after 40-45 minutes of the alleged incident.

15. Apart from above, it has specifically come in the statement of PW2 that no statement was recorded on 3.7.2006, by the police. Though, it has come in the statement of PW3 that his statement was recorded by the police, but this version put forth by PW3 appears to be false in the wake of specific statements given by PWs 1, 2 and 10, who have categorically admitted that on 3.7.2006, nothing was done at the spot, save and except, recovery of stones as well as broken pieces of bottles, allegedly used by the accused. It also emerge from the statement of PW3 that he was not able to recognize any of the accused because it has come in his statement that at that relevant time, the assailants were calling the name of the accused " Raju Raju Raju Raju"

16. This witness (PW3) has also admitted in his cross-examination that it takes 30-45 minutes to reach Kufri from Shimla and police reached the spot after half an hour of the alleged incident. In one breath, this witness stated that he remained present at the spot for 10-15 minutes and in another breath, he stated that he remained with police for almost one hour and thereafter he started his journey at around 11:30 pm. Aforesaid version put forth by this witness is totally contrary to the stand taken by the PW1, 2, 10 and 11, wherein they admittedly stated that police after reaching spot of occurrence, took PW1 (complainant) to the hospital and further proceedings were conducted on spot on 4.7.2016, in the morning.

17. This court after having carefully perused the statement of this material prosecution witnesses, who were allegedly present at the time of alleged incident, sees substantial force in the argument of the Mr. Vaidya, that no reliance, if any, could be placed by the court below on their statements while holding accused guilty of having committed offence under the sections, especially, in the teeth of material contradictions in the statements of these prosecution

witnesses. Version put forth by these witnesses, cannot be termed to be sufficient, cogent much less convincing for holding the accused guilty.

18. At this stage, this Court deems it fit to take note of the statement of PW10 Pawan Kumar, who visited the spot of incident on 3.7.2006, with ASI Sato Kumar. He specifically stated that he returned to the Police Station after completion of proceedings at spot and thereafter, visited spot on the next day. He specifically stated that on the date of alleged incident, statement of the complainant (PW1) was recorded and he was got medically examined and thereafter, nothing happened. He also denied that when he reached spot on 3.7.2006, bus was parked hundred meters ahead of Kufri at Galu. He specifically stated that bus was parked at Kufri Bazar and from that point, Kufri Bazar was visible.

19. It clearly emerge from the statement of this witness that no statement was recorded by the investigating officer at spot on 3.7.2006, and on that day, complainant was sent for medical examination. Similarly, version put forth by this witness belies the version putforth by PWs1 and 2 that bus was parked hundred meters ahead of Kufri at Galu after the alleged incident.

20. PW11 in his statement stated that he recorded statement of PW1 under Section 154 of the Cr.PC (Ext.PW9/A) and took him to IGMC hospital, for medical examination. He further stated that he recorded the statement of passengers, but definitely there is no mention, if any, of time/day, at/on which he recorded statement of passengers travelling in the bus. Otherwise also, it is undisputed that only one passenger namely Darshan (PW3) came to be cited as prosecution witnesses. PW11 also stated that he left place of the alleged incident after leaving bus in custody of conductor i.e. PW2 and one Home Guard. He further stated that he again visited the spot of incident along with Ram ji Das i.e. complainant on the next date and got photographs (Ext.11E to F), clicked. In his cross-examination, this prosecution witness stated that he recorded the statement of passengers and thereafter, he came back to the Police Station. He specifically admitted in his cross-examination that by the time, he reached the Police Station, FIR was already lodged. He also stated that when on 4.7.2006, he visited the spot, none of the passengers was present. He also admitted that statement, if any, under Section 161 of the Cr.PC, is recorded after lodging of FIR. This witness specifically admitted in cross-examination that statements of passengers were recorded by him under Section 161 of the Cr.PC and thereafter, he came to Police Station. This witness also admitted in his cross examination that none of the independent witness was associated from the spot. Similarly, this witness stated that home guard remained with bus on the date of alleged incident alongwith conductor, but he did not record his statement under Section 161 of the Cr.PC. If statements of PW10 and 11 are read in its entirety, it certainly create doubt with regard to proceedings, if any, conducted by the ASI Sato Kumar at the spot of occurrence on 3.7.2006. PW11 specifically admitted in his cross-examination that by the time he reached Police Station at Dhali, FIR was registered. It is not understood that how statement under Section 161 of the Cr.PC could be recorded by the ASI Sato Kumar (PW11) before lodging of FIR. There is nothing on record that intimation, if any, was given to ASI Sato Kumar by the officials of Thana at Dhalli, with regard to lodging of FIR. Leaving everything aside, it clearly emerge from the statements of PW 2 and 10 that no statement was recorded by the ASI Sato Kumar (PW11) on 3.7.2006, and as such, version put forth by the PW11 appears to be totally false and untrustworthy. It is PW11, who has categorically admitted that on 4.7.2006, none of the passenger was present on the spot when he visited the spot of occurrence along with complainant Ramji Dass. Version put forth by PW2 clearly belies the stand taken by PW3 that his statement was recorded by the police authorities on 3.7.2006 at the spot of occurrence. Since, it stood duly proved on record with the statements of PW2 and 10 that no statements were recorded on 3.7.2006 at the post of occurrence, version put forth by the PW3 could not be relied upon by the court below.

21. This Court after having carefully perused the statement of aforesaid prosecution witness has no hesitation to conclude that no reliance, if any, could be placed upon the statements of aforesaid witnesses in the wake of material contradictions in their statements.

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

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

23. True it is that perusal of medical examination adduced on record by the prosecution suggests that the complainant suffered grievous injuries in the alleged incident but same may not be sufficient to hold the appellants-accused guilty of having committed offences. In the instant case, prosecution has not been able to connect accused with the alleged incident to prove the case against the appellants-accused under Sections 353/34, 332/34, 333/34 and 506 (II)/34 of the Indian Penal Code, as well as under Section 3 of the Prevention of Damage to Public Property Act, 1984. It was incumbent upon the prosecution to prove beyond reasonable doubt that on 3.7.2006, the accused in furtherance of their common intention committed mischief by pelting beer bottles and stones on the wind screen of the bus in question and caused injury to the complainant, while he was discharging his lawful duty as a public servant.

24. Similarly, this Court finds that no evidence was led on record by the prosecution suggestive of the fact that complainant (PW1) was prevented by the accused from discharging his lawful duties. None of the prosecution witnesses specifically stated that the accused prevented the complainant from discharging his lawful duty. Similarly as has been discussed above, prosecution was not able to prove beyond reasonable doubt that accused voluntarily caused grievous and simple injuries on the person of the complainant with an intention to prevent/deter him from discharging his duties on the date of incident. Version put forth by the PW1 could not be placed reliance upon in view of the total contradictory stand taken by him while deposing before the Court. Similarly, no much reliance could be placed on the statement of PW2 conductor, in view of the material contradictions in his statement with regard to the identity of the accused persons as well as recording of statements by PW11, version putforth by the sole independent witness (PW3) associated by the prosecution to prove its case beyond reasonable

doubt, is also not worth lending any credence in view of the contrary stand taken by PWs 1, 2, 10 and 11 with regard to the presence of this witness (PW3) at the time of alleged incident, especially, at the time of recording his statement under Section 161 of the Cr.PC, by the Investigating Officer. Most importantly, as has been taken note above, no attempt was ever made by the Investigating Agency to place on record travelling ticket of this witness (PW3) to prove beyond reasonable doubt that he was traveling in the bus in question at that relevant time.

25. True it is that presence of all the accused at the spot stands admitted by the defence but if defence taken under Section 313 of the Cr.PC, is read/examined, carefully juxtaposing statements having been made by the prosecution witnesses, it certainly indicates towards the prior acquaintance of PW1 i.e. complainant and his animosity with one Shri Dinesh Kumar, who happened to be brother of the accused namely Rajinder Kumar alias Raju. Had court below cared to examine/analyze statements of the accused under Section 313 of the Cr.PC in light of the initial complaint made under Section 154 of the Cr.PC., by the complainant and subsequent deposition made before the Court, it would have definitely reached at some other conclusion.

26. It is well settled that guilt of the accused must be proved beyond reasonable doubt and in this regard, burdon of proving case beyond reasonable doubt always lies on the prosecution and never shifts. Reliance is also placed on judgment rendered by the Hon'ble Apex Court in "**Harbeer Singh v. Sheeshpal and Ors.**, (2016) 16 SCC 418, relevant para whereof is being reproduced herein below:-

> ***"11. It is a cardinal principle of criminal jurisprudence that the guilt of the accused must be proved beyond all reasonable doubt. The burden of proving its case beyond all reasonable doubt lies on the prosecution and it never shifts. 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. [Vide Kali Ram Vs. State of Himachal Pradesh, (1973) 2 SCC 808; State of Rajasthan Vs. Raja Ram, (2003) 8 SCC 180; Chandrappa & Ors. vs. State of Karnataka, (2007) 4 SCC 415; Upendra Pradhan Vs. State of Orissa, (2015) 11 SCC 124 and Golbar Hussain & Ors. Vs. State of Assam and Anr., (2015) 11 SCC 242]."***

27. Consequently, in view of the detailed discussion as well as law referred herein above, instant appeals are allowed and judgment passed by the Court below is quashed and set-aside. Accordingly, appellants-accused are acquitted of the charges so framed against them. Bail bonds discharged. Interim order, if any, vacated. All applications, if any, also stand disposed of.

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

The Himachal Pradesh State Industrial Development Corporation Limited ...Plaintiff

Versus

M/s Himachal Air Products (P) Ltd ...Defendants.

OMP No. 266 of 2017 in
C.S. No. 26 of 2005
Decided on : 28.7.2017

Code of Civil Procedure, 1908- Order 22 Rule 4- Defendant No. 2 has died during the pendency of the suit- his estate is represented by defendant No. 5 – no other legal representative is surviving – the application allowed and defendant No. 5 ordered to be substituted as legal representative. (Para-2 and 3)

For the applicant : Mr. Balwant Kukreja, Adv.
For the non-applicant(s) : Mr. Rohit Chauhan, Advocate vice counsel for non-applicants No. 1 and 5.
Mr. Y.Paul, Advocate, for non-applicant No. 6.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

On 12.5.2017 this Court had upon OMP No. 426 of 2016 made a direction upon the plaintiff to through an appropriate application, hence beget substitution of deceased co defendant No. 2 by his LRs. However, today it stands revealed that on demise of one Munshi Ram Sethi, co-defendant No. 2, his estate is represented by co-defendant No. 5. At this stage, no material exists on record in respect of the latter's estate being represented by LRs other than co defendant No. 5. Consequently, bearing in mind the mandate occurring in the provisions of Order 22 Rule 2 CPC, provisions whereof stands extracted hereinafter:

> "2. **Procedure where one of several plaintiffs or defendants dies and right to sue survives**-Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants",

wherein it stands postulated that with the memo of parties borne in the apposite plaint reflecting the arraying therein of more than one plaintiffs or more than one defendant(s), as is the scenario hereat, thereupon on occurrence of demise of one or several co-plaintiffs or of co-defendants, besides emphatically with the right to sue evidently surviving upon other co-plaintiffs or against surviving defendants, given the latters' being the LRs of deceased co-plaintiffs or of deceased co defendants,' as is the apt capacity held by co-defendant No. 5, thereupon a direction being enjoined to be meted by this Court that all records in the aforesaid respect be appositely updated.

2. In aftermath, when co-defendant No. 5 is at this stage shown to be the person who on demise of co defendant No. 2, is competent to represent the latters' estate, thereupon when the right to maintain the instant suit against co-defendant No. 5 hence survives. As a corollary, the Registry is directed to make apposite reflection(s) in the memo of parties of the instant suit. It is also not necessary for the learned counsel for the plaintiff to move an application under the provisions of Order 22 Rule 4 CPC, provisions whereof are extracted hereinafter, to thereupon beget substitution of deceased co-defendant No. 2 by his LRs.

> "**4. Procedure in case of death of one of several defendants or of sole defendant**-(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit.
>
> (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
>
> (3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.
>
> (4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest

the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under Section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said section 5 have due regard to the fact of such ignorance, if proved.

3. Conspicuously, when the provisions borne in Order 22 Rule 4 CPC, are applicable only when the LRs of deceased litigant(s) concerned are not reflected in the apposite memo of parties in the plaint concerned nor obviously they stand arrayed therein either in the array of co-plaintiffs or of co-defendants, thereupon with hence on demise of the litigant concerned the right to sue not surviving vis-à-vis them or against the deceased defendant concerned, whereupon in consonance with the aforesaid provision(s) an application being enjoined to be moved by the litigant concerned qua the LR(s) of the deceased concerned, being ordered to be brought on record for hence obviating the ill consequence of the suit or the proceedings automatically abating in whole or in part as the case may be.

4. Accordingly, the present application is disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Rajan Kumar .....Petitioner.
Versus
State of H.P. and others .....Respondents.

CWP No.127 of 2016.
Judgment reserved on: 24.07.2017.
Date of decision: 31st July ,2017.

Constitution of India, 1950- Article 226- **Himachal Pradesh Co-operative Societies Act, 1968 -** Section 94- Petitioner was appointed as Secretary in the society- his appointment was challenged by respondent No.6 by filing a revision- revision was allowed and the selection of the petitioner was set aside- aggrieved from the order, present writ petition had been filed- held that the power of revision has been given where no appeal has been preferred- this power can be exercised at the instance of the party or suomotu- this power is in the nature of supervisory jurisdiction- remedy of revision cannot be invoked against the order passed by the society- proceedings under Section 94 would be the proceedings of the authorities under the Act but would not include the proceedings of the society- aggrieved party can approach the Civil Court- order passed in revision is without jurisdiction, hence the same ordered to be set aside- writ petition allowed. (Para-7 to 38)

Cases referred:

Union of India and another versus Raghubir Singh (dead) by LRs. etc., AIR 1989 SC 1933
GSL (India) Limited versus Bayers ABS Limited 2000 (1) Gujarat Law Reporter 651

Kavalappara Kottarathil Kochuni @ Moopil Nayar & others versus The States of Madras and Kerala and others AIR 1960 SC 1080
Amar Chandra Chakraborty versus The Collector of Excise, Govt. of Tripura, Agartala and others AIR 1972 SC 1863
Commissioner of Income Tax, Udaipur, Rajasthan versus McDowell and Co. Ltd. (2009) 10 SCC 755
Maharashtra University of Health Sciences and others versus Satchikitsa Prasarak Mandal & others (2010) 3 SCC 786
Sumer Chand Katoch versus The Kangra Central Co-operative Bank Ltd., 1996 (2) Sim. L.C. 134
State of Haryana versus Subhash Chander Marwaha (1974) 1 SCR 165
Miss.Neelima Shangla versus State of Haryana and others (1986) 4 SCC 268
Jitendra Kumar and others versus State of Punjab and others (1985) 1 SCR 899
Shankarsan Dash versus Union of India AIR 1991 SC 1612

For the Petitioner : Mr.Ajay Sharma, Advocate.
For the Respondents: Mr.Shrawan Dogra, Advocate General with Ms.Meenakshi Sharma, Addl. A.G. and Mr.Neeraj K.Sharma, Dy. A.G., for respondents No.1 to 4.
Mr.Kishore Pundir, Advocate, for respondent No.5.
Mr.R.K.Gautam, Senior Advocate with Mr.Gaurav Gautam, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This writ petition has been filed with the following prayer:-

"(i) *That impugned orders dated 6.1.2016 annexure P-5 may kindly be quashed and set aside thereby holding that appointment of the petitioner as Secretary/Manager in respondent No.5 society is rightly made in consonance with the rules."*

2. The facts, in brief, are that respondent No.5, 'The Marwari PBM Cooperative Agriculture Service Society Ltd.', invited applications for the post of Manager/Secretary by passing a resolution dated 10.02.2015. In the selection so conducted, it was the petitioner, who was shown to be selected and thereafter such appointment came to be challenged by respondent No.6 by filing a revision petition before Registrar, Co-operative Societies, H.P., Shimla (respondent No.2), who not only entertained the petition, but thereafter issued notices to the petitioner, who appeared and filed his reply. Respondent No.2 thereafter allowed the revision vide order dated 06.01.2016 and the selection of the petitioner was quashed and set aside.

3. At the time of hearing of the petition, the parties in view of the language of Section 94 of the Himachal Pradesh Co-operative Societies Act (for short the "Act") were asked to assist the Court regarding the maintainability of the revision petition before respondent No.2 which admittedly was preferred against the appointment of the petitioner as a Manager/Secretary.

4. It is vehemently argued by Shri Ajay Sharma, learned counsel for the petitioner that the issue in question is no longer *res integra* in view of the learned Division Bench judgment of this Court in ***CWP No.533 of 2000,*** titled ***'Shri K.D.Sharma & Ors.*** *versus* ***Financial Commissioner-cum-Secretary (Co-operation) to Government of H.P. & Ors.'*** decided on 06.06.2001 and subsequent judgment of the learned Division Bench of this Court in ***CWP No.3148 of 2016***, titled '***The Tiara Co-operative Agriculture Service Society Ltd.*** *versus* ***State of Himachal Pradesh and others'***, decided on 20.12.2016.

5. On the other hand, the learned Advocate General as also Shri R.K.Gautam, Senior Advocate, assisted by Shri Gaurav Gautam, Advocate, would vehemently argue that the only remedy against an illegal selection is by way of revision petition to the Registrar/State as envisaged under Section 94 of the Act and, therefore, no exception can be taken to recourse adopted by respondent No.6 in availing such remedy.

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

6. Before proceeding any further, certain chapters and provisions of the Act need to be taken note of.

7. Chapter-VIII of the Act specifically deals with the audit, inquiry, inspection and surcharge. Section 65 therein deals with inspection of cooperative societies. Section 67 deals with inquiry by the Registrar. Whereas, Section 69 relates to surcharge proceedings, which are to be initiated in case during the course of an audit, inquiry, inspection or the winding up of a co-operative society, it is found that any person who is or was entrusted with the organization or management of such society, or who is or has at any time been an officer or an employee of the society, has made any payment contrary to the provisions of the Act, the rules or the bye-law or has caused any deficiency in the assets of the society by breach of trust or willful negligence or has misappropriated or fraudulently retained any money or other property belonging to the society, the Registrar may, of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorized by him, by an order in writing in this behalf, to inquire into the conduct of such person.

8. Chapter-XII relates to the jurisdiction, appeal and review and the relevant provisions for the adjudication of this petition is contained in Section 94, which reads thus:

> ***"4. Review and Revision:— (1) The State Government except in a case in which an appeal is preferred under section 93 may call for an examine the record of any inquiry or inspection held or made under this Act or any proceedings of the Registrar or of any person subordinate to him or acting on his authority, and may pass thereon such orders as it thinks fit.***
>
> ***(2) The Registrar may at any time,—***
>
> ***(a) review any order passed by himself; or***
>
> ***(b) call for and examine the record of any inquiry or inspection held or made under this Act or the proceedings of any person subordinate to him or acting on his authority and if it appears to him that any decision, order or award or any proceedings so called or should for any reason be modified, annulled or reversed, may pass such order thereon as he thinks fit;***
>
> ***Provided that, before any order is made under sub-section (1) and (2), the State Government or the Registrar as the case may be shall afford to any person likely to be affected adversely by such orders an opportunity or being heard.***
>
> ***"Provided further that every application under sub-section (1) and (2), to the State Government or the Registrar, as the case may be shall be made within ninety days from the date of the communication of the order sought to be reviewed or revised."***

9. A bare perusal of the aforesaid provisions clearly shows that this Section gives revisional powers to the State Government in a case where no appeal under section 93 of the Act has been preferred and similar powers have been conferred upon the Registrar to be exercised either *suo motu* or on an application of a party, provided the same is preferred within 90 days from the date of communication of the order sought to be reviewed or revised and further that the person(s) likely to be effected adversely by such order is afforded an opportunity of being heard. It

is immaterial whether the revisional power is exercised, on action initiated at the instance of the interested party or *suo motu*, the order passed would be within jurisdiction.

10. This Section specifically deals with the power of the State Government/Registrar to call for and to examine the record of any inquiry or inspection held or made under this Act or any proceedings. The State Government can examine any proceedings of the Registrar or any person subordinate to him or acting on his authority, whereas the Registrar is empowered to call for and examine the proceedings of any person subordinate to him or acting on his authority and if it appears to him that any decision, order or award or any proceedings so called or should for any reason be modified, annulled or reversed, may pass such order thereon as he thinks fit.

11. However, it needs to be clarified that if revisional application is not maintainable, fortiori *suo motu* powers cannot also be exercised.

12. The power exercised by the State Government/Registrar under Section 94 of the Act is in the nature of supervisory jurisdiction conferred upon them over the orders passed by the authorities constituted under the Act and not the orders passed by the Society.

13. In terms of the first proviso, the State Government or the Registrar, as the case may be, is obliged to afford to any person likely to be effected adversely by such order an opportunity of being heard. In terms of the section proviso, every application under sub-section (1) and (2), to the State Government or the Registrar, as the case may be, has to be made within 90 days from the date of the communication of the order sought to be reviewed or revised.

14. A learned Division Bench of this Court in ***Tiara's case*** (supra) after examining all the provisions as have been noticed above, came to the following conclusions:-

> **13.** ***In view of what has been observed above, we can safely come to the following conclusions:***
>
> ***i) The State Government or the Registrar under Section 94 of the Act can exercise its suo motu revisonal jurisdiction or on an application made by an aggrieved party;***
>
> ***ii) the remedy of revision before the State Government is barred only in the cases where an appeal has already been preferred under section 93 of the Act;***
>
> ***iii) the remedy of revision either suo motu or otherwise can be exercised only against the decision or order passed by the authority under the Act or proceedings arising out of the Act or the Rules framed thereunder. However, this remedy cannot be invoked against an order passed by the society;***
>
> ***iv) the suo motu power of revision cannot be exercised by the State Government or the Registrar, as the case may be, if at the instance of an aggrieved party, the revision is not maintainable, fortiori suo motu power cannot also be exercised."***

15. It would, thus, be evidently clear that in terms of conclusion No.iii), the remedy of revision cannot be invoked against an order passed by the Society and can be exercised either suo motu. The judgment having been rendered by a learned Division Bench of this Court is obviously binding on this Court.

16. It is more than settled that when a Division Bench decides a case on specific question of law that decision is binding upon the Single Bench. There is no constitutional or statutory prescription in this issue and the point is governed entirely by the practice, procedure and propriety in the Indian Courts sanctified by repeated affirmations over a century of time. It is in order to guard against possibility of inconsistent decisions on points of law by different Benches that the rule has been evolved in order to promote consistency and certainty in the development of law and its contemporary status, that the statement of law by a Division Bench is

considered binding on the same or lesser number of judges. Upsetting of the all principles laid down and introducing uncertainty is gross impropriety.

17. In ***Union of India and another*** *versus* ***Raghubir Singh (dead) by LRs. etc., AIR 1989 SC 1933***, the question arose with regard to pronouncements of law by the Division Bench in relation to a case relating to the same point subsequently before a Division Bench or a smaller number of Judges and it was ruled thus:-

> ***"28.......It cannot be doubted that in order to promote consistency and certainty in the law laid down by a superior Court, the ideal condition would be that the entire Court should sit in all cases to decide questions of law, and for that reason the Supreme Court of the United States does so. But having regard to the volume of work demanding the attention of the Court, it has been found necessary in India as a general rule of practice and convenience that the Court should sit in Divisions, each Division being constituted of Judges whose number may be determined by the exigencies of judicial need, by the nature of the case including any statutory mandate relative thereto, and by such other considerations which the Chief Justice, in whom such authority devolves by convention, may find most appropriate. It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges. We may refer to a few of the recent cases on the point. In John Martin v. The State of West Bengal, [1975] 3 SCR 211 a Division Bench of three Judges found it right to follow the law declared in Haradhan Saha v. State of West Bengal, [1975] 1 SCR 778 decided by a Division Bench of five Judges, in preference to Bhut Nath Mate v. State of West Bengal, AIR 1974 SC 806 decided by a Division Bench of two Judges. Again in Smt. India Nehru Gandhi v. Shri Raj Narain, [1976] 2 SCR 347 Beg, J. held that the Constitution Bench of five Judges was bound by the Constitution Bench of thirteen Judges in His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala, [1973] Suppl. 1 SCR. In Ganapati Sitaram Balvalkar & Anr. v. Waman Shripad Mage (Since Dead) Through Lrs., [1981] 4 SCC 143 this Court expressly stated that the view taken on a point of law by a Division Bench of four Judges of this Court was binding on a Division Bench of three Judges of the Court. And in Mattulal v. Radhe Lal, [1975] 1 SCR 127 this Court specifically observed that where the view expressed by two different Division Benches of this Court could not be reconciled, the pronouncement of a Division Bench of a larger number of Judges had to be, preferred over the decision of a Division Bench of a smaller number of Judges. This Court also laid down in Acharaya Maharajshri Narandraprasadji Anandprasadji Maharaj etc. etc. v. The State of Gujarat & Ors., [1975] 2 SCR 317 that even where the strength of two differing Division Benches consisted of the same number of Judges, it was not open to one Division Bench to decide the correctness or otherwise of the views of the other. The principle was reaffirmed in Union of India & Ors. v. Godfrey Philips India Ltd., [1985] 4 SCC 369 which noted that a Division Bench of two Judges of this Court in Jit Ram v. State of Haryana, [1980] 3 SCR 689 had differed from the view taken by an earlier Division Bench of two Judges in Motilal Padampat Sugar Mills v. State of U.P., [1979] 2 SCR 641 on the point whether the doctrine of promissory estoppel could be defeated by invoking the defence***

of executive necessity, and holding that to do so was wholly unacceptable reference was made to the well accepted and desirable practice of the later Bench referring the case to a larger Bench when the learned Judges found that the situation called for such reference.

29. We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court. We would, however, like to think that for the purpose of imparting certainty and endowing due authority decisions of this Court in the future should be rendered by Division Benches of at least three Judges unless, for compelling reasons that is not conveniently possible."

18. Even though the writ petition could have been allowed in view of the binding decision of this Court in ***Tiara's case*** (supra). However, to be fair to the learned counsel for the respondents, it would be necessary to advert to the other contentions raised by them in support of the revision being maintainable before respondent No.2.

19. The learned Advocate General for the State and Shri R.K.Gautam, Senior Advocate, representing the private respondent at this stage have raised two-fold submissions.

20. Firstly, that the appointment made by the Selection Committee is a "proceeding" of the Society and, therefore, can be revised and reviewed by the Registrar/Government, as the case may be. Secondly, the appointment being in derogation of the service rules which have been framed with the approval of the Registrar can always be quashed by him (Registrar).

21. A learned Single Judge of the Gujarat High Court while dealing with the expression 'proceedings' in case ***GSL (India) Limited*** *versus* ***Bayers ABS Limited 2000 (1) Gujarat Law Reporter 651*** observed as under:-

"18. Contention raises on inquiry into the issue whether in the context of Sections. 442 and 446 word "proceedings" used in Section 442 or word "other proceedings" in Section 446(1) or phrase "the legal proceedings" under Section 446(2) has a different meaning than one assigned to it by this Court in the aforesaid decision in Harish C. Raskapoor & Ors. v. Jaferbhai Mahomedbhai Chhatpar [1989 (85) Comp. Cases 163] - In Re : Divya Vasundhara Finance (P.) Ltd. Ordinarily, rule is that word used by the Legislature must be given its normal literal meaning if there is no ambiguity. If that rule is applied, undoubtedly, the word 'proceedings' unless context otherwise warrants is of a wide amplitude. Word "proceedings" has many shades of meaning. In its widest sense it may mean action of going onward or a particular action or course of action in furtherance of any transaction or business, of whatever nature, be it by administrative authority, legislature or any other authority including Courts. We are obviously not concerned with this wide expansive meaning of proceedings. In its popular sense, it refers to a legal action or process. In its sphere of legal activity it may embrace entire process from instituting or carrying on action at law beginning with the institution of an action to its culmination in judgment. Such legal action may constitute enforcement of private right, imposition of taxes, or for punishing a person for alleged commission of offences, as defined under various laws. It may be an action before ordinary Courts administering justice by determining private rights as well as enforcing laws, or may be before Administrative Tribunals, or may be by way of invoking extraordinary jurisdiction of superior Courts under Constitution for issue of writs and directions. Looking to context in which expression has been used it may mean all process in its entirety or relate to every step in an action as a

separate proceedings. We are concerned with the expression "proceedings" in the context of legal proceedings that are taken in Courts.

19. The word proceedings in the context of the legal terminology as shown in New Shorter Oxford English Dictionary means "instituting or carrying on of an action at law, a legal action or process; any act done by authority of a Court at law; any step taken in a cause by either party."

20. The term "proceeding" is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one ambit of whose meaning will be governed by the statute. It does not confine by itself departmentalising to civil, criminal or other administrative or miscellaneous proceedings.

21. Meaning assigned to the word proceedings in Black's Law Dictionary "proceedings" "in a general sense, the form and manner of conducting juridical business before a Court or judicial office. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before Agencies, Tribunals, Bureaus, or the like."

22. It is further said "the word may be used synonymously with action or suit to describe the entire course of an action at law or suit in equity from the issuance of the writ or filing of the complaint until the entry of a final judgment, or may be used to describe any act done by authority of a Court of law and every step required to be taken in any cause by either party. The proceedings of a suit embrace all matters that occur in its progress judicially."

23. In the same dictionary "proceedings" has also been defined to mean any action, hearing, investigation, inquest or inquiry, whether conducted by a Court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorised by law, in which, pursuant to law, testimony can be compelled to be given.

24. It will be seen that word proceedings by itself does not reflect any colour. The word "proceedings" by itself does not make any distinction between the civil proceedings and criminal proceedings pending in the Court. It embraces all actions at law whether relating to ventilation of civil or private rights, or determination of tax liability or enforcement of law by imposition of punishments. Further classification depends upon nature of action which is advancing or moves onwards. If it relates to determination of private right, and commences at the instance of an affected person as remedy for enforcement of his right, it may be termed as civil proceedings or proceedings of civil nature. If it relates to assessment and imposition of tax liability, it may be termed as revenue proceedings and if the action is initiated to enforce law for prosecuting a person for alleged commission of an offence, it may be termed as criminal proceedings.

25. As stated in Bradlaugh v. Clarke, 52 LJ AB 505, civil proceeding is a process for the recovery of an individual right or redress of individual wrong, inclusive of suits by the crown. It is opposed to criminal proceedings.

26. In this context reference may also be made to ILR 16 Cal. 267, wherein a Full Bench of Calcutta High Court opined:

"The word 'proceedings' is a very general one; it is not limited to proceedings other than the civil proceedings and civil proceedings other than suits. When applied to suits, it may be used to mean suit as a whole or it may be used, and often is used, to express the separate steps taken in the course of suit the aggregate of which makes up the suit."

22. What is the meaning of "proceedings" as used under Section 94 of the Act was the subject matter of decision in ***K.D.Sharma's* case** (supra) wherein the Court was dealing with a case where the H.P. State Co-operative Bank had sought approval of the Registrar as was required under Section 56(3) of the Himachal Pradesh Co-operative Societies Rules, 1971 (for short "Rules") to appoint 9 Mobile Guides in Grade III category in the Bank. The approval as sought for was granted by the Registrar, but the said order thereafter assailed by the Bank before the State Government by way of revision by invoking Section 94 of the Act. The Mobile Guides questioned the action of the State Government in entertaining the revision petition by filing the aforesaid writ petition. This Court after reproducing Section 94 proceeded to determine the meaning of proceedings in the following manner:-

"***7. The perusal of Section 94 (1) of the Act makes it clear that State Government has the revisional powers in respect of any inquiry or inspection held or made under the Act and also any proceedings of the Registrar or of any person subordinate to him or acting on his authority. So far the case in hand is concerned, it is to be examined whether the order dated 29.6.2000 passed by the Registrar can be considered 'the proceedings of the Registrar'. If the answer is in positive, the State Government has the revisional powers to examine the said order and pass such orders as it thinks fit. But if the answer is in negative, the revision against the order dated 29.6.2000 presently pending before respondent No.1 is without jurisdiction and not maintainable. The answer depends upon the interpretation of the word 'proceedings of the Registrar'.***

8. In Black's Law Dictionary 6th Edition the word 'proceeding' means:

"In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like.

An act which is done by the authority or direction of the court, agency, or tribunal, express or implied; an act necessary to be done in order to obtain a given and a prescribed mode of action for carrying into effect a legal right............

'Proceeding means any action, hearing investigation, inquest or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given."

9. In Babu Lal v. M/s Hazari Lal Kishori Lal and others, (1982) 1 SCC 525, learned Judges of Supreme Court while interpreting the words at any stage of the proceedings' occurring in proviso to sub section (2) of Section 22 of the Specific Relief Act which provides for the amendment of the plaint on such terms as may be just for including a claim for possession' at any stage of the proceedings have observed in para 17:

"The word 'proceeding' is not defined in the Act. Shorter Oxford Dictionary defines it as "carrying on of an action at law, a legal

> ***action or process, any act done by authority of a court of law; any step taken in a cause by either party". The term 'proceeding' is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning will be governed by the statute. It indicates a prescribed mode in which judicial business is conducted. The word 'proceeding' in Section 22 includes execution proceedings also........"***

9. In M/s K.J. Lingan and A.V. Mahayalam and others v. Joint Commercial Tax Officer, AIR 1968 Madras 76, the learned Judge held the notice of compounding under Section 46 of the Madras General Sales Tax Act as proceedings under the said Act treating it a step in aid or action taken by the concerned authority in the whole process of assessing a dealer on his turnover. For coming to this conclusion the learned Judge has referred to the earlier judgments of his Court in re: Ramanathan Chettiar AIR 1942, Mad. 390; Ganga Naicken v. Sunderam Aiyar, AIR 1956 Mad. 597 and Kochadai Naidu v. Nagayasami Naidu, AIR 1961 Mad. 247.

10. Following the above quoted judgments of the Madras High Court, the learned Judges of the Calcutta High Court in Sm. Reba Sircar and others v. Bisweswar Lal Sharma alias B.L.Sharma, AIR 1980 Calcutta 328, have held that a proceeding is a prescribed course of action for the enforcement of a legal right.

11. Therefore, as per the dictionary meaning and the interpretation given by the Supreme Court and the High Courts the term 'proceedings' is comprehensive one. It does not have a definite meaning and its scope will depend upon the context in which it is used. If its meaning in the general sense is taken, it is a prescribed course of action for enforcing a legal right or the requisite steps by which judicial action is invoked. So far the case in hand is concerned, against 'proceedings of the Registrar' revisional powers have been given to the State. In other words, the 'proceedings of the Registrar' would be his prescribed course of action whereby the Registrar will exercise powers conferred on him under the various provisions of the Act and pass orders. The orders against which appeal lies are prescribed under Section 93 of the Act and the remaining orders are subjected to revision by the State; for example, appeal lies against the order of the Registrar made under Section 8 (4) of the Act refusing to register a Society but if somebody is aggrieved by the order registering a Society or any other order passed during the course of passing the final order of the Registration, it may file revision against the said order. The perusal of Section 93 of the Act shows that number of the orders passed by the Registrar in exercise of his powers under various provisions of the Act are made appellable but we can easily comprehend many more orders passed or actions taken by the Registrar in discharge of his statutory functions which may entail decisions on the rights of parties, against which the remedy provide is the revision and review under Section 94 of the Act."

12. So far the impugned order under Rule 56(3) of the Rules is concerned, it cannot be held 'proceedings of the Registrar' under the Act. Rules are made under Section 109 of the Act. Section 109(2)(p) of the Act provides for prescribing the qualification of the employees of the Society in the Rules. Accordingly, Rule 56(1) provides that no Co-operative Society shall appoint any person in any category of service unless he possesses the

qualification and furnishes the security as specified by the Registrar from time to time. This Rule further provides that the Registrar shall specify the conditions of the service of the employees of the Society. By adding Sub Rule (3) to Rule 56 on 8.7.1987 further restriction has been imposed on a Co-operative Society that it shall not employ a salaried officer or servant with total monthly emoluments exceeding rupees one thousand without the previous permission of the Registrar. The promotion of an employee to a higher post is also considered an appointment under this sub-rule. For passing order under this provision neither there is prescribed course of action which the Registrar is to follow nor the legal right of any party is enforced. As the provision of Rule 56 is not withstanding anything contained in bye laws, a Co-operative Society cannot claim that it has a legal right to employ any officer or servant with total monthly salary of more than Rs.1000/- without the permission of the Registrar. If a Co-operative Society does not have any such right how an individual likely to be appointed or promoted may have such a right. Therefore, if there is no legal right in anyone there is no corresponding duty on the part of the Registrar to follow a course of action, such as, to give hearing to the parties before passing the order or to call for their comments etc. etc. The Registrar is to simply consider the recommendations made by a co-operative society and pass order in its interest.

13. In this view of the matter the order passed by the Registrar cannot be termed as quasi-judicial. It is purely administrative order. The tests for determining whether an order is administrative or quasi-judicial have been laid down in State of Andhra Pradesh v. S.M.K. Parasurama Gurukul, (1973) 2 SCC 232. These are:-

> ***"(1) There must be a lis between the two parties;***
>
> ***(2) the opinion should be formed on the objective satisfaction and should not depend upon the subjective satisfaction of the tribunal; and***
>
> ***(3) there must be a duty to act judicially."***

13. In Km. Neelima Misra v. Dr. Harinder Kaur Paintal and others, AIR 1990 SC 1402, the learned Judges of the Supreme Court have held that an administrative function is called quasi-judicial when there is an obligation to adopt the judicial approach and to comply with the basic requirements of justice. Where there is no such obligation, the decision is called purely administrative and there is no third category. After quoting the judgment in Ridge v. Baldwin (1963) 2 All ER 66, and their earlier judgments the learned Judges have quoted the following paragraph from Administrative Law by H.W.R. Wade 6th Ed. Pp. 46-47 in paragraph 21 of the judgment:-

> ***"A judicial decision is made according to law. An administrative decision is made according to administrative policy. A quasi-judicial function is an administrative function which the law requires to be exercised in some respects as if it were judicial. A quasi-judicial decision is, therefore, an administrative decision which is subject to some measure of judicial procedure, such as the principles of natural justice."***

It is further observed that an administrative order which involves civil consequences must be made consistently with the rule expressed in the Latin Maxim 'audi alteram partem'. It is further observed that the shift is

now to a broader notion of fairness and fair procedure in the administrative action and the administrative officer is supposed to act fairly if not judicially. After referring to their earlier judgments in Keshav Mills Co. Ltd. v.Union of India, AIR 1973 SC 389; Mohinder Singh Gill v. Chief Election Commissioner, AIR 1978 SC 851 and Swadeshi Cotton Mills v. Union of India, AIR 1981 SC 818, the learned Judges have observed that :-

> ***".......For this concept of fairness, adjudicative setting are not necessary, nor it is necessary to have lites inter parties. There need not be any struggle between two opposing parties giving rise to a 'lis'. There need not be resolution of lis inter parties. The duty to act judicially or to act fairly may arise in widely different circumstances. It may arise expressly or impliedly depending upon the context and considerations. All these types of non-adjudicative administrative decision making are now covered under the general rubric of fairness in the administration. But when even such an administrative decision unless it affects one's personal rights or one's property rights, or the loss of or prejudicially affects something which would juridically be called at least a privilege does not involve the duty to act fairly consistent with the rules of natural justice. We cannot discover any principle contrary to this concept."***

Applying the ratio of above judgment we have no hesitation to hold that order under Rule 56(3) of the Rules does not adversely affect the personal right or property right of any one, which would involve the duty to act fairly consistent with the rules of natural justice.

14. Lastly in State of H.P. v. Raja Mahendra Pal and others, (1999) 4 SCC 43, the learned Judges of the Supreme Court approved the following principles laid down in Province of Bombay v. Khushaldas S. Advani (since deceased) and after him his legal representatives (a) Govindram Khushaldas and (b) Ramchand Khushaldas and others, AIR 1950 SC 222, to adjudge whether there is a duty to act judicially by the Administrative Authority:-

> ***"(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statue which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and***
>
> ***(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."***

Again, by applying the above principles, the order under Rule 56(3) of the Rules is purely administrative order. There is no duty imposed upon the Registrar to act judicially."

23. Thus, the proceedings as find mention in sub-section (1) of Section 94 would essentially relate to the proceedings of the Registrar or any person subordinate to him or acting on his authority. As regards sub-section (2), the proceedings of any person subordinate to the Registrar or acting on his authority or could pertain to an order, award or any proceedings so called. The term "proceedings" will have to be interpreted in light of other words in the company of which it occurs by relying upon principle rule of *ejusdem generis.*

24. The principal rule of *ejusdem generis* is one of the species of wider rule *noscitur a sociis* and is an application of the maxim. According to Maxwell, this rule means that when two or more words which are susceptible of analogous meaning are coupled together; they are understood to be used in the cognate sense. They take as it were their colour from each other; that is the more general is restricted to a sense analogous to a less general.

25. In Words and Phrases maxim has been thus explained:

> ***"Associated words take their meaning from one another under the doctrine of noscitur a sociis, the philosophy of which is that the meaning of the doubtful word may be ascertained by reference to the meaning of words associated with it; such doctrine is broader than the maxim ejusdem generis."***

26. The term "*ejusdem generis*" has been defined in Black's Law Dictionary, 9th Edn. as follows:-

> ***"A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."***

27. A Constitution Bench of the Hon'ble Supreme Court in ***Kavalappara Kottarathil Kochuni @ Moopil Nayar & others*** *versus* ***The States of Madras and Kerala and others AIR 1960 SC 1080*** construed the principle of *ejusdem generis* wherein it was observed as follows:-

> ***"......The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified. But it is clearly laid down by decided cases that the specific words must form a distinct genus or category. It is not an inviolable rule of law, but is only permissible inference in the absence of an indication to the contrary."***

28. Again the Hon'ble Supreme Court in another Constitution Bench decision in the case of ***Amar Chandra Chakraborty*** *versus* ***The Collector of Excise, Govt. of Tripura, Agartala and others AIR 1972 SC 1863*** observed as under:-

> **"......The *ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the statute contains an enumeration of specific words; (ii) the subjects of the enumeration constitute a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration; and (v) there is no indication of a different legislative intent."***

29. The rule of *ejusdem generis* as defined by the Hon'ble Supreme Court in ***Commissioner of Income Tax, Udaipur, Rajasthan*** *versus* ***McDowell and Co. Ltd. (2009) 10 SCC 755*** is as follows:-

> "***The principle of statutory interpretation is well known and well settled that when particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. This rule is known as the rule of ejusdem generis. It applies when:***

(1) the statute contains an enumeration of specific words;

(2) the subjects of enumeration constitute a class or category;

(3) that class or category is not exhausted by the enumeration;

(4) the general terms follow the enumeration; and

(5) there is no indication of a different legislative intent."

30. The meaning of the expression *ejusdem generis* was further considered by the Hon'ble Supreme Court on a number of occasions and has been reiterated in ***Maharashtra University of Health Sciences and others*** *versus* **Satchikitsa Prasarak Mandal & others *(2010) 3 SCC 786***. The principle is defined thus:-

> ***"The Latin expression "ejusdem generis" which means "of the same kind or nature" is a principle of construction, meaning thereby when general words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of the restricted words. This is a principle which arises "from the linguistic implication by which words having literally a wide meaning (when taken in isolation)are treated as reduced in scope by the verbal context". It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication (see Glanville Williams, The Origins and Logical Implications of the Ejusdem Generis Rule, 7 Conv (NS) 119."***

31. Even otherwise, I see no justification in moving away from the Latin maxim "*noscitur a sociis*", which contemplates that a statutory term is recognized by its associated words. The Latin word "*sociis"* means society. Applying the aforesaid principle, I am unable to stretch the meaning of term "proceedings" as was sought for by the respondents and the same would be construed as limited to the same kind as those specified vis-à-vis inquiry, inspection, decision, order or award of the authorities of a person or authority subordinate to the State Government or the Registrar, as the case may be.

32. It is thus evidently clear that the term "proceedings" used in Section 94 of the Act would essentially be those proceedings of the lower in hierarchy authorities to the State Government under the Act, but would not relate or include the proceedings of the "Society".

33. That apart, the Registrar or the State Government has not been conferred with unfettered adjudicatory powers but would derive their authority strictly in terms of the Act, Rules and Byelaws etc. As observed above, the jurisdiction conferred upon the State or the Registrar, as the case may be, is only available to them against the decision or order passed by the authority under the Act or proceedings arising out of the Act or Rules framed thereunder. However, this remedy cannot be invoked against an order passed by the Society. Merely because the service rules are framed after approval from the Registrar, they will not be clothed with statutory flavour so as to equate them with the provisions of the statutory Rule or the Act thereby vest jurisdiction to the State or the Registrar, as the case may be, to interfere in the revision petition under Section 94 of the Act.

34. Even otherwise, the pronouncement of law by the learned Division Bench of this Court is binding on this Court and reference in this regard can conveniently be made to a Constitution Bench judgment of the Hon'ble Supreme Court in ***Union of India's case*** (supra).

35. The learned counsel for the private respondent would further vehemently argue that once the remedy of revision against an illegal selection/appointment is not available to an aggrieved party that would render the aggrieved party remedy less.

36. I am afraid that such submission cannot be accepted as it is always open for an aggrieved party to approach the Civil Court. Such dispute is not a matter touching the Constitution, management or business of the Society so as to be barred under the provisions of

the Act. Reference in this regard can conveniently be made to a judgment rendered by this Court in ***Sumer Chand Katoch*** *versus* ***The Kangra Central Co-operative Bank Ltd., 1996 (2) Sim. L.C. 134*** wherein it was held as under:-

> ***"16. However, the vital question for the application of section 76 of the Act is whether the matter in respect of setting aside the termination order and grant of consequential relief is a matter touching the constitution, management or the business of the society, as stated in section 76 of the Act. This Court may hold without any fear of contradiction that it is not an act touching she constitution and the business of the society. In Deccan Merchants Co-operative Ltd v. Dalichand Jugraj Jain, AIR 1969 SC 1320 ; Co-operative Central Bank Ltd v Additional Industrial Tribunal, Andhra Pradesh, AIR U70 SC 245 and The Allahabad District Co operative Ltd v Hanuman Butt Tewari, AIR 1982 SC !20, it is held by the learned Judges of the Supreme Court that since the word 'business' is Equated with the actual trading or commercial or other similar business activity of the society, the dispute relating to conditions of service of the workman employed by the society cannot be held to be a dispute touching the business of the society.***
>
> ***17. The words 'touching the constitution, management or the business of a co-operative society used in section 76 of the Act also occur in section 72 of the Act, which provides than any dispute touching the constitution, management, or the business of a co-operative society arising between the parties stated therein, shall be referred to the Registrar for decision and no court shall have jurisdiction to entertain any suit or other proceeding in respect of such dispute. Undoubtedly, these words used in both these sections carry the identical meaning. Section 72 of the Act is para materia to section 96 of the Gujarat Co-operative Societies Act, 1961, which fell for consideration of learned Judges of the Supreme Court in The Gujarat State Co-operative Land Development Bank Ltd v, P. R. Mankad and another (supra). Interpreting the expression 'management of the society', it was held that :-***
>
>> ***"35......Grammatically, one meaning of the terra 'management' is : 'the Board of Directors' or 'the apex body or Executive Committee at the helm which guides, regulates, supervises, directs and controls the affairs of the Society. In this sense, it may not include the individuals who under the overall control of that governing body or Committee, run the day-today business of the Society.......... Another meaning of the term 'management' may be : 'the act or acts of managing or governing by direction, guidance, superintendence, regulation and control the affairs of a society'.***
>>
>> ***36. A still wider meaning of the term which will encompass the entire staff of servants and workmen of the Society, has been convassed for by Mr. Dholakia The use of the term 'management' in such a wide sense in section 96 (1) appears to us, to be very doubtful.***
>>
>> ***37. Be that as it may, what has been directly bidden 'out-of-bounds for the Registrar by the very scheme and object of the Act, cannot be indirectly inducted by widening the connotation of 'management', A construction free from contexual contraints, having the effect of smuggling into the circumscribed limits of the expression 'any dispute', a dispute which from its very nature is incapable of being resolved by the Registrar, has to be eschewed. Thus considered, a dispute raised against the Society by its***

> ***discharged servant claiming reliefs such as reinstatement in service with back wages, which are not enforceable in a Civil Court is outside the scope of the expression 'touching the management of the Society* used in section 96 (I) of the Act of 1961, and the Registrar has no jurisdiction to deal with and determine it Such a dispute squarely falls within the jurisdiction of the Labour Court under the B I. R. Act."***

18. In view of these clear observations of the learned Judges of the Supreme Court, the District Judge was not right in relying upon the judgment of Rajasthan High Court in Sawai Madhopur Co-operative Marketing Society Ltd v. Rajasthan State Co-operative Tribunal, Jaipur and another (supra) The learned Judge of Rajasthan High Court took the view that having regard to the provisions of the Rajasthan Co operative Societies Act and the Rules, the dispute in question relating to validity of the suspension and termination is a dispute touching the management of the society and falls within the ambit of section 75 of the Rajasthan Co operative Societies Act. According to them, the ambit and import of word 'touching' are very wide and it includes any matter which relates to the management of the society, more particularly, when the Registrar deals with the matters relating to the officers and employees as provided in the Act and the Rules. Section 75 of the Rajasthan Co-operative Societies Act is para materia to section 72 of the Act and also section 96 of the Gujarat Co-operative Societies Act, which was under consideration of the learned Judges of the Supreme Court in The Gujarat State Co-operative Land Development Bank Ltd v. P R Mankad and another (supra). The learned Judges of the Rajasthan High Court have tried to distinguish the judgment of the Supreme Court by stating that, "it appears that attention of their Lordships of the Supreme Court was not drawn to the provision of section 76 under Chapter VII of the Gujarat Act and the Rules made thereunder". Section 76 of the Gujarat Cooperative Societies Act falls under Chapter VII, which deals with the management of societies and reads as under :-

> ***"76. The qualifications for the appointment of a manager, secretary, accountant or any other officer or employee of a society and the conditions of service of such officers and employees shall be such as may, from time to time, be prescribed ;***
>
> ***Provided that no qualification shall be prescribed in respect of any officer not in receipt of any remuneration."***

37. As a last ditch effort, Shri R.K.Gautam, Senior Advocate would vehemently argue that respondent No.6 is not aggrieved against the appointment of the petitioner as given by the Society, but is aggrieved by the selection conducted by the Selection Committee which comprised of the nominee of the Registrar. If that really be the case, then nothing virtually survives for adjudication qua the claim of respondent No.6 as it is more than settled that mere selection or enlistment does not confer any right of appointment and the Employer is well within its right not to give appointment. (**Refer:** ***State of Haryana*** *versus* ***Subhash Chander Marwaha (1974) 1 SCR 165, Miss.Neelima Shangla*** *versus* ***State of Haryana and others (1986) 4 SCC 268, Jitendra Kumar and others*** *versus* ***State of Punjab and others (1985) 1 SCR 899, Shankarsan Dash*** *versus* ***Union of India AIR 1991 SC 1612).*** Therefore, a person can only be aggrieved by an order of appointment and mere selection will not furnish any cause of action.

38. In view of the aforesaid discussion, the order passed by respondent No.2 (Annexure P-5) is clearly without jurisdiction and is accordingly quashed and set aside.

39. The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

40. However, before parting, it is made clear that since the petition has been allowed only on technical grounds, the same shall not prevent respondent No.6 from availing such remedy as may be available to her under the law.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Court on its own motion ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWPIL No.: 31 of 2017.
Decided on: 01.08.2017.

Constitution of India, 1950- Article 226- Grievance raised in the letter was redressed as verified by the Inspection Committee- trees were felled- Learned Advocate General prayed that direction be issued for taking steps for removal of dried up trees within the municipal limits of Shimla – consequently, direction issued to the Tree Committee to identify the dried up trees within the Municipal limits of the Shimla and to take appropriate action within three months. (Para- 3 to 5)

For the petitioner	Mr. Vijay Chaudhary, Advocate as Amicus Curiae.
For the respondents	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Addl. Advocate Generals and Mr. J.K. Verma, Dy.Advocate General for the respondents-State. Ms. Nishi Goelm Advocate for respondent No. 4. Mr. Hamender Singh Chandel, Advocate for respondent No. 8.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice *(Oral)*

On the basis of letter dated 16th of May, 2017, so addressed to Hon'ble Chief Justice, High Court of Himachal Pradesh at Shimla, *suo motto* cognizance was taken and notice issued. The averments made in the letter were found to be factually correct. Consequently, on 04.07.2017, this Court took on record the following statement of the learned Advocate General:

> *" Learned Advocate General under instructions from the Officers who are present in the Court states that (a) the toilets, if any inexistence, shall be made fully functional, otherwise they shall be set up and made operational; (b) after completion of the work, the temporary structures (sheds) where the labour is residing shall be removed; (c) prior to the commencement of construction work, certain trees had dried up and steps for seeking permission in accordance with law, for felling the same, is under process; (d) There are two types of debris lying on the site. (i) old debris from earlier project (ii) fresh debris from the present project. The fresh debris arising out of the construction of the project in question shall be adjusted scientifically on the spot and excess debris, if any, shall be removed immediately and dumped at identified site and such work shall be got executed either through the contractor or through the department; insofar as the old debris is concerned, a Committee consisting of Officers of Forest Department, Revenue Department, PWD Department and Municipal Corporation shall be constituted to examine as to what is required to be done with the same; (e) The construction raised is for public purpose namely 'residential houses for government*

servants'. In future Officers/officials shall be careful in undertaking executions of such like projects, who have assured that the atmosphere and the environment is otherwise not damaged or destroyed."

2. From the report dated 29th of July, 2017 that of the Committee constituted by this Court vide order dated 04.07.2017, it is heartening to note that following steps stand taken:

"(a) That the entire fresh debris lying on the spot of the construction site has been removed by H.P. Public Works Department through contractor and stacked at the places behind the retaining/breast walls/plinth area of the plot/back filling of footings. Hence these sports after inspection is found cleared without any fresh soil/debris by the committee members.

(b) That the old debris which had already subsisted on the slopes of the forest belonging to Public Works Department, it is found that landscaping of the area has been done by Public Works Departt. in such a manner that small fields have been created which is totally a scientific method to block further erosion of soil downward in future on these slopes/fields where flower can be raised or further plantation can be made by the concerned agency.

(c) The committee also inspected the labour huts in order to inquire specifically where labour toilets have been created by the contractor to the labourers engaged in said construction work of the building at the spot. Upon inspection it is found that 3 numbers of toilets for the labourers are functional at the spot adjoining the labour huts which are sufficient for the requirement of engaged labour in the said construction.

(d) The committee also inspected the path leading from Nabha to Fagli and found that the same has been repaired in entirety by the Public Works Department to its original width in entire reaches. Hence the residents can conveniently enjoy the facility of this path without any hindrances.

(e) With respect to allegation of stacking of useful extracted stone around the stem(s) of the trees, the committee found that all stones stands removed from the spot and further utilized in construction of retaining and breast walls or in creating fields on the old debris site to create small fields. Thus no tree is now lying covered with the stones at the spot.

(f) The committee also inspected the record with respect to granting of sanction of two up-rooted trees as sought by Public Works Department from forest department. As per record it is found in one case for the uprooted trees sanction has been conveyed by the forest department for its removal whereupon now it has also been removed from the spot. However, 2nd sanction for another dry tree so dried up way back, its sanction till now could not be conveyed as it involved inspection of tree committee or it fell of its own. Thus upon inspection it is found that it has not dried up due to acts of the Public Works Department and dried in its natural way and likely to fell it not removed. Hence Public Works Department cannot be held responsible for causing any damage whereby it has dried up. Thus in the last the committee is of the opinion that removal measures as required in this case has fully been taken by the Public Works Department. Therefore it has also been decided that the copy of this report may be filed by the H.P. Public Works Department through its compliance affidavit jointly."

3. Thus, we find the grievances to have been redressed.

4. In so far as dried up trees referred to in para (f) of the report (supra) are concerned, learned Advocate General and Mr. Hamender Singh Chandel pray that directions be issued to the appropriate authorities, for taking steps for removal of not only these trees but also all other such like dried up trees within the municipal limits of Shimla. The urgency being the ongoing monsoon season when falling of trees is a common feature, endangering human life and

causing immense loss to public property. We are informed that there is a procedure prescribed for removal of such trees.

5. We find favour with such request. As such, we direct the Tree Authority so constituted under the Municipal Corporation Act to identify all such trees, falling within the municipal limits of Shimla, and take all necessary and effective steps, if so required and warranted, for taking appropriate action/decision in having such dried up trees felled, in accordance with Chapter XX of the Himachal Pradesh Municipal Act. Necessary action be positively taken at the earliest, in view of the ongoing monsoon season, causing uprooting of such trees, and certainly, within three months, before the onset of winters, when normally due to heavy snowfall damage is caused to the trees. Whether dried up trees are required to be felled or not is for the authorities to consider, depending upon the location, condition of tree, potential damage which may be caused to adjoining property, salvage value of timber etc.

With the aforesaid observations, we close the present proceedings, acknowledging and appreciating the efforts put in by the State Government, the Municipal Corporation and the learned Amicus Curiae in this regard. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Jasbir Singh .....Appellant

Versus

State of Himachal Pradesh ......Respondent

Cr. Appeal No. 451 of 2012
Reserved on: 19.07.2017
Decided on: 01.08.2017

Indian Penal Code, 1860- Section 307- **Indian Arms Act, 1959-** Section 27- Accused had a quarrel with his wife- accused brought his gun and shot her on the neck- accused was tried and acquitted by the Trial Court- However, the Court ordered the confiscation of his gun as he was not found to be a fit person to keep the gun- held in appeal that wife did not support prosecution version and stated that her husband was going to the fields with the loaded gun to protect the crop from the animals- he lost his control and the trigger of the gun was accidently pressed- however, it was proved that accused was under the influence of liquor- he was talking irrelevantly and was smelling heavily of alcohol – hence, there is every possibility that accused can commit similar offences in future - accused was rightly acquitted by the trial Court and gun was rightly ordered to be confiscated – appeal dismissed. (Para-7 to 17)

For the appellant : Mr. Dheeraj K. Vashisht, Advocate.
For the respondent : Mr. Pushpinder Jaswal, Dy. AG with Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present criminal appeal, under Section 454 of the Code of Criminal Procedure, 1973, has been maintained by the appellant/who was the accused before the learned Court below (hereinafter to be called as "the accused"), against the judgment, dated 31.10.2011, passed by the learned Additional Sessions Judge, Fast Track Court, Una, H.P., in Sessions Trial No. 10/2011, whereby the learned Court below while acquitting the accused, under Sections 307 of IPC and 27 of Arms Act, has confiscated the gun of the accused, bearing No. 1452 alongwith cartridges and hold that the accused is not a fit person to keep such weapon.

2. The key facts, giving rise to the present appeal as per the prosecution story are that on 01.10.2010, at about 8:30 p.m., Kanta Devi was cleaning utensils in the courtyard of her house and her husband-accused was taking meal, in the meantime, accused asked her wife to bring green chilly from the nearby kitchen garden, to which she refused and on this, the accused started quarreling with her wife and gave beatings to her. Thereafter, the accused brought his gun from the room and shot her wife on her neck, due to which, she sustained injuries. After the said occurrence, Kanta Devi was taken to the Hospital by her mother-in-law with the help of local people. The incident was reported to the Police by the Pradhan, Gram Panchayat Ambota and the Police party, headed by ASI Jasbir Singh, reached at the spot. The brother of the injured gave statement to the Police under Section 154 Cr.P.C, on the basis of which, FIR was registered for the commission of offences punishable under Sections, 307 IPC and 27 of Indian Arms Act. During the investigation, spot map was prepared and blood sample, DBBL gun alongwith six live and one empty cartridge were taken into possession. The statements of the witnesses under Section 161 Cr.P.C were recorded. After completion of investigation, challan was presented before the learned Court below.

3. Prosecution, in order to prove its case, examined as many as fourteen witnesses. Statement of the accused was recorded under Section 313 Cr.P.C, wherein he denied the prosecution case and claimed innocence. Accused did not lead any defence evidence. The learned Court below, vide impugned judgment dated 31.10.2011, acquitted the accused, however the gun of the accused, bearing No. 1452 alongwith its cartridges was confiscated and learned Court below has hold that the accused is not a fit person to keep such weapon. Hence the present appeal.

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

5. Learned counsel for the appellant has argued that though the learned Court below has acquitted the accused, but the order of confiscating the gun of the accused is against the facts, which has come on record, hence the order passed by the learned Court below is required to be set aside and the gun alongwith cartridges, is required to be given to the appellant. on the other hand learned Deputy Advocate General has argued that the learned Court below has acquitted the accused only on the basis of suspicion in the prosecution story and because the wife of the accused had gone hostile, otherwise prosecution has proved that the accused has fired gun and his wife could only be saved, as the injury was caused to the portion of her neck.

6. To appreciate the arguments of learned Deputy Advocate General and learned defence counsel, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

7. Puran Chand, brother of the injured, while appearing in the witness box, as PW-1, has deposed that her sister was married to the accused about 15 years ago and she has four children. He further deposed that on 01.10.2010, he received telephonic message that her sister sustained injuries and thereafter he alongwith Surjeet Singh and other relatives reached at her sister's village, where he came to know that his sister was taken to Hospital at Hoshiarpur. In his cross-examination, this witness has admitted that after the occurrence, the accused has shown remorse and he assured the injured that he will never repeat such kind of act in future. He has admitted that the accused had licensed gun. He has also admitted that when he reached at the house of his sister, only then he came to know that she sustained injuries, due to gun shot. He has admitted his signatures on memo Ext. PW-1/B, vide which, DBBL gun, No. 1472, alongwith six live and one empty cartridges was taken into possession.

8. PW-2, Kumari Sunali, daughter of the accused and injured has feigned ignorance about the alleged incident. She has also denied portion A to A, A to C and C to C and deposed that she did not made her statement before the Police.

9. PW-3, Kamal Kumar, Pradhan of Gram Panchayat, Amobta, has deposed that on 01.10.2010, at about 9:00 p.m., he received telephonic message at the house of Jassi that one

person has sustained injuries with gunshot. He admitted that after informing the Police over telephone, he went to the house of the accused, where he came to know that the accused has shot her wife with gun. He has also admitted that the Police came to the spot in his presence and took into possession the gun, six live and one cartridges, vide memo Ext. PW-1/B. He has further deposed that the Police have also taken into possession blood stained *dupatta* and soil. In his cross-examination, he admitted his signatures on memo, Ext. PW-1/C. However, he has denied to have gone through the contents of memo, Ext. PW-1/C, before signing the same. He has identified photographs, mark A-1 to mark A-4. He admitted his signatures on an application produced by the accused for renewal of gun licence, which was taken into possession by the Police, vide memo, Ext. PW-3/A. He has further admitted that gun, Ext. P-1, was taken into possession vide memo, Ext. PW-1/B.

10. PW-4, Dr. Sukhwinder Singh, in his examination-in-chief, has deposed that on an application, Ext. PW-4/B, moved by the Police, on 01.10.2010, he conducted the medical examination of Kanta Devi and issued MLC, Ext. PW-4/A. He has further deposed that the injured was not got x-rayed, despite advise, however, according to the Police summary, she was treated in private hospital at Hoshiarpur and opined injuries to be simple in nature. In his cross-examination, he admitted that injuries on the person of Kanta Devi were not dangerous to life and are possible if somebody falls carrying loaded gun on surface and trigger of gun accidently pressed.

11. PW-5, Kanta Devi, injured, has deposed that her husband-accused does not take liquor and denied the case of the prosecution. In her cross-examination, she denied that on 01.10.2010, her husband gave beatings to her and shot her with gun. However, she admitted that when she was cleaning the utensils, her husband was going to the fields to protect maize crop with loaded gun. She has further admitted that due to darkness, her husband lost his balance and fell down with loaded gun and trigger of the gun was accidently pressed, which hit her on her ear.

12. PW-6, Kusum Lata and PW-7, Sulakshna Devi, stated to be eye-witnesses of the occurrence, have also resiled from their previous statements and were got declared hostile.

13. PW-8, Yash Pal, has proved on record, application moved by the accused for renewal of gun licence, Ext. PW-8/A and memo, Ext. PW-3/A, vide which the same has been taken into possession. PW-9, Constable Rajesh Kumar, on receiving telephonic call regarding incident, entered the same in daily diary, Ext. PW-9/A, which bears his signatures. PW-10, Constable Dharam Pal, has deposed that he deposited three parcels containing gun, live cartridges and one empty cartridge, sealed with seal impression 'S' at FSL, Junga, vide RC No. 167/2010, which were handed over to him by MHC Ram Saroop and he returned RC to him on 14.10.2010.

14. PW-11, HC Ram Saroop, on 02.10.2010, has received statement of Puran Singh, Ext. PW-1/A, on the basis of which, FIR, Ext. PW-11/A was registered and made endorsement, Ext. PW-11/B on ruka. He also received six parcels sealed with seal 'S', containing DBBL gun, six live and one empty cartridges, blood stained *dupatta* and blood stained soil, which he entered into register No. 19. On 12.10.2010, vide RC No. 167/10, except parcel containing belt, he handed over all the parcels to Constable Dharam Pal for chemical examination, who returned RC after deposited articles on 14.10.2010. He proved copies of RC Exts. PW-11/C and PW-11/D. On 24.11.2010, he has received case property after chemical test alongwith FSL report, Ext. PW-11/E, which he handed over to the Investigation Officer. In his cross-examination, he has stated that the case property was not scaled in his presence, neither his statement under Section 161 Cr.P.C. is on the Court file. PW-12, SI Mohinder Singh, has prepared the challan.

15. PW-13, Surjeet Singh, has feigned ignorance about this case. He has denied that he remained associated with the investigation of this case and that the accused shot her sister to kill her. He has admitted his signatures on memo, Ext. PW-1/B, vide which, gun, cartridges and belt were taken into possession. He has also admitted his signatures on memo, Ext. PW-1/C, vide

which, Police have taken blood stained soil from the spot. He has denied portions A to A, A to C & C to C of his statement recorded by the Police. In his cross-examination, he admitted that the Police have obtained his signatures later on, on blank paper.

16. PW-14, ASI Jasbir Singh, deposed that he has received telephonic information from Pradhan, Gram Panchayat, Ambota about the incident and on the basis of which, rapat No. 44(A), Ext. PW-9/A was entered, thereafter, he alongwith Police party reached at the spot and recorded the statement of Puran Chand, under Section 154 Cr.P.C., which was sent to Police Station for registration of FIR, Ext. PW-11/A. He further deposed that he prepared the spot map, Ext. PW-14/A, took into possession gun, live cartridges, belt and empty cartridge vide memo, Ext. PW-1/B, in presence of the witnesses and these articles were packed in sealed parcels, sealed with seal 'S'. He also took into possession blood stained *dupatta*, Ext. P-10 and blood stained soil, vide memo, Ext. PW-1/C. Further he has recorded statements of the witnesses, moved application, Ext. PW-14/F for medical examination of the injured as well as accused and obtained MLCs of Kanta Devi, Ext. PW-4/A and the accused Ext. PW-4/B. He also recorded supplementary statement of Kamal Kumar, Ext. PW-14/J, got clicked photographs of the spot Ext. PW-14/K to Ext. PW-14/N and took into possession application, Ext. PW-8/A produced by the accused vide memo, Ext. PW-3/A and thereafter handed over case file for remaining investigation to ASI Susheel Kumar. In his cross-examination, he admitted that he did not cite ASI Susheel Kumar as witness. He denied that trigger of the gun was accidently pressed. He further deposed that when he reached at the spot there were many people and he only recorded statement of Kamal Kumar, Pradhan. He has denied that he prepared wrong site plan or clicked wrong photographs of the spot.

17. In the present case, though the wife-injured has gone hostile, but it is correct that gun was fired by the accused in intoxicated condition. However, injured-wife, in her cross-examination has deposed that her husband-accused was going to the fields with loaded gun to protect maize crop from the animals and as it was dark outside, her husband lost his control, due to which trigger of loaded gun was accidently pressed which hit her, but it is on record that the accused was carrying gun, under influence of liquor and also found over talking irrelevantly, smelling heavily alcohol and even sustained three injuries on his person as mentioned in his MLC. There is every possibility that the accused can commit such offence, under the similar circumstance in future and which will not be in the interest of justice of the society, as well as family members of the accused. In these circumstance, this Court finds that the order, passed by the learned Court below, confiscating the gun of the accused, requires no interference and the same is after appreciating the facts, which has come on record to its true perspective.

18. In view of the aforesaid discussion, I find no merit in this appeal and the same deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

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

Sardar Singh .....Petitioner
Versus
State of Himachal Pradesh .....Respondent

Cr.MMO No. 209 of 2017
Decided on 1.8.2017

Code of Criminal Procedure, 1973- Section 311- An application for summoning Deputy Director RFSL was filed on the ground that she had compared the disputed and specimen handwriting of the accused – her report is not per se admissible, hence, she be summoned – the application was

allowed by the Trial Court – held that the Court has to form an opinion that examination of the witness is essential for just decision of the case – mere delay in filing of the application is not sufficient to dismiss the application – the report has already been proved and no prejudice would be caused by the examination - the Court had rightly allowed the application- petition dismissed. (Para-10 to 18)

Cases referred:

Mannan SK and others vs. State of West Bengal and another AIR 2014 SC 2950
Raja Ram Prasad Yadav vs. State of Bihar and another, (2013)14 SCC 461
Zahira Habibullah Sheikh (5) and another vs. State of Gujarat and others (2006)3 SCC 374
Rajindra Prashad v. Narcotics Cell (1999) 6 SCC

For the petitioner. Mr. Vijay Chaudhary, Advocate.
For the respondent. Mr. R.K. Sharma, Additional Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant criminal miscellaneous petition filed under Section 482 of the Code of Criminal Procedure, challenge has been laid to order dated 13.6.2017, passed by the learned Special Judge, Chamba, District Chamba, passed in Cr. Misc. Application No. 122 of 2017 in Session Trial No. 57 of 2015, whereby application having been preferred by the respondent-State under Section 311 of the Cr.PC., came to be allowed.

2. Briefly stated facts as emerge from the record are that an application under Section 311 of the Cr.PC came to be filed on behalf of respondent-State in Session trial No. 57 of 2015, wherein prayer was made to the Court below to summon Ms. Meenakshi Mahajan, Deputy Director, RFSL as a witness.

3. Perusal of the averments contained in the application (Annexure P1) having been filed by the respondent-State suggests that certain disputed/questioned signatures and handwritings of both the accused along with their specimen signatures and hand writings, were sent to RFSL Dharamshala, for comparison of signatures and hand writing. Report received from the RFSL Dharamshala under the hand and signature of Ms. Meenakshi Mahajan, Deputy Director, RFSL, was placed on record and marked as Ext. PX. In the application referred above, respondent averred that though, as per provisions of Section 293 of the Cr.PC, reports under the hand of government scientific expert are per-se admissible, but comparison of hand writing is not covered under this provision and as such, Ms. Meenakshi Mahajan, Deputy Director, RFSL, is required to be summoned and examined qua the correctness of aforesaid document placed on record in the form of Ext.PX. Respondent further averred in the application that the evidence of hand writing expert namely Ms. Meenakshi Mahajan, is very much relevant for the just decision of the case and her examination will not cause any prejudice to the accused, rather, it would help the court below to adjudicate the matter in just and fair manner. Respondent further submitted that the factum with regard to the requirement of examination of aforesaid hand writing expert only came to the notice of the prosecution while preparing the facts of the arguments. Respondent further stated that non-examination of aforesaid material witness is neither intentional nor deliberate but inadvertently, her name was not mentioned in the list of witnesses.

4. Aforesaid application came to be hotly contested by the accused on the ground of maintainability as well as delay. Accused while denying the contents of the application in toto, stated that prosecution had closed the evidence after examining the entire case and it was well within their knowledge that questioned documents were sent to Ms. Meenakshi Mahajan, Deputy Director, RFSL, for comparison and as such, her examination was quite relevant. But since despite knowledge, prosecution failed to examine her and had closed evidence, it will cause prejudice to the accused in case Ms. Meenakshi is allowed to be examined.

5. Learned court below taking note of the averments contained in the application as well as reply thereto filed on behalf of the respondent-accused, allowed the application and ordered for summoning Ms. Meenakshi Mahajan, Deputy Director, RFSL.

6. Being aggrieved and dis-satisfied with the aforesaid order passed by the Special Judge, Chamba, accused preferred instant petition praying therein for setting aside the impugned order dated 13.6.2017, passed by the learned Special Judge.

7. Shri Vijay Chaudhary, Advocate, representing the petitioner/accused while inviting attention of this Court to the Section 311 of the Cr.PC strenuously argued that the impugned order passed by the learned court is not sustainable as the same is not in conformity/consonance with the provisions contained in Section 313 of the Cr.PC. Learned counsel further argued that bare perusal of Section 311 of the Cr.PC though suggests that court enjoys vast powers of summoning or recalling any witness at any stage of proceedings, if his/her evidence appears to be essential for just decision of the case but certainly, same is required to be exercised with circumspection. Learned counsel further contended that it is admitted case of the parties that evidence of prosecution was closed and as such, present application was filed solely with a view to delay the proceedings. While inviting attention of this Court to the application having been filed on behalf of the respondent under Section 311 of the Cr.PC, learned counsel contended that bare perusal of same nowhere suggests that explanation worth the name has been/was rendered in the same qua inordinate delay in summoning the official of RFSL. Mr. Chaudhary, further contended that since application was hopelessly time barred and there was no explanation for delay, learned court below had no occasion whatsoever, to allow the same. He further contended that the learned court below by passing the impugned order provided opportunity to the prosecution to fill up lacuna, which had definitely crept in and as such, same deserves to be quashed and set-aside.

8. Mr. R.K. Sharma, learned Additional Advocate General, while inviting attention of this Court to the provision contained in Section 311 of the Cr.PC, forcefully contended that the court enjoys vast powers of summoning/ recalling any witness at any stage of proceedings provided that same is necessary for proper decision of the case. Learned Additional Advocate General, further contended that there is no illegality and infirmity in the impugned order passed by the court below rather, examination of Ms. Meenakshi Mahajan, Deputy Director, RFSL, would facilitate proper adjudication of the case and no prejudice, whatsoever, would be caused to the accused, who would be provided proper/adequate opportunity of cross examination. Learned counsel further contended that if provision as contained in Section 311 of the Cr.PC is read in its entirety, paramount consideration of Court should be of doing justice to the case and court can examine witness at any stage, and even if it results into filling up of lacuna or loopholes in that situation, it is a subsidiary factor. In the aforesaid background, learned Additional Advocate General prayed that petition be dismissed being devoid of any merits.

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

10. Before ascertaining the merits of the submissions having been made by learned counsel representing the respective parties vis-à-vis impugned order passed by the learned trial Court, it would be profitable to take note of Section 311 Cr.P.C., which reads as under:-

> ***"311. Power to summon material witness, or examine person present:-. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case"***

Bare perusal of aforesaid provision suggests that the Court may, at any time, summon any person as a witness, or recall and re-examine any witness provided that same is essentially

required for just decision of the case, and judgments passed by Hon'ble Apex Court in ***Mannan SK and others vs. State of West Bengal and another AIR 2014 SC 2950,*** wherein the Hon'ble Court has held as under:-

> ***"10. The aim of every court is to discover truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re- examination of the witness is necessary. Since the power is wide it's exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammeled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether recall of a witness is for filling-up of a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill-up a lacuna because the line of demarcation is thin. It is for the court to consider all the circumstances and decide whether the prayer for recall is genuine."***

11. Hon'ble Apex Court in ***Raja Ram Prasad Yadav vs. State of Bihar and another, (2013)14 SCC 461,*** has held that powers under Section 311 Cr.P.C. to summon any person or witness or examine any person already examined can be exercised at any stage provided the same is required for just decision of the case. It may be profitable to take note of the following paras of the judgment:-

> ***"14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just***

decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

15. In this context, we also wish to make a reference to certain decisions rendered by this Court on the interpretation of Section 311 Cr.P.C. where, this Court highlighted as to the basic principles which are to be borne in mind, while dealing with an application under Section 311 Cr.P.C.

15.1 In the decision reported in Jamatraj Kewalji Govani vs. State of Maharashtra - AIR 1968 SC 178, this Court held as under in paragraph 14:-

"14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the Court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction." (Emphasis added)

15.2 In the decision reported in Mohanlal Shamji Soni vs. Union of India and another - 1991 Suppl.(1) SCC 271, this Court again highlighted the importance of the power to be exercised under Section 311 Cr.P.C. as under in paragraph 10:-

> *"10....In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re- examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."*

15.3 In the decision in Raj Deo Sharma (II) vs. State of Bihar - 1999 (7) SCC 604, the proposition has been reiterated as under in paragraph 9:-

> ***"9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case it is the duty of the court to summon and examine or recall and re-examine any such person." (Emphasis added)***

15.4 In U.T. of Dadra and Nagar Haveli and Anr. vs. Fatehsinh Mohansinh Chauhan - 2006 (7) SCC 529, the decision has been further elucidated as under in paragraph 15:-

> ***"15. A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice." (Emphasis supplied)***

15.5 In Iddar & Ors. vs. Aabida & Anr. - AIR 2007 SC 3029, the object underlying under Section 311 Cr.P.C., has been stated as under in paragraph 9:-

> ***"9...27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of inquiry or trial or other proceeding under this Code'. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind." (Emphasis added)***

15.6 In P. Sanjeeva Rao vs. State of A.P.- AIR 2012 SC 2242, the scope of Section 311 Cr.P.C. has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case,

which was dealt with in that decision in paragraphs 20 and 23, which are as under:-

> ***"20. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar (2000) 10 SCC 430. The following passage is in this regard apposite:***
>
> > ***"6. ...In such circumstances, if the new counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."***
>
> ***23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself." (Emphasis in original)***

15.7 In a recent decision of this Court in Sheikh Jumman vs. State of Maharashtra - (2012) 9 SCALE 18, the above referred to decisions were followed.

16. Again in an unreported decision rendered by this Court dated 08.05.2013 in Natasha Singh vs. CBI (State) – Criminal Appeal No.709 of 2013, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 15 and 16:

> ***"15. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party.***

The power conferred under Section 311 Cr.P.C. must, therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection.

The very use of words such as 'any Court', 'at any stage', or 'or any enquiry', trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should, therefore, be whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors. AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.) (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I. (2012) 3 SCC 387.)"

17. ***From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:***

a) ***Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?***

b) ***The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.***

c) ***If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.***

d) ***The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.***

e) ***The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances***

of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

f) ***The wide discretionary power should be exercised judiciously and not arbitrarily.***

g) ***The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.***

h) ***The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.***

i) ***The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.***

j) ***Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.***

k) ***The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.***

l) ***The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.***

m) ***The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.***

n) ***The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."***

12. Hon'ble Apex Court in ***Zahira Habibullah Sheikh (5) and another vs. State of Gujarat and others (2006)3 SCC 374*** has held as under:-

"27. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise

of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.

28. ***As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not must of course depend on the facts of each case, and has to be determined by the Presiding Judge.***

29. ***The object of the Section 311 is to bring on record evidence not only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court gives evidence against the complainant he should be allowed an opportunity to cross- examine. The right to cross-examine a witness who is called by a Court arises not under the provision of Section 311, but under the Evidence Act which gives a party the right to cross- examine a witness who is not his own witness. Since a witness summoned by the Court could not be termed a witness of any particular party, the Court should give the right of cross- examination to the complainant. These aspects were highlighted in Jamat Raj Kewalji Govani v. State of Maharashtra, (AIR 1968 SC 178).***

30. ***Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.***

13. In the judgments referred above, the Hon'ble Apex Court has specifically observed that the words "*essential to the just decision of the case"* are key words and in this regard, the court must form an opinion that for the just decision of the case, whether it is necessary to recall or examine the witness or not.

14. True it is that in the aforesaid judgments the Hon'ble Apex Court has also cautioned the courts below to be more careful and cautious while exercising power under Section 311 of the Cr.PC, but court can always summon, recall or reexamine any witness at any stage, provided his/her statement is necessary for proper adjudication of the case. It is well settled that wider the power greater is the responsibility on the courts which exercise it and exercise of such power cannot be untrammeled and arbitrary, rather, same must be only guided upon by the object of arriving at a just decision of the case.

15. Similarly, in the judgments supra, the Hon'ble Apex Court has held whether recall of a witness is for filling up of a lacuna or it is for just decision of a case depends on the given circumstances of each case. In the case at hand, it is quite apparent that disputed/questioned signatures and hand writing of both the accused along with their specimen signatures and handwriting (S1 to S40) as well as admitted hand writing (A1 to A14) were sent to RFSL Dharamshala for comparison. Similarly, there is no dispute that report received from RFSL Dharamshala, was placed on record and exhibited as Ext.PX. Though, report being per-se admissible, issued by the Deputy Director RFSL Dharamshala, was taken on record but respondent-State claimed that in absence of formal proof, the report of hand writing expert would not be admissible in evidence. It is also not in dispute that copies of report of hand writing experts were supplied to the accused and as such, the accused were aware of the fact that prosecution has relied upon report of handwriting expert to prove its case. Since aforesaid report was issued by Ms. Meenakshi Mahajan, Deputy Director, RFSL, it cannot be said that examination, if any, of Ms. Meenakshi, at this stage would amount to filling up of lacuna. Though, lacuna means an inherent defect in the prosecution case and not each and every error committed by the investigating officer, as has been held by the Hon'ble Apex Court in *Rajindra Prashad v. Narcotics Cell (1999) 6 SCC*, which has also been taken note of, by the learned Special Judge while passing the impugned order. Otherwise also, as has been held in judgments supra, paramount consideration of Court should be of doing justice to the case and court can and ought to examine witness at any stage and if it results in filling up of lacuna or loopholes then, in that situation it is a subsidiary factor.

16. At the cost of repetition, it may be observed that section 311 of the Cr.PC is in two parts: Second part is purely mandatory and it casts duty upon court to summon, reexamine or recall a witness at any stage, if his/her evidence appears to be essential for the just decision of the case. Apart from above, underlying object of Section 311 of the Cr.PC is that there is no failure of justice on account of mistake of either of the party in bringing valuable piece of evidence on record or leaving ambiguity in the statements of the witnesses examined from either of the side.

17. As far as argument with regard to inordinate delay in moving the instant application having been advanced by the learned counsel for the petitioner is concerned, same deserves outright rejection in the teeth of vide powers conferred on the Court under Section 311 of the Cr.PC to summon witnesses at any stage of any inquiry or trial or other proceedings under the Cr.PC. Needless to say, aforesaid power/discretion is required to be exercised judiciously to the paramount consideration of the Court of doing justice to the case. Since report in the shape of Ext.PX submitted under hand wring and signatures of the Deputy Director RFSL Dharamshala is already on record, no prejudice whatsoever would be caused to the accused in the event of examination of aforesaid officer. It goes without saying that accused will have sufficient opportunity to cross-examine the aforesaid official. The Hon'ble Apex Court in Mannan SK case supra has categorically observed that words '*essential to the just decision of the case'* are the key words and in this regard, court keeping in view all the circumstances, needs to form an opinion whether recall or re-examine or summoning of new witness is necessary or not.

18. In the case at hand, this Court sees no illegality and infirmity in the impugned order, rather same appears to be in conformity with the provision contained in Section 311 of the Cr.PC as well as law laid down by the Hon'ble Apex Court as well as this Court and as such, same deserves to be upheld.

19. Consequently, in view of the detailed discussion made herein above, impugned order passed by the learned trial Court, is upheld and present petition is dismissed being devoid of any merits.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh …..Appellant
Versus
Munni Lal ……Respondent

Cr. Appeal No. 77 of 2008
Reserved on: 24.07.2017
Decided on: 01.08.2017

Indian Penal Code, 1860- Section 279- Accused was driving a vehicle in a rash and negligent manner- vehicle being driven by accused collided with another vehicle- accused was tried and acquitted by the Trial Court- held in appeal that accident had taken place in the middle of the road- there was a truck ahead of the vehicle of the accused and the accused had no option but to take his vehicle to the right- informant was late and was driving the vehicle in a fast speed- Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-6 to 19)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the appellant : Mr. Virender K. Verma, Addl. AG with Mr. Pushpinder Jaswal, Dy. AG and Mr. Rajat Chauhan Law Officer.
For the respondent : Mr. J.S. Bhogal, Senior Advocate with Mr. Parmod Negi, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present criminal appeal, under Section 378 of the Code of Criminal Procedure has been maintained by the State of Himachal Pradesh, against the judgment of acquittal, dated 03.10.2007, passed by learned Judicial Magistrate 1st Class, Court No. 3, Shimla, H.P., in criminal case No. 61/2 of 2006, under Section 279 of the Indian Penal Code.

2. The key facts, giving rise to the present appeal as per the prosecution story are that on 26.05.2006, at about 12.30 p.m., Gurnaib Singh/complainant (hereinafter to be called as "the complainant") was on his way from Shimla to Kaithlighat in his vehicle, bearing No. HR-37-B-5689 and when he reached near Sonu Bangla, one pick up, bearing No. HP-63-1053, came from Shoghi side and collided with his vehicle. It has been alleged that the accused was driving his vehicle in a rash and negligent manner, due to which, the accident has occurred. On the basis of statement of the complainant, FIR was registered against the accused. During the course of investigation spot map was prepared and both the vehicles in question were taken into

possession, vide separate seizure memo and were got mechanically examined. Statements of the other witnesses were also recorded under Section 161 Cr.P.C., photographs of the spot were got clicked and after completion of investigation, challan was presented in the Court.

3. Prosecution, in order to prove its case, examined as many as 7 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C, wherein he denied the prosecution case and claimed innocence. Accused did not lead any defence evidence. The learned trial Court, vide impugned judgment dated 03.10.2007, acquitted the accused for the commission of offence punishable under Sections 279 of the IPC, hence the present appeal.

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

5. Learned Additional Advocate General has argued that the spot map, coupled with the statements of the prosecution witnesses, makes it clear that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt and after re-appreciating the evidence, the accused is required to be convicted. On the other hand, learned Senior Counsel appearing on behalf of the respondent has argued that the prosecution has failed to prove the guilt of the accused, as it was the complainant, who was driving the vehicle in a rash and negligent manner, as he was on VIP duty and in hurry to reach Kaithlighat, before the Railway Minister reaches there. He has further argued that taking into consideration the time of the accident and the distance between the place of accident and Kaithlighat, it is clear that it was the complainant, who was driving the vehicle in a rash and negligent manner. In rebuttal, learned Additional Advocate General has argued that the case of the accused is of simple denial and he has not given any explanation while he was being examined under Section 313 Cr.P.C.

6. To appreciate the arguments of learned Additional Advocate General and learned defence counsel, this Court has gone through the record in detail and minutely scrutinized the statements of the witnesses.

7. PW-1, Narinder Kumar, has deposed that the vehicles bearing No. HR-37-B-5689 and HP-63-1053, were taken into possession alongwith their documents, vide seizure memos, Ext. PW-1/A and Ext. PW-1/B. In his cross-examination, he has admitted his signature on Ext. PW-1/B. He has also admitted that documents of the vehicle No. HP-63-1053 has been taken into possession in his presence.

8. PW-2, Head Constable, Manoj Kumar, has deposed that he has recorded the statement of the complainant, Ext. PW-2/A, on the basis of which, FIR, Ext. PW-2/B was registered. He has further deposed that he prepared the spot map, Ext. PW-2/D and took into possession both the vehicles, vide seizure memos, Ext. PW-1/A and PW-1/B, in presence of the witnesses. He has admitted that vehicle, bearing No. HR-37-B-5689 has been handed over to the complainant on sapurdari. He has further deposed that photographs of the spot has been taken, which are mark A-1 to A-7, both the vehicles were mechanically examined and mechanical report, mark A-8 was obtained. He has also recorded the statements of the witnesses, under Section 161 Cr.P.C. In his cross-examination, he has deposed that he reached on the spot at about 1:30 p.m. and at that time accused Muni Lal, Complainant Gurnaib Singh, Sandeep and Narinder were present there. He has admitted that on the spot there is a curve.

9. PW-3, complainant, in his examination-in-chief, has deposed that on 26.05.2006, at about 12:30 p.m. when he reached at Sonu Bangla, in his vehicle bearing No. HR-37-B-5689, one pick up, which was on its way from Shoghi to Shimla, collided with his vehicle. He has further deposed that his vehicle, alongwith documents was taken into possession, vide seizure memo, Ext. PW-1/A and thereafter handed over to him on sapurdari, copy of the driving licence is Ext. PW-3/A, R.C. is Ext. PW-3/B and Insurance is Ext. PW-3/C. In his cross-examination, he has admitted that at the spot, there is double way traffic road. He has also admitted that a truck was in front of the vehicle of the accused and when a truck gave pass to the vehicle of the accused then it collided. He has also admitted that his vehicle was parked on the edge of the road. He has denied that the accused was not driving his vehicle in a rash and negligent manner.

10. PW-4, Mohammed Shah, has deposed that on 27.05.2006, he was sitting inside the vehicle of the accused, when they reached at Sonu Bangla and tried to pass the truck, which was parked on the road, one qualis collided with their vehicle. He has admitted that both the drivers were rash and negligent. In cross-examination, he has admitted that speed of the vehicle was normal.

11. PW-5, Sandeep Singh, has deposed that on 27.05.2006, he was travelling with the complainant, in his vehicle and at about 12:30 p.m. when they reached at Sonu Bangla, a pick up, bearing No. HP-63-1053 collided with their vehicle. He has further deposed that the accused was driving the vehicle in a rash and negligent manner. In his cross-examination, he has admitted that on the spot there is a curve. He has also admitted that a truck was also on its way from Shoghi to Shimla in front of the vehicle of the accused. He has denied that the complainant was driving his vehicle in a rash and negligent manner.

12. PW-6, Vikas Sharma, has taken the spot photographs, Ext. PW-6/A to Ext. PW-6/G. In his cross-examination, he admitted that he has not given the negatives to the Police.

13. PW-7, Head Constable, Sanjeev Kumar, has deposed that both the vehicles were mechanically examined by him, on the basis of which, he has prepared the report, Ext. PW-7/A and Ext. PW-7/B. In his cross-examination, he has admitted that there was no mechanical defect in both the vehicles.

14. In the present case, prosecution was required to prove that the accused was driving the vehicle in a rash and negligent manner, so as to endanger human life. However, mere fact that the accused was driving the vehicle in fast speed does not amount to rash and negligent driving. PW-3, Gurnaib Singh, has specifically deposed that the vehicle came from the other side and hit his vehicle, however the accident has taken place in middle of the road, i.e. 3 feet towards the right side of the road from middle of the road by the offending vehicle and nearly in middle of the road by vehicle of the complainant. After the accident, vehicle of the complainant has gone ahead to a distance of 20 to 30 feet and it stopped on the left side, it shows that vehicle of the complainant was being driven in such a speed that even after other vehicle hit the vehicle of the complainant, he could not stop his vehicle from 20 to 30 feet, whereas the offending vehicle being driven by the accused was standing at the same place. Further prosecution witnesses have deposed that there was a truck ahead from the vehicle of the accused and presence of that truck on the spot itself shows that the accused could have no option, but to take his vehicle to the right.

15. At the same point of time, PW-5, Sandeep Singh, has admitted that the on the spot there is a curve and as far as, PW-4, Mohammed Shah, both the drivers were rash and negligent. The statements of these witnesses can be taken against the complainant. Further the complainant was on VIP duty and he had to reach Kaithlighat within specific time. The difference between the time of accident and time the complainant was to reach Kaithlighat, as well as the distance between the place of accident and Kaithlighat makes it clear that the complainant was driving his vehicle in fast speed.

16. In these circumstance, it is clear that the complainant was driving his vehicle in a fast speed. On the other hand, there is nothing on record to suggest that the accused was driving his vehicle in a rash and negligent manner. All this goes to show that prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt and in these circumstances, acquittal of the accused needs no interference.

17. It has been held in **K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258,** that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/misappreciation of evidence on record, reversal thereof by High Court was not justified.

18. The Hon'ble Supreme Court in **T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

19. In view of the aforesaid decisions of the Hon'ble Supreme Court and the discussion made hereinabove, I find no merit in this appeal and the same deserves dismissal and is accordingly dismissed. Pending application(s), if any, shall also stands disposed of.

****

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

Shri Balbir Singh @Rana ….Petitioner.
Vs.
State of Himachal Pradesh …..Respondent.

Cr. MP(M) No.: 626 of 2017 a/w
Cr.MMO No. 222 of 2017
Reserved on: 12.07.2017
Date of Decision: 02.08.2017

Code of Criminal Procedure, 1973- Section 167 (2)- An FIR was registered against the petitioner for the commission of offences punishable under Sections 452, 392 and 307 read with Section 34 of I.P.C.- petitioner was arrested on 17.9.2016- other accused B and L were arrested earlier and the challan was filed against them prior to the arrest of the petitioner- petitioner filed an application for bail pleading that the challan was not filed against him within statutory period and he is entitled to bail- application was dismissed by the Magistrate on the ground that challan had already been filed before Additional Sessions Judge, which was to be withdrawn and presented before the Magistrate as Learned Sessions Judge was on leave – subsequently, an order was passed that the charge sheet was not filed against the petitioner and was being filed against him before the Court- held that challan was not filed initiallyagainst the petitioner and subsequently a supplementary challan was filed before the Additional Sessions Judge- challan was filed against the petitioner before the Magistrate after the expiry of 90 days- the Competent Court to receive the challan was the Court of Magistrate- Only Magistrate could have taken cognizance in the matter and Sessions Judge was not competent to take cognizance- presentation of challan before the Court competent to take cognizance is necessary - an indefeasible right occurred by not filing the challan within the statutory period- petition allowed- order rejecting the bail set aside- petitioner ordered to be released on bail in the sum of Rs.1 lac with one surety in the like amount. (Para- 17 to 32)

Cases referred:

Uday Mohanlal Acharya Vs. State of Maharashtra (2001) 5 Supreme Court Cases 453
Sanjay Dutt Vs. State through CBI (1994) 5 SCC 410
Union of India through Central Bureau of Investigation Vs. Nirala Yadav alias Raja Ram Yadav alias Deepak Yadav (2014) 9 Supreme Court Cases 457

For the petitioner(s): M/s. Ashok Saini and Ajeet Jaswal, Advocates.
For the respondent: Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

This judgment shall dispose of both these petitions, which with the consent of the parties, were heard together.

2. Brief facts necessary for the adjudication of the present petitions are that an FIR was registered under Sections 452, 392, 307 read with Section 34 of the Indian Penal Code, dated 13.12.2015 at Police Station Indora, District Kangra, on the complaint of Ram Mohammad Isa Singh to the effect that the complainant was a practicing lawyer at Pathankot and his elder brother Raj Vikram and his parents used to remain at home. As per the complainant, on the previous day, he had gone to Chandigarh in connection with his cases and he reached home at around 10:30 p.m. His father Dilbag Rai was lying on his bed, whereas his mother Abhinash Rai prepared food, which was eaten by him as well as his brother Raj Vikram. At around 11:30 p.m., all family members went to sleep in their respective rooms. It was further mentioned in the FIR that at around 6:15 a.m. in the morning, their servant Yashpal, who used to come for milking cow, raised alarm that his parents (parents of the complainant) had been beaten by some one and they were drenched in blood. He opened the door of his parents' room and saw injuries on the face and head of his mother, who was lying unconscious on the bed, whereas his father was lying on a separate bed in the same room and there were blood stained injuries on the head and body of his father. Thereafter, he went to the room of his brother Raj Vikram and found him also lying in an injured condition with blood on his head and face. All articles lying in the Almirahs of both the rooms were thrown open and lockers of the Almirahs were also broken. Important documents as well as cash and jewellary, which were kept in the Almirahs were found stolen. It was further mentioned in the FIR that Raj Vikram slowly told the complainant that men of Baljinder Singh had injured them and that about 3-4 persons had entered their house and had hit them with deadly sharp edged weapons. It was further mentioned in the FIR that Baljinder Singh, son of Kartar Singh, who at the relevant was confined in Gurdaspur Jail in connection with a case lodged against him by the complainant, had threatened him and his family and that he suspected that Baljinder Singh Bajwa was behind the attack on his family members.

3. Records demonstrate that as a result of injuries which were suffered by him, Dilbag Rai passed away on 13.12.2015 itself. Smt. Abhinash Kaur also succumbed to her injuries on 23.12.2015.

4. On 25.12.2015, Manjeet Singh, son of Budh Singh, resident of Prem Nagar, Tehsil Batala, District Gurdaspur and Surender Singh, son of Waryam Singh, resident of Touki, Tehsil and Police Station Indora were arrested, who after investigation were released on 29.12.2015. Accused Lakhwinder Singh was arrested on 17.02.2016 and he was produced before the Court on 18.02.2016. Police remand of Baljinder Singh was obtained on 04.03.2016. Petitioner before this Court, namely, Balbir Singh was later on arrested on 17.09.2016. Challan was filed against Baljinder Singh and Lakhwinder Singh on 16.05.2016.

5. Petitioner filed an application under Section 167(2) of the Code of Criminal Procedure in the Court of Judicial Magistrate, 1st Class Indora on 16.01.2017. It was mentioned therein that petitioner was in custody since 17.09.2016 in FIR No. 251 of 2015, dated 13.12.2015, registered under Sections 452, 392, 307, 302 & 120-B of the Indian Penal Code at Police Station Indora, District Kangra, H.P. and that he was falsely implicated in the case. It was further mentioned in the application that after investigation, State had failed to file charge sheet against him within 90 days and as he had spent more than 92 days in judicial custody since his arrest on 17.09.2016 and as no charge sheet stood filed against him, he be released from judicial custody in the interest of justice.

6. Application so filed by the petitioner was dismissed by the Court of learned Judicial Magistrate, 1st Class Indora vide order dated 16.01.2017, which reads as under:

"16.01.2017

Present: *Sh. Sanjeev Kumar Lakha, APP, for the State.*

Accused Balbir Singh @ Rana S/o Sh. Lakhwinder Singh produced through Video Conference, at 12:30 p.m. in custody of Sh. Vinod Sharma Asstt. Superintendent of Sub-Jail Nurpur, in the presence of Sh. Sanjay Sehra, Advocate for the accused. The accused has

been stated about his right to move his bail application and also about any problem in Sub-Jail Nurpur.

An application seeking judicial remand of accused Balbir Singh @ Rana has been filed by the SHO, Police Station Indora, through Ld. APP. SHO Police Station Indora has sought time for filing the challan in this Court after withdrawing the same from the Court of Ld. Addl. Sessions Judge-III, Kangra at Dharamshala as Ld. Addl. Sessions Judge-III, Kangra at Dharamshala is on leave and therefore no effective order has yet been passed by the Court of Ld. Addl. Sessions Judge-III, Kangra at Dharamshala. Prayer considered and allowed.

In these circumstances, to my mind, to prevent the accused person from committing any further offence at this stage, accused is required to be remanded to judicial custody. Moreover, present case is exclusively triable by the Court of Sessions. Therefore, keeping in view gravity of offence, application moved by the Police for judicial remand of the accused is considered and allowed and the accused (Balbir Singh @ Rana) is remanded into judicial custody till 28.01.2017, on which date, he be produced before this Court at 10:00 A.M. sharp through legal process as per law. Put up on 28.01.2017. Endorsement be made on jail warrant.

Today, an application U/S 167(2) of Cr. P.C. has also been filed by ld. Counsel for the accused seeking release of accused Balbir Singh @ Rana from the judicial custody. Reply to this application has been filed by the SHO, Police Station Indora through ld. APP, in which, it is stated that the Challan against the accused Balbir Singh @ Rana has been filed before the Court of Ld. Addl. Sessions Judge-III, Kangra at Dharamshala on dated 13.12.2016 as per R.C. No. 213/16 dated 13.12.2016. In view of these circumstances, present application U/S 167(2) of Cr. P.C. is not maintainable at this stage and hence, present application is dismissed as the Challan has already been filed in the Court against the present accused namely Balbir Singh @ Rana. Accordingly, present application is disposed of. It be tagged with relevant case file/FIR after its due completion/registration.

Put up on 28.01.2017. Endorsement be made on jail warrant.

Sd/-

(Niranjan Singh),

JMIC, Indora."

7. Thereafter, on 17.01.2017, the following order was passed by the Court of learned Judicial Magistrate 1st Class, Indora:

"*Office report seen.*

Ld. APP stated that the case arising from present FIR against accused Balbir Singh & Surjeet Singh have not been committed before the Court of Ld. Sessions Judge, Kangra at Dharamshala as charge sheet was not filed by the Police against them when charge sheet was filed against accused Baljinder Singh & Lakhwinder Singh and these are in judicial custody till 28.01.2017. Although other accused persons namely Lakhwinder Singh and Baljinder Singh are facing trial before the Court of Ld. Sessions Judge, Kangra at Dharamshala after committing the case by this Court vide order dated 04.07.2016.

Heard. Record perused. There are sufficient grounds to proceed against the accused Balbir Singh and Surjeet Singh for commission of offence punishable U/Ss. 452,392,307,302 readwith Section 120-B of IPC.

As it is alleged that it is a supplementary challan, therefore, copy of the same is required to be supplied to all the accused persons. Therefore, let production warrant be issued to the concerned Superintendent of Jail to produce the accused persons namely Lakhwinder Singh, Baljinder Singh, Balbir Singh &

Surjeet Singh in person before this Court on dated 28.01.2017, at 10:00 a.m. sharp, so that copy of this supplementary challan be supplied to them and also for further orders.

Sd/-

(Niranjan Singh),

JMIC, Indora."

8. On 27.01.2017 and 28.01.2017, the following orders were passed by the Court of learned Judicial Magistrate, 1st Class Indora:

"27.01.2017: Presented by SHO Tilak Raj, P.S. Indora. Crl. Ahlmad to check and report for 28.01.2017.

Sd/-

(Niranjan Singh),

Judicial Magistrate 1st Class,

Indora, District Kangra, H.P."

"28.01.2017:

Pt.: *Sh. V.K. Rehalia, PP, for the State.*

Office report seen.

This supplementary challan be tagged with other supplementary challan fixed for today."

Sd/-

(Niranjan Singh),

Judicial Magistrate 1st Class,

Indora, District Kangra, H.P."

9. Application for grant of regular bail filed by the present petitioner under Section 439 of the Code of Criminal Procedure was dismissed by the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala vide order dated 18.02.2017.

10. Feeling aggrieved, petitioner filed Cr.MPM No. 626 of 2017 under Section 439 read with Section 167(2) of the Code of Criminal Procedure praying for release of petitioner on regular bail in FIR No. 251 of 2015, dated 13.12.2015 registered against him at Police Station Indora. In the petition so filed, the following prayer was made:

"It is therefore most humbly and respectfully submitted that the petitioner may be ordered to be released on bail, pending Trial, in FIR No. 251/2015 dated 13.12.2015 under Section 452, 392, 307, 302 and 120-B IPC Police Station Indora District Kangra (HP)."

11. During the course of arguments in the said petition, learned counsel for the petitioner made submissions qua the illegality of order which was passed by the Court of learned Judicial Magistrate, 1st Class Indora, dated 16.01.2017, vide which, application filed by the petitioner before the said Court under Section 167(2) of the Code of Criminal Procedure was dismissed. When it was pointed out that in the petition itself, no relief was claimed by the petitioner for quashing of order dated 16.01.2017, passed by the learned Judicial Magistrate, 1st Class Indora, on 21.06.2017, a prayer was made on behalf of the learned counsel for the petitioner before this Court to permit the petitioner to independently assail the said order, which liberty was granted by this Court on 21.06.2017. Thereafter, Cr.MMO No. 222 of 2017 was filed by the petitioner, in which the following prayers were made:

"It is therefore most humbly and respectfully submitted that Impugned Order Dated 16.01.2017 (Annexure P-5) passed u/s 167(2) Cr. PC by Ld. JMIC Indora in FIR No. 251/2015 Dated 13.12.2015 under

sections 452,392,307,302,120-B IPC Police Station Indora District. Kangra (HP) may be quashed in the interest of justice.

With

The further prayer that all/any further proceeding arising as a consequence of the said order may also be quashed.

With

The further prayer that the petitioner may be released forthwith in the abovenoted case.

With

The further prayer that any other order/writ/direction this Hon'ble Court deems fit in the facts and circumstances of the case may also be passed in the interest of justice."

12. Both the cases were heard together on 28.06.2017.

13. Learned counsel for the petitioner has primarily argued that the order so passed by the Court of learned Judicial Magistrate, 1st Class Indora, dated 16.01.2017, vide which, the application filed by the present petitioner under Section 167(2) of the Code of Criminal Procedure was dismissed, is a perverse order and not sustainable in the eyes of law, as while dismissing said application, filed by the present petitioner, learned Judicial Magistrate, 1st Class, Indora erred in not appreciating that as the challan was not filed against the petitioner within the statutory period as is contemplated under Section 167(2) of the Code of Criminal Proceduce, the petitioner was entitled to be released on bail as detention of the petitioner thereafter was totally illegal.

14. As per learned counsel for the petitioner, perusal of the impugned order demonstrates that the application by the petitioner was dismissed by the Court of learned Judicial Magistrate, 1st Class Indora on the ground that challan already stood filed against accused Balbir Singh in the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala on 13.12.2016 as per R.C. No. 2134/16 dated 13.12.2016 and application by the petitioner under Section 167(2) of the Code of Criminal Procedure was thus dismissed as not maintainable. Learned counsel for the petitioner submitted that the findings so returned by the learned Court below were perverse findings as no challan stood filed against the petitioner in the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala on 13.12.2016 and in fact challan against the petitioner was filed in the Court of learned Judicial Magistrate, 1st Class Indora on 27.01.2017 and the same was ordered to be tagged with other supplementary challan by the said Court on 28.01.2017.

15. On the other hand, learned Deputy Advocate General, on the basis of records has submitted that challan stood filed against the petitioner in the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala on 13.12.2016 and because the said challan was filed within the statutory period, there is no merit in the contention of the petitioner that no challan was filed within the period contemplated under Section 167(2) of the Code of Criminal Procedure. Learned Deputy Advocate General further submitted that even if it is assumed that the challan was filed in a wrong Court of law, then also no benefit of the irregularity so committed by the prosecution can be taken by the accused, because it is not as if no challan was filed at all by the prosecution within the statutory period. On these bases, learned Deputy Advocate General has prayed that the petitions be dismissed.

16. I have heard the learned counsel for the parties and have also gone through the records of the case, which have been placed before this Court by the State on 12.07.2017.

17. Records demonstrate that Incharge Police Station Indora, District Kangra vide communication dated 11.12.2016 filed a supplementary challan under Section 173(8) of the Code of Criminal Procedure in FIR No. 251/15, dated 13.12.2015, under Sections 452, 392, 307,302

and 120-B of the Indian Penal Code registered at Police Station Indora against the present petitioner Balbir Singh and one Surjit Singh (photocopy of the same is ordered to be placed on record).

18. There are two Road Certificates on record, dated 13.12.2016 and 17.01.2017 (photocopies of the same are ordered to be placed on record). Road Certificate dated 13.12.2016 demonstrates that vide the said Road Certificate issued by MHC Police Station Indora, he forwarded supplementary challan in Case FIR No. 251/15, dated 13.12.2015, under Sections 452,392,302,307 and 120-B of the Indian Penal Code, Police Station Indora through HC Inderjeet No. 203 to the learned Fast Track Court, Dharamshala. There is also an endorsement "Received", which finds mentioned therein and the same is also dated 13.12.2016. Road Certificate dated 17.01.2017 is addressed by MHC Police Station Indora to the Court of learned Judicial Magistrate 1st Class Indora stating therein that challan with regard to Case No. 251/15, dated 13.12.2015 under Sections 302,392,307,452 and 120-B of the Indian Penal Code was being sent through SI Subhash Singh. There is also on record an application addressed by Incharge, Police Station Indora dated 16.01.2017 (photocopy of the same is ordered to be placed on record) to the Court of learned Judicial Magistrate, 1st Class Indora in Case FIR No. 251/15, dated 13.12.2015, under Sections 452,392,302,307 and 120-B of the Indian Penal Code, Police Station Indora on the following subject:

> *"Aaropi Balvir Singh Urf Rana wa Surjit Singh Uproket ke Khilaf Prastuet Challan Ke Sandherb Mai."*

A perusal of the same demonstrates that it is mentioned therein that petitioner Balbir Singh was arrested on 17.09.2016 and the limit of 90 days was expiring on 15.12.2016. It is further mentioned in this application that challan against the petitioner stood filed on 13.12.2016. Relevant extract of this application is quoted hereinbelow:

> *"……Jahan tak anupurek challan balbir singh wa surjit singh ke virudh taiyar karne ka sambandh hai 90 din nayayik samay Awadhi ko dekhete hue challan tithi 13.12.2016 ko maanniye atiriket zila awam sater nayayadhis-III ki aadalet mai mutabik RC No.213/16 dinank 13.12.2016 ko wadest mu aa inderjeet no. 203 ke prastut nayayalya kiya ja chukka hai.*
>
> *Mahodeya ne tithi 22.12.2016 ko aadesh diya ki Committal Proceeding ke liye challan JMIC Indora aadalet mai paish kiya jawe. Is sambandh mai maaniye atiriket zila awam sater nayayadhis-III, Kangra Sthith Dharamshala mai Committal Proceeding ke liye challan mahodeye ki aadalet mai bhazene bare guzarish ki zani thi lakin sambandhit nayayadhis mahodeye thithi 13.1.2017 tak awakash awam 14,15-1-2017 ka awakash hone ki wajeh se agle kal thithi 17.01.2017 ko is sambandh mai guzarish ki jayegi. Yeh bilkul satye na hai ki police dhono aaropiyon ke virudh challan pesh karne mai asmerth rahi hai. Challan samay par nayayaley mai prastut kiya ja chukka hai. Ata wistrit report pesh aadalet hai."*

19. One thing which is apparent from this application is that prosecution was directed on 22.12.2016 by the learned Judicial Magistrate, 1st Class Indora that challan be filed in the Court of learned Judicial Magistrate, 1st Class Indora for committal proceedings and on account of these orders, challan was filed against the petitioner in the Court of learned Judicial Magistrate 1st Class Indora on 17.01.2017. This challan was delivered in the Court of Judicial Magistrate 1st Class Indora by SI Subhash Singh vide Road Certificate of even date. The order passed by the Court of learned Judicial Magistrate 1st Class, Indora dated 17.01.2017 (Annexure-P6) reads as under:

> *"Office report seen.*
>
> *Ld. APP stated that the case arising from present FIR against accused Balbir Singh & Surjeet Singh have not been committed before the Court of Ld. Sessions Judge, Kangra at Dharamshala as charge sheet was not filed by the*

Police against them when charge sheet was filed against accused Baljinder Singh & Lakhwinder Singh and these are in judicial custody till 28.01.2017. Although other accused persons namely Lakhwinder Singh and Baljinder Singh are facing trial before the Court of Ld. Sessions Judge, Kangra at Dharamshala after committing the case by this Court vide order dated 04.07.2016.

Heard. Record perused. There are sufficient grounds to proceed against the accused Balbir Singh and Surjeet Singh for commission of offence punishable U/Ss. 452,392,307,302 readwith Section 120-B of IPC.

As it is alleged that it is a supplementary challan, therefore, copy of the same is required to be supplied to all the accused persons. Therefore, let production warrant be issued to the concerned Superintendent of Jail to produce the accused persons namely Lakhwinder Singh, Baljinder Singh, Balbir Singh & Surjeet Singh in person before this Court on dated 28.01.2017, at 10:00 a.m. sharp, so that copy of this supplementary challan be supplied to them and also for further orders."

20. Therefore, from the above facts, it is clear that challan for the first time came to be filed before the competent Court, i.e. the Court of learned Judicial Magistrate 1st Class, Indora against the present petitioner on 17.01.2017 vide application so addressed to the said Court by Incharge Police Station Indora dated 17.01.2017, as is envisaged under Section 2(r) of the Code of Criminal Procedure, 1973. There is nothing on record from which it can be deciphered that on 13.12.2016 challan/supplementary challan was filed against the petitioner, as provided in Section 2(r) (supra) before a Magistrate competent to take cognizance of such challan. Though as per Road Certificate dated 13.12.2016, challan was also sent to the Court of learned Fast Track Court, Dharamshala by MHC Police Station Indora, but there is no order on record passed by the learned Fast Track Court, Dharamshala about taking cognizance of the challan so filed before it. In fact, there is no earlier order to the order passed by the learned Judicial Magistrate 1st Class, Indora dated 17.01.2017 *(supra)* pertaining to cognizance being taken of any challan/supplementary challan having been filed by the prosecution against the accused. Moreover, the very fact that challan was filed in the Court of learned Judicial Magistrate 1st Class Indora by sending the same through Road Certificate itself demonstrates that the challan was with the police before the same was so filed before the Court of learned Judicial Magistrate 1st Class, Indora. At the cost of repetition, I state that what happened with challan which was purportedly filed vide Road Certificate 13.12.2016 before the learned Fast Track Court, Dharamshala, District Kangra is not on record. During the course of arguments, a pointed question was put to the learned Deputy Advocate General in this regard, who on the basis of instructions as well as records fairly submitted that save and except Road Certificate dated 13.12.2016, there was nothing on record to suggest that challan/supplementary challan was actually filed in the Court of learned Fast Track Court, Dharamshala against the petitioner on 13.12.2016. Learned Deputy Advocate General has further on instructions submitted that on record there is no order passed on the challan which was purportedly sent through Road Certificate dated 13.12.2016 to the Court of learned Fast Track Court, Dharamshala by the said Court.

21. Section 173 of the Code of Criminal Procedure, 1973 envisages that every investigation under Chapter XII of the said Code shall be completed without unnecessary delay and as soon as the investigation is completed, the officer incharge of the Police Station shall forward to the Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government stating therein particulars as are mentioned in Sub-section (2) (i) thereof.

22. Section 2(r) of the Code of Criminal Procedure Code reads as under:

"2(r) "police report" means a report forwarded by a police officer to a Magistrate under sub-section(2) of section 173"

23. A harmonious perusal of Section 2(r) and Section 173 demonstrate that law envisages submission of a police report after completion of investigation to be filed by officer incharge of the Police Station before a Magistrate empowered to take cognizance of the offence on the basis of the said police report. It has not been disputed during the course of arguments that the Magistrate, who was empowered to take cognizance of the offences alleged to have been committed by the petitioner was Judicial Magistrate 1st Class, Indora, before whom challan was presented/filed on 17.01.2017. It is not in dispute that as from the date of arrest of the petitioner, the statutory period of 90 days as is contemplated under Section 167(2) of the Code of Criminal Procedure expired on 15.12.2016. It is also not in dispute that there is nothing on record from which it can be inferred that before 15.12.2016, any challan/supplementary challan was filed by Incharge of Police Station Indora before the Magistrate empowered to take cognizance of the offences alleged to have been committed by the petitioner. What happened to the challan which was purportedly filed before the learned Fast Track Court, Dharamshala on 13.12.2016 has not been explained by the State. On instructions, what was stated by learned Deputy Advocate General was that as the challan was wrongly presented on 13.12.2016 before the learned Fast Track Court, the mistake was subsequently rectified by filing the challan before the Magistrate competent to take cognizance, i.e. Judicial Magistrate 1st Class Indora on 17.01.2017.

24. In these circumstances, the moot question which has to be decided by this Court is whether presentation of challan/supplementary challan vide Road Certificate dated 13.12.2016 by officer incharge Police Station Indora before the learned Fast Track Court, Dharamshala, which Court otherwise was not competent to take cognizance of the offences alleged against the petitioner, as envisaged under Section 2(r) of the Code of Criminal Procedure can be termed to be sufficient compliance of provisions of Section 173 of the said Code. In my considered view, the answer is no for reasons mentioned hereinafter.

25. A three Judge Bench of the Hon'ble Supreme Court in ***Uday Mohanlal Acharya*** Vs. ***State of Maharashtra*** (2001) 5 Supreme Court Cases 453, per majority after relying upon various judgments of the Hon'ble Supreme Court has held that an indefeasible right accrues to the accused on the failure of the prosecution to file the challan within the period specified under sub-section(2) of Section 167 and right can be availed of by the accused if he is prepared to offer the bail and abide by the terms and conditions of the bail. Hon'ble Supreme Court has also held that the said indefeasible right does not survive or remain enforceable on the challan being filed, if already not availed of. While holding so, the Hon'ble Supreme Court relied upon the Constitutional Bench judgment by the Hon'ble Supreme Court in Sanjay Dutt Vs. State through CBI (1994) 5 SCC 410. Hon'ble Supreme Court further went on to hold as under:

> *"13…………………On the aforesaid premises, we would record our conclusions as follows:*
>
> *1. Under sub-section (2) of Section 167, a Magistrate before whom an accused is produced while the police is investigating into the offence can authorize detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding 15 days on the whole.*
>
> *2. Under the proviso to the aforesaid sub-section(2) of Section 167, the Magistrate may authorize detention of the accused otherwise than in the custody of police for a total period not exceeding 90 days where the investigation relates to offence punishable with death, imprisonment for life or imprisonment for a term of not less than 10 years, and 60 days where the investigation relates to any other offence.*
>
> *3. On the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the Magistrate.*

4. When an application for bail is filed by an accused for enforcement of his indefeasible right alleged to have been accrued in his favour on account of default on the part of the investigating agency in completion of the investigation within the specified period, the Magistrate/Court must dispose of it forthwith, on being satisfied that in fact the accused has been in custody for the period of 90 days or 60 days, as specified and no charge-sheet has been filed by the investigating agency. Such prompt action on the part of the Magistrate/court will not enable the prosecution to frustrate the object of the Act and the legislative mandate of an accused being released on bail on account of the default on the part of the investigating agency in completing the investigation within the period stipulated.

5. If the accused is unable to furnish the bail as directed by the Magistrate, then on a conjoint reading of Explanation I and the proviso of sub-section (2) of Section 167, the continued custody of the accused even beyond the specified period in para (a) will not be unauthorized, and therefore, if during that period the investigation is complete and the charge-sheet is filed then the so-called indefeasible right of the accused would stand extinguished.

6. The expression "if not already availed of" used by this Court in Sanjay Dutt Case must be understood to mean when the accused files an application and is prepared to offer bail on being directed. In other words, on expiry of the period specified in para(a) of the proviso to sub-section(2) of Section 167 if the accused files an application for bail and offers also to furnish the bail on being directed, then it has to be held that the accused has availed of his indefeasible right even though the Court has not considered the said application and has not indicated the terms and conditions of bail, and the accused has not furnished the same."`

26. Therefore, it is evident from the above judgment of the Hon'ble Supreme Court that on expiry of the statutory period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default on the part of the investigating agency in completing the investigation within the period prescribed and the accused is to be released on bail if is prepared to furnish the bail as directed by the Magistrate.

27. In ***Union of India through Central Bureau of Investigation*** Vs. ***Nirala Yadav alias Raja Ram Yadav alias Deepak Yadav*** (2014) 9 Supreme Court Cases 457, the Hon'ble Supreme Court has held as under:

"44. At this juncture, it is absolutely essential to delve into what were the precise principles stated in Uday Mohanlal Acharya's case and how the two-Judge Bench has understood the same in Pragyna Singh Thakur (supra). We have already reproduced the paragraphs in extenso from Uday Mohanlal Acharya's case and the relevant paragraphs from Pragyna Singh Thakur (supra). Pragyna Singh Thakur (supra) has drawn support from Rustam and others case to buttress the principle it has laid down though in Uday Mohanlal Acharya's case the said decision has been held not to have stated the correct position of law and, therefore, the same could not have been placed reliance upon. The Division Bench in paragraph 56 which have been reproduced hereinabove, as referred to paragraph 13 and the conclusions of Uday Mohanlal Acharya's case. We have already quoted from paragraph 13 and the conclusions.

45. The opinion expressed in paragraph 54 and 58 in Pragyna Singh Thakur (supra) which we have underlined, as it seems to us, runs counter to the principles stated in Uday Mohanlal Acharya (supra) which has been followed in Hassan Ali Khan and another (supra) and Sayed Mohd. Ahmad Kazmi. The decision in Sayed Mohd. Ahmad Kazmi's case has been rendered by a three-Judge Bench. We may hasten to state, though in Pragyna Singh Thakur's case the

learned Judges have referred to Uday Mohanlal Acharya's case but as stated the principle that even if an application for bail is filed on the ground that the charge-sheet was not filed within 90 days, but before the consideration of the same and before being released on bail, if charge- sheet is filed the said right to be enlarged on bail is lost. This opinion is contrary to the earlier larger Bench decisions and also runs counter to the subsequent three-Judge Bench decision in Mustaq Ahmed Mohammed Isak's case. We are disposed to think so, as the two-Judge Bench has used the words "before consideration of the same and before being released on bail", the said principle specifically strikes a discordant note with the proposition stated in the decisions rendered by the larger Benches.

46. At this juncture, it will be appropriate to refer to the dissenting opinion by B.N. Agarwal, J. in Uday Mohanlal Acharya's case. The learned Judge dissented with the majority as far as interpretation of the expression "if not already availed of" by stating so:-

"29. My learned brother has referred to the expression "if not already availed of" referred to in the judgment in Sanjay Dutt case for arriving at Conclusion 6. According to me, the expression "availed of" does not mean mere filing of application for bail expressing therein willingness of the accused to furnish the bail bond. What will happen if on the 61st day an application for bail is filed for being released on bail on the ground of default by not filing the challan by the 60th day and on the 61st day the challan is also filed by the time the Magistrate is called upon to apply his mind to the challan as well as the petition for grant of bail? In view of the several decisions referred to above and the requirements prescribed by clause (a)(ii) of the proviso read with Explanation I to Section 167(2) of the Code, as no bail bond has been furnished, such an application for bail has to be dismissed because the stage of proviso to Section 167(2) is over, as such right is extinguished the moment the challan is filed.

30. In this background, the expression "availed of" does not mean mere filing of the application for bail expressing thereunder willingness to furnish bail bond, but the stage for actual furnishing of bail bond must reach. If the challan is filed before that, then there is no question of enforcing the right, howsoever valuable or indefeasible it may be, after filing of the challan because thereafter the right under default clause cannot be exercised."

On a careful reading of the aforesaid two paragraphs, we think, the two- Judge Bench in Pragyna Singh Thakur's case has somewhat in a similar matter stated the same. As long as the majority view occupies the field it is a binding precedent. That apart, it has been followed by a three-Judge Bench in Sayed Mohd. Ahmad Kazmi's case. Keeping in view the principle stated in Sayed Mohd. Ahmad Kazmi's case which has based on three-Judge Bench decision in Uday Mohanlal Acharys's case, we are obliged to conclude and hold the principle laid down in Paragraph 54 and 58 of Pragyna Singh Thakur's case(which have been underlined by us) do not state the correct principle of law. It can clearly be stated that in view of the subsequent decision of a larger Bench that cannot be treated to be a good law. Our view finds support from the decision in Union of India and others v. Arviva Industries India Limited and others.

47. Coming to the facts of the instant case, we find that prior to the date of expiry of 90 days which is the initial period for filing the charge-sheet, the prosecution neither had filed the charge-sheet nor had it filed an application for extension. Had an application for extension been filed, then the matter would have been totally different. After the accused respondent filed the application, the prosecution submitted an application seeking extension of time for filing of the charge-sheet. Mr. P.K. Dey, learned counsel for the appellant would submit that the same is permissible in view of the decision in Bipin Shantilal Panchal (supra)

but on a studied scrutiny of the same we find the said decision only dealt with whether extension could be sought from time to time till the completion of period as provided in the Statute i.e., 180 days. It did not address the issue what could be the effect of not filing an application for extension prior to expiry of the period because in the factual matrix it was not necessary to do so. In the instant case, the day the accused filed the application for benefit of the default provision as engrafted under proviso to sub- Section (2) of Section 167 CrPC the Court required the accused to file a rejoinder affidavit by the time the initial period provided under the statute had expired. There was no question of any contest as if the application for extension had been filed prior to the expiry of time. The adjournment by the learned Magistrate was misconceived. He was obliged on that day to deal with the application filed by the accused as required under Section 167(2) CrPC. We have no hesitation in saying that such procrastination frustrates the legislative mandate. A Court cannot act to extinguish the right of an accused if the law so confers on him. Law has to prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such an act is not permissible. If we permit ourselves to say so, the prosecution exhibited sheer negligence in not filing the application within the time which it was entitled to do so in law but made all adroit attempts to redeem the cause by its conduct."

28. Chapter II of the Code of Criminal Procedure deals with the constitution of criminal Courts and offices. Section 6 of the same reads as under:

"6. Classes of Criminal Courts- Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely:-

(i) Court of Session;

(ii) Judicial Magistrate of the first class and, in any metropolitan area, Metropolitan Magistrate;

(iii) Judicial Magistrates of the second class; and

(iv) Executive Magistrates."

29. Provisions regarding jurisdiction of the Criminal Courts in the matter of inquiries and trials are provided in Chapter XIII of the Code. How warrant cases and summon cases are to be conducted is provided under Chapter XII and XX of the Code respectively. The powers, functions and jurisdiction of the Courts are thus clearly defined and unless and until specific powers are conferred under the Code, no Court can take cognizance and entertain any application or petition contrary to the said statutory provisions. In this backdrop, learned Fast Track Court, Dharamshala even otherwise cannot be construed to be the Court of Magistrate empowered to take cognizance of the offences before whom report of police officer on completion of investigation was to be submitted under the provisions of Section 173 of the Code. Even otherwise, this fact has not been disputed by the State that the competent Magistrate to take cognizance of the offences alleged against the accused was learned Judicial Magistrate 1st Class, Indora and not learned Fast Track Court, Dharamshala. Application under Section 167(2) of the Code of Criminal Procedure for grant of bail was filed by the petitioner before the Court of learned Judicial Magistrate 1st Class, Indora on 16.01.2017. Same was dismissed by the Court of learned Judicial Magistrate 1st Class, Indora vide order of the even date.

30. A perusal of this order demonstrates that on the said date when the matter was listed before the Court of learned Judicial Magistrate 1st Class, Indora, a request was made by the learned Assistant Public Prosecutor before the said learned Magistrate seeking time for filing challan before the said Magistrate after withdrawing the same from the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala on the ground that as learned Additional Sessions Judge-III, Kangra at Dharamshala was on leave, therefore, no effective order as yet been passed by the Court on the same. This prayer was considered and allowed by the learned Judicial

Magistrate 1st Class, Indora. Vide the same order wherein prayer for filing challan before it after withdrawing the same from the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala was allowed by the learned Judicial Magistrate 1st Class, Indora, said Magistrate dismissed the application filed under Section 167(2) of the Code of Criminal Procedure so preferred before it by the petitioner on the ground that challan against the petitioner stood filed in the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala on 31.12.2016 as per R.C. No. 213/16 dated 13.12.2016. However, in my considered view, while passing the said order, Magistrate erred in not appreciating that the so called challan filed against the petitioner in the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala was no challan in the eyes of law as the same did not meet the requirements of either Section 2(r) or Section 173 of the Code of Criminal Procedure, as the Court of learned Additional Sessions Judge-III, Kangra at Dharamshala was not the Court of a Magistrate competent to take cognizance of the offence(s) alleged against the accused.

31. Therefore, from the above discussion, the only conclusion which can be drawn is that as on 16.01.2017, when the petitioner preferred an application under Section 167(2) of the Code of Criminal Procedure for being released on bail on the ground that no report/challan, as is envisaged under Section 173 of the Code of Criminal Procedure was filed within 90 days from the date of his arrest. Indeed no challan against him was filed by the prosecution in the Court of a Magistrate competent to take cognizance of the offences alleged against the accused. The order passed by the Court of learned Judicial Magistrate 1st Class, Indora, dated 16.01.2017, vide which application so filed by the petitioner was dismissed by holding that said challan already stood filed before the learned Additional Sessions Judge-III, Kangra at Dharamshala on 13.12.2016, is therefore erroneous and perverse and not sustainable in the eyes of law.

32. Accordingly, Cr. MMO No. 222 of 2017 is allowed. Order passed by the Court of learned Judicial Magistrate 1st Class, Indora, dated 16.01.2017, vide which, it rejected the application filed by the petitioner under Section 167(2) of the Code of Criminal Procedure is quashed and set aside and the petitioner is ordered to be released on bail, on his furnishing personal bond to the tune of Rs.1,00,000/- with one surety in the like amount to the satisfaction of learned trial Court, subject to the following conditions:

i. He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

ii. He shall not hamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

iii. He shall not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

iv. He shall not leave the territory of India without prior permission of the Court.

33. It is clarified that the observations made by this Court in this judgment are only for the purpose of adjudicating upon the present petitions and the learned trial Court shall not be influenced by any of these observations while deciding the case on merits, in the course of trial.

__Cr. MPM No. 626 of 2017__

34. In view of the order passed in Cr. MMO No. 222 of 2017, no order is required to be passed in this petition, which is accordingly disposed of. Miscellaneous applications, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Jyoti Education Welfare Society Regd. .....Petitioner
Versus
State of Himachal Pradesh and another .....Respondents

CMP No. 3677 of 2017 In
CWP No. 2392 of 2016
Decided on: August 2, 2017

Constitution of India, 1950- Article 226- A direction was issued to carry out the inspection in terms of guidelines as well as the norms fixed by Indian Nursing Council after affording adequate opportunities of hearing to the parties within two weeks- the inspection was carried out and the report was filed before the Court- the matter was disposed of with a direction to do the needful – present application has been filed for implementation of the judgment- held that no objection certificate was granted on the basis of earlier reports of Evaluation Committee which were discarded by the Court- inspection had not found any institution (including that of the petitioner) eligible for issuance of no objection certificate, therefore, the no objection certificate was rightly withdrawn and no fault can be found with the same – there was no violation of the judgment- petition dismissed. (Para-10 to 16)

For the petitioner(s): Mr. B.C. Negi, Senior Advocate with Mr. P.P. Singh, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Additional Advocate General and Mr. J.K. Verma, Deputy Advocate General for respondent No.1.
Sood, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral)

By way of instant application under Article 226 of the Constitution of India, having been filed by applicant-petitioner, in disposed of petition, prayer has been made to direct respondent authorities to implement judgment dated 12.4.2017, passed by this Court in CWP No. 2392 of 2016 and connected matter.

2. Facts, in brief, as are necessary for the adjudication of the instant application are that aforesaid petition was with regard to opening of GNM and B.Sc. Nursing courses in the State of Himachal Pradesh, for which respondents invited Expression of Interest, in response whereof, private respondents in the instant petitions applied. Material on record suggests that case of private respondents, as referred to above, was considered and placed before Council of Ministers. Petitioners, in the writ petitions above referred, assailed said action of respondents by way of writ petitions.

3. However, before proceeding further in deciding the present application, it would be relevant to have a bird's eye view of the events, which took place in the matter.

4. Keeping in view the allegations and counter allegations with regard to correctness of reports submitted by evaluation committee, having been made by parties in the writ petitions, referred above, this Court, directed authorities vide order dated 24.11.2016, to carry out fresh inspection strictly in terms of guidelines framed in this regard as well as norms fixed by Indian Nursing Council after affording adequate opportunity of hearing to the applicants including petitioners as well respondents.

5. Respondent State was directed to do the needful within two weeks from the date of passing of order i.e. 24.11.2016 and matter was ordered to be listed for 30.11.2016.

6. On 8.3.2017, report was filed by the respondent State in terms of order dated 24.11.2016 and matter was ordered to be posted on 5.4.2017. Ultimately on 12.4.2017, on the basis of report of the authorities, which admittedly was undisputed, as neither the parties to the petitions, objected to the same, therefore, the Court disposed of the matter with the direction to the respondent to do the needful in terms of order dated 24.11.2016 and report filed in terms of said order.

7. After the petitions having been disposed of by this Court, an application being CMP No. 3677 of 2017 was filed by petitioner (in CWP No. 3677 of 2017), thereby seeking direction to respondents to implement judgment dated 12.4.2017.

8. On the direction of this Court, an affidavit came to be filed by the Chief Secretary to the Government of Himachal Pradesh, on 27th day of July, 2017, wherein, following facts were elucidated:-

> "i) That it is submitted respectfully that in compliance to order dated 24-11-2016, the fresh inspection of all the applicant institutions/Societies was done and the report was presented before this Hon'ble Court in sealed cover.
>
> ii) That vide order dated 12-4-2017, this Hon'ble Court was pleased to dispose of both the writ petitions i.e. CWP No. 2392/2016 and CWP 1740/2016 with the directions to the concerned authority to do the needful in term of order dated 24-11-2016 and the report filed in terms of order (supra).
>
> iii) It is worthwhile to submit here that in para 13 of order dated 24-11-2016, this Hon'ble Court has clearly observed that it would be in the interest of justice if authorities are directed to conduct fresh inspection of all institutions/societies, who had applied in term of advertisement dated 24-09-2014 as well as Northern International Education and Research Centre, so that allegations of bias as well as arbitrary exercise of power as alleged by the parties, is put to rest.
>
> iv) Be is submitted further with utmost regards, before this Hon'ble Court that opinion of Evaluation Committee i.e. Annexure R-1 had made it amply clear that none of five institutions fulfill the Indian Nursing Council (INC) norms and the conditions as laid down vide government notification dated 7-6-2008 i.e. annexure R-2.
>
> v) Accordingly, the matter was placed for the consideration before the Council of Ministers. It is worthwhile to mention here that it was essential to place the matter to the cabinet as earlier the no objection certificates in favour of the institutions were issued on the basis of recommendations/ approval of the Cabinet. The Memorandum is appended with this affidavit as Annexure R-3, for the kind consideration of this Hon'ble Court. It was proposed in view of the observation of evaluation committee that the No Objection Certificate (NOC) issued in compliance of Cabinet decision dated 12-5-2016 may be withdrawn and fresh EOI's (Expression of Interest) may be invited from interested parties, for establishment of Nursing Institutions with 60 GNM and 60 B.Sc. Nursing Seats in Private sector, attached to Dr. Rajender Prasad Medical College Kangra at Tanda.
>
> vi) It is therefore, respectfully submitted that the directions issued by the Hon'ble Court vide order dated 24-11-2016 and 12-4-2017 were complied in to-to."

9. We have heard the learned counsel for the parties and gone through the records.

10. After having carefully perused supplementary affidavit filed by the Chief Secretary to the Government of Himachal Pradesh, in terms of order 6.7.2017, we find that grievance of applicant-petitioner no more survives. By way of application at hand, applicant prayed for implementation of judgment dated 12.4.2017, which appears to have been implemented.

11. This Court sees no merit in the contention of Mr. B.C. Negi and Mr. N.K. Sood, learned senior Advocates representing the parties, that orders dated 24.11.2016 and judgment dated 12.4.2017, have not been complied with in their letter and spirit by the authorities. Similarly, we are not inclined to accept the contention of learned senior Advocates that respondents have made an attempt to overreach order dated 24.11.2016/judgment dated 12.4.2017 passed by this Court, by passing order dated 15.7.2017, whereby no objection certificates issued in compliance to Cabinet's decision dated 12.5.2016, has been ordered to be withdrawn with further direction to call for fresh "Expression of Interest", from all interested parties, for establishment of Nursing institutions with 60 GNM and 60 B.Sc. (Nursing) seats.

12. Needless to say, vide order dated 24.11.2016, this Court, taking note of method adopted by authorities, while analyzing/scrutinizing applications, submitted by petitioners as well as respondent societies, pursuant to advertisement dated 24.9.2014, had come to conclusion that no uniform yard stick was adopted by the evaluation committee, while carrying out inspection of institutions and, accordingly, authorities were directed to conduct fresh inspection of all the institutions/ societies, which had applied in terms of advertisement referred above as well as Northern Educational Research Centre, whose case was considered by the government, while accepting its representation dated 6.1.2015, so that controversy/allegations of bias as well as arbitrary exercise of power as alleged by the parties, is put to rest.

13. It is also not in dispute that pursuant to aforesaid directions issued by this court, respondent authorities conducted fresh inspection of parties concerned, and submitted its report to the Court, in a sealed cover. It is also not in dispute that copies of aforesaid report were made available to the parties through their counsel, enabling them to file objections, if any to the report.

14. Since, none of the parties except respondent No.5 in CWP No. 1740/2016 filed objections to the aforesaid report, this Court, after having gone through objections filed by respondent No.5, deemed it fit to dispose of the petitions with the direction to the concerned authority to do the needful in terms of order dated 24.11.2016, as well as report filed in terms of order referred to above. It is also not in dispute that aforesaid order dated 24.11.2016, and judgment dated 12.4.2017 passed by this Court, attained finality, since no appeal was filed against the same, in the competent court of law. Rather, applicant-petitioner moved instant application seeking therein implementation of aforesaid orders passed by this Court. Perusal of affidavit filed by Chief Secretary, clearly suggests that since none of five institutions including petitioners, fulfilled the Indian Nursing Council norms and conditions as laid down vide Government notification dated 7.6.2008, committee constituted in terms of order dated 24.11.2016, passed by this Court, did not recommend case of petitioners/respondent societies. Chief Secretary in his affidavit has categorically stated that since none of the institutions including that of petitioners was found eligible by evaluation committee constituted by this Court, matter was placed for consideration of Council of Ministers since, no objection certificates were earlier issued in compliance of cabinet decision dated 12.5.2016.

15. Having carefully perused the affidavit filed by Chief Secretary, we have no hesitation to conclude that orders referred above passed by this Court, stand duly complied with. There is no force in the arguments having been made by the learned senior Advocates representing the parties that no objection certificates granted in their favour pursuant to cabinet decision dated 12.5.2016, could not be withdrawn, on the basis of report submitted by evaluation committee constituted in terms of orders passed by this Court. Since this Court, taking note of the discrepancies in the report of evaluation committee had ordered for fresh inspection by evaluation committee, vide order dated 24.1.2016, applicant-petitioner as well as respondents

can not be allowed to state/argue that no objection certificates granted in their favour pursuant to cabinet decision dated 12.5.2016, still hold good.

16. At this stage, it may be observed that no objection certificates, if any, pursuant to cabinet decision dated 12.5.2016, was definitely based upon reports of evaluation committee, which were discarded by this Court, while passing order dated 24.11.2016. After passing of order dated 24.11.216, everything was to be guided by the report submitted by evaluation committee constituted in terms of order dated 24.11.2016, since evaluation committee constituted in terms of orders dated 24.11.2016, did not find any of the institutions including that of petitioners, eligible for issuance of no objection certificate/essentiality certificate, we see no illegality in order dated 15.7.2017 passed by Principal Secretary (Health) to the Government of Himachal Pradesh (Annexure R-2 of affidavit).

17. Having said so, we see no reason to differ with the contentions having been made by learned Advocate General that order dated 24.11.2016/judgment dated 12.4.2017, stands duly complied with.

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

Liaq Ram … Petitioner
Versus
State of H.P. & Anr. … Respondents

CWP No. 2736 of 2012 a/w
CWPs No. 2737, 2741, 2742,
2743, 2744 and 2698 of 2012
Date of decision: 02.08.2017

Land Acquisition Act, 1894- Section 18- The Collector denied to forward the reference to the Court on the ground that award was declared null and void – aggrieved from the act of the Collector, present writ petition had been filed- held that it is mandatory for the Collector to make a reference to the Court and it is not for him to decide and reject the same – the Collector had erred in not forwarding the representation to the Court- petition allowed- Collector directed to forward the reference petition to the Court and reference Court held to be at liberty to answer the petition by taking into consideration the factum of award having been declared null and void and any other factors bearing on the same – petition disposed of. (Para-5 to 7)

For the petitioner(s): Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate, in all the petitions.
For the respondents: Mr. Vikram Thakur, Deputy Advocate General, in all the petitions.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. (Oral):

The moot issue involved in these cases is as to whether after the receipt of reference petition under Section 18 of the Land Acquisition Act, the Collector can deny forwarding the said reference petition to the Reference Court or in all eventualities after the receipt of reference petition under Section 18 of the Land Acquisition Act, the same has to be forwarded by the Land Acquisition Collector to the Reference Court.

2. According to Mr. G.D. Verma, Senior Advocate, learned counsel for the petitioners, once the Land Acquisition Collector receives a reference after the Collector has made award, the Collector is bound to forward the same to learned Reference Court and in no eventuality the Collector can take a decision not to forward the same to learned Reference Court.

3. On the other hand, Mr. Vikram Thakur, learned Deputy Advocate General, submits that no fault can be found with the act of the Collector of not forwarding reference petitions to learned Reference Court as the award qua which the reference petitions were preferred by the land owners, was declared null and void by this Hon'ble Court vide judgment dated 26.04.2011 passed in CWP No. 2385 of 2010.

4. Learned Deputy Advocate General further submitted that thereafter Land Acquisition Collector also passed subsequent Award No. 13/2011 dated 28.06.2011 and the said award was passed by the Land Acquisition Collector after issuing notices to all the interested holders and after recording their statements.

5. It is settled law that on receipt of an application for reference it is mandatory for the Collector to make a reference under Section 18 of the Land Acquisition Act in the manner prescribed under Section 19 thereof. It is further settled law that it is not for the Collector to decide and reject reference under Section 18 of the Land Acquisition Act but he has to refer the same leaving the question open to be decided by learned Reference Court to which reference is made under Section 18 of the Land Acquisition Act as to what relief the applicant is entitled to. Reference Court has wide powers to throw out a reference petition under Section 18 if it comes to the conclusion that the award was accepted without any protest or that the award was a consent award or otherwise.

6. Therefore, in the present cases, in my considered view, the Land Acquisition Collector erred in not forwarding the applications so received under Section 18 of the Land Acquisition Act to learned Reference Court because the effect of the award having been declared null and void by this Court obviously could have been taken care of by learned Reference Court while answering the reference petitions.

7. Accordingly, all these petitions are disposed of with the direction that the Collector shall forthwith forward all the reference petitions to learned Reference Court and thereafter, learned Reference Court shall answer the same in accordance with law. It goes without saying that learned Reference Court shall be at liberty to answer reference petitions by taking into consideration the factum of the award against which reference petitions were filed having been declared null and void by this Court in CWP No. 2385 of 2010 decided on 26.04.2011 and any other fact having bearing on the same being placed before learned Reference Court by the parties concerned.

8. All the petitions stand disposed of in the above terms. Miscellaneous applications, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

M/s Utkarsh Apparels & another ….Appellants.

Versus

M/s Winnsome Textiles Industries Ltd. ….Respondent.

LPA No.58 of 2017

Date of Decision: August 2, 2017

Code of Civil Procedure, 1908- Section 104- Order 43- An award passed by the arbitrator was put to execution - the presence of the judgment debtor was required - when he did not appear,

the Court ordered his detention- an application for recall was filed, which was dismissed - aggrieved from the order, present appeal has been filed- an objection was raised regarding maintainability of the appeal – held that the award of the arbitrator has to be executed as a decree of the Civil Court – there is no provision of filing an appeal under Section 104 and Order 43 and the appeal cannot be filed under the provisions of Letters Patent – the orders passed by the Court do not fall within the definition of judgment and appeal is not maintainable- further the appeal is barred by limitation – appeal dismissed. (Para-8 to 36)

Cases referred:
Shah Babulal Khimji v. Jayaben D. Kania & another, (1981) 4 SCC 8
Fuerst Day Lawson Limited v. Jindal Exports Limited, (2011) 8 SCC 333
P.S.Sathappan (Dead) By LRs v. Andhra Bank Ltd. and others, (2004) 11 SCC 672
Paramjeet Singh Patheja v. ICDS Ltd., (2006) 13 SCC 322

For the Appellants — Mr. Ankush Dass Sood, Senior Advocate, with Ms Shweta Joolka, Advocate.
For the Respondent — Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lal, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ

Whether the present appeal (Letters Patent Appeal) is maintainable under Clause 10 of the Letters Patent, Section 104 and Order 43 of the Code of Civil Procedure or not, is the issue which we are called upon to answer.

2. At this juncture, we may only observe certain facts, leading to the filing of present appeal. Vide Award passed by the Arbitral Tribunal, so constituted under the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), claims of the present respondent M/s Winnsome Textiles Industries Ltd. came to be adjudicated in the affirmative. The award having attained finality, the present respondent filed an application for execution of the same, claiming a sum of Rs.45,07,878/- (including interest upto 1.3.2015).

3. Notice in the Execution Petition came to be issued, and after service by way of publication, appellants, through counsel, entered appearance on 29.11.2016, on which date, the matter was adjourned to enable the learned counsel to file Power of Attorney as also obtain instructions. On the following date, i.e. 20.12.2016, the Court passed the following order:

> "Respondent-Judgment Debtor No.2, Rajan Pahwa, Sole Proprietor of M/s Utkarsh Apparels, is directed to attend this Court in person on 3.1.2017 and to file his affidavit indicating therein the statements of his accounts and detail of other properties on the prescribed Form No.16(A) of Appendix-E to the Code of Civil Procedure. On his failure to do so, the plea of his detention in civil imprisonment will be considered on the next date.
>
> List on 3.1.2017."

4. On 3.1.2017, the Court adjourned the matter for compliance of earlier orders, further directing presence of Judgment Debtor No.2 Rajan Pahwa for 1.3.2017, on which date the Court passed the following order:

> "OMP No.71 of 2015
>
> On the previous date, JD No.2 Rajan Pahwa was directed to attend this Court in person and also to report compliance to the order passed on 20.12.2016. He is not present nor the previous order has been complied with. Mr. Avinash Jaryal, Advocate, learned counsel representing the said JD has pleaded no instructions.

Appearance on behalf of the Judgment Debtors was entered on 29.11.2016. On that day, learned Counsel appearing on their behalf had sought time for filing power of attorney and to obtain instructions. On the date next thereto i.e. 20.12.2016 no one appeared on behalf of the respondents-JDs. Being so, the following order came to be passed on that day:

"Respondent-Judgment Debtor No.2, Rajan Pahwa, Sole Proprietor of M/s Utkarsh Apparels, is directed to attend this Court in person on 3.1.2017 and to file his affidavit indicating therein the statements of his accounts and detail of other properties on the prescribed Form No.16(A) of Appendix-E to the Code of Civil Procedure. On his failure to do so, the plea of his detention in civil imprisonment will be considered on the next date.

List on 3.1.2017."

However, on the next date i.e. 3.1.2017, neither JD No.2 Rajan Pahwa had attended this court in person nor filed the affidavit on Form No.16(A), Appendix-E to the Code of Civil Procedure. Being so, on the prayer made on his behalf by learned Counsel he was directed to attend this Court in person today and also to report compliance to the order ibid passed on 20.12.2016. Today again the said Judgment Debtor is absent. Learned Counsel has also pleaded no instructions. Such act and conduct of JD No.2 leave no manner of doubt that he is not only evading the order passed by this Court but also the payment of the decreetal amount to the petitioner-DH. The present, as such, is a fit case where said Rajan Pahwa JD No.2 has rendered himself liable to be detained in civil imprisonment initially for a period of one month on deposit of necessary detention charges and taking requisite steps within two weeks. Ordered accordingly. The warrant be issued qua arrest of aforesaid Rajan Pahwa accordingly. The application is allowed and disposed of."

5. In the meanwhile, appellants filed an application, being OMP No.53 of 2017, seeking recall of order dated 1.3.2017 (reproduced supra), so passed in OMP No.71 of 2015 (sic, should be 70 of 2015), in which the Court passed the following order, on 9.3.2017:

"**OMP No.53 of 2017**

Reply be filed within a week. List on 18th March, 2017. The warrant of arrest ordered to be issued against the applicant/JD, however, be kept in abeyance in the meanwhile subject to the condition that in order to show his bonafide, he will deposit the decretal amount either in toto or some substantial amount and also subject to his appearance in this Court in person on the next date."

6. From subsequent orders dated 18.3.2017, 5.4.2017, 9.5.2017 and 24.5.2017, it is apparent that the directions so issued by the learned Single Judge, vide orders dated 20.12.2016, 3.1.2017 and 1.3.2017 were never complied with, and repeatedly adjournments were sought for depositing the decretal or substantial amount thereof.

7. Subsequently, on 9.5.2017, the Court passed the following order:

"Mr. Ankush Dass Sood, Sr. Advocate, on instruction from the said respondent/JD No.2, prays for and is granted two weeks time to comply with the order passed on the previous date, however, by way of last and final opportunity. List before appropriate Bench, as per roster of Boards on 24.5.2017.

Copy dasti."

8. It is in this backdrop that this Court asked the appellants to consider as to whether they would be open to have the matter amicably resolved or not. The answer is in the negative.

9. Suggestion of Mr. R.L. Sood, learned Senior Advocate, to the appellants for depositing the entire decretal amount in the Registry of this Court, also did not find favour.

10. At the time of issuance of notice in the appeal, i.e. on 1.6.2017 itself, Mr. R.L. Sood, learned Senior Advocate, had raised a preliminary objection, with regard to its maintainability. As such, it is this question, which we are deciding today.

11. Perusal of various orders passed by the learned Single Judge only reveals the same to be in the nature of consent order. In view of the same, whether it would be permissible for the appellants to file an appeal at all or not, being a different matter, for we otherwise proceed to examine its maintainability on merits, as the issue involved is of significance and importance.

12. While inviting our attention to the decision rendered by the Hon'ble Supreme Court of India in *Shah Babulal Khimji v. Jayaben D. Kania & another,* (1981) 4 SCC 8, Mr. Ankush Dass Sood, learned Senior Advocate, contends that the present appeal, assailing the orders passed in an application for execution, is maintainable, under Section 104 read with Section 43 of the Code of Civil Procedure, 1908 (for short, CPC).

13. Apex Court in *Shah Babulal Khimji (supra)* has simply observed as under:

"78. Thus, after considering the arguments of Counsel for the parties on the first two limbs of the questions, our conclusions are:-

(1) That there is no inconsistency between section 104 read with Order 43, Rule 1 and the appeals under the Letter Patent and there is nothing to show that the Letter Patent in any ways excludes or overrides the application of section 104 read with Order 43, Rule 1 or to show that these provisions would not apply to internal appeals within the High Court.

(2) That even if it be assumed that Order 43, Rule 1 does not apply to Letter Patent appeals, the principles governing these provisions would apply by process of analogy.

(3) That having regard to the nature of the orders contemplated in the various clauses of Order 43, Rule 1, there can be no doubt that these orders purport to decide valuable rights of the parties in ancillary proceedings even though the suit is kept alive and that these orders do possess the attributes or character of finally so as to be judgments within the meaning of Clause 15 of the Letters Patent and hence, appealable to a larger Bench.

(4) The concept of the Letters Patent governing only the internal appeals in the High Courts and the Code of Civil Procedure having no application to such appeals is based on a serious misconception of the legal position.

79. This now brings us to the second important which is involved in this appeal. Despite our finding that section 104 read with Order 43, Rule 1 applies to Letter Patent appeals and all orders passed by a trial edge under Clauses (a) to (w) would be appealable to the Division Bench, there would still be a large number of orders passed by a trial judge which may not be covered by Order 43, Rule 1. The next question that arises is under what circumstances orders passed by a trial judge not covered by Order 43, Rule 1, would be appealable to a Division Bench. In such cases, the import, definition and the meaning of the word 'judgment' appearing in Clause 15 assumes a real significance and a new complexion because the term 'judgment' appearing in the Letters Patent does not exclude orders not filing under the various clauses of Order 43, Rule 1. Thus the serious question to be decided in this case and which is indeed a highly vexed and controversial one is as to what the real concept and purport of the word 'judgment' used in Clause 15 of the Letters Patent. The meaning of the word

> 'judgment' has been the subject matter of conflicting decisions of the various High Courts raging for almost a century and in spite of such length of time, unfortunately, no unanimity has so far been reached. As held by us earlier it is high time that we should now settle this controversy once for all as far as possible."

14. The said decision, in our considered view, specifically does not deal with appeals, arising out of orders passed under the provisions of the Act, a special legislation, a complete Code in itself, providing a right and procedure for execution of the award.

15. At this juncture, we may observe three facts – (a) the issue in question, with regard to maintainability of an appeal against an order passed, with respect to enforcement of arbitral award under Section 36 of the Act, is no longer res integra, in view of law laid down by the Hon'ble Supreme Court of India in *Fuerst Day Lawson Limited v. Jindal Exports Limited,* (2011) 8 SCC 333; (b) provisions of clauses (a) to (f) of sub-section (1) of Section 104 of CPC came to be omitted with the incorporation of Act No.10 of 1940, being the Arbitration Act, 1940; and (c) Chapter IX of the Act specifically provides remedy of appeals against an order passed under the Act.

16. The Act is divided into four parts. Part-I deals with the conduct of arbitrations, which are domestic in nature; Part-II deals with enforcement of foreign awards; Part-III deals with conciliation, whereas Part-IV deals with the supplementary provisions.

17. We are concerned with the enforcement of domestic award, which is covered under Part-I of the Act. Clause (c) of sub-section (1) of Section 2, defines, what is an "arbitral award" and clause (e) of sub-section (1) of Section 2, defines what is a "Court". In the case of arbitration, other than international commercial arbitration, "Court" means, the Principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration, if the same had been the subject matter of the suit.

18. Now, in the instant case, it is not in dispute that this Court does have original side jurisdiction and as such would fall within the meaning of "Court" so defined under the Act.

19. Chapters III, IV, V, VI, VII & VIII of Part-I deal with the composition, jurisdiction, conduct and the proceedings to be conducted by the Arbitral Tribunal. We need not refer to the relevant provisions, for it is not disputed before us that the Arbitral Tribunal, so constituted in terms thereof, has passed an award which has attained finality. Its legality is not an issue before us.

20. It is not disputed before us that with the dismissal of application, so filed under Section 34 of the Act, the award has attained finality. It being a different matter, as is so brought to our notice by Mr. Ankush Dass Sood, learned Senior Advocate, appellants are pursuing remedies in accordance with law. Be that as it may, the fact of the matter being that as on date, the award which came to be enforced, is subsisting and bindingly enforceable as a decree, in accordance with law.

21. Significantly, by virtue of Section 35 of the Act, there is finality attached to an arbitral award.

22. Section 36, Chapter-VIII, makes the award, having attained finality, to be enforceable, in accordance with the provisions of CPC, in the same manner as it were a decree of the Court. It is under this provision that the decree-holder (respondent herein) filed an application, seeking enforcement of the award against the judgment debtors (appellants herein).

23. It is a settled position of law that the Act is a self-contained Code, fully exhaustive in nature. It provides for substantive rights and prescribes the procedure for enforcement of an award.

24. Apex Court in *Fuerst Day Lawson (supra),* while dealing with the enforcement of an award under Part-II of the Act, had the occasion to examine, in extenso, various provisions for enforcement of the Act, both under Part-I and Part-II, as also the remedy of appeal so provided thereunder (Sections 37 and 50).

25. The Court, after examining the ratio of law laid down in its earlier decisions, more specifically in *P.S.Sathappan (Dead) By LRs v. Andhra Bank Ltd. and others,* (2004) 11 SCC 672, reiterated the principles laid down in *Shah Babulal Khimji (supra)*, to the effect that when an appeal is provided for under a special Act, Section 104 of CPC shall have no application, in relation thereto, as it merely recognizes such right, but does not provide for a right of appeal, and that if a status higher than what is given to a Letters Patent over the law passed by the Parliament, including the Code of Civil Procedure, is given, it would run contrary to the history to the Letters Patent, as also the Parliamentary Acts.

26. Having considered the aforesaid principles, as also the provisions providing for enforcement of an appeal under the Act, specifically dealing with the issue of enforcement of the award and any appeal lying under the Letters Patent jurisdiction of the High Court, the apex Court in *P.S. Sathappan (supra)* decided the issue in the following terms:

> "86. Such a scheme barring a Letters Patent Appeal is found to be existing in representation of the People Act. Under Article 329 (b) of the constitution, a single judge of a High Court exercises a jurisdiction to hear an election dispute. While doing so he exercises a special jurisdiction. Having regard to the history thereof as also the limited nature of appeal from judgment disposing of an election petition expressly provided under Section 116-A of the Representation of the People Act, it will be evident that a right of appeal under the Letters patent had been held to have been taken away by necessary implication. (See *N. P. Ponnuswami v. Returning Officer, Namakkal Constituency,* AIR 1952 SC 64, *Upadhyaya Hargovind Devshanker v. Dhirendrasinh Virbhadrasinhji Solanki,* (1988) 2 SCC 1, and *Dipak Chandra Ruhidas v. Chandan Kumar Sarkar,* (2003) 7 SCC 66)
>
> 87. Even in the aforementioned cases also, it has been held that a Letters Patent appeal may be barred by implication.
>
> 88. The question, however, may be different when an appeal is provided for under a special statute. It is trite that Section 104 (1) of the Code saves such an appeal. Section 104, therefore, saves such appeal in view of the appeals provided under the special statute but it does not create a right of appeal as such, and it does not, therefore, bar any further appeal also, if the same is provided for under any other Act for the time being in force which would include a Letters Patent. Whenever the statute provides such a bar, it is so stated either expressly or by necessary implication.
>
> 89. It is true that Section 100-A of the Code contains a non-obstante Clause as regards the overriding effect of the said provision over the Letters Patent of the High Court but the same, in our considered opinion, was done by way of *ex abundanti cautela*. Furthermore, the Code of Civil Procedure (Amendment) Act, 1976 and the Code of Civil Procedure (Amendment) Act, 2002 being subsequent statutes, the same may not have any application in relation to the interpretation of sub-section (2) of Section 104 of the Code.
>
> 90. It is not necessary, in my considered opinion, that the provision restricting a further right of appeal must specifically mention the provisions of the Letters Patent of the High Courts or any other statute inasmuch as the same has to be construed having regard to the scheme thereof. What is recognized under sub-section (1) of Section 104 of the Code following the decisions of the Calcutta, Madras and Bombay High courts in *Toolsee Money Dassee v. Sudevi Dassee*, ILR (1899) 26 Cal. 361, *Sabhapathi chetti v. Narayanasami Chetti,* ILR

(1902) 25 Mad. 555, and *Secy of State for India in Council v. Jehangir Maneckji Cursetji,* (1902) 4 Bom LR 342, respectively, are those appeals which are provided for under special statute and not an appeal from the appellate order therein. Let us at this juncture notice as to what had been decided in those cases although the position in law is, to some extent, sought to be clarified in *Shah Babulal Khimji v. Jayaben D. Kania*, (1981) 4 SCC 8 which would fall for discussions hereinafter in some details.

91. In *Toolsee Money Dassee (supra)*, the question which arose for consideration was whether refusing to set aside an award against an order by a single judge of the high Court in the original side of the appeal would be governed by Section 588 of the Code of Civil Procedure, 1861. The said contention was rejected on the premise that Section 588 of the Code does not control appeals under special statute. The Court followed *Hurrish Chunder chowdhry v. Kali Sunderi Debia,* ILR (1882) 9 Cal 482 (PC)."

27. Thus, we are of the considered view that there being no specific provision for filing an appeal under Section 104 or Order 43 of CPC and a special mechanism being provided under the provisions of the Act, the present appeal under the provisions of the Letters Patent, would not be maintainable.

28. With profit, we may also take note of the decision rendered by a Division Bench of High Court of Bombay in *Jet Airways (India) Limited v. Subrata Roy Sahara,* decided on 17.10.2011, to which our attention is invited by Mr. R.L. Sood, learned Senior Advocate, wherein also the Court had an occasion to address an identical issue, i.e. maintainability of the appeal under Clause-15 of the Letters Patent, more specifically, in view of the exclusionary clause under Section 37 of the Act. The Court observed:

> "22. In fact a perusal of 1996 Act and the 1940 Act will indicate that both the enactments provide for filing of an appeal against only some specified orders and do not provide for an appeal against every order passed in the proceedings under the 1996 Act. It is well established that general law cannot defeat a provision of special law to the extent to which they are in conflict; else effort has to be made on reconciling the two provisions by homogeneous reading. In the present case, the provisions of section 37 (the relevant portion of which is pari materia relevant portion of section 39 of 1940 Act) leave no manner of doubt that the provisions of the special enactment will prevail over the general law namely, the 1908 Code. The Statutory Scheme of 1996 Act and the Letters Patent and the binding precedents of Supreme Court and this Court lead us to only one conclusion that clause 15 of the Letters Patent are impliedly excluded by the 1996 Act."

29. Further, what is a "judgment" is not defined under the Act nor the word "decree".

30. In *Paramjeet Singh Patheja v. ICDS Ltd.,* (2006) 13 SCC 322, the apex Court, while construing the meaning of word "decree" under the Act, observed that the words "as if" in Section 36 of the Act demonstrate that "award" and "decree" are not the same.

31. The Act creates a legal fiction for a limited purpose of enforcement of a decree, not intending to make it a decree for all purposes, under all other statutes.

32. This takes us to yet another question, though unrelated to the controversy, in view of our finding on the main issue, and that being as to whether the impugned order is really a "judgment" within the meaning of clause-15 of the Letters Patent.

33. Apex Court in *Shah Babulal Khimji (supra)*, as we have already noticed, has held "judgment" to mean a statement given by the Judge of the grounds of a decree or order. The Court clarified that in the course of trial, a trial Judge may pass number of orders, whereby some of the various steps to be taken by the parties in prosecution of the suit may be of a routine nature while other orders may cause some inconvenience to either of the parties. These orders

are purely interlocutory in nature and would not constitute a "judgment", for a "judgment" would mean that which decides matters of moment or affect vital and valuable rights of the parties and causing serious injustice to the party concerned.

34. Now in the instant case, as we have already observed, the orders passed are more in the nature of consent, repeatedly asking for time for depositing the amount. Thus, in our considered view, the order impugned cannot be said to be in the nature of a "judgment" deciding the rights of the parties.

35. There is yet hurdle, which the appellants needs to cross. The appeal came to be preferred on 26.5.2017. The first of the orders came to be passed on 29.11.2016, whereafter effective orders came to be passed on 3.1.2017, 1.3.2017 and 9.3.2017. The appeal does not contain prayer for condonation of delay, either in the body or by way of separate application. We may also observe that objections, under Order 47 of CPC (OMP No.61 of 2017) came to be filed by the appellants on 16.3.2017, which was subsequent to passing of orders dated 3.1.2017, 1.3.2017 and 9.3.2017. Limitation is thus an issue not addressed by the appellants at all.

36. For all the aforesaid reasons, we hold the appeal to be not maintainable and the same is accordingly dismissed.

37. Needless to add, application for execution shall be considered and decided, in accordance with law, more so in view of directions contained in our order dated 21.6.2017.

Pending application(s), if any, also stand disposed of.

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

Munish Jain and another .....Appellants.
Vs.
Sunita Devi and others .....Respondents.

FAO (MVA) No.: 147 of 2011
Reserved on: 13.07.2017
Date of Decision: 02.08.2017

Motor Vehicle Act, 1989-Section 149- The deceased was hit by a motor cycle being driven by Respondent no. 2 on the left side of the road in a rash and negligent manner- she was taken to the hospital but was declared dead- MACT awarded compensation of Rs. 2,00,000/- along with interest @ 7.5% which was to be paid by the Respondent no. 1 (owner) and Respondent no. 2 (driver) on the ground that the driving license was fake and there was breach of terms and conditions of the policy - aggrieved from the award, present appeal has been filed pleading that the insurance company should have been directed to indemnify the insured- held that the insurance company cannot be exonerated from the liability on the ground that the driving license was fake unless it is proved that the owner was in any manner negligent- in the present case, the owner had handed over the motor cycle to the driver after checking the license and he was not supposed to verify from the Registration and Licensing Authority whether the license was genuine or not- it was not proved by the insurance company that the owner was negligent or had failed to exercise any reasonable care- Tribunal had wrongly exonerated the insurance company of liability- the appeal allowed and insurance company directed to indemnify the owner.
(Para 13 to 19)

Cases referred:

National Insurance Co. Ltd. Vs. Swaran Singh & others (2004) 3 Supreme Court Cases 297
United India Insurance Co. Ltd. Vs. Lehru and others (2003) Supreme Court Cases 338

For the appellants: Mr. Amandeep Sharma, Advocate.
For the respondents: Mr. Bhuvnesh Sharma, Advocate, for respondents No. 1 and 2.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge **:**

By way of this appeal, the appellants/respondents have challenged the award passed by the learned Motor Accident Claims Tribunal-II, Kangra at Dharamshala, dated 12.01.2011, vide which, learned Tribunal allowed the claim petition so filed before it by claimants Sunita Devi and Kultar Singh in the following terms:

> *"30. As a result of my findings on all the Issues above, the petition is allowed and an amount of Rs.2,00,000/- (Rs. Two lac) is hereby awarded as compensation in favour of petitioners, which is liable to be paid by the respondents No. 1 and 2 jointly and severally. However, it is made clear that out of the awarded amount, an amount of Rs.50,000/- as interim compensation has already been paid by the respondent No. 3, Insurance Company, to the petitioners. As such, the respondent No. 3 is at liberty to get this amount recovered from the respondents No. 1 and 2 by filing execution against them. The petitioners are also held entitled to interest at the rate of 7.5% per annum from the date of petition till the payment of the compensation amount by the respondents No. 1 and 2. The amount of compensation awarded in favour of the petitioners shall be apportioned in equal shares between the petitioners. Memo of costs be drawn. The file after due completion be consigned to the record room."*

2. Appellants before this Court were respondents No. 1 and 2 before the learned Tribunal. Appellant No.1 Munish Jain is the owner of motorcycle, which was involved in the accident, whereas appellant No. 2 Saurav Kumar was driving the said vehicle when the accident took place. Learned Tribunal while awarding compensation in favour of the claimants before it, in the course of deciding Issue No. 2 held that liability to compensate the claimants was upon respondents No. 1 and 2 therein, i.e. the present appellants. Appeal before this Court stands filed by the appellants primarily challenging the award on the ground that the learned Tribunal erred in holding that the liability to compensate the claimants was upon them and not the Insurance Company.

3. Brief facts necessary for the adjudication of this appeal are that a claim petition was filed praying for compensation by the claimants therein, i.e. present respondents No. 1 and 2 on account of the death of their daughter Kumari Sapna, who on 08.03.2004, at around 1:45 p.m. while crossing Amb Pathiar road, after purchasing toffees from a shop on her way to her house, was hit by a motorcycle bearing registration No. HP-55-4093 and that too on the left side of the road, which motorcycle was being driven from Jawalamukhi side to Nadaun side. According to the claimants, the accident took place on account of rash and negligent driving of Saurav Kumar (present appellant No. 2), who struck the deceased on the wrong side of the road and had dragged her up to a distance of 10-15 meters. Though immediately after the accident Kumari Sapna was rushed to CHC Jawalamukhi, however, there she was declared dead. Her age at the relevant time was 9 ½ years. She was a student of 4th Class.

4. In their reply filed to the claim petition, stand taken by the present appellants was that the accident had not occurred on account of the rash and negligent driving of appellant No. 2, but the accident took place as child came on the road all of a sudden and when she saw the motorcycle, she got perplexed and fell on the road and in fact the motorcycle never struck her, as alleged.

5. Insurance Company filed a separate reply, in which it took preliminary objections that the motorcycle was not insured and the driver of the vehicle involved in the

accident was not holding a valid and effective driving licence and further that the vehicle was being plied without registration certificate.

6. On the basis of pleadings of the parties, the learned Tribunal framed the following issues:

> *"1. Whether deceased Kumari Sapna died in an accident with the offending vehicle motorcycle bearing registration No. HP-55-4093 on 8.3.2004 at village Amb Doli Police Station Jawalamukhi, as a result of rash and negligent manner of the respondent No. 2, as alleged? OPP*
>
> *2. Whether the petitioners are entitled for compensation being dependents of deceased from the respondents, if so, its extent and liability thereof? OPP*
>
> *3. Whether the offending vehicle was not insured with the insurer of the offending vehicle at the time of accident, as alleged? OPR-3.*
>
> *4. Whether the driver of the offending vehicle was not holding a valid and effective driving licence at the time of accident, as alleged OPR 3*
>
> *5. Whether the offending vehicle was not being driven under valid and effective certificate of registration, as alleged? OPR.*
>
> *6. Relief.*

7. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned Tribunal to the issues so framed:

> *"Issue No. 1: Yes.*
>
> *Issue No. 2: Yes.*
>
> *Issue No. 3: No.*
>
> *Issue No. 4: Yes.*
>
> *Issue No. 5: Yes.*
>
> *Relief: The petition is allowed as per operative part of the award.*

8. As I have already mentioned above, an amount of Rs.2,00,000/- was awarded as compensation in favour of the claimants alongwith interest. Though Issue No. 5 was decided against the present appellants by the learned Tribunal, however, during the pendency of this appeal, by way of an application so filed under Order 41 Rule 27 of the Code of Civil Procedure read with Section 151 thereof, appellants placed on record copies of Registration Certificate of the motorcycle in issue, from which it is evident that motorcycle was duly registered with the Registering and Licencing Authority, Nadaun, District Hamirpur on the date when the accident took place. This aspect of the matter, during the course of arguments has also not been agitated by the learned counsel for the respondents/Insurance Company in this Court.

9. Issue No. 4 framed by the learned Tribunal was whether the driver of the offending vehicle was not holding a valid and effective driving licence at the time of accident, as alleged? This issue stands decided by the learned Tribunal against the appellants. It was held by the learned Tribunal that driving licence Ex. RW1/A was stated to be issued at Hoshiarpur and Insurance Company had examined RW 2 Beant Singh, Clerk from DTO office Hoshiarpur, who had stated that licence No. 909 REP dated 11.05.2001 in favour of Saurav Kumar, son of Sh. Ramesh Kumar was not issued from their office and as per office record, extract of which was placed on record as Ex. RW2/A, Sr. No. 909 was blank. On these basis, it was concluded by the learned Tribunal that the motorcycle in question was being driven by respondent No. 2 therein, i.e. present appellant No. 2, who was not possessed of a valid licence to drive the vehicle.

10. Learned counsel for the appellants has argued that the findings so returned by the learned Tribunal are perverse and not sustainable in the eyes of law, as while coming to the

said conclusion, learned Tribunal erred in not taking into consideration the law laid down by the Hon'ble Supreme Court in ***National Insurance Co. Ltd***. Vs. ***Swaran Singh and others*** (2004) 3 Supreme Court Cases 297. He has drawn the attention of this Court to para 110 of the said judgment and argued that merely because the licence of the driver was a fake licence, the same did not absolve the Insurance Company from its liability to indemnify the insured. He has further submitted that in the present case, the vehicle in question was a motorcycle, which was being driven at the unfortunate time when the accident took place by a person who was in possession of a licence to drive the same and Insurance Company has not led any evidence from which it could be inferred that the insurer was guilty of negligence and had failed to exercise reasonable care in the matter of fulfilling the condition of policy.

11. On the other hand, learned counsel for the respondent-Insurance Company has submitted that there was no infirmity with the findings returned by the learned Tribunal, because when it was discovered subsequently that the licence being possessed by appellant No. 2 was in fact a fake licence, Insurance Company could not have been called upon to indemnify the insured by paying compensation to the claimants.

12. I have heard the learned counsel for the parties and have also gone through the records as well as the award passed by the learned Tribunal.

13. A three Judge Bench of the Hon'ble Supreme Court in ***National Insurance Co. Ltd***. Vs. ***Swaran Singh and others*** (2004) 3 Supreme Court Cases 297, inter alia held in Clause (iii) of para 110 as under:

> *"110 (iii)The breach of policy condition e.g. disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time."*

14. The Hon'ble Supreme Court has thus held that mere absence, fake or invalid driving licence are in themselves no defences available to the insurer against either the insured or the third party. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver.

15. In the present case, the vehicle involved in the accident is a motorcycle. It is no one's case that either the motorcycle was a commercial vehicle or that appellant No. 2 was engaged by appellant No. 1 as a driver to ply the said motorcycle on his behalf. Thus, here is a case where appellant No. 1 owner of the motorcycle had handed over the said motorcycle for driving the same to appellant No. 2 when the unfortunate accident took place. There is no relationship of employer and employee between appellants No. 1 and 2.

16. The Hon'ble Supreme Court in **United India Insurance Co. Ltd.** Vs. **Lehru and others** (2003) Supreme Court Cases 338 has held as under:

> *"20. When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner*

has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be absolved of liability. If it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia 's Sohan Lal Passi 's and Kamla 's case. We are in full agreement with the views expressed therein and see no reason to take a different view."

17. This judgment is referred to in ***National Insurance Co. Ltd.*** Vs. ***Swaran Singh and others*** (*supra*), wherein the Hon'ble Supreme Court in reference to the said judgment (i.e. United India Insurance Co. Ltd. Vs. Lehru and others) in paras 99 and 100 thereof has held as under:

"99. So far as the purported conflict in the judgments of Kamla (supra) and Lehru (supra) is concerned, we may wish to point out that the defence to the effect that the licence held by the person driving the vehicle was a fake one, would be available to the insurance companies, but whether despite the same, the plea of default on the part of the owner has been established or not would be a question which will have to be determined in each case.

100. The court, however, in Lehru (supra) must not read that an owner of a vehicle can under no circumstances has any duty to make any enquiry in this respect. The same, however, would again be a question which would arise for consideration in each individual case.

18. Now, coming again to the facts of this case, herein there was a motorcycle which on the unfortunate day was being driven by a person whose licence was subsequently found to be fake. In other words, as on the date when the accident took place, it is not as if the driver was not having any licence to drive the motorcycle. However, the same was fake, as was later on discovered by the Insurance Company. It is a matter of record that Insurance Company has not placed any material on record from which it can be gathered that the owner of motorcycle as on the date when the accident took place, was aware of the fact that the licence being possessed by appellant No. 2 was a fake licence. In view of the fact that there is no relationship of employer and employee between the owner of the vehicle and the person who was driving the same at the time when the accident took place, prudently all that could be expected from the owner of the motorcycle was that he handed over the motorcycle to be driven to a person who was possessing a licence to drive the same. In my considered view, appellant No. 1 before permitting appellant No. 2 to drive the motorcycle was not supposed to approach the licence issuing authority concerned to satisfy himself as to whether the licence so possessed by appellant No. 2 to drive the motorcycle was a valid driving licence or not. The fact that the driver of the motorcycle was possessing a licence at the time when the owner of the motorcycle permitted him to drive the said motorcycle, in my considered view, satisfies the condition as is contemplated in para 100 (iii) of the judgment of the Hon'ble Supreme Court in *National Insurance Co. Ltd. Vs. Swaran Singh and others (supra),* because in such like situation, it cannot be held that the owner of the vehicle was either guilty of negligence or he failed to exercise reasonable care regarding use of vehicle by a duly licensed driver. A perusal of the judgment so passed by the Hon'ble Supreme Court (supra) demonstrates that onus to prove violation of the condition of policy is upon the insurer and not the insured. In other words, onus was upon the insurer to prove that when insured handed over the vehicle to the person who was possessing a fake licence for the purpose of driving the same, he was aware of this fact on account of his either having acted in negligence or on account of his having failed to exercise reasonable care in this regard. Both these facts, in my considered view, have not been proved on record by the insurer. This very important aspect of the matter has been completely ignored by the learned Tribunal.

19. Therefore, in view of the above discussion, this appeal is allowed and the findings returned by the learned Motor Accident Claims Tribunal-II, Kangra at Dharamshala in M.A.C.P. No. 35-G/2004 qua issues No. 4 and 5 are reversed and the award passed by the learned Tribunal is modified to the extent that liability to compensate the claimants stands fastened upon the Insurance Company and not the present appellants. Miscellaneous applications, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Brij Lal ………Appellant
Vs.
State of H.P. and others ………Respondents

LPA No. 77 of 2017
Decided on: August 3, 2017

Constitution of India, 1950 - Article 226- Writ petitioner was appointed as PET under PTA Grant-in-Aid Rules, 2006- his appointment was challenged by the present appellant- an inquiry committee was constituted, which held that the appointment of the writ petitioner was not in accordance with the instructions contained in para-11 of the guidelines/Notification dated 27.5.2008 – this order was upheld in appeal – writ petitioner filed a writ petition which was allowed and the orders were quashed- matter was remitted to the inquiry authority for a fresh decision- enquiry committee held that the appellant deserved to be appointed in place of the writ petitioner- a writ petition was filed and the order of the inquiry authority was set aside- aggrieved from the order, present appeal has been filed- held that writ court had clearly held earlier that the criterion specified in the year 2008 could not be applied retrospectively to the selection made in the year 2006- inquiry committee had made evaluation on the basis of criterion laid down in the year 2008- it was not shown that the appointing authority had adopted any arbitrary criterion for appointment of the writ petitioner- the writ court had rightly allowed the writ petition- appeal dismissed. Para-(Para 7 to 16)

For the appellant	:	Mr. G.R. Palsra, Advocate.
For the respondents	:	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma & Mr.Kush Sharma, Deputy Advocate Generals, for respondent-State. Nemo for respondent No.4.

The following judgment of the Court was delivered:

<u>Sandeep Sharma, J.</u>

By way of instant Letters Patent Appeal, challenge has been laid to judgment dated 21.6.2017 passed by learned Single Judge in CWP No. 1641 of 2012, whereby learned Single Judge, while allowing writ petition preferred by the petitioner, set aside the order dated 17.1.2012 passed by inquiry committee and upheld the appointment of the petitioner made against the post of Physical Education Teacher (PET) pursuant to interview held on 18.9.2006.

2. Briefly stated the facts as emerge from the record are that respondent No. 4(petitioner in CWP No. 1641 of 2012) was appointed as PET under PTA Grant-in-Aid Rules, 2006 in September 2006. However, the fact remains that aforesaid appointment of the petitioner

was assailed by Brij Lal (appellant herein). Vide order dated 15.10.2008, inquiry committee was constituted to look into aforesaid complaint made by the appellant against appointment of the respondent No.4, namely Naresh Kumar, on the ground that proper procedure to select candidate for the post in issue, was not followed and adopted by PTA. Committee, vide aforesaid order dated 15.10.2008, held that appointment of the petitioner was not in consonance with the instructions contained in para-11 of the guidelines/Notification dated 27.5.2008, which has been taken note by the learned Single Judge. It also emerges from the record that order passed by Committee was upheld by appellate authority, vide order dated 24.12.2008. Being aggrieved with aforesaid order passed by inquiry committee, which was further upheld by the appellate authority, respondent No.4 namely Naresh Kumar, preferred CWP No.1101 of 2009, before this Court. Aforesaid writ petition came to be disposed of by this Court vide judgment dated 18.3.2010, wherein, Division Bench, taking note of letter No. EDN-Kha(7)3706-I dated 3.9.2009, quashed impugned order, reserving liberty to the inquiry committee to consider the matter, afresh in view of instructions contained in letter dated 3.9.2009.

3. At this stage, it would be profitable to take note of relevant portion of judgment dated 18.3.2010, as under:

> "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. 632/2009 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….."

4. Record, reveals that sequel to aforesaid judgment passed by Divisional Bench, inquiry committee considered matter afresh. Inquiry Committee with a view to comply with the orders passed by this Court on 4.8.2009 and 28.7.2009, in CWP No. 525/2009, titled **Ravinder Singh** versus **State of H.P. and others** and CWP No. 2632 of 2008 titled **Koyal Kumar** versus **State of H.P. and others**, assessed merit of the candidates taking into consideration marks obtained by them in matriculation, plus two examination, B.A./M.A. and B.P.Ed./Diploma. Interview Committee, on the basis of merit, drawn by it, taking into consideration, academic qualifications, referred to above, came to the conclusion that appellant namely Brij Lal, was required to be appointed as PET on PTA basis and not respondent No.4, namely Naresh Kumar.

Committee, specifically came to the conclusion that the merit was ignored by the then PTA, while appointing respondent No.4, Naresh Kumar as PET. Accordingly, appointment of respondent No.4, Naresh Kumar, as PET in GSSS Baryara made by PTA on 18.9.2006, was declared invalid.

5. Respondent No.4, being aggrieved with the aforesaid order passed by interview committee approached this Court by way of CWP No. 1641 of 2012. Learned Single Judge, taking note of pleadings and material adduced on record by the respective parties, as well as orders passed by interview committee, quashed order dated 17.1.2012 passed by inquiry committee and upheld selection of respondent No.4 to the post of Physical Education Teacher, pursuant to selection held on the basis of interview held on 18.9.2006.

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

7. It is not in dispute that CWP No. 1101/2009 having been filed by respondent No. 4 was disposed of with the direction to the inquiry committee to consider the matter afresh in light of instructions referred to in the judgment. Division Bench, of this Court, while dealing with bunch matters including CWP No. 1101 of 2009, specifically taking note of communication dated 24.9.2009, whereby clarification was issued by Director, Higher Education, Himachal Pradesh, taking note of letter No. EDN-kha(7)3706-1 dated 3.9.2009, issued by Principal Secretary (Education) to the Government of Himachal Pradesh, directed the inquiry committee to consider matter afresh in light of the instructions contained in the letter referred to herein above.

8. It would be profitable to take note of communication dated 24.9.2009 as under:

> "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. 632/2009 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 direct ed to comply with the directions of the Government and take action in the matter accordingly."

9. Perusal of aforesaid communication clearly suggests that inquiry committee, while deciding matter afresh was required to take into consideration observations made by this Court in CWP's No. 525/2009 and 2632/2008. At this stage, this Court deems it necessary to take note of following observations made by Division Bench of this Court in CWP No. 525/2009, titled **Ravinder Singh** versus **State of H.P. and others**:

> "The notification, dated 27th May, 2008 talks about the committees constituted in April, 2008. It provides that all complaints should be made latest by 20th June, 2008. It lays down the parameters which the Committees can inquire into. These are:- Adequate publicity not made; Interviews not held; All the eligible applicants not invited for interview; Merit ignored; and or any other issue brought to the notice of the Committee. The notification also lays down that the complaints against ignoring of the merit shall be evaluated based on the evaluation criteria in Annexure-A attached to the notification. We are of the considered view that this criteria cannot be applied retrospectively. If the PTA has followed a rational

criteria this substituted criteria cannot be applied retrospectively to cases where interviews were held and selections made even before this criteria had been thought about by any person. It is a well settled principle of law that the State by executive instructions cannot take away the vested right of any person with retrospective effect. We may make it clear that we are not saying that if the PTA has not at all followed any objective criteria and has totally ignored merit, the Committee should not interfere. If, however, the PTA has followed some reasonable criteria then the fresh thought of criteria cannot be applied to set aside a valid selection.

Therefore, the criteria laid down in the notification dated 27.5.2008 could not have been applied retrospectively."

10. Division Bench of this Court, while dealing with CWP No. 525/2009, categorically held that criteria laid down in Notification dated 27.5.2008, could not have been applied retrospectively. Division Bench, in the aforesaid case, while setting aside orders of D.C. as well as order of the Committee passed in that case, further held that Committee, after giving adequate opportunity of hearing to the petitioner as well as respondent can look into the matter and decide whether appointment of petitioner was valid or not?

11. After having carefully perused material available on record vis-à-vis impugned judgment passed by learned Single Judge, we find that inquiry committee, while carrying out fresh exercise in terms of judgment passed by Division Bench on 18.3.2010, in CWP No. 1101 of 2009, re-determined merit of the candidates in terms of criteria laid down in Notification dated 27.5.2008. At this stage, it may be reiterated that vide aforesaid judgment dated 18.3.2010, direction was issued to inquiry committee, to decide case of the petitioner afresh in terms of instructions contained in communication dated 24.9.2009, wherein admittedly, inquiry committees were directed to decide issue with regard to appointments of PTA teachers, taking into consideration observations of this Court made in CWP No. 525/2009. In the aforesaid facts, Division Bench had specifically held that criteria laid down in Notification dated 27.5.2008, could not be applied retrospectively. This Court sees no force in the arguments of Mr. G.R. Palsra, that order dated 17.1.2012 passed by inquiry committee is strictly in accordance with judgment passed by Division Bench of this Court on 18.3.2010, in CWP No. 1101/2009. Since Committee was required to decide the case of the petitioner in view of observations made by this Court in aforesaid case, there was no occasion as such for the inquiry committee to re-determine the merit of candidates including petitioner and respondent, on the basis of criteria laid down vide Notification dated 27.5.2008, rather, Committee, while considering complaint, if any, of unsuccessful candidate, ought to have examined, whether PTA had followed some 'reasonable' criteria at the time of making selection to the post of PET or not?

12. Mr. G.R. Palsra, learned counsel representing the appellant, was unable to point out discussion, if any, in order dated 17.1.2012 passed by inquiry committee, with regard to criteria adopted by selection committee in the interview held on 18.9.2006. Perusal of order dated 18.9.2006, suggests that merit of candidates was determined by Committee by applying uniform criteria taking into consideration various relevant factors, including educational qualifications possessed by the candidates and their experience etc. There is nothing in the order dated 17.1.2012, from where it could be inferred that selection committee, while appointing respondent No.4, adopted unreasonable and arbitrary criteria, to accommodate respondent No. 4, rather, this Court, after having carefully perused record, finds that all the concerned candidates, including appellant and respondent No.4, were assessed on the same yard stick and since respondent No.4 was found to be more meritorious amongst them, he was rightly offered appointment to the post of PET.

13. At this stage, this Court, at the cost of repetition, may again refer to judgment 4.8.2009 passed by this Court in CWP No. 525/2009, titled **Ravinder Singh** versus **State of H.P. and others**, wherein Division Bench, while testing validity of notification dated 27.5.2008, specifically held that criteria laid down in notification can not be applied retrospectively and if

PTA has not at all followed any objective criteria and has totally ignored merit, the Committee can interfere. If, however, the PTA has followed reasonable criteria then fresh criteria cannot be applied to set aside a valid selection.

14. Mr. G.R. Palsra, learned counsel representing the appellant, was unable to show on record that inquiry committee while examining merit afresh in terms of judgment dated 18.3.2010, did not examine the case of candidates, who had appeared in the initial selection process, in terms of criteria laid down in notification dated 27.5.2008, rather, it set aside the selection of respondent No.4, taking note of the fact that PTA did not follow some reasonable criteria.

15. Since, the learned counsel for the appellant was unable to point out that the authorities concerned, while appointing respondent No.4 as Physical Education Teacher, in September, 2006, adopted arbitrary criteria, this Court sees no illegality or infirmity in the findings returned by the learned single Judge that it was not open for the selection committee to redraw the merit, that too, on the basis of criteria laid down in Notification dated 27.5.2008. Admittedly, there is nothing on record suggestive of the fact that criteria adopted by selection committee at the time of initial interview held on 18.9.2006, was not in vogue, as such, matter, if any, could be re-considered by inquiry committee in terms of judgment passed by this Court taking into consideration criteria prevalent at the time of selection in the year 2006, not as per criteria laid down vide notification dated 27.5.2008. In order dated 17.1.2012, though Committee has observed that selection committee while selecting respondent No.4 ignored merit but there is no discussion as such that in what manner, merit was ignored by selection committee, in the year 2006. It clearly emerge from merit drawn by selection committee in the year 2006 that candidates, who had appeared in the interview were also awarded marks in the interview. It also emerge from the record that respondent No.4 was given weightage by selection committee taking into consideration land donated by him to the School concerned.

16. In view of aforesaid discussion, this Court is in agreement with the findings returned by learned single Judge that selection committee erred in not appreciating judgment passed by Division Bench, whereby it had categorically held that instructions issued by the respondents, dated 27.5.2008, can not be applied retrospectively and in case appointments made before issuance of aforesaid instructions are found to be based on reasonable criteria followed by PTA then it was not binding for inquiry committee to apply fresh criteria to set aside valid selection.

17. Consequently, in view of above, there is no merit in the present appeal and the same is dismissed. Pending applications, if any, are disposed of. Interim directions, if any, are also vacated.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Commissioner of Income Tax, Shimla …Appellant

Versus

M/s Him Knit Feb. …Respondent.

ITA No. 34 of 2009
Date of Decision: August 3, 2017

Income Tax Act, 1961- Section 80IB- Assessee is carrying on the activity of manufacturing knitted cloth with the aid of power- he had not employed more than 10 workers for more than five months in assessment years in question – he claimed exemption, which was allowed by Commissioner of Income Tax- aggrieved from the order, the present appeal has been filed- held

that if the foremen are taken into consideration, the assessee is entitled to benefit of Section 80IB – the employment of foremen was found to be factually correct on inspection – the findings were correctly recorded by the Commissioner of Income Tax- no substantial question of law arises in this case- appeal dismissed. (Para-6 to 28)

Cases referred:
Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar, (1999) 3 SCC 722
Panchugopal Barua v. Umesh Chandra Goswami, (1997) 4 SCC 713
Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179
K. Raj and Anr. v. Muthamma, (2001) 6 SCC 279

For the Appellant: Mr. Vinay Kuthiala, Sr. Advocate with Ms.Vandana Kuthiala & Mr.Diwan Singh Negi, Advocates, for the appellant.
For the Respondent: Mr. Vishal Mohan, Advocate, for the respondent.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice (oral).

The appeal came to be admitted on the following substantial question of law:-

> "Whether the condition specified in Section 80IB(2)(iv) of the Income Tax Act can be said to be substantially complied with, even though the number of workers is less than ten during seven months of the year?"

2. The only issue which arises for consideration is as to whether findings of fact, so returned by the authorities below, qua employment of workers, more than ten in number, during the substantial part of the year, warrants interference by this Court or not. Are they perverse, erroneous or illegal?

3. This Court vide judgment dated 30.09.2010, passed in ITA No. 32 of 2004, titled as *M/s Amrit Rubber Industries Versus Commissioner of Income Tax,* has already interpreted the term "employment for substantial part of the year" to mean the employment not to be for the entire year, but for a substantial period, which, in the facts of case was held to be more than six months in a year.

4. Claiming statutory deduction under the provisions of Clause (iv) of sub-section (2) of Section 80IB of the Income Tax, 1961 (hereinafter referred to as the Act), with respect to the assessment year 2003-04, the present assessee declared his income by filing the return.

5. On scrutiny, such claim of the assessee came to be rejected by the Assessing Officer, in terms of order dated 30.03.2006 (Annexure P-1).

6. It is not in dispute that findings of fact, that of the Assessing Officer qua engagement of less than ten workers, came to be reversed by the Commissioner of Income Tax (Appeals) [hereinafter referred to as CIT (A)], in terms of order dated 24.11.2006 (Annexure P-2).

7. Also finding of fact that of CIT (A) came to be affirmed by the Income Tax Appellate Tribunal (hereinafter referred to as the Tribunal), in terms of order dated 17.11.2008 (Annexure P-3).

8. For proper appreciation, we reproduce here-in-under relevant clause of Section 80 IB(2) of theAct:-

> "80 IB(2): ...
>
> ... ...
>
> (iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a

> manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power."

9. The only issue being as to whether the assessee is compliant of the said provision or not. From the bare reading of sub-clause (iv) reproduced supra, it is evident that the undertaking of the assessee, must have employed ten or more workers in a manufacturing unit carried out with the aid of power.

10. Otherwise assessee being a manufacturing unit, is entitled to the benefits of deductions, fulfilling all other conditions specified in sub-section (2) of Section 80IB of the Act, is not in dispute.

11. In the instant case, assessee is carrying on the activity of manufacturing knitted cloth with the aid of power. It is not in dispute.

12. The Assessing Officer, in a tabulated form, depicted employment status of each one of the workers so employed by the assessee on monthly basis. From a reading of para-5.1 of order dated 30.03.2006 (Annexure P-1, page-7), it is evident that assessee had not employed more than ten workers for more than five months in the assessment year in question. Considering the principle of law laid down by this Court in *Amrit Rubber Industries* (supra), it cannot be disputed that if findings returned in the said paragraph alone are to be considered, then the assessee was not compliant of the essential eligibility criteria of having employed the requisite number of workers in an undertaking engaged in the process of manufacturing.

13. However, in the instant case, as stands observed by the Assessing Officer himself, in para-5.5 of the order, assessee's employment of foremen in the undertaking was found to be doubtful. Finding is based on his appreciation of material, so available on record. Reasons and findings, which prompted him to exclude employment of foremen from considering the number of employees engaged, so referred to in para-5.5 of the order passed by the Assessing Officer, were found to be not only factually incorrect, but to be based on surmise and conjecture. Except for what is recorded in para-5.5 of the order, the Assessing Officer did not record any other reason for rejecting the contention of the assessee, with regard to employment of requisite number of persons.

14. If the number of persons employed as Foremen are accounted for, assessee would be in compliant of the statutory provisions, entitling him for statutory deductions.

15. The CIT (A), while recording his findings on the question of fact with regard to employment of requisite number of workers, holding the assessee entitled to the benefits under Section 80IB of the Act, returned its findings after ascertaining the factual matrix on the basis of inspection carried out on 21.08.2002, on the premises of the assessee. Now significantly, inspection took place in presence of the Assessing Officer, when entire record was inspected and upon thorough examination of books of account, the factum of employment of foremen, as claimed by the assessee, was found to be factually correct. It is in this backdrop, that the Appellate Authority observed as under:-

> "3(xii) In the light of the above legal and factual discussions and having regard to the judicial mandates, on the issue in question, it is evident that compliance with the statutory condition of section 80IB(2)(iv) of the Act, is to be considered in terms of evidences documentary or otherwise on record, plain relevant provisions of the Act, direct decisions of various courts/tribunals and not in terms of suspicions, surmises and conjectures. It is only empirical evidence and not mathematical exercise that is relevant and decisive, in ascertaining the compliance with the relevant statutory condition. It is not statutorily incumbent on the appellant to explain and justify day–to-day employment of such workers, based on the product or outcome of various statistical formulations. Therefore, having regard to the submissions made by the appellant, relevant record and above discussions, it is evident that the appellant has substantially complied

with the said statutory condition of employment of workers. Consequently, such findings of the A.O., based on pure surmises and suspicion are not sustainable and, hence, found unacceptable."

16. Perusal of the order dated 17.11.2008 (Annexure P-3) passed by the Tribunal, only reveals the aforesaid findings to have been affirmed.

17. While contending that in fact the Tribunal had concurred with the findings of the Assessing Officer, Ms. Vandana Kuthiala, learned counsel, invites our attention to para-10 of the order, which we reproduce as under:-

> "10. It is evident from the above decisions that, what is necessary is the substantial compliance of condition provided under section 80IB(2)(iv) of the Act. In other words, an assessee need not to have employed ten or more employees during the entire year to claim deduction under section 80IB(2)(iv) of the Act. In the instant case, the assesse has furnished a chart showing number of persons employed by the assesee. It would be seen from the chart as placed on record by the assessee that it has substantially complied with the condition as provided under section 80IB(2)(iv) of the Act. In fact, it is seen that the assessee has employed ten or more workers for substantial part of the year. The contention of the AO that foremen cannot be treated as part of the manufacturing process is unfounded and incorrect. In the case of the assessee, we find that, for five complete months, there are ten or more employees and even for other months, though at time, during the month, the assessee may not have employed ten or more person yet even during those months, the assessee had intermittently employed ten or more workers. We, thus, in light of the above judicial pronouncements and the facts of the case hold that the assessee has satisfied the statutory pre-condition for claiming deduction under section 80IB(2)(iv) of the Act and we hereby confirm the findings of the CIT(A), who on the basis of the relevant record has also found that, the assessee has substantially complied with the statutory pre-condition of employment of workers and, the findings of the AO are not based correct appreciation of the evidence on record and, provisions of law."

18. Careful perusal of the aforesaid findings only reveals the Tribunal to have independently formed an opinion, based on correct, complete and proper appreciation of entire material, that the assessee had in fact employed more than ten workers for substantial part of the year. Findings of fact cannot be said to be arbitrary, illegal, erroneous or unreasonable.

19. As to whether foremen were employed in the process of manufacture or not was not an issue either before the Assessing Officer or before the CIT (A). The only issue being as to whether Foremen were employed in the undertaking or not. It is in this backdrop, the Tribunal found it appropriate not to answer the contention of the revenue that in fact foreman is not treated as a part of the manufacturing process. In fact, Tribunal was not even required to answer the same, for there was no dispute as to whether the undertaking of the assessee is engaged in the activity of manufacture or that foremen were not employed for the process of manufacture, in the particular undertaking of the assessee, for which, benefit under Section 80IB(2)(iv) was sought.

20. Though this Court, after having gone through the material adduced on record by appellant-department vis-a-vis impugned order passed by the learned Appellate Tribunal, is of the view that no substantial question of law arises for determination of this Court, but otherwise also, as has been discussed hereinabove, learned Tribunal has correctly dealt with each and every aspect of the matter, taking into consideration law laid down by Hon'ble Apex Court as well as the rule occupying the field.

21. This Court, after having carefully examined the text of questions of law formulated in the appeal vis-a-vis findings recorded by learned Appellate Tribunal, finds that

questions framed by the appellant-department are pure questions of fact, which definitely cannot be looked into in the present proceedings, and as such present appeal deserves to be dismissed.

22. Section 260-A of the Income Tax Act, 1961 provides that *"An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal before the date of establishment of the National Tax Tribunal, if the High Court is satisfied that the case involves a substantial question of law."*

23. Taking note of the aforesaid provision of law, the foremost question for consideration is as to whether any substantial question of law arises in this case or not.

24. In this regard reliance is placed upon *Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar,* (1999) 3 SCC 722**,** wherein the Hon'ble Apex Court has held as under:-

> "6. If the question of law termed as a substantial question stands already decided by a larger bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second appeal. This Court in Reserve Bank of India v. Ramakrishan Govind Morey, AIR (1976) SC 830 held that whether the trial court should not have exercised its jurisdiction differently is not a question of law justifying interference."

25. In *Panchugopal Barua v. Umesh Chandra Goswami*, (1997) 4 SCC 713, it has been laid down by Hon'ble Apex Court that existence of substantial question of law is sine qua non for the exercise of jurisdiction. The Hon'ble Apex Court has held as under:-

> "7. A bare look at Section 100 C.P.C. shows that the jurisdiction of the High Court to entertain a second appeal after the 1976 amendment is confined only to such appeals as involve a substantial question of law, specifically set out in the memorandum of appeal and formulated by the High court. Of course, the proviso to the Section shows that nothing 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 the Court is satisfied that the case involves such a question. The proviso presupposes that the court shall indicate in its order the substantial question of law which it proposes to decide even if such substantial question of law was not earlier formulated ate by it. The existence of a "substantial question of law" is thus, the sine-qua-non for the exercise of the jurisdiction under the amended provisions of Section 100 C.P.C."

26. In *Santosh Hazari v. Purushottam Tiwari***,** (2001) 3 SCC 179, the court reiterated the statement of law that the High Court cannot proceed to hear a second appeal without formulating the substantial question of law.

> "9. The High Court cannot proceed to hear a second appeal without formulating the substantial question of law involved in the appeal and if it does so it acts illegally and in abnegation or abdication of the duty cast on Court. The existence of substantial question of law is the sine qua non for the exercise of the jurisdiction under the amended Section 100 of the Code. [See Kshitish Chandra Purkait Vs.

Santosh Kumar Purkait, (1997) 5 SCC 438, Panchugopal Barua Vs. Umesh Chandra Goswami, (1997) 4 SCC 413 and Kondila Dagadu Kadam Vs. Savitribai Sopan Gujar, (1999) 3 SCC 722].

10. At the very outset we may point out that the memo of second appeal filed by the plaintiff-appellant before the High Court suffered from a serious infirmity. Section 100 of the Code, as amended in 1976, restricts the jurisdiction of the High Court to hear a second appeal only on "substantial question of law involved in the case". An obligation is cast on the appellant to precisely state in the memorandum of appeal the substantial question of law involved in the appeal and which the appellant proposes to urge before the High Court. The High Court must be satisfied that a substantial question of law is involved in the case and such question has then to be formulated by the High Court. Such questions or question may be the one proposed by the appellant or may be any other question which though not proposed by the appellant yet in the opinion of the High Court arises as involved in the case and is substantial in nature. At the hearing of the appeal, the scope of hearing is circumscribed by the question so formulated by the High Court. The respondent is at liberty to show that the question formulated by the High Court was not involved in the case. In spite of a substantial question of law determining the scope of hearing of second appeal having been formulated by the High Court, its power to hear the appeal on any other substantial question of law, not earlier formulated by it, is not taken away subject to the twin conditions being satisfied: (i) the High Court feels satisfied that the case involves such question, and (ii) the High Court records reasons for its such satisfaction."

27. All the aforesaid judgments have been referred to in the later judgment of *K. Raj and Anr. v. Muthamma***,** (2001) 6 SCC 279. A statement of law has been reiterated regarding the scope and interference of the court in second appeal under Section 100 of the Code of Civil Procedure.

28. Consequently, in view of detailed discussion made hereinabove, it cannot be said that any question of law much less substantial, is involved in this appeal, which needs adjudication by this Court. Therefore, order passed by the learned Appellate Tribunal is upheld and the present appeal dismissed.

All interim orders are vacated and all the miscellaneous pending applications are disposed of.

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

Balwant Singh ....Petitioner.

Versus

Dinakshi Rana ....Respondent.

CMPMO No. 367 of 2016.
Decided on: 4th August, 2017

Hindu Marriage Act, 1955- Section 24- The Court allowed the application for maintenance pendente lite and awarded maintenance @ Rs. 4,000/- per month in addition to Rs. 3000/- per month already awarded by Additional Chief Judicial Magistrate, Dehra under Protection of Women from Domestic Violence Act – litigation expenses of Rs. 10,000/- were also awarded - aggrieved from the order, present petition has been filed- held that husband is running a dental clinic and his monthly income is Rs.10,000/- Rs. 12,000/- - he is already paying maintenance of Rs.3,000/- to his wife- the maintenance amount was fixed by the Court after taking into

consideration, the income of the husband – the wife is not entitled to maintenance pendente lite- hence, the order set aside- however, litigation expenses enhanced to Rs. 20,000/-. (Para-5 to 7)

For the appellant : Mr. Ashok Kumar Thakur, Advocate.
For the Respondent : Mr. R.P. Singh & Mr. Sunil Thakur, Advocates.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

The order under challenge in this petition is Annexure P-2 passed by learned Additional District Judge (II), Kangra at Dharamshala in an application registered as 58-G/2015 filed in the main case i.e. HMP No.12-G/15/14, under Section 24 of the Hindu Marriage Act. Learned Court below has allowed the application filed by the respondent while awarding maintenance *pendente lite* @Rs.4,000/- per month in addition to Rs.3000/- already awarded to her by learned Additional Judicial Magistrate, Dehra, District Kangra, in the proceedings she initiated under the Domestic Violence Act. She has also been granted a sum of Rs.10,000/- towards the litigation expenses.

2. Interestingly enough, the respondent-wife has been awarded a sum of Rs.3,000/- as maintenance, in the proceedings she initiated against the petitioner under the Domestic Violence Act by learned Additional Chief Judicial Magistrate, Dehra, District Kangra, vide order Annexure P-1. Subsequent to the order Annexure P-1, the petitioner-husband has instituted a divorce petition against her, which is pending disposal in the Court below. It is during the course of proceedings in that petition, she has filed the application under Section 24 of the Act for grant of maintenance pendentelite and litigation expenses on the ground that a sum of Rs.3,000/-, she already getting towards her maintenance consequent upon the order Annexure P-1, is not sufficient for her own maintenance and also that of her school going son Master Vidhan. She, as such, has claimed maintenance pendentelite @Rs.8,000/- per month and also the litigation expenses against her husband, the petitioner.

3. The petitioner, in reply to the application, has denied the claim as laid by the respondent being wrong and came forward with the version that he is running a private dental clinic and earning Rs.10,000-Rs.12,000/- per month. It is out of this income, he is paying her maintenance @ Rs.3,000/- per month awarded under the provisions of Domestic Violence Act. It is further claimed that the respondent is a B. Ed. Teacher and working in private School as well as doing tuition work and thereby earning Rs.10,000/- per month.

4. Learned Trial Court, on appreciation of the pleadings of the parties and also hearing learned counsel on both sides, has allowed the application and granted Rs.4,000/- per month as maintenance pendentelite to respondent-wife from the date of institution of application and a sum of Rs.10,000/- towards litigation expenses.

5. Now if coming to the claims and counter claims as laid on both sides, admittedly the respondent-wife has already been granted maintenance @ Rs.3,000/- per month in the proceedings she initiated under the Domestic Violence Act. Be it stated that there is no bar to claim maintenance pendentelite under Section 24 of the Act in addition to the maintenance allowance already granted by the competent Court either under the Domestic Violence Act or under Section 125 of the Code of Criminal Procedure. The paramount consideration, however, in that situation is the income and the capacity of the husband paying the same.

6. In the case in hand, the petitioner-husband is running a dental clinic at his native village. He has admitted his income as Rs.10,000-12,000/- per month. Nothing is available on record to show that his income was more than that. Similarly, his claim that the respondent being B.Ed. Teacher is earning Rs.10,000/- per month is also not supported by any

other and further material. The pleadings qua earning of the parties on both sides are equally balanced. In such circumstances, it is not known as to how learned trial Judge has guessed the income of the petitioner-husband as Rs.25,000/- per month. No doubt, in such type of cases, the guess work is permissible to reasonable extent. Anyhow, the facts remain that the income of the petitioner-husband is Rs.10,000-12,000/- or at the most Rs.15,000/- per month. Out of the same Rs.3,000/- is being paid by him to the respondent-wife for her maintenance under the Domestic Violence Act. Learned Additional Chief judicial Magistrate has granted the maintenance allowance to her vide order Annexure P-1 after taking into consideration the earning capacity of the petitioner-husband.

7. True it is that a sum of Rs.3,000/- is on lesser side and is not sufficient for the maintenance of the respondent-wife. She, however, is at liberty to seek appropriate remedy for getting the same enhanced. The petitioner-husband is also liable to maintain Master Vidhan, their school going son. The respondent is at liberty to initiate proceedings, in accordance with law, to seek enhancement in maintenance against her husband, the petitioner, however, so far as these proceedings are concerned, in the opinion of this Court, she is not entitled to the grant of maintenance pendentelite, however, should have been granted only the litigation expenses because it is her husband, the petitioner, who has dragged her in the litigation by filing divorce petition in the trial Court. Since Rs.10,000/- awarded as litigation expenses to her is on lesser side, therefore, irrespective of she has not assailed this order coupled with the factum of she is dragged in litigation upto this Court by filing the present petition, the sum of Rs.10,000/- awarded to the respondent towards litigation expenses is enhanced to Rs.20,000/-. The petitioner husband is directed to pay the enhanced amount and the amount originally awarded, if not already paid, on the next date.

8. With the above observations, the order under challenge is quashed and set aside and the petition is accordingly dismissed. Pending application(s), if any, shall also stand disposed of.

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

State of H.P. & anr. ......Appellants.
Versus
Smt. Rami Devi & ors. ......Respondents.

FAO(WCA) No.368 of 2008.
Date of decision: August 4, 2017.

Employees compensation Act, 1923- Section 4(1)(a)- R was working as beldar – he, RW-1, RW-2, PW-1 and another person were deputed to remove the fault in the line at Hattu to restore the water supply to the house of S, where marriage was being solemnized – they remove the defect – the deceased suffered heaviness in his body – he was taken to hospital but died on the way – the claim petition was allowed by the Commissioner- it was contended by the Department that R was not on duty and the death had not taken place during the course of employment – held that the deceased was deputed to rectify the fault – there was a direct nexus between the employment and the death – appeal dismissed. (Para-3 to 6)

Case referred:
National Insurance Company vs. Smt. Gurmeeto and others, Latest HLJ 2006 (HP) 33

For the appellants Mr. Varun Chandel, Additional Advocate General.
For the respondents Exparte.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

The appeal is admitted on the following substantial question of law:

> Whether the award passed by the Commissioner, Workmen's Compensation Act, is not legally substanional (sustainable) as the same is against the provision of the Law i.e. Section 4(1)(a) of the Workmen's Compensation Act and is liable to be set aside.

2. Respondent-department in case No. SIM-NO-WC(Fatal)167-06 is in appeal before this Court. The complaint is that learned Commissioner under Workmen's Compensation Act below has erroneously allowed the claim petition filed by the claimants, respondents herein and awarded the compensation. According to the appellants herein deceased Ram Singh was not on duty on 10.12.2001 at the time when he died. Therefore, when he never died during the course of his employment, no compensation could have been awarded to the claimants-respondents. The evidence as has come on record by way of the testimony of respondent-claimant No. 1 Smt. Rami Devi PW1 and also from that of PW2 Jag Mohan a fellow Beldar of deceased Ram Singh and also from that of RW1 Puran Chand and RW2 Jia Lal coupled with FIR Ext.PW1/A registered at the instance of PW2 Jag Mohan Singh, deceased Ram Singh was working as Beldar. On 10.12.2001 he along with RW1 Puran Chand, RW2 Jia Lal, one Rattan Chand and PW1 Jag Mohan were deputed around 5:00 P.M. to remove the fault in the line at Hattu so that the supply of water could be restored in the area including to the house of one Sabir Dass at village Khanar where marriage was being solemnized. They removed the defect in the pipe line and restored the water supply around 9:00 P.M. They reached at Silli Kandli around 11:00 P.M. While RW1 Puran Chand, RW2 Jia Lal and Ratan Chand returned to Narkanda, deceased Ram Singh and PW1 Jag Mohan proceeded to Village Khanar to ascertain as to whether the restoration of the water supply stand restored or not. On finding the restoration of water supply in that village particularly in the house of Sabir Dass, they had meal there and proceeded around 3:00 A.M. to their quarter at Narkanda. When they reached at Village Khamaut the deceased told PW1 that he is feeling heaviness in his body. They had to stay in open during night at that place. Next day i.e. 11.12.2001 around 7:00 A.M. PW1 went to nearby village Khmaut and informed the villagers about the ill health of the deceased. On this the villagers rushed to the place where deceased was sitting. After massage etc. the villagers decided to remove him to hospital at Narkanda. However, on the way to hospital he died around 11:00. near Singhadhar.

3. There is no denial to such facts disclosed by the respondents-claimants in the claim petition and ultimately established from the evidence produced by the parties on both sides. As a matter of fact, it lie ill to claim that the deceased was not on duty or that the death has not occurred during the course of his employment. It is satisfactorily proved on record that he was deputed along with PW1, RW1, RW2 and one Rattan Chand to set a fault right in the pipe line at Hatu on 10.12.2001 around 5:00 P.M. Not only the testimony of PWs 1 and 2 but that of RWs1 and 2 the fault was set right by them around 9:00 P.M. and it is thereafter they returned to home. While three of them went to Narkanda, the deceased and PW1 went to village Khanar to check the availability of water supply in the house of Sabir Dass where the marriage was being solemnized. On way back to Narkanda at his quarter the deceased died at Singhadhar on account of his ailment cropped up all of sudden. The news paper clipping Ext.PW1/C is suggestive of that he died while on duty. The post mortem report is Ext.PW1/B. Being so, there is direct nexus between employment of the deceased and the ailment from which he suffered in the discharge of his duty.

4. In a case FAO No. 177 of 2006, titled *Nirmala and others* versus *Kaushalaya Devi and another*, decided by this Court on 11th July, 2016 while placing reliance on the judgment again that of this Court in ***National Insurance Company*** versus ***Smt. Gurmeeto and others, Latest HLJ 2006 (HP) 33*** where the driver of the truck fell ill on account of driving the same without windscreen and ultimately died after few days, in his house it was held that he died

during the course of his employment. The findings of this Court are as such supported by the judgment in Nirmala's case hereinabove.

5. Therefore, appellant-department is not at all justified in claiming that since the death of Ram Singh having not been occurred on account of injury he received during the course of his employment, the award of compensation to the respondents-claimants is violative of Section 4-A of the Workmen's Compensation Act. As a matter of fact, in view of the law laid down by this Court in Nirmala's case *supra* it is not always answer that the death should be occurred only on account of receiving injury while on duty. However, in a case where the workman fell ill while discharging his duty, those cases are also covered under the Act for the purpose of awarding compensation.

6. Having said so, the substantial question of law referred hereinabove does not at all arise for adjudication in this appeal. The order passed by learned Commissioner below rather is legally sustainable.

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

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J

Shankar Dass …Petitioner

Versus

Municipal Committee, Hamirpur …Respondent

CMPMO No. 126 of 2017
Decided on: August 8, 2017

Code of Civil Procedure, 1908- Order 29 Rule 9- An application for appointment of Local Commissioner to demarcate the suit land and to report the nature and extent of encroachment was filed- application was dismissed by the Trial Court as premature – a subsequent application was filed for the appointment of local Commissioner after the closure of evidence by the parties- application was dismissed by the Trial Court- held that the dispute between the parties related to the boundaries, which can be adjudicated only by the demarcation- Court had erred in dismissing the application- application allowed and Court directed to appoint Local Commissioner. (Para-12 to 17)

For the petitioner	Mr. Dhananjay Sharma, Advocate vice. Mr. Sanjeev Sood, Advocate.
For the respondent:	Mr. Anil God, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of instant petition under Article 227 of the Constitution of India, prayer has been made for quashing and setting aside order dated 10.3.2017 passed by Civil Judge (Senior Division), Court No. 1, Hamirpur, Himachal Pradesh in Civil Suit No. 139/2012, whereby application having been filed by petitioner under Order 26 Rule 9 CPC, for appointment of local commissioner to demarcate suit property as well as adjoining path constructed by municipal Committee, Hamirpur, came to be dismissed.

2. Briefly stated the facts, as emerge from the record are that petitioner-plaintiff, filed a civil suit bearing No. 139/2012 for permanent prohibitory injunction, restraining the respondent-defendant from raising any construction or laying passage in suit land and in the

alternative sought decree for mandatory injunction directing defendant to restore suit land to its original position, in case it succeeds in constructing passage, during the pendency of the suit.

3. It emerges from the record that plaintiff preferred an application under Order 26 Rule 9 CPC read with Section 151 CPC for appointment of local commissioner to demarcate suit land and submit its report with regard to nature and extent of encroachment, if any, over the land in dispute and existence of passage. Aforesaid application was contested by the defendant and learned Civil Judge (Senior Division), Court No.1, vide order dated 6.4.2015, dismissed the application terming the same to be premature.

4. Perusal of order dated 6.4.2015 i.e. annexure P-3 clearly suggests that plaintiff specifically averred in the application that defendant is forcibly trying to construct passage over the suit land, while laying down passage in Khasra Nos. 1136 and 1139. Plaintiff, specifically submitted in the application that issue No. 2 as framed by the Court is with regard to mandatory injunction and as such, in order to ascertain encroachment done by the defendant over the suit land, some local commissioner is required to be appointed to demarcate the suit land, so that controversy at hand is decided for all times to come. Further perusal of order dated 6.4.2015, suggests that learned trial Court, taking note of the specific prayer/averments having been made by the plaintiff in the plaint that, "*in case during the pendency of the suit, defendant/respondent succeeds in constructing passage through suit land, then a decree for mandatory injunction be passed*", came to the conclusion that no such construction has been raised by the defendant over any portion of suit land and as such, there is no question of ascertaining nature and extent of the encroachment of defendant over the suit land. Learned Court below, vide aforesaid order, dismissed the application having been preferred by the plaintiff, being premature. While dismissing the aforesaid application, trial Court further observed that in order to prove interference, if any, by the defendant over the suit land, plaintiff is required to lead evidence rather than taking help of the court in creating evidence in its favour.

5. It is not in dispute that aforesaid order was not challenged by plaintiff in any court of law, rather, same was accepted without any demur. Thereafter, plaintiff, vide fresh application being CMA No. 232/2016, again moved the Court under Order 26 Rule 9 CPC, for appointment of local commission to demarcate the suit land.

6. It is also not in dispute that aforesaid application came to be filed after closure of evidence of both the parties.

7. Defendant, while opposing aforesaid prayer having been made by the plaintiff for appointment of local commissioner only contended before the learned Court below that onus to prove issue is/was upon the parties as such, court can not create evidence for either of the parties, by ordering for appointment of local commissioner.

8. Learned Court below, vide order dated 10.3.2017, dismissed the application having been preferred by the plaintiff by concluding that sufficient and reasonable opportunities were granted to the plaintiff and court, in no manner, can assist plaintiff in proving encroachment, if any, on the suit land by the defendant/municipal committee. In the aforesaid background, plaintiff has come before this Court, by way of instant proceedings.

9. Despite opportunity, no reply has been filed on behalf of the respondents.

10. Mr. Anil God, learned counsel representing the defendant, while inviting attention of this Court to earlier order dated 6.4.2015, passed by learned Court below, contended that since earlier application having been filed by plaintiff was rejected by the Court below, vide order dated 6.4.2015, specifically holding therein that contents of plaint show that no construction is/has been raised by defendant over any portion of suit land, and as such, there is/was no question of ascertaining nature and extent of encroachment, if any, by the defendant over the suit land. Mr. God, further contended that at no point of time, challenge, if any, was laid to the aforesaid order passed by learned trial Court, as such, no fresh application could be filed by plaintiff that too at the stage of hearing.

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

12. It is not in dispute that the plaintiff had filed an application under Order 26 Rule 9 CPC for appointment of local commissioner, immediately after framing of issues. Aforesaid application having been filed by the plaintiff was dismissed by the Court, on the ground that it is evident from the averments contained in the plaint that no encroachment is made on the suit land by the defendant-Committee and as such there is no occasion for the Court to appoint local commissioner to ascertain the extent and nature of encroachment, if any, over the suit land by the defendant. It is also not in dispute that aforesaid order was not laid challenge by the plaintiff in any higher court of law, as such, it had attained finality. Subsequently, fresh application under Order 26 Rule 9 CPC came to be filed on behalf of the plaintiff for appointment of local commissioner to prove the factum of encroachment over the suit land by the defendants, which was again dismissed by the Court below on the ground that onus was upon the plaintiff to prove his case by leading cogent and convincing evidence and Court cannot assist in creating evidence in favour of plaintiff. Averments contained in the application as well as orders passed on the application having been filed by the plaintiff for appointment of local commissioner by the Court, clearly suggests that there is boundary dispute inter se parties and no harm would have been caused to either of the parties, if Court had acceded to the request of the plaintiff for appointment of local commissioner to ascertain nature and extent of encroachment over the suit land by the defendant, who, admittedly constructed passage adjoining to the suit land.

13. Though, allegation of encroachment over suit land, by defendant was specifically denied by the defendant, but it clearly emerges from impugned order that one Premi Devi was found to have encroached upon the land and accordingly, she was served with a notice.

14. Learned Court below has erred in concluding that plaintiff despite sufficient opportunities, failed to prove encroachment. Learned Court below while rejecting application preferred by the plaintiff, failed to take note of defence of the defendant, whereby defendant specifically stated that no interference is being caused over the suit land of plaintiff and passage belonging to Municipal Committee passes through Khasra Nos. 1136 and 1139. Plaintiff has specifically averred in the application that suit land i.e. Khasra Nos. 1138 and 1140 are possessed and owned by him and adjoining to it, there is a passage belonging to Municipal Committee, being Khasra Nos. 1136 and 1139, but said passage has been encroached upon and thereafter, Municipal Committee passage has been diverted towards land of the plaintiff. Perusal of pleadings adduced on record by respective parties clearly suggests that dispute, if any, inter se parties is a boundary dispute.

15. It is well settled that Order 26 Rule 9 CPC also casts duty upon the Courts to appoint local commission, if necessary, for proper adjudication of the case, especially where there is boundary dispute.

16. This court cannot lose site of the fact that application, at the first instance was filed by plaintiff immediately after framing of issues for appointment of local commissioner to prove encroachment, if any, on the suit land, by the defendants, but at that stage, same was dismissed by the Court below on a very flimsy ground.

17. Consequently, in view of above, present petition is allowed. Order dated 10.3.2017, passed by Civil Judge (Senior Division), Court No. 1, Hamirpur, HP is set aside. Learned Court below is directed to appoint local commissioner, to visit suit land, to ascertain nature and extent of encroachment over municipal path as well as suit land, if any, by either of parties. Parties, through their counsel, are directed to appear before the learned trial Court on **30th August, 2017.**

18. Pending applications, if any, are disposed of.

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

State of H.P. & Others ………Appellants.
Versus
Bhoop Ram …….Respondent.

LPA No. 79 of 2017.
Decided on: 8th August, 2017

Constitution of India, 1950- Article 226- Writ Court directed the State to ascertain the total area of the writ petitioner utilized for the construction of the road and thereafter to acquire the same and in case the land is not acquired, to hand over the possession to the petitioner – held that the written consent has not been obtained from the petitioner- in absence of any assertion regarding donation or any documentary evidence regarding the same it cannot be believed that petitioner had consented for the construction of the road over the land belonging to him – the Writ Court had rightly allowed the writ petition – appeal dismissed. (Para-2 to 4)

For the appellants : Mr. D.S. Nainta, Additional Advocate General.
For the Respondents : Mr. Chandranarayana Singh, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

LPA No. 79 of 2017 & CMP Nos. 5546 and 5547 of 2017.

In view of the orders passed on the previous date, we have taken-up the main appeal itself for final disposal.

2. As a matter of fact, vide judgment under challenge, learned Single Judge has directed the appellants-State to ascertain the total area of the land belonging to respondent-writ petitioner Bhoop Ram, utilized for construction of 'Mauta-Bagshar' road and thereafter to acquire the same as well as make payment of the compensation to him. In case the land of the petitioner is not required for the construction of road change the alignment thereof and hand over the possession to the original petitioner.

3. The grouse of the appellants-State as brought to this Court in the present appeal, however, is that the road on the land belonging to the petitioner has been constructed with his consent and to his knowledge and notice; however, admittedly written consent has not been obtained from the petitioner before construction of the road. The law on the point is no more *res integra* as the apex Court in ***Civil Appeal No.9105 of 2015 {SLP (C) No. 2373 of 2014}, Raj Kumar*** versus ***State of H.P. and Others,*** a case with similar facts, has directed the State of Himachal Pradesh, as under:-

> 1. The Deputy Commissioner Collector, Solan shall undertake a verification and determine the exact extent of land utilized for construction of road in question out of Survey No. in which the appellant holds a share and thereby determine the exact extent of land which the appellant has been deprived of on account of such construction/utilization.
>
> 2. Upon determination of the extent of land of which the appellant has been deprived of by reason of construction of the road in question, the Deputy Commissioner shall determine the amount of compensation payable to him based on the amount determined towards compensation in Award No.10 of 2008 relating to the land acquired for the very same road in favour of other owners including Kanwar Singh having regard to the classification of the land.

> 3. Upon determination of the amount so payable the Deputy Commissioner Collector shall disburse the said amount within a period of three months from the date the determination is completed. The payment of the amount so determined shall represent the amount due and payable to the appellant in full and final settlement of all his claims towards the value of the land utilized for the construction of the road. In case however the payment is not made within the time so stipulated even after determination, the amount so determined shall start earning interest @12% p.a. from the date the period of three months expires."

4. In the case before the Hon'ble apex Court also the stand of the appellant-State was that the road under '*Pradhan Mantri Gram Sadak Yojna*' was constructed after having the consent of Raj Kumar, the petitioner/owner of the land in that case. The apex Court, however, has observed that for want of a specific assertion regarding donation or documentary evidence in support thereof, it cannot be believed that the petitioner had consented for construction of road over the land belonging to him. Therefore, we find no illegality or irregularity in the judgment under challenge in this appeal as the point in issue rather is covered in favour of the respondent-original petitioner Bhoop Ram by the judgment of the Hon'ble apex Court supra. A Single Bench of this Court in ***CWP No. 3090 of 2009***, titled ***Neem Chand*** versus ***State of H.P. & others***, decided on ***5.7.2016,*** after placing reliance on the judgment in ***Raj Kumar's*** case supra has also taken a similar view of the matter. Therefore, we find no merit in the present appeal and the same is accordingly dismissed. Both the applications shall also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Eshan Akthar ....Petitioner

Versus

State of Himachal Pradesh ...Respondent

Cr.MP(M) No. 669 2017

Decided on: 9th August, 2017

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Section 354-A, 354-B, 354-C and 376 of I.P.C- the petitioner filed an application for bail pleading that he is innocent and has been falsely implicated – the recoveries have already been effected and custodial interrogation of the accused is not required – the petitioner is not in a position to temper with the prosecution evidence – he is a permanent resident of the State and is working as a teacher – the application allowed and petitioner ordered to be released in the event of his arrest on a personal bond of Rs. 10,000/- with one surety for the like amount. (Para-5 to 7)

Cases referred:

K.K. Jerath vs. Union territory, Chandigarh and others, (1998) 4 SCC 80

Muraleedharan vs. State of Kerala, (2001) 4 SCC 638

Siddharam Satlingappa Mhetre vs. State of Maharashtra and others, AIR 2011 Supreme Court 312

For the petitioner:	Mr. Imran Khan, Advocate.
For the respondent/State:	Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Deputy Advocate General.
For the complainant:	Mr. Rajiv Rai, Advocate.

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 438 of the Code of Criminal Procedure for releasing him on bail, in the event of his arrest, in case FIR No. 7 of 2017, dated 16.05.2017, registered under Sections 354A, 354B, 354C and 376 of Indian Penal Code, 1860 (for short "IPC"), at Women Police Station Dharamshala, District Kangra, H.P.

2. As per the learned counsel for the petitioner, the petitioner is innocent and has been falsely implicated in the present case. He is permanent resident of District Bilaspur and neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, thus he may be released on bail.

3. Police reports stand filed. As per the prosecution story, on 16.05.2017, the prosecutrix lodged a complaint against the petitioner alleging that she is working as Staff Nurse and the petitioner is working as a Teacher. The prosecutrix has further alleged that she met the petitioner in June, 2016, and they became good friends. Both of them got clicked photographs together and the petitioner used to take the prosecutrix perforce to guest houses and he also used to take her pictures after making her nude. The petitioner also threatened the prosecutrix whenever she used to stop him. The petitioner every time used to say that he will commit suicide and he also used to weep in front of the prosecutrix, thus the prosecutrix agreed to the demands of the petitioner. As per the prosecution, the petitioner used to maintain relations with the prosecutrix. The prosecutrix has further alleged in her complaint that the petitioner thereafter made her to believe that she is doing wrong and one day he slapped her eight times. The police registered a case against the petitioner under Sections 354A, 354B, 354C and 376 IPC and conducted the investigation. As per the police report, the recoveries have already been effected and now the voice sample of the accused has to be taken.

4. I have heard the learned counsel for the petitioner, learned Additional Advocate General for the State, learned counsel for the prosecutrix (complainant) and gone through the record, including the police report, carefully.

5. The learned counsel for respondent No. 2 (prosecutrix) has relied upon the decision of a Co-ordinate Bench of this Hon'ble High Court, rendered in ***Cr.MP(M) No. 815 of 2014, Jolly Bansal vs. State of Himachal Pradesh***, dated 14.08.2014, wherein vide para 6 (relevant portion whereof has been extracted for ready reference) it has been held as under:

> ***"6. ... ...***
>
> ***Court is of the opinion that applicant is not entitled for relief of anticipatory bail due to his own act and conduct and due to the fact that proceedings under Section 82 Cr.P.C. initiated against applicant by learned Chief Judicial Magistrate for declaring him as proclaimed offender. It is held that custodial interrogation of applicant is essential in present case in order to ascertain the preparation of CD and in order to ascertain the fact that how the copy of CD transmitted to Mandi. Custodial interrogation of applicant is also essential in present case in order to recover original hard disk of computer and laptop through which obscene recording was conducted and transmitted. Custodial interrogation is essential in present case in order to recover mobile phone through which SMS were sent to co-accused Lawan Thakur. Custodial interrogation of applicant is essential in present case in order to ascertain whether obscene video/CD were prepared in the presence of applicant or not."***

However, in the present case the recoveries have already been effected and nothing remains to be recovered at the instance of the petitioner, so the judgment (supra) is not applicable to the facts of the present case, thus the same cannot be relied upon.

6. Similarly, the learned Counsel for the prosecutrix has relied upon ***K.K. Jerath vs. Union territory, Chandigarh and others, (1998) 4 SCC 80,*** and ***Muraleedharan vs. State of Kerala, (2001) 4 SCC 638,*** but in the case in hand, the petitioner is neither in a position to tamper with the prosecution evidence nor his custodial interrogation is necessary, therefore, the judgments, as referred hereinabove, are not applicable to the facts of the present case, as the petitioner is fully co-operating in the investigation and recoveries have already been effected, thus custodial interrogation of the petitioner is not required at all. The petitioner, as held above, is not in a position to tamper with the prosecution evidence, as is evident from the police record and at the same point of time it has been held as under, vide para 122, in ***Siddharam Satlingappa Mhetre vs. State of Maharashtra and others, AIR 2011 Supreme Court 312:***

> ***"122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:***
>
> ***i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;***
>
> ***ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;***
>
> ***iii. The possibility of the applicant to flee from justice;***
>
> ***iv. The possibility of the accused's likelihood to repeat similar or the other offences.***
>
> ***v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.***
>
> ***vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.***
>
> ***vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over-implication in the cases is a matter of common knowledge and concern;***
>
> ***viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;***
>
> ***ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;***
>
> ***x. Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."***

The judgment (supra) is fully applicable to the facts of the present case as the petitioner is neither in a position to tamper with the prosecution evidence nor he is in a position to flee from justice, as he is working as Teacher, having permanent property in Himachal Pradesh. Thus, taking into

consideration the situation of the parties, this Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail, in the event of his arrest, is required to be exercised in his favour. Under these circumstances, it is ordered that the petitioner be released on bail, in the event of his arrest, in case FIR No. 7 of2017, dated 16.05.2017, which has been registered under Sections 354A, 354B, 354C and 376 IPC, on his furnishing personal bond to the tune of Rs.10,000/- (rupees ten thousand only) with one surety in the like amount to the satisfaction of Investigating Officer. The bail is granted subject to the following conditions:

(i) That the petitioner will join investigation of the case as and when called for by the Investigating Officer in accordance with law.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

7. In view of the above, the petition is disposed of.

Copy *dasti.*

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

Balvinder Singh Mahal …..Petitioner.

Vs.

Union of India and another …..Respondents.

CWP No.: 2569 of 2012
Date of Decision: 10.08.2017

Constitution of India, 1950- Article 226- Petitioner is the legal representative of late H who had served in British Army – he took part in freedom struggle and was ordered to be discharged - respondent No. 2 pleaded that H had fought second world war as a soldier of British Army and was ineligible to be declared as freedom fighter- held that it was not mentioned in the discharge certificate that discharge was on account on participation in the freedom struggle of the country – discharge certificate shows that conduct of H was exemplary – H had not applied to be declared himself a freedom fighter – no direction can be issued to declare him a freedom fighter and not to treat him as a deserter – petition dismissed. (Para-5 and 6)

For the petitioner: Ms. Tim Saran, Advocate.

For the respondents: Mr. Angrez Kapoor, Advocate, vice Mr. Ashok Sharma, ASGI, for respondent No. 1.
Mr. Vikram Thakur, Deputy Advocate General, for respondent No. 2.

The following judgment of the Court was delivered:

<u>Ajay Mohan Goel, Judge</u> *(Oral):*

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

(i) That the respondents may kindly be directed to grant the status of freedom fighter family to the petitioner and his family, so that the stigma of so called deserter may be removed.

(ii) Directing the respondents to consider the case of the father of the petitioner for granting all benefits being extended to all freedom fighters under the freedom fighters policy, which has been adopted and followed by the State of Himachal Pradesh and is applicable to all freedom fighters for the purpose of pension/pensionary benefits/reservation for the wards of freedom fighters and other benefits etc.

(iii) Any other order as this Hon'ble Court may deem fit, just and proper in the facts and circumstances of the present case, may be passed in the interest of justice.

(iv) Entire record pertaining to instant case may please be summoned and examined, which would help this Hon'ble Court to arrive at just conclusion.

(v) The writ petition may kindly be allowed with costs."

2. Case of the petitioner is that late Havaldar Sh. Harnam Singh died in the year, 2005 and his wife thereafter died in the year, 2008 and petitioner is one of their legal heirs/representatives. As per the petitioner, his father served in the British Army with full devotion, honesty and dedication and he was also given out of turn promotion as Havaldar. As per the petitioner, his father also took active part in freedom struggle and for the said reason, he was ordered to be discharged by the then Brigade Commander of Rajmak Brigade of the British Army. It is further averred in the petition that father of the petitioner fought the second World War till his forcible discharge from the British Army. Grievance raised in the petition is that unfortunately father of the petitioner is known as a deserter in the local area despite the fact that he was forcibly discharged from the British Army on account of his activities in the freedom struggle of the Nation. In these circumstances, this writ petition has been filed praying for the reliefs already mentioned hereinabove.

3. In the reply so filed to the petition by respondent No. 2, the stand taken by the State is that father of the petitioner was recruited in British Army as a Soldier and he retired from the post of Havaldar and at no point of time, he in any manner participated in National Freedom Struggle. It is further mentioned in the reply that father of the petitioner fought Second World War as a Soldier of the British Army, which had no connection with the freedom movement of India. It further finds mentioned in the reply that representation filed by the petitioner to extend to him the benefit of freedom fighter already stood rejected by the State on the ground that his father was ineligible to be declared as a freedom fighter in accordance with the Swatantrata Sainik Samman Pension Scheme, 1980.

4. I have heard the learned counsel for the parties and have also gone through the pleadings as well as documents appended alongwith the petition.

5. Annexure P-5 is the order of discharge of the father of the petitioner issued by Brigade Commander of Rajmak Brigade dated 01.06.1945. A perusal of the same demonstrates that the father of the petitioner was enrolled with the British Army on 13.11.1932 and he stood discharged from the same on 01.06.1945. It is nowhere mentioned in this discharge certificate that the said discharge of the father of the petitioner was on account of his having participated in the freedom struggle of the country. On the other hand, a perusal of the discharge certificate demonstrates that it finds mentioned therein that the bearer's conduct, i.e. conduct of the father of the petitioner and character while with the Army had been exemplary. Now, whether or not the father of the petitioner participated in the freedom struggle of India and whether or not he was discharged from the Army on account of his alleged active participation in the freedom struggle of India are disputed questions of fact, which cannot be gone into in a petition so filed under Article 226 of the Constitution of India.

6. Learned counsel for the petitioner could not give any satisfactory answer as to why the father of the petitioner had not applied for being conferred the status of a freedom fighter during his life time, as it is evident from the averments made in the writ petition that Shri Harnam Singh, i.e. father of the petitioner, was alive till 2005. In fact, this Court can read in

between lines in order to infer that this entire exercise has been undertaken by the petitioner to take benefit of the concessions which are accruable to the kith and kin of freedom fighters. Even otherwise, in my considered view, this Court can not either confer the status of freedom fighter upon the family of the petitioner, as has been prayed for, nor any direction can be issued by this Court that the stigma of so called deserter may be removed from the name of his father. By no stretch of imagination this Court can issue a mandamus to the inhabitants of the native place of the petitioner directing them not to allegedly treat the father of the petitioner as a deserter. Passing any such order evidently is beyond the jurisdiction so conferred upon this Court by the Constitution of India under Article 226 of the same.

7. Accordingly, as there is no merit in the petition, the same is therefore dismissed. Miscellaneous applications, if any, also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Jitender Guleria …Petitioner.

Versus

Himachal Pradesh Vidhan Sabha and others ..Respondents.

CWP No. 4771 of 2015
Judgment reserved on: 01.08.2017
Date of decision: August 10th, 2017.

Constitution of India, 1950- Article 226- Respondent No. 1 advertised one post of clerk to be filled from general category under limited direct recruitment scheme for class-IV employees – the petitioner submitted his written consent and was informed that he was permitted to sit in the competitive examination – 7 candidates appeared out of which the petitioner and respondent No. 4 qualified – petitioner obtained 50 out of 50 marks while respondent No. 4 obtained 48 marks out of 50 marks – Interview Committee awarded 4 marks to the petitioner and 6½ marks to the respondent No. 4 – consequently, respondent No. 4 was selected- aggrieved from the selection, the petitioner has filed the present petition – held that process of selection cannot be challenged by an unsuccessful candidate by pointing certain irregularities in the process – the petitioner is estopped from filing the present writ petition – petition dismissed as not maintainable.

(Para-9 to 20)

Cases referred:

Madras Institute of Development Studies and another vs. K. Sivasubramaniyan and others (2016) 1 SCC 454

Ashok Kumar and another vs. State of Bihar and others (2017) 4 SCC 357

Raj Kumar and others vs. Shakti Raj and others (1997) 9 SCC 527

Bedanga Talukdar vs. Saifudaullah Khan and others (2011) 12 SCC 85

Dhananjay Malik and others vs. State of Uttaranchal and others (2008) 4 SCC 171

For the Petitioner : Mr. Vijay Chaudhary, Advocate.

For the Respondents : Mr. Dushyant Dadwal, Advocate, for respondents No. 1 and 3.
Ms. Meenakshi Sharma, Addl. A.G. with Mr. Ramesh Thakur, Dy. A.G. for respondent No.2.
Mr. J.P. Sharma, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This writ petition has been filed by the petitioner claiming therein the following substantial reliefs:

"(A) That the recommendation of respondent No.4 for the post of Clerk pursuant to the advertisement dated 7.8.2015, Annexure P-1 may kindly be quashed and set-aside and further respondent No.1 may kindly be directed to appoint petitioner to the post of Clerk being more meritorious and more qualified with all consequential benefits.

(B) That a fresh scrutiny of selected candidates be subjected to a fresh interview before a Interview Board constituted by this Hon'ble Court.

2. The respondent No.1 advertised one post of Clerk to be filled up from the General Category under 'Limited Direct Recruitment Scheme' for Class IV employees. The interested candidates were requested to submit their written consent on or before 17.8.2015 in the office of respondent No.1 as per advertisement, a copy of which is annexed with the petition as Annexure P-1.

3. The petitioner submitted his written consent to respondent No.1 and vide letter dated 2.9.2015 he was informed that he has been permitted to sit in the competitive examination to be held on 14.9.2015 at 11.00 a.m. In terms of Rule 7-A of the Himachal Pradesh Vidhan Sabha Secretariat (Recruitment and Conditions of Service) Rules, 1974 (for short, Service Rules), a selection committee came to be constituted by the Hon'ble Speaker for holding the interviews to be held on 14th & 15th September, 2015 at 11.00 a.m. In all, seven candidates appeared in the competitive examination out of which only two persons qualified i.e. petitioner and respondent No.4. The petitioner secured 50 marks out of 50 marks, whereas respondent No.4 secured 48 marks out of 50 marks. The petitioner and respondent No.4 thereafter underwent the typing test in which both of them qualified and were thereafter called for interview. In the said interview, the petitioner was awarded 4 marks, whereas the respondent No.4 was awarded 6 ½ marks, out of 8 marks. Resultantly, it was the respondent No.4, who came to be selected having obtained 54½ marks out of 58 marks, whereas the petitioner only secured 54 marks.

4. Aggrieved by the selection of respondent No.4, the petitioner filed the instant writ petition inter alia on the ground that the selection of respondent No.4 has been done in an illegal and arbitrary manner and the same smacks of malafides as the selection committee has awarded more marks to respondent No.4 just to ensure his appointment, even though, the petitioner is having a better academic record and was more qualified and had faired better. It is further averred that since the respondent No.4 was designated as Library Attendant, but was deputed in the house of Secretary, Himachal Pradesh Vidhan Sabha, therefore, there was every possibility of his have influenced the selection committee while holding interview for the aforesaid post. Lastly, it is averred that the selection was to be made on the basis of the Service Rules which did not provide for viva-voce or interview and, therefore, the selection deserves to be quashed and set-aside or in the alternative, the marks for interview are required to be ignored while making the selection.

5. The respondents No.1 and 3 i.e. Himachal Pradesh Vidhan Sabha and Selection Committee have filed joint reply wherein it has been averred that even though the Service Rules do not provide for viva-voce or interview, but there are instructions/guidelines issued by the Government in respect of recruitment of various categories of employees of the State which have been adopted by the respondent. That apart, the respondents framed Regulations known as "Himachal Pradesh Vidhan Sabha Secretariat Regulations, 2002 wherein Regulation-7 contemplates as under:

"(i) The Secretary shall exercise all the powers of the Secretary to the Government, both administrative and financial, that have been or may

hereinafter be notified by the State Government for the Secretary to the Government from time to time or such powers as may be delegated to him by the Speaker from time to time under the rules.

(ii) All cases of administrative and financial power beyond the competency of the Secretary shall be put up to the Speaker for his approval. All such administrative and financial sanctions shall be issued in the name of the Speaker by the Secretary."

6. It has been denied that respondent No.4 was ever deputed in the residence/house of the Secretary of the respondent No.1. On merits, it has been submitted that irrespective of caste, colour, creed, religion and region of the candidates, who appeared before the selection committee were treated equally and the entire selection process had been carried out in a fair, transparent and legal manner, strictly as per the advertisement for the post in question. Since respondent No.4 was found to be the best and most suitable, he was accordingly selected. The selection was made not only on the basis of the academic qualification alone, but on the over all performance of the candidate. It is further averred that the Government of Himachal Pradesh has recently issued instructions dated 17.4.2017 whereby it has been clarified that henceforth there would be no interviews for Class-III and Class-IV posts in the State of Himachal Pradesh

7. The respondent No.4, who is the selected candidate, has filed a separate reply wherein he has raised preliminary submission regarding maintainability of the petition claiming therein that the same does not disclose any cause of action. In addition thereto, it has been contended that the petitioner with his eyes wide open had appeared before the selection committee knowing fully well about the terms and conditions and procedure for selection and having taken a chance and not qualified, he cannot turn around and question the selection process and the present petition being an after thought, is not maintainable. He has further denied that he ever remained posted/deputed in the house/residence of the Secretary, H.P. Vidhan Sabha. On merits, these averments have been reiterated and it is not necessary to reproduce the same in detail.

8. The petitioner has filed rejoinders to the replies of the respondents wherein the averments made in the petition have been reiterated.

I have heard learned counsel for the parties and have gone through the records of the case carefully and meticulously.

9. It is settled law that a process of selection cannot be challenged by an unsuccessful candidate by pointing to certain irregularities here and there in the process of which he was aware, once the result is not to his liking. Relief, in such a case, is declined by applying the principles of estoppel, acquiescence and/or waiver. Reference in this regard can conveniently be made to the two recent judgments of the Hon'ble Supreme Court.

10. In ***Madras Institute of Development Studies and another*** vs. ***K. Sivasubramaniyan and others (2016) 1 SCC 454,*** the Hon'ble Supreme Court has held as under:

12. The contention of the respondent no.1 that the short-listing of the candidates was done by few professors bypassing the Director and the Chairman does not appear to be correct. From perusal of the documents available on record it appears that short-listing of the candidates was done by the Director in consultation with the Chairman and also senior Professors. Further it appears that the Committee constituted for the purpose of selection consists of eminent Scientists, Professor of Economic Studies and Planning and other members. The integrity of these members of the Committee has not been doubted by the respondent- writ petitioner. It is well settled that the decision of the Academic Authorities about the suitability of a candidate to be appointed as Associate Professor in a research institute cannot normally be examined by the High Court under its writ jurisdiction. Having regard to the fact that the candidates so selected possessed all requisite qualifications

and experience and, therefore, their appointment cannot be questioned on the ground of lack of qualification and experience. The High Court ought not to have interfered with the decision of the Institute in appointing respondent nos. 2 to 4 on the post of Associate Professor.

13. Be that as it may, the respondent, without raising any objection to the alleged variations in the contents of the advertisement and the Rules, submitted his application and participated in the selection process by appearing before the Committee of experts. It was only after he was not selected for appointment, turned around and challenged the very selection process. Curiously enough, in the writ petition the only relief sought for is to quash the order of appointment without seeking any relief as regards his candidature and entitlement to the said post.

14. The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra.

15. In Dr. G. Sarana vs. University of Lucknow & Ors., (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Athropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held: (SCC P. 591, para 15)

> *"15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee.This view gains strength from a decision of this Court in Manak Lal vs. Prem Chand Singhvi, AIR 1957 SC 425 where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting: (AIR p.432, para 9)*
>
> > *'9. ….It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.' "*

16. In Madan Lal & Ors. vs. State of J & K & Ors. (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that: (SCC p. 493, para 9)

> > *"9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a*

> *chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted.In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla 1986 Supp SCC 285, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."*

17. In Manish Kumar Shahi vs. State of Bihar, (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed: (SCC p. 584, para 16)

> *"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."*

18. In the case of Ramesh Chandra Shah and others vs. Anil Joshi and others, (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under: (SCC p. 320, para 24)

> *"24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."*

19. So far as the finding recorded by the Division Bench on the question of maintainability of the writ petition on the ground that the appellant Institute is a 'State' within the meaning of Article 12 of the Constitution, we are not bound to go into that question, which is kept open."

11. In ***Ashok Kumar and another vs. State of Bihar and others (2017) 4 SCC 357,*** a Bench of three Hon'ble Judges of the Hon'ble Supreme Court, has held as under:

"13. *The law on the subject has been crystalized in several decisions of this Court. In Chandra Prakash Tiwari v. Shakuntala Shukla[4], this Court laid down the principle that when a candidate appears at an examination without objection and is subsequently found to be not successful, a challenge to the process is*

precluded. The question of entertaining a petition challenging an examination would not arise where a candidate has appeared and participated. He or she cannot subsequently turn around and contend that the process was unfair or that there was a lacuna therein, merely because the result is not palatable. In Union of India v. S. Vinodh Kumar (2007) 8 SCC 100, this Court held that : (SCC p.107, para 18)

> *"18. It is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same (See also Munindra Kumar v. Rajiv Govil (1991) 3 SCC 368 and Rashmi Mishra v. M.P. Public Service Commission (2006) 12 SCC 724)".*

14. The same view was reiterated in Amlan Jyoti Borooah (2009) 3 SCC 227, where it was held to be well settled that candidates who have taken part in a selection process knowing fully well the procedure laid down therein are not entitled to question it upon being declared to be unsuccessful.

15. In Manish Kumar Shah v. State of Bihar (2010) 12 SCC 576, the same principle was reiterated in the following observations: (SCC p.584, para 16)

> *"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the Petitioner is not entitled to challenge the criteria or process of selection. Surely, if the Petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The Petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the Petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the Judgments in Madan Lal v. State of J. and K. (1995) 3 SCC 486, Marripati Nagaraja v. State of Andhra Pradesh and Ors. (2007) 11 SCC 522, Dhananjay Malik and Ors. v.State of Uttaranchal and Ors.(2008) 4 SCC 171, Amlan Jyoti Borooah v. State of Assam (2009) 3 SCC 227 and K.A. Nagamani v. Indian Airlines and Ors. (2009) 5 SCC 515."*

16. In Vijendra Kumar Verma v. Public Service Commission, (2011) 1 SCC 150, candidates who had participated in the selection process were aware that they were required to possess certain specific qualifications in computer operations. The appellants had appeared in the selection process and after participating in the interview sought to challenge the selection process as being without jurisdiction. This was held to be impermissible.

17. In Ramesh Chandra Shah v. Anil Joshi, (2013) 11 SCC 309, candidates who were competing for the post of Physiotherapist in the State of Uttrakhand participated in a written examination held in pursuance of an advertisement. This Court held that if they had cleared the test, the respondents would not have raised any objection to the selection process or to the methodology adopted. Having taken a chance of selection, it was held that the respondents were disentitled to seek relief under Article 226 and would be deemed to have waived their right to challenge the advertisement or the procedure of selection. This Court held that: (SCC p. 318, para 18)

"18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome."

18. In Chandigarh Administration v. Jasmine Kaur[11], it was held that a candidate who takes a calculated risk or chance by subjecting himself or herself to the selection process cannot turn around and complain that the process of selection was unfair after knowing of his or her non-selection. In Pradeep Kumar Rai v. Dinesh Kumar Pandey (2015) 11 SCC 493,this Court held that: (SCC p.500, para 17) :

"17. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. This, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

This principle has been reiterated in a recent judgment in Madras Institute of Development v. S.K. Shiva Subaramanyam's case (supra).".

12. However, the learned counsel for the petitioner would argue that the above said proposition would apply only to cases where the selection is made in accordance with the provision of the Rules and not where the selection has been made *dehors* the Rules. In support of his contention, strong reliance is placed on the judgment of three Judges of the Hon'ble Supreme Court in ***Raj Kumar and others vs. Shakti Raj and others (1997) 9 SCC 527***, wherein it was observed as under:

"16. Yet another circumstance is that the Government had not taken out the post from the purview of the Board, but after the examinations were conducted under the 1955 Rule and after the results were announced, it exercised the power under the proviso to para 6 of 1970 notification and the post were taken out from the purview thereof. Thereafter the Selection Committee was constituted for selection of the condidates. The entire procedure is also obviously illegal. It is true, as contended by Shri Madhava Reddy, that this Court in Madan Lal vs. State of & K [(1995) 3 SCC 486] and other decisions referred therein had held that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the selection Board or the method of Selection as being illegal; he is estopped to question the correctness of the selection. But in his case, the Government have committed glaring illegalities in the procedure to get the candidates for examination under 1955 Rules, So also in the method of selection and exercise of the power in taking out from the purview of the and also conduct of the selection in accordance with the Rules. Therefore, the principle of estoppel by conduct or acquiescence has no application to the facts in this case, thus, we consider that the procedure offered under the 1955 Rules adopted by the Government or the Committee as well as the action take by the Government are not correct in law."

13. He would further submit that the plea of estoppel is otherwise not available to the respondents as the selection process has not been conducted strictly in accordance with the stipulated selection process, which needs to be scrupulously maintained and the respondents could not have introduced an additional mode of selection by prescribing interview, which otherwise was not stipulated in the Rules and has placed reliance upon the judgment of the

Hon'ble Supreme Court in ***Bedanga Talukdar vs. Saifudaullah Khan and others (2011) 12 SCC 85*** wherein it was held as under:

> *"29. We have considered the entire matter in detail. In our opinion, it is too well settled to need any further reiteration that all appointments to public office have to be made in conformity with Article 14 of the Constitution of India. In other words, there must be no arbitrariness resulting from any undue favour being shown to any candidate. Therefore, the selection process has to be conducted strictly in accordance with the stipulated selection procedure. Consequently, when a particular schedule is mentioned in an advertisement, the same has to be scrupulously maintained. There can not be any relaxation in the terms and conditions of the advertisement unless such a power is specifically reserved. Such a power could be reserved in the relevant Statutory Rules. Even if power of relaxation is provided in the rules, it must still be mentioned in the advertisement. In the absence of such power in the Rules, it could still be provided in the advertisement. However, the power of relaxation, if exercised has to be given due publicity. This would be necessary to ensure that those candidates who become eligible due to the relaxation, are afforded an equal opportunity to apply and compete. Relaxation of any condition in advertisement without due publication would be contrary to the mandate of quality contained in Articles 14 and 16 of the Constitution of India.*
>
> *30. A perusal of the advertisement in this case will clearly show that there was no power of relaxation. In our opinion, the High Court committed an error in directing that the condition with regard to the submission of the disability certificate either along with the application form or before appearing in the preliminary examination could be relaxed in the case of respondent No. 1. Such a course would not be permissible as it would violate the mandate of Articles 14 and 16 of the Constitution of India."*

14. Even though, many other judgments have been cited at the Bar, however, I find the issue to be no longer *res integra* in view of the judgment of the Hon'ble Supreme Court in ***Dhananjay Malik and others vs. State of Uttaranchal and others (2008) 4 SCC 171*** the facts therein was that an advertisement was issued on 24.6.2002 for Garhwal Region for the selection and appointment of the Physical Education Teachers (L.T.Grade) for which the requisite qualification indicated in the advertisement is B.P.E. or Graduate with Diploma in Physical Education. The unsuccessful candidates in the interview challenged the selection on various grounds. One of the grounds was that the advertisement and selection were not based in accordance with the Rules called U.P. Subordinate Educational (Trained Graduates Grade) Service Rules, 1983. The writ petitions were dismissed by the Single Judge. However, on appeal by the unsuccessful candidates, the order of the Single Judge was reversed and the appeals were allowed. It was in such factual background that the matter reached in the Hon'ble Supreme Court and it observed as follows:

> *"7. It is not disputed that the respondent-writ petitioners herein participated in the process of selection knowing fully well that the educational qualification was clearly indicated in the advertisement itself as B.P.E. or graduate with diploma in Physical Education. Having unsuccessfully participated in the process of selection without any demur they are estopped from challenging the selection criterion inter alia that the advertisement and selection with regard to requisite educational qualifications were contrary to the Rules.*
>
> ** ** ** ** **
>
> 9. *In the present case, as already pointed out, the respondent-writ petitioners herein participated in the selection process without any demur; they are estopped from complaining that the selection process was not in accordance with the Rules. If they think that the advertisement and selection process were not in accordance*

with the Rules they could have challenged the advertisement and selection process without participating in the selection process. This has not been done.

10. In a recent judgment in the case of Marripati Nagaraja vs. The Government of Andhra Pradesh, (2007) 11 SCR 506 at p.516, this Court has succinctly held that the appellants had appeared at the examination without any demur. They did not question the validity of fixing the said date before the appropriate authority. They are, therefore, estopped and precluded from questioning the selection process.

11. We are of the view that the Division Bench of the High Court could have dismissed the appeal on this score alone as has been done by the learned Single Judge."

15. A perusal of paragraphs 7 and 9 (supra) would clearly go to show that the writ petitioners therein participated in the selection process without any demur and it was held that they are estopped from complaining that the selection process was not in accordance with the Rules and if they knew that the advertisement and selection process was not in accordance with the Rules, they could have challenged the advertisement and selection process without participating in the selection process and, therefore, the writ petition of such candidates after having participated in the selection process was held to be not maintainable.

16. Even in the instant case, as already observed, the petitioner was duly informed vide letter dated 2.9.2015 that he had been permitted to sit in the competitive examination to be held on 14.9.2015 at 11.00 a.m. and in case he is successful, he would be interviewed by a selection committee on 14th and 15th September, 2015 at 11.00 a.m.

17. During the course of hearing, it has been informed by learned counsel for respondent No.1 that it is not for the first time that the petitioner is appearing for the post in question, but had on four earlier occasions participated in similar selection process without any demur even though in such selection, interviews were held. Therefore, this is an additional ground to reject the claim of the petitioner.

18. In view of what has been stated above, it can conveniently be held that the ratio laid down in ***Raj Kumar's*** case (supra) and ***Bedanga Talukdar's*** case (supra) as relied upon by the petitioner are clearly not applicable to the facts of the case as the petitioner participated in the process of selection knowing fully well that the interview was clearly indicated in the advertisement itself. Having unsuccessful participated in the process selection without any demur, he is estopped from challenging the selection criteria inter alia that the advertisement and the selection with regard to the interview was contrary to the Rules.

19. However, it needs to be clarified that the dimension or degree of illegality in the selection process is a factor while applying the principle of waiver or estoppel to non-suit unsuccessful participants from a proceeding brought to invalidate the selection process. However, it is not an absolute proposition of law that unsuccessful candidates would not in any circumstances be entitled to question the process for recruitment in which they are participated. One such example would be where there are glaring defects in the selection, there could be similar other instances like violation of Act 14 etc., but insofar as the instant case is concerned, the ratio of the judgment in ***Dhananjay Malik's*** case (supra) is fully attracted.

20. In view of the aforesaid discussion, this Court has no hesitation to conclude that the petitioner having taken a chance in the selection process including the interview and having not qualified the same, cannot turn around and question the selection process and the present petition being an after thought, is not maintainable. Accordingly, the petition is dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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

Shishu Pal ....Petitioner.
Versus
State of H.P. & Others ....Respondents.

Cr.MMO No. 338 of 2016 &
Cr. MMO No. 110 of 2017.
Decided on: 10th August, 2017

Code of Criminal Procedure, 1973- Section 482- The Prosecutrix and petitioner fell in love with each other – petitioner belongs to Schedule Caste community whereas the prosecutrix is a Rajput – the parents of the prosecutrix were not willing to solemnize her marriage with the petitioner- the prosecutrix eloped with the petitioner and solemnized inter caste marriage – the petitioner and the prosecutrix are residing as husband and wife – held that the prosecutrix stated in her statement under Section 164 Cr.P.C that she had voluntarily eloped with the petitioner in her free volition – father of the prosecutrix also stated that he did not want to proceed further in the matter – no useful purpose would be served by continuing with the proceedings- petition allowed – FIR and consequent proceedings quashed. (Para-6 to 12)

Cases referred:

Jitender Kumar Sharma versus State & Another, 2010 (4) Civil Court cases 432 (Delhi) (DB)
S. Varadarajan versus State of Madras, AIR 1965 Supreme Court, 942

For the petitioner(s) Mr. S.C. Sharma, Advocate.
For the Respondent(s) Mr. Varun Chandel, Addl. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

This judgment shall dispose of the present petition and also Cr.MMO No. 110 of 2017 filed by both accused in FIR No. 64/14 registered in Police Station, Rajgarh, District Sirmaur for quashing the same and also consequential proceedings pending disposal in the Court of learned Sessions Judge, Sirmaur District at Nahan.

2. It is seen that the complainant in this case is Om Singh of village and Post Office Habban (Shivpur), Tehsil Rajgarh District Sirmaur, H.P. He is respondent No.2 in Cr.MMO No.338 of 2016. The prosecutrix (name withheld) is daughter of the complainant. The prosecutrix and the petitioner Shishu Pal, fell in love with each other. Their parents were also aware about it, however, the petitioner a member of Scheduled Caste community whereas the prosecutrix Rajput, her parents were not ready, at any cost, to solemnize her marriage with accused Shishu Pal. When her parents started preparation of her marriage with someone else, the prosecutrix on 12.8.2014 eloped with petitioner Shishu Pal and solemnized inter-caste marriage somewhere at Chopal. The co-accused of the petitioner Shri Inder Singh, who is petitioner in connected petition, is his real brother. He allegedly facilitated the elopement of the prosecutrix with his brother, the principle accused Shishu Pal and solemnization of marriage by both of them. On this the matter came to be reported to the Police of Police Station Rajgarh, District Sirmaur on 21.8.2014. Initially the FIR Annexure P-4 (Colly.)(page 25) was registered under Section 363, 366 read with Section 34 of the Indian Penal Code against both accused-petitioners. During the course of investigation, the offence punishable under Section 368 and 376 IPC was also added and accordingly the report under Section 173 Cr.P.C., Annexure P-4 filed in the Court.

3. The criminal case is still pending disposal in the trial Court. The petitioner was ordered to be admitted on bail by a co-ordinate Bench of this Court vide order dated 4.11.2014, Annexure P-1, passed in Cr.MP(M) No.967 of 2014. The criminal writ petition registered as Cr.WP No.20 of 2014 filed by the petitioner seeking police protection was permitted to be withdrawn by a Division Bench of this Court with liberty reserved to the petitioner to file fresh petition.

4. The facts, on the record further reveals that the accused-petitioner Shishu Pal and the prosecutrix are presently residing in the matrimonial home as husband and wife. Though after registration of the case, her father, the complainant, had taken away her with him from Theog on 25.8.2014, where she was in the company of her husband accused-petitioner Shishu Pal. As per her affidavit Annexure P-5 (page 64) sworn in on 28.9.2016 and filed in the Registry of this Court on 6.10.2016, she re-joined the company of her husband on 25.9.2016. The marriage even also consummated after 25.9.2016. In the affidavit she has claimed her age as 20 years. As a matter of fact, as per the submissions made, she was born on 3.6.1996. During the course of proceedings in the application, the accused petitioner filed for grant of bail in this Court, the prosecutrix also appeared in person and filed an affidavit that she was born on 3.6.1996, however, as per her date of birth certificate, Annexure P-3 she was born on 3.6.1998. Meaning thereby that on the date of her elopement with accused-petitioner Shishu Pal i.e. 15.8.2014. she was above 16 years of age.

5. True it is that the prosecutrix was minor. So far as the commission of offence punishable under Section 363, 366 and for that matter under Section 376 IPC and Section 4 of the POCSO Act 2012, is concerned, after her elopement with accused-petitioner Shishu Pal and solemnization of marriage with him, she was compelled to abandon his Company at the behest of her parents and she started leaving with her parents thereafter.

6. It is satisfactorily established at this stage that the accused-petitioner have never used any force in enticing her away or compelled her to leave the company of her parents. As per her version in the statement recorded on 26.8.2014 under Section 164 Cr.P.C., she eloped with the accused-petitioner in her free volition and intended to join the company of her husband. She had refused to return to her parental house and live there.

7. Interestingly enough, the complainant (respondent No.2), when appeared before this Court on 7.3.2017 was allowed to meet the prosecutrix, who was also present in the court on that day. When the matter was re-called and he again appeared in the Court stated that the accused-petitioner, as revealed by his daughter the prosecutrix, is treating her nicely in the matrimonial home. Also that since she was happy in the company of her husband, therefore, he was not interested to contest the present petition. His statement to this effect was recorded separately on that day. Consequently, following order came to be passed on that day:-

> "Respondent No. 2 Om Singh is present in person. He was given an opportunity to contest this petition. He, however, complained that he was not allowed to meet his daughter (prosecutrix in this case), ever since her abduction by petitioner Shishu Pal, against whom FIR under Sections 363, 366, 368 and 376 IPC has been registered by the police at his instance. Since his daughter, the prosecutrix, is present in person today in the Court, therefore, he was allowed to meet her outside the Court. The case when recalled, respondent No.2 opted for not filing reply to this petition as according to him during his conversation with his daughter, it is disclosed by her that she has solemnized marriage with Shishu Pal and that she is happy in his company. His statement to this effect has also been recorded separately. As prayed, list on 29th March, 2017."

8. Therefore, the complaint, if any, of the father of the prosecutrix as find recorded in the order ibid was that the accused-petitioner did not allow him to meet his daughter ever-since her abduction.

9. In the light of the given facts and circumstances, irrespective of the prosecutrix was below 18 years of age on the day of her elopement in the company of accused petitioner Shishu Pal and solemnization of marriage with him, in the considered opinion of this Court the present is a case where the FIR registered against the accused-petitioner and his co-accused and also consequential criminal proceedings deserves to be quashed for the reasons that no useful purpose is likely to be served by allowing the same to continue as the prosecutrix and the accused-petitioner Shishu Pal are happily married with each other and living in complete harmony and peace in the matrimonial home. The complainant is also satisfied with the cordial relations of the couple. Initial anguish was somewhat natural for the reason that in our society inter-caste marriages are still not accepted. The present, in the given facts and circumstances, is a case, where allowing the criminal proceedings against the accused petitioner to continue would amount to abuse of process of law for the reason that if the investigation conducted in the matter and evidence collected is taken as it is, the criminal case is not going to end with the conviction of the accused-petitioner because the prosecutrix and for that matter her father, the complainant may also not support the prosecution case. While arriving at such conclusion, this Court finds support from the judgment of a Division Bench of Delhi High Court in ***Jitender Kumar Sharma*** versus ***State & Another, 2010 (4) Civil Court cases 432 (Delhi) (DB)***. As a matter of fact, the facts in ***Jitender's*** case were identical to that before this Court because in that case also the age of the prosecutrix was 16 years whereas that of the accused 18 years. They having fallen in love, eloped together and got married, as per Hindu rites and customs in a temple. After registration of the case, the custody of the prosecutrix was entrusted to an NGO, namely ***'Nirmal Chhaya'***, however, the Division Bench seized of the matter deemed it appropriate to hand over her custody to her husband, the accused, irrespective of he was also minor aged 18 years. The Division Bench in that case had also taken into consideration the fundamental right to 'life' and 'liberty' guarnted by Article 21 of the Constitution of India and also the provisions contained under the Hindu Marriage Act 1955 as well as Child Marriage Restraint Act, 1929 and the provisions contained under Section 6 of Hindu Minority and Guardianship Act, 1956 and held as under:-

> "22. A reading of the 1890 Act and the 1956 Act, together, reveals the guiding principles which ought to be kept in mind when considering the question of custody of a minor Hindu. We have seen that the natural guardian of a minor Hindu girl whose is married, is her husband. We have also seen that no minor can be the guardian of the person of another minor except his own wife or child. Furthermore, that no guardian of the person of a minor married female can be appointed where her husband is not, in the opinion of the court, unfit to be the guardian of her person. The preferences of a minor who is old enough to make an intelligent preference ought to be considered by the court. Most importantly, the welfare of the minor is to be the paramount consideration. In fact, insofar as the custody of a minor is concerned, the courts have consistently emphasized that the prime and often the sole consideration or guiding principle is the welfare of the minor.
>
> 23. In the present case, Poonam is a minor Hindu girl who is married. Her natural guardian is no longer her father but her husband. A husband who is a minor can be the guardian of his minor wife. No other person can be appointed as the guardian of Poonam, unless we find that Jitender is unfit to act as her guardian for reasons other than his minority. We also have to give due weight and consideration to the preference indicated by Poonam. She has refused to live with her parents and has categorically expressed her desire and wish to live with her husband, Jitender. Coming to Poonam's welfare which is of paramount importance, we are of the view that her welfare would be best served if she were to live with her husband. She would get the love and affection of her husband. She would have the support of her in-laws who, as we have mentioned earlier, welcomed her. She cannot be forced or compelled to continue to reside at Nirmal Chhaya or some other such institution as that would amount to her detention

against her will and would be violative of her rights guaranteed under article 21 of the Constitution. Neetu Singh's case (supra) is a precedent for this. Sending her to live with her parents is not an option as she fears for her life and liberty.

24. As regards the two FIRs which have been registered are concerned, we are of the view that continuing proceedings pursuant to them would be an exercise in futility and would not be in the interest of justice. Poonam has clearly stated that she left her home on her own and of her own free will. This cuts through the case of kidnapping and insofar as the offence punishable under section 376 IPC is concerned, the present case falls under the exception to section 375 inasmuch as Poonam is Jitender's wife and she is above 15 years of age. The allegation of criminal intimidation is also not sustainable at the outset. Hence, FIR No. 110/2010 u/s 363/376 IPC and FIR No. 177/2010 u/s 363/506 IPC (both of PS Gandhi Nagar, New Delhi) and all proceedings pursuant thereto are liable to be quashed. Since Jitender is less than 18 years of age, even the offence under Section 9 of the Prohibition of Child Marriage Act, which provides for the punishment of a male adult above 18 years of age, is not made out.

25. Before we conclude, we would like to point out that the expression 'child marriage' is a compendious one. It includes not only those marriages where parents force their children and particularly their daughters to get married at very young ages but also those marriages which are contracted by the minor or minors themselves without the consent of their parents. Are both these kinds of marriages to be treated alike? In the former kind, the parents consent but not the minor who is forced into matrimony whereas in the latter kind of marriage the minor of his or her own accord enters into matrimony, either by running away from home or by keeping the alliance secret. The former kind is clearly a scourge as it shuts out the development of children and is an affront to their individualities, personalities, dignity and, most of all, life and liberty. As per the 205th Report of the Law Commission of India, February 2008, child marriages continue to be a fairly widespread social evil in India and in a study carried out between the years 1998 to 1999 on women aged 15-19 it was found that 33.8% were currently married or in a union. In 2000 the UN Population Division recorded that 9.5% of boys and 35.7 % of girls aged between 15-19 were married [at p.15 of the Report]. Such practices must be rooted out from our social fabric. In the law commission reports on the subject as well as in the statements of objects and reasons behind the Child Marriage Restraint Act, 1929 and now the Prohibition of Child Marriage Act, 2006, the apparent target seems to be these unhealthy practices. However, we have, in our experience in the present bench, noticed a burgeoning of cases of missing daughters and married daughters detained by their parents. It is a serious societal problem having civil and criminal consequences. In countries like USA and Canada also there is the problem of teenage marriages. There many states have recognized teenage marriages provided the boy and girl are both above 16 years of age and the minor has his or her parents' consent. In some cases, consent and approval of the court is also required with or without the consent of the parents. Where the minor girl is pregnant, the marriage is usually permitted. There is a distinction between the problem of child marriages as traditionally understood and child marriages in the mould of teenage marriages of the West. India is both a modern and a tradition bound nation at the same time. The old and evil practices of parents forcing their minor children into matrimony subsists alongwith the modern day problem of children falling in love and getting married on their own. The latter may have been occasioned by aping the West or the effect of movies or because of the independence that the children enjoy in the modern era. Whatever be the reason, the reality must be accepted and the State must take measures to educate the

> youth that getting married early places a huge burden on their development. At the same time, when such marriages to occur, they may require a different treatment. The sooner the legislature examines these issues and comes out with a comprehensive and realistic solution, the better, or else courts will be flooded with habeas corpus petitions and judges would be left to deal with broken hearts, weeping daughters, devastated parents and petrified young husbands running for their lives chased by serious criminal cases, when their 'sin' is that they fell in love.

10. Therefore, in ***Jitender Kumar's*** case supra, the FIR registered under Section 363, 366 and 376 was ordered to be quashed and the couple i.e. accused-petitioner Jitender Kumar and prosecutrix, irrespective of minors were allowed to live as husband and wife in the company of each other. In similar set of facts and circumstances, the apex Court in ***S. Varadarajan versus State of Madras, AIR 1965 Supreme Court, 942,*** has concluded that no case under Section 363 and 366 is made out against the accused.

11. Even a co-ordinate Bench of this Court in a recent judgment in ***Cr.MMO No.113 of 2016*** titled ***Rajinder Singh*** versus ***State of H.P. & Others*** decided on 29.3.2017 in an identical case where the prosecutrix, belonging to a higher caste abandoned the company of her parents to join the company of her husband, the accused petitioner and solemnize marriage voluntarily with him, the Court after taking into consideration the law laid down by the apex Court has held as under:-

> "12. Thus, taking into consideration the averments and law, as discussed hereinabove, I find that the interest of justice will be met, in case, the proceedings are quashed, as the parties are living a peaceful life and the fact that proforma respondent No. 4, Sita Devi has married to the petitioner with her own consent, Marriage Registration Certificate (Annexure P-2), to this effect is duly placed on record. The allegation, as made in the FIR, does not disclose the commission of any offence against the petitioner. Since the complainant has now died and his legal heirs are not coming to the Court, despite service, it seems that they do not want to continue the criminal proceedings against the petitioner.
>
> 13. Accordingly, I find this case to be a fit case to exercise powers under Section 482 of the Code and accordingly F.I.R No. 277 of 2009, dated 09.10.2009, under Sections 363, 366 and 506 of the Indian Penal code, registered at Police Station, Manali, District Kullu, H.P., is ordered to be quashed. Since F.I.R No. 277 of 2009, dated 09.10.2009, under Sections 363, 366 and 506 of the Indian Penal code, registered at Police Station, Manali, District Kullu, H.P., has been quashed, consequent proceedings/Challan pending before the learned Judicial Magistrate 1st Class, Manali, District Kullu, H.P. against the petitioner, are thereby rendered infructuous. However, the same are expressly quashed so as to obviate any confusion."

12. Having said so, the present is a fit case where allowing the pending criminal proceedings to continue against the accused petitioner would be nothing but merely an abuse of the process of law. Being so, FIR No.64/14 registered in Police Station, Rajgarh, District Sirmaur, H.P. is quashed and set aside. As a result thereof, the criminal proceedings having arisen out of the FIR pending disposal in the court of learned Sessions Judge Sirmaur District at Nahan will also stand quashed. This petition and connected one are accordingly allowed and stands disposed of.

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

Paras Ram …Petitioner
Versus
Smt. Kiran & others …Respondents

CMPMO No. 280 of 2016.
Date of Decision : August 11, 2017

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a civil suit for declaration and injunction – an application for injunction was filed in which an order of status quo was issued – an appeal was filed which was allowed- held that P and I are recorded to be the owners of the suit land who had sold the land to K – the possession of K cannot be said to unauthorized – the Appellate Court had rightly reversed the order- however, the Appellate Court had relied upon the head notes of the judgment which is not permissible – the Court has to ascertain the ratio decidendi and to apply the same- direction issued to the Judicial Academy to conduct course on the same – petition dismissed. (Para-5 to 21)

Cases referred:
Dorab Cawasji Warden vs. Coomi Sorab Warden & others, (1990) 2 SCC 117
Gujarat Bottling Co. Ltd. & others vs. Coca Cola Co. & others, (1995) 5 SCC 545
Hindustan Petroleum Corpn. Ltd. vs. Sriman Narayan & another, (2002) 5 SCC 760
Kishore Kumar Khaitan & another vs. Praveen Kumar Singh, (2006) 3 SCC 312
M. Gurudas & others vs. Rasaranjan & others, (2006) 8 SCC 367
Purshottam Vishandas Raheja & another vs. Shrichand Vishandas Raheja & others, (2011) 6 SCC 73
Akhilesh Jindani (Jain) & another vs. State of Chhattisgarh, 2002 Cri. L.J. 1660
Eastern Book Company & others vs. D.B. Modak & another, (2008) 1 SCC 1
Atmaram vs. Nagpur Municipal Corporation, 2011 (2) Bom.CR 577
United States vs. Detroit Timber & Lumber Company, 200 U.S. 321 (1906)

For the petitioner : Mr. S. C. Sharma, Advocate, for the petitioner.
For the respondent : Mr. Bimal Gupta, Senior Advocate with Ms.Rubeena Bhatt, Advocate, for respondent No. 1.
Mr. Ajay Vaidya, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Sanjay Karol, ACJ.

Plaintiff, Paras Ram (petitioner herein) filed a suit for declaration of his status over the suit land allegedly possessed by him, with a further prayer for injunction, restraining the defendants (Kiran, Prithi Chand and Indu – respondents herein) from interfering with the nature and user thereof.

2. In the written statement defendants averred that Shri Prithi Chand (defendant No. 2) and Smt.Indu (defendant No. 3) had sold the land to Smt.Kiran (defendant No. 1) vide registered sale deed executed in the year 2014, where after entries of ownership were also recorded in the revenue record with the preparation of revenue record and carving out of a separate tatima (spot map & revenue record). The construction so raised is exclusively over the land under the ownership and possession of Smt. Kiran (defendant No.1).

3. In an application, so filed under Order 39 Rules 1 & 2 CPC, trial Court directed the parties to maintain status quo, qua nature and possession of the suit land. Order dated

4.12.2015, so passed by Civil Judge (Junior Division), Kandaghat, District Solan, H.P. in CMP No. 7-K/6 of 2015 (Civil Suit No. 6-K/1 of 2015), titled as *Paras Ram vs. Kiran & others,* came to be assailed by the defendants and vide impugned order dated 11.4.2016, passed in Civil Misc. Appeal No. 01ADJ-II/14 of 2016, titled as *Kiran & others vs. Paras Ram,* the lower appellate Court set aside the same by allowing the appeal.

4. Having heard learned counsel for the parties as also perused the record so made available in Court, this Court, *prima facie,* is of the view that three ingredients so required to be established by the plaintiff, entitling him for grant of relief of interim injunction, are lacking in the instant case.

5. Law with regard to grant of interim injunction is now well settled.

6. It is elementary that grant of an interlocutory injunction is a matter requiring exercise of discretion by the Court for which the following tests apply:-

(i) whether the plaintiff has a prima facie case;

(ii) whether the balance of convenience is in favour of the plaintiff; and

(iii) whether the plaintiff would suffer an irreparable loss and injury if his prayer for interlocutory injunction is disallowed, which cannot be compensated in terms of money.

7. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the exercise of legal right asserted by the plaintiff and its alleged violation are both contested and remain uncertain till they are established on evidence at the trial. The relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff, during the period before which that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury, by violation of his right for which he could not be adequately compensated in damages recoverable in the action, if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. **[***Dorab Cawasji Warden vs. Coomi Sorab Warden & others*, (1990) 2 SCC 117; *Gujarat Bottling Co. Ltd. & others vs. Coca Cola Co. & others,* (1995) 5 SCC 545; *Hindustan Petroleum Corpn. Ltd. vs. Sriman Narayan & another*, (2002) 5 SCC 760; *Kishore Kumar Khaitan & another vs. Praveen Kumar Singh,* (2006) 3 SCC 312; *M. Gurudas & others vs. Rasaranjan & others,* (2006) 8 SCC 367 and *Purshottam Vishandas Raheja & another vs. Shrichand Vishandas Raheja & others,* (2011) 6 SCC 73**]**

8. In the instant case, revenue record i.e. jamabandi for the year 2009-2010 reflects Shri Prithi Chand and Smt. Indu to be the owners of the suit land. Vide sale deed such ownership and possession of the land came to be transferred in favour of Smt.Kiran. Thus construction, so raised on the spot is not over joint land but in fact over the land, subject matter of said sale deed. Possession of Smt.Kiran over the suit land cannot be said to be unauthorized. Revenue record corroborates such fact.

9. Hence, prima facie, it cannot be said that plaintiff has been able to establish that (a) he has a strong prima facie case for grant of relief of injunction in his favour; (b) in the absence of grant of injunction, irreparable loss and injury would be caused to him which cannot be compensated in terms of money; or (c) balance of convenience lies in his favour.

10. Unless and until Court is prima facie convinced of existence of all the three ingredients, interim injunction, as prayed for, cannot be granted and that too as a matter of routine. As such, this Court finds no reason to interfere, insofar as reasoning adopted and findings returned in reversing the order of grant of injunction, so passed by the trial Court is concerned.

11. However, in the impugned order dated 11.4.2016 one notices one disturbing feature. The Presiding Officer of the lower appellate Court, is of the rank of Additional District Judge. While deciding the appeal, he referred to and relied upon judicial precedents. Rather than applying the ratio decidendi or coming to the conclusion that principles laid down therein are applicable to the instant facts, he simply reproduced the head-notes of the said decisions as is evident from paragraphs 15 to 18 of his order reproduced as under:

> "15. Similarly I also place reliance on the law laid down in (No. 1) Shiv Chand vs. Manghru & ors. Latest HLJ 2007 (HP) 413 as under:
>
> > "Important Point:- A person in joint possession of land cannot change the nature of land unless partitioned or consented by other persons in joint possession. However, if separate possession is established no injunction to restrain the other from construction can be passed.
>
> A) Specific Relief Act, 1963, Section 36 – Injunction grant of – Separate possession proof – Where the plaintiff/appellant admitted separate possession on the property from the time of predecessor and on death of predecessor the appellants came in possession of that portion, which was held by their predecessor. The parties cannot said to be in joint possession. Held the appellants not entitled for injunction against the respondent. (Para-9).
>
> 16. Similarly I also place reliance on the law laid down in Jaishi Ram & anr. versus Kamal Dev & ors. 2008 (1) S.L.J. (H.P.) 715 as under:
>
> > "Joint Property – In the present case, for fourteen years the appellants accepted the change ofuser made by respondents on the suit land by raising construction thereon. – Fourteen years of silence is more than sufficient to hold that appellants accepted the construction raised by the respondents on the suit land – Therefore, after fourteen years they cannot question the construction raised by the respondents on the suit land – The remedy, if any, available to the appellants is to partition the suit land and not a decree of permanent prohibitory injunction and mandatory injunction against the respondents – Where a co-owner is in possession of separate parcels under an arrangement consented to by the other co-owners, it is not open to any one to disturb the arrangement without the consent of others except by filing a suit for partition – Sant Ram Nagina Ram vs. Daya Ram Nagina Ram (AIR 1961 Punjab 528)".
>
> 17. Further I also place reliance on the law laid down in Payar Singh vs. Narayan Dass & ors. 2010 (2) Him. L.R. 751 as under:
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> > "Civil Procedure Code, 1908, S. 115 – Civil Procedure Code, 1908, O. 39 R. 1 & 2 – Temporary Injunction – Suit for permanent prohibitory and mandatory injunction – Parties are in separate possession under family settlement – Petitioner has already constructed his house – It is not the stand of petitioner that respondents are raising construction on an area which is more than their share – Case of respondents is that petitioner has constructed his house on a better portion of land – Photographs indicate sufficient gap between already constructed house of petitioner and under construction house of the respondents – Respondents are claiming possession over the suit land under family arrangement i.e. with the consent of the petitioner over which they are raising construction – Respondents have thus established prima facie case, balance of convenience, irreparable loss in their favour – Petitioner not entitled to temporary injunction to restrain respondents to raise construction on suit land."

> 18. Hon'ble High Court of Punjab and Haryana in a case 2010(2) RCR (Civil), titled as Ram Chander Versus Gobind Ram and other has held as under:
>
> > "Specific Relief Act, 1963, Section 41 (i) – Injunction against – A co-sharer himself in possession of part of property having raised construction himself, cannot say that raising of construction by the other co-sharer would tantamount to wasting or illegitimately using the property – He is not entitled to injunction against his co-sharer.""

12. It is this practice which needs to be deprecated. Head-notes are prepared by Reporters which may or may not be correctly prepared. In any event principle of law laid down is not the head-notes but the body of the judgment and whether the said principle is applicable to the attending facts or not is for the Court to consider and if applicable, accordingly apply the same. Unfortunately, this practice of merely reproducing the head-notes or lengthy paragraphs of the precedents, without discussing the principle of law and its applicability to the given facts, is becoming more prevalent.

13. Reliance on the judgments, be that of the High Courts or the Supreme Court, is for ascertaining the ratio decidendi and considering its applicability to the given facts. Judicial Officers are expected to read the entire judgment and not the head-notes, for as already observed, head- notes simply reflect the understanding and wisdom of the Editor. In this regard, with profit, following observations made by the learned Judge in *Akhilesh Jindani (Jain) & another vs. State of Chhattisgarh,* 2002 Cri. L.J. 1660 (Chhatisgarh High Court) are reproduced as under:

> "18. … … The Judges do not prepare placitum, they deliver the judgments. The Editors do not deliver judgments but prepare Head-note/placitum according to their understanding. It is expected of all concerned that before placing reliance upon the words employed in placitum, they would read the judgment and try to appreciate that under what particular circumstances a particular judgment was delivered by the Court. When a fact-based judgment is delivered by the Court, then, the said judgment would be applicable to a case of similar facts; but when the law is interpreted in a particular judgment, then, whenever question of said interpretation arises, the earlier judgment would be cited as precedent."

14. Though in a case of infringement of copyright, the Apex Court in *Eastern Book Company & others vs. D.B. Modak & another,* (2008) 1 SCC 1, whereby Court was examining the functions, duties and rights of an Editor in preparing the head-notes of the judgments delivered by the Judges, observed that even an Editor is required to read whole of the judgment and understand the questions involved in the case.

15. In a totally different context, but relating to the issue in question, a Division Bench of the High Court of Bombay (Nagpur Bench) in *Atmaram vs. Nagpur Municipal Corporation,* 2011 (2) Bom.CR 577, also observed that even a head-note of the section is not an authoritative text and it is the language of "substantive Section itself which is determinative in interpretative exercise".

16. This Court must acknowledge the efforts put in by Sh. Neeraj Gupta, learned Advocate, in assisting the Court on this issue. During the course of hearing he was present in the Court and invited attention of this Court to several decisions. Head-note, as he points out, is a brief summary of a particular point of law, that is added to the text of a court decision to aid readers in locating discussion of a legal issue in an opinion.

17. He also invites attention of the Court to the decision rendered by the United States Supreme Court in *United States vs. Detroit Timber & Lumber Company,* 200 U.S. 321 (1906), to the effect that head-notes have no legal standing and therefore do not set precedent.

18. Decisions on the issue can be multiplied.

19. Reproduction of the head-notes/paragraphs of decisions, by the Officer of the level of Additional District Judge is only reflective of lack of proper understanding of law as how the decisions are to be appreciated and applied. It lacks maturity on the part of the Officer, reflective of lack of proper training.

20. Under these circumstances, this Court recommends that the Judicial Academy of the State conducts a course for the concerned Judicial Officer on the issue in which the Officer who passed the order dated 11.4.2016, in Civil Misc. Appeal No. 01ADJ-II/14 of 2016, titled as *Kiran & others vs. Paras Ram,* is made to participate.

21. Petition being devoid of any merit, is dismissed. Pending application(s), if any, also stand disposed of accordingly. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

However, directions contained shall be complied with by all the authorities. Registrar (Judicial) to take follow up action.

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

Kishori Lal ....Petitioner.
Versus
State of H.P. .....Respondent.

Cr. Revision No. 38 of 2007.
Decided on: 16th August, 2017

Indian Penal Code, 1860- Section 279, 337 and 304-A- Accused was driving a jeep in a rash and negligent manner – he failed to control the same and it rolled down 250 meters below the road – the occupants sustained injuries and one J died in the accident – the accused was tried and convicted by the Trial Court- an appeal was filed, which was dismissed- held in revision that the accident was not denied – the vehicle was travelling on a road passing through hilly terrain – the driver is supposed to drive vehicle cautiously and in a normal speed- the mechanical expert had died prior to his examination in the Court and his report could not be proved- thus, it is not proved that the accident was not caused due to any mechanical defect – the judgments passed by the Courts are not sustainable- revision allowed and accused acquitted. (Para-9 to 14)

Cases referred:

Suresh Kumar Vs. Sate of H.P., I L R 2017 (III) HP 606
Raj Kumar versus State of H.P., 1997 (2) Shim.L.C., 161

For the appellant : Mr. Virender Thakur, Advocate.
For the respondent : Mr. Pramod Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Judgment dated 16.3.2007 passed by learned Addl. Sessions Judge, Solan, in Cr. Appeal No. 4-S/1 of 2006 is under challenge in this petition. It is seen that learned lower appellate Court has affirmed judgment dated 27.7.2006 passed by learned Sub Divisional Judicial Magistrate, Arki, District Solan in Cr. Case No. 29/2 of 2003, whereby the accused has been convicted under Sections 279, 337 and 304-A IPC and sentenced to undergo rigorous

imprisonment for a period of three months and to pay a fine of Rs. 500/- under Section 279 IPC, three months rigorous imprisonment and to pay a sum of Rs. 500/- as fine under Section 337 IPC and to undergo rigorous imprisonment for a period of one year and to pay a sum of Rs. 1,000/- as fine under Section 304-A IPC.

2. In a nut shell, the case of the prosecution against the accused is that on 25.10.2002 at Kararaghat-Kashlog road in District Solan, he was driving jeep No. HP-07-4427 carrying the injured witnesses PW-1 Ram Dass, PW-4 Kalawati and one Jeet Ram as well as other persons, eight in all, in a rash and negligent manner and thereby the vehicle met with an accident at Gaggal as he failed to control the same. The vehicle rolled down 250 meters below the road. While Sh. Jeet Ram has succumbed to injuries received in the accident, the remaining persons travelling in the ill-fated jeep received injuries, simple in nature on their person. The police of PS Darlaghat was informed by deceased Jeet Ram around 9:30 AM about this accident. The information so given was reduced into writing vide docket No. 6 Ext. PA. The police swung into action. Consequently, the statement of injured Kalawati (PW-4) vide Ext. PW-4/A was recorded on the same day. On the basis of Ext. PW-4/A, FIR Ext. PW-5/A was registered in the Police Station qua this accident. The investigation was conducted by SI/SHO Chain Ram (PW-8).

3. On the completion of investigation, report under Section 173(2) Cr.P.C. was filed against the accused in the Court of learned Judicial Magistrate Ist Class, Arki, District Solan. Learned Magistrate, on consideration of the report and the documents annexed therewith and on finding a prima-facie case for the commission of an offence punishable under Sections 279, 337 and 304-A IPC made out against the accused had put the notice of accusation to him accordingly. The accused, however, pleaded not guilty to the notice and claimed trial.

4. The prosecution in support of its case has examined 8 witnesses in all. The material prosecution witnesses are PW-1 Ram Dass and PW-4 Kalawati, who were the occupants of the ill-fated jeep. The remaining witnesses, including PW-8 SHO Chain Ram are, however, formal. The motor mechanic who has allegedly inspected the ill-fated jeep though would have been a material witness to this case, however, he died well before the prosecution evidence was recorded in the trial Court. Anyhow, on the appreciation of the evidence produced by the prosecution and examining the defence of the accused as emerges from the trend of cross-examination of prosecution witnesses as well as the statement under Section 313 Cr.P.C, learned trial Court has arrived at a conclusion that the prosecution has proved its case against the accused beyond all reasonable doubt. He, as such, was convicted for the commission of offence punishable under Sections 279, 337 and 304-A IPC.

5. Learned lower appellate Court has affirmed the findings of conviction and sentence recorded against the accused by learned trial Court and dismissed the appeal.

6. The legality and validity of the findings of conviction and sentence passed by both Courts below has been questioned on the grounds *inter alia* that highly contradictory evidence produced by the prosecution has been relied upon to record the findings of conviction and sentence against the accused. The statement of accused under Section 313 Cr.P.C. was not recorded in accordance with law. There being no evidence to show that the vehicle was being driven by the accused in a rash and negligent manner, no findings of conviction could have been recorded against him.

7. On the other hand, the defence version that the accident had taken place on account of mechanical fault, has not been appreciated at all. The plea that the accident occurred due to break failure has also not been considered.

8. On hearing Mr. Virender Thakur, Advocate, learned counsel representing the accused and also learned Additional Advocate General on behalf of the respondent-State, the only question, which needs adjudication in this petition, is that the findings of conviction recorded against the accused are not based on proper appreciation of evidence available on record and rather based upon conjectures, surmises and hypothesis. However, before coming to adjudication of such controversy, it is desirable to take note as to what constitute an offence

punishable under Sections 279 and 337 IPC in legal parlance. This Court in a recent judgment in ***Criminal Revision No.158 of 2009***, titled ***Suresh Kumar*** versus ***Sate of H.P.***, decided on 19.5.2017, after taking note of the law laid down by a Co-ordinate Bench in ***Raj Kumar*** versus ***State of H.P., 1997 (2) Shim.L.C., 161*** has held that mere rashness and negligence is not sufficient for recording the findings of conviction against an offender, however, it is criminal rashness and criminal negligence on the part of the accused which constitutes an offence punishable under the Sections ibid. Additionally, the prosecution is also required to plead and prove that it was an act on the part of the accused alone responsible for the accident in question. It has also been held in the judgment supra that the speed of the offending vehicle alone is no criteria to come to the conclusion that the same was being driven in a rash and negligent manner but other factors, such as, density of traffic, width of the road and the attempt of the driver to take precautions to avert the accident etc., also need to be taken into consideration.

9. Now if adverting to the case in hand, there is no denial to the accident of jeep No. HP-07-4427 occurred at a place, namely, Gaggal on Kararaghat Kashlog road on 25.10.2002 around 9:30 AM. The injured witnesses PW-1 Ram Dass and PW-4 Kalawati along with deceased Daya Ram and other persons, total 8 in number were travelling in the ill fated jeep at the time of accident. The spot map Ext. PW-8/A reveals that it is a single road having only 8 ft. *pucca* width. The road passes through hilly terrain. On such a road, it is expected from the driver of a vehicle to drive the same cautiously and in a normal speed as well as by having full control over the vehicle.

10. The pivotal question around which the entire controversy revolves is the manner in which the accused was driving the ill-fated jeep at the time of the accident. The prosecution, in order to prove its case that the accused was driving the ill-fated jeep in a rash and negligent manner, has examined the injured witnesses PW-1 Ram Dass and PW-4 Kalawati. They both hail from rural area and as such are simpleton and rustic villagers. It is for this reason they failed to depose about the speed of the ill-fated jeep. They expressed their ignorance as to what constitutes rash and negligent driving and the gear system etc. in a vehicle. It is for this reason they expressed their inability, including telling as to in which gear the vehicle was being driven by the accused at the relevant time. Though, both have stated in one voice that the accused was driving the vehicle at high speed, however, they failed to disclose the exact speed of the vehicle at the time of accident. Therefore, their testimony is not sufficient to conclude that the rashness and negligence on the part of the accused was the cause of the accident. The testimonies of PW-1 Ram Dass and PW-4 Kalawati is not at all sufficient to arrive at a conclusion that the accused was driving the ill fated jeep in a rash and negligent manner and it is such driving attributed to him was sole cause of the accident.

11. The report of the mechanic Ext. P-8 would have thrown some light on the manner in which the accident has occurred, however, the prosecution could not prove the same in accordance with law because the author thereof Sh. Daya Ram Chandel had expired before his statement could have been recorded by the Trial Court. It is the I.O., while in the witness-box has produced this document in evidence stating that since the similar reports were obtained from deceased Daya Ram Chandel, the motor mechanic in other cases, therefore, he was well conversant with his hand writing and signatures. It does not discharge the onus upon the prosecution to prove this document in accordance with law. As a matter of fact, even if Daya Ram aforesaid has expired well before recording of the prosecution evidence, the prosecution could have proved this document by way of producing secondary evidence. Such a course, however, has not been resorted to, therefore, it cannot be said that the vehicle was not having any mechanical fault and its all systems were working properly. It is only with the help of such evidence, the Court would have formed an opinion that it was rash and negligent driving on the part of the accused and noneelse. No doubt, there is nothing on record that the accident occurred either on account of failure of break or some mechanical defect developed in the ill-fated jeep and as such, the defence of the accused as emerges from the trend of cross-examination of prosecution witnesses that the accident occurred on account of mechanical fault seems to be not justified, however, the cause of accident was rash and negligent driving on the part of the accused

alone onus was on the prosecution to prove so and as the prosecution has failed to discharge the same, therefore, findings of conviction could have not been recorded against the accused.

12. Surprisingly enough, both Courts below should have given weightage to the report of the motor mechanic Ext. P-8 to arrive at a conclusion that the cause of accident was rash and negligent driving on the part of the accused, however, erroneously because this document being not legally proved on the record could have not been relied upon against the accused. Therefore, if this document is excluded from the prosecution evidence, there remains only the testimony of PW-1 Ram Dass and PW-4 Kalawati, which for the reasons recorded hereinabove, is hardly sufficient to record findings of conviction against the accused. The evidence as has come on record by way of remaining prosecution witnesses was formal in nature which could have at the most been used as link evidence, however, only when the prosecution had otherwise proved its case against the accused beyond all reasonable doubt.

13. The reappraisal of the given facts and circumstances and also the evidence available on record leads to the only conclusion that both the Courts below have failed to appreciate the evidence in its right perspective. It has vitiated the proceedings in the trial Court and also the judgment of conviction and sentence passed against the accused. Learned lower appellate Court has also failed to appreciate the evidence in its right perspective, therefore, the impugned judgment which is not legally sustainable should be quashed and set aside by this Court while exercising its revisional jurisdiction.

14. This petition, as such, is allowed. Consequently, the impugned judgment is quashed and set aside and the accused is acquitted of the notice of acquisition put to him by learned trial Court. The bail bonds are cancelled and discharged. The amount of fine, if any, deposited be refunded to the accused under proper receipt. The revision petition is accordingly allowed and disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Lalit Kumar …..Appellant.

Versus

State of Himachal Pradesh …..Respondent.

Cr. Appeal No. 361 of 2016
Reserved on: 25.07.2017
Decided on: 16.08.2017

Indian Penal Code, 1860- Section 376, 511 and 506- Prosecutrix had gone to the house of her neighbour – the accused molested her – he had molested her earlier as well – the accused was tried and convicted by the Trial Court- held in appeal that there are material contradictions in the testimonies of prosecutrix and other witnesses- medical evidence ruled out the sexual intercourse – there is enmity between the family of the accused and the family of the prosecutrix – the Trial Court had wrongly convicted the accused – appeal allowed and the accused acquitted.

(Para-9 to 31)

Cases referred:

State of Kerala vs. Anilachandran @ Madhu and others, 2009 (13) SCC 565
Rai Sandeep @ Deepu vs. State of NCT of Delhi, 2012 (8) SCC 21
Narender Kumar vs. State (NCT of Delhi), 2012 (7) SCC 171
Abbas Ahmad Choudhary vs. State of Assam, 2010 (12) SCC 115
Radhu vs. State of Madhya Pradesh, 2007 (12) SCC 57
Aman Kumar vs. State of Haryana, 2004 (4) SCC 379

For the appellant:	Mr. Anoop Chitkara and Ms. Sheetal Vyas, Advocates.
For the respondent:	Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG and Mr. Rajat Chauhan, Law Officer, for the respondent-State.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The instant appeal has been preferred by the appellant/convict/accused (hereinafter referred to as "the accused") laying challenge to the judgment, dated 22.07.2016, passed by learned Additional Sessions Judge, Sirmaur District at Nahan, H.P. in Sessions Trial No. 9-N/7 of 2013, whereby the accused was convicted for the commission of offence punishable under Sections 376, read with Section 511, and Section 506 of Indian Penal Code, 1860 (hereinafter referred to as "IPC").

2. Tersely, the facts giving rise to the present appeal, as per the prosecution, are that on 14.01.2013, Smt. Nirmala Devi (complainant), lodged a report with the police that she lives in Housing Board Colony, Nahan, alongwith her husband and children and her husband is serving in the office of District & Sessions Court, Nahan. As per the complainant, she has two daughters, elder daughter is 20 years of age and younger daughter, the prosecutrix (name withheld) is about 18 years of age. She has further alleged that on14.01.2013, around 12:30 p.m., she went to her neighbor's house to give vegetables and the prosecutrix was made to sit in the room, however, on her return, around 01:00 p.m., she noticed the prosecutrix coming out from the back door of the house of accused, who is working as Process Server in the Court, and she was pulling her shirt downwards. The prosecutrix was shivering, having teary eyes and on asking she told her that the accused called her to his room. On relentless questioning, the prosecutrix divulged that accused opened her pant and did wrongful act with her. The complainant checked the private parts of the prosecutrix and noticed some liquid creamy substance. The complainant further alleged that prior to this incident, the accused had also done wrongful act with the prosecutrix. Consequently, the complainant telephonically informed her husband and when he came to the house, the complainant narrated the entire incidence to him. The husband of the complainant further called his brother, Shri Amarjeet Singh, and all of them went to police station for lodging a report. Report was registered and investigation ensued. During the course of investigation, the prosecutrix was medically examined, spot map was prepared and the statements of the witnesses were recorded. The accused was arrested and was medically examined. The room of the accused was thoroughly inspected and the police took into possession a bed sheet, at the instance of the prosecutrix, which was sealed in a parcel having seal impression 'I'. The accused gave demarcation of the spot, whereupon spot map, Ex. PW-13/D, was prepared. On 16.01.2013, the accused got recovered one tube of *'Boro Plus Cream'* which was taken into possession vide separate memo, Ex. PW-5/B and the same was sealed. The parcels were sent to SFSL, Junga, for chemical analysis. As per the prosecution, the prosecutrix was suffering from mild mental retardation and qua this aspect she was medically examined by Dr. Pravesh Aggarwal and her disability certificate, Ex. PW-11/A, was obtained. As per the opinion of the doctor, the mental age of the prosecutrix was opined as seven years. The police, after completion of the investigation, concluded that the accused did not commit any sexual assault on the prosecutrix, however, he attempted to commit rape, thus Section 376 IPC was deleted and chargesheet was filed for the commission of offence punishable under Section 376 read with Section 511 IPC. After completion of investigation, *challan* was presented in the Court.

3. The prosecution, in order to prove its case, examined as many as thirteen witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he denied the prosecution case and claimed innocence. A court witness was examined and the accused, in defence, examined a witness.

4. The learned Trial Court, vide impugned judgment dated 25.07.2016, convicted the accused for the commission of offence punishable under Section 376 read with Section 511 IPC and sentenced him to undergo rigorous imprisonment for five years and to pay fine of Rs.20,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for two months. The accused was further sentenced to undergo simple imprisonment for six months and to pay fine of Rs.5000/- and in default of payment of fine, to undergo simple imprisonment for one month for the offence punishable under Section 506 IPC. The learned Trial Court also ordered that out of the fine amount, Rs.20,000/- shall be paid to the prosecutrix, as compensation, hence the present appeal.

5. I have heard Mr. Anoop Chitkara, Advocate, learned Counsel for the appellant (accused) and Mr. Virender K. Verma, learned Additional Advocate General for the respondent/State.

6. Mr. Chitkara has argued that the story of the prosecution is totally improbable and unconvincing. The findings of conviction, as recorded by the learned Court below, are based on surmises and conjectures and the learned Court below has failed to take into consideration the evidence to its true perspective. He has further argued that the statements of the witnesses are contradictory and do not inspire confidence. The learned Court below, without their being any evidence on record, has passed the conviction and sentenced the appellant, which is required to be set-aside. In contrast to what has been argued by the learned counsel for the appellant, Mr. Verma, learned Additional Advocate General, has argued that the accused has committed a heinous crime in the broad day light. He has further argued that statements of PW-1, Smt. Nirmala Devi (mother of the prosecutrix), and the prosecutrix clearly prove the guilt of the accused, thus no interference is required in the well reasoned judgment passed by the learned Trial Court. He has prayed that the appeal is without merits and the same may be dismissed.

7. In rebuttal, Mr. Chitkara has vehemently argued that the statement of PW-1, Smt. Nirmala Devi, is wholly unreliable, as there are material contradictions in it and the statement of the prosecutrix also cannot be relied upon, as the her version did not find any lateral support from the medical evidence/forensic report. He has further argued that the prosecution has failed to connect the accused with the alleged offence and so the presence of the accused on the spot of occurrence at the relevant time is shrouded with doubt. He has argued that it is emanating that the accused was found fit for performing sexual intercourse and the prosecutrix has also deposed that earlier to the alleged occurrence, the accused had committed bad act with her, however, the medical evidence does not support this part of the statement of the prosecutrix. He has argued that in the above enumerated circumstances, the appellant cannot be convicted, as the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt.

8. In order to appreciate the rival contentions of the parties, I have gone through the record carefully and in detail.

9. PW-1, Smt. Nirmala Devi (mother of the prosecutrix) deposed that her younger daughter (prosecutrix) was studying in 10th standard and her date of birth is 16.10.1994. On 14.01.2013, around 12:30 p.m., the prosecutrix was made to sit in the room and she went to neighbor's house for giving vegetables. On her return, after 10/12 minutes, she did not find the prosecutrix in the room and she repeatedly called out the prosecutrix from her nick name. Owing to her calls the prosecutrix came out from the room of the accused. She was shivering and adjusting her dress. The prosecutrix disclosed to PW-1 that the accused has called her. The prosecutrix was weeping and when PW-1 asked her why she is weeping, she divulged that she could not tell as the accused told her to kill her parents, in case she divulges anything to anyone. On relentless inquires, the prosecutrix disclosed that accused committed sexual assault upon her. Subsequently, PW-1 telephoned her husband and when he came from his office, she disclosed the incident to him. This witness has further deposed that they called their relative, Amarjeet, who met them en route police station. She has further deposed that she, her husband, prosecutrix and Amarjeet went to Police Station, Nahan, and lodged FIR, Ex. PW-1/A. The

prosecutrix was medically examined and police investigated the matter. This witness, in her cross-examination, has deposed that when she was standing on the back door of her accommodation, she herself saw the prosecutrix coming out from the room of the accused. The rooms of the accused were in the same building and she searched the prosecutrix in her two rooms, kitchen, bathroom, thereafter, she called out the name of the prosecutrix from inside the rooms. She has deposed that there was a *gali* (street) towards the back side of their accommodation where they had installed a *chulaha* (hearth) for heating water and for preparing *chapaties*. She denied the suggestion that smoke of the hearth used to go to the house of the accused for which the accused objected many times. She also denied the suggestion that due to the installation of said hearth, the accused and their family used to have altercations.

10. The prosecutrix was examined as PW-2. She has deposed that in the year 2013 she was studying in 9th class and on the day of occurrence when she was studying in her room, her mother had gone to the house of neighbour (Smt. Anju) for giving vegetables, the accused called her in his room. She went to the room of the accused and he opened her pant and she was laid down on the bed by him. She has further deposed thereafter the accused committed bad act with her. The accused also applied cream and massaged her private parts. The prosecutrix has further deposed that earlier also the accused had done bad act with her. She has deposed that accused threatened that he will kill her parents, in case she discloses anything to anyone. As per the statement of the prosecutrix, when her mother called her, she came out from the back door of the accommodation of the accused. Thereafter, she narrated the entire incidence to her mother and she checked her private part and found cream thereon. Her mother informed her father and thereafter she was taken to police station by her mother, father and uncle Amarjeet. She was medically examined. The police visited the spot and she identified bed sheet, Ex. P-2, which was taken into possession by the police, vide seizure memo Ex. PW-2/A. The prosecutrix, in her cross-examination, could not tell when earlier sexual assault was committed by the accused. She has further deposed that she never saw the tube of *borolin* cream. She also could not tell that for how long she remained in the room of the accused. As per her statement, she was taken to the same room of the accused by the police on the next day. She did not tell to the police qua the threatening given by the accused.

11. PW-3, Shri Amarjeet Singh, uncle of the prosecutrix, deposed that on 14.01.2013 his brother Shri Devinder Singh (PW-11) called him to his accommodation. He met his brother, his wife (Smt. Nirmala Devi, PW-1) and the prosecutrix en route to police station. The parents of the prosecutrix informed him about the occurrence. Smt. Nirmala Devi, PW-1, lodged a report in the police station and prosecutrix was taken for medical examination. On the subsequent day, the prosecutrix identified the room and a bed sheet. The identified bed sheet was taken into possession vide memo Ex. PW-2/A and was sealed in a cloth parcel, which was signed by the prosecutrix and by him. This witness, in his cross-examination, has deposed that where the accused and the prosecutrix used to reside, there are 30 to 40 government accommodations. As per this witness, he was with the prosecutrix when she was taken to hospital for medical examination. He feigned his ignorance whether the police visited the house of the prosecutrix and the accused on the same day or not. He also feigned his ignorance whether on the day of occurrence there were vacations in the school. He further deposed that he did not go in the room of the accused when the police visited the spot and bed sheet, Ex. P-2, was shown to him by the police in the lawn of the government accommodation. As per this witness, no neighbours were present when the bed sheet, Ex. P-2, was taken into possession. He also feigned his ignorance that due to the smoke of the hearth, there was dispute between the accused and the parents of the prosecutrix.

12. PW-4, Smt. Anju Sharma, deposed that on 14.01.2013, around 12:30 - 12:45 p.m., Smt. Nirmala Devi (PW-1) came to her house for giving vegetables to her. After giving vegetables to her and talking with her, she returned to her house. Subsequently, she (PW-4) came to know about the occurrence. This witness, in her cross-examination, has deposed that there are two accommodations in between their house and the house of Smt. Nirmala Devi (PW-1). As per this witness, PW-1 told her that she has brought vegetables from the village. Smt.

Nirmala Devi (PW-1) stayed in her house for about a minute. PW-5, Constable Sanjeev Kumar, deposed that on 16.01.2013 the accused gave demarcation of his house at Housing Board Colony, Nahan, and memo, Ex. PW-5/A, was prepared in this regard, which bears his signatures. He has further deposed that accused also got recovered a tube of *boroplus* cream from a room of his accommodation and the same was used tube. The said tube was put in a cloth parcel and sealed with seal impression 'I' at two places and facsimile seal was separately taken on a piece of cloth. As per this witness, said parcel was taken into possession, vide memo Ex. PW-5/B, which was signed by him. This witness, in his cross-examination, has deposed that the Investigating Officer did not make any inquiry from the accused in his presence. Head Constable Gurdayal Singh recovered tube, Ex. P-4, of *boroplus* cream when two-three persons were present there. As per this witness, tube of *boroplus* cream was lying in the next room on double bed. Memo, Ex. PW-5/A, qua demarcation of the house of the accused and seizure of a tube of *boroplus* cream, Ex. PW-5/B, were prepared by HC Gurdayal Singh.

13. Dr. Gopal Ashish Sharma, Medical Officer, R.H. Nahan (PW-6), deposed that on 15.01.2013, police moved application, Ex. PW-6/A, for conducting medical examination of the accused and the same was marked to him. He conducted the medical examination of the accused and found no signs of fresh injury on any part of the body of the accused. He found the accused fit to perform sexual act. He preserved the underwear and pubic hair of the accused, which were sealed and handed over to the police by him. He issued medico legal certificate, Ex. PW-6/B, qua the accused. This witness, in his cross-examination, has deposed that by naked eyes he did not see any stains on the underwear and pubic hair of the accused.

14. PW-7, Constable Raj Kumar, deposed that on 19.01.2013, MHC, Sandeep Negi, vide RC No. 11/13, dated 19.01.2013, handed over to him six sealed parcels with sample seals 'RH' and 'I' for being deposited in State Forensic Science Laboratory, Junga. As per his statement, he deposited the said case property on the same day in State Forensic Science Laboratory, Junga, and on return RC was handed over to MHC. The case property remained intact under his custody. PW-8, HHC Krishan Kumar, deposed that on 14.01.2013 and 15.01.2013, he videographed the statements of Nirmala Devi and other witnesses and converted the same into CD, which was handed over to the police on 20.01.2013. This witness, in his cross-examination, has deposed that on 14.01.2013 he videographed the statement of Nirmala Devi (PW-1) at Police Station, Nahan and on 15.01.2013, he videographed the statement of the prosecutrix in Housing Board Colony.

15. PW-9, Dr. Shahida Ali, S.M.O., R.H. Nahan, deposed that on 14.01.2013 police moved an application, Ex. PW-9/A, for medical examination of the prosecutrix, who was brought with alleged history of sexual intercourse, and she conducted her medical examination. The version of this witness is re-extracted as under:

> ***"On examination:-*** *She was wearing the same dress and underwear, passed urine one time after the incident, there was no difficulty in urination. Her gait was normal.*
>
> ***On examination:-*** *No injury mark was found on lips, cheeks, neck, breasts, chest, back and abdomen. Dark pink coloured underwear having staining on inner side sealed and handed over to the police for forensic lab examination. Pubic hair 3 cm long not matted shaved sealed and handed over to the police for forensic lab report. No staining or injury mark found on inner sides of thighs. Labia majora minora well developed and no staining seen on external genetalia. Her hymen was found intact, forchette intact, swab taken from the vagina. Smear formed on slide, dried and slide handed over to the police for forensic lab report.*
>
> ***Per vaginal examination:-*** *Vagina admits one finger with difficulty, uterous was normal size and non-tender. The forensic report received on 14 February, 2013 and as per the report blood and semen was not detected on vaginal smear slides, pubic hair and underwear."*

As per the final opinion of this witness, there was nothing suggesting fresh sexual intercourse. She issued Medico Legal Certificate, Ex. PW-9/B, qua the prosecutrix, which bears her signatures.

16. PW-10, Head Constable Sandeep Negi, deposed that on 14.01.2013, Lady Constables Vijay Laxmi and Laxmi handed over to him two parcels of cloth, which were sealed with seal impression 'RH' alongwith samples of seal. He made entry to this effect in *malkhana* register at Sr. No. 205. He has further deposed that on 15.01.2013, Constable Raj Kumar, gave to him three sealed parcels of cloth, which were sealed with seal impression 'RH' alongwith a sample of seal and he made entry to this effect in the *malkhana* register at Sr. No. 207/13. On the same day, that is, 15.01.2013, ASI Lekh Raj also gave him a sealed parcel of cloth, which was sealed with seal impression 'I' and he made entry to this effect in the *malkhana* register at Sr.No. 208/13. On 16.01.2013, ASI Lekh Raj handed over to him a sealed parcel of cloth, which was sealed with seal impression 'I', alongwith sample of seal impression 'I'. To this effect, he made an entry in the *malkhana* register at Sr. No. 210/13. He has further deposed that the said case property was handed over to Constable Raj Kumar for being depositing at State Forensic Science Laboratory, Junga, vide RC No. 11/13, dated 19.01.2013. Constable Raj Kumar, after depositing the case property in State Forensic Science Laboratory, Junga, handed over to him RC.

17. PW-11, Shri Devinder Singh (father of the prosecutrix) deposed that he is working as Civil Ahlmad in the Court of Additional District and Sessions Judge, Sirmaur at Nahan and he used to reside with his family in government accommodation, New Housing Board Colony, Nahan. As per this witness, his daughter (prosecutrix) was about 19 years of age and suffering from mild mental retardation. On 14.01.2013 when he was working in his office, he received mobile call from his wife (PW-1), who asked him to come immediately. When he reached the house, his wife narrated the incident to him. As per this witness, the prosecutrix, who was panic-stricken, narrated the incident to him. He informed his younger brother, Shri Amar Jeet Singh (PW-3), on mobile phone and subsequently went to Police Station for lodging the report. As per this witness, the prosecutrix was medically examined in Government Hospital and his wife (PW-1) got identified the house of the accused. He has further deposed that the prosecutrix was examined qua mils mental retardation and report in this regard is Ex. PW-11/A. This witness, in his cross-examination, has deposed that he, in his statement under Section 161 Cr.P.C. recorded by the police, divulged that his wife (PW-1) went to the house of Smt. Anju (PW-4) at 12:30 p.m. and returned at 01:00 p.m. He further deposed that he divulged to the police that the prosecutrix is mentally retarded, whereas in his statement recorded by the police it is not so recorded.

18. PW-12, Dr. Pravesh Aggarwal, Medical Officer, R.H. Nahan, deposed that on 20.04.2013 he referred the prosecutrix to PGI, Chandigarh, for intelligence quotient assessment. The prosecutrix was examined at PGI, Chandigarh, by Dr. Devinder Kumar Rana, and the intelligence quotient of the prosecutrix was assessed as 51 (mild mental retardation). He has further deposed that the mental age of the prosecutrix was assessed as seven years. On the basis of the report of the PGI, Chandigarh, District Medical Board of District Sirmaur, of which he was a member, gave 40% disability certificate, vide certificate No. 251, dated 15.06.2013, copy of which is Ex. PW-11/A. This witness, in his cross-examination, has denied the suggestion that a false disability certificate had been issued by them.

19. PW-13, SI Lekh Raj (Investigating Officer), deposed that on 14.01.2013, at 03:30 p.m., Smt. Nirmala Devi (PW-1) alongwith her husband, Devinder Singh (PW-11) and the prosecutrix (PW-2) came to police station for lodging FIR, Ex. PW-1/A. Thereafter, the police by moving application, Ex. PW-9/A, got the prosecutrix medically examined and the medico legal certificate, Ex. PW-9/B, was obtained. As per this witness, on the same day, i.e., 14.01.2013, sets No. 15 and 16 of Housing Board Colony were inspected at the instance of complainant (PW-1) and spot map, Ex. PW-13/A, was prepared. The accused was interrogated on the same day around 08:30 p.m. On 15.01.2013, through application, Ex. PW-6/A, the accused was medically examined and his medico legal certificate, Ex. PW-6/B, was obtained. The accommodation of the accused was again inspected on 15.01.2013 at the instance of the prosecutrix and the

prosecutrix identified the room and a bed sheet was taken into possession, which was sealed in a cloth parcel having seal impression 'I' at three places. Facsimile seal, Ex. PW-13/B, was also taken on a separate piece of cloth and recovery memo, Ex. PW-2/A, was prepared, which was signed by Surender Singh, Amarjeet, as witnesses, and by the prosecutrix. Spot map, Ex. PW-13/C, was prepared. On 16.01.2013 the accused gave demarcation at Set No. 15, Housing Board Colony, Nahan, and spot map, Ex. PW-13/D, was prepared at the instance of the accused. Memo of spot, Ex. PW-5/A, was prepared and the accused got recovered a tube of *boroplus* cream from second room and the same was enwrapped in a cloth parcel having seal impression 'I', which was taken into possession vide memo, Ex. PW-5/B. Ex. PW-5/B was signed by the accused and Constable Sanjeev Kumar. This witness, in his cross-examination, has deposed that when he reached the spot on 14.01.2013, the accommodation of the accused was found closed and on 15.01.2013 son of the accused (Surender) came to the police station with a key, thereafter, the accommodation of the accused was opened around 10:15 a.m. in his presence and the prosecutrix, her mother, father and uncle were called. He has further deposed that on 14.01.2013 he did not go inside the accommodation of the accused. As per this witness, on 15.01.2013 entire house of the accused was searched and on 16.01.2013 *boroplus* cream was found on the dressing table. He did not record any statement of the accused under Section 27 of the Indian Evidence Act qua recovery of *boroplus* cream.

20. The learned Trial Court vide its order dated 14.10.2015 summoned CW-1, Shri Devinder Kumar Rana, Clinical Psychologist Department of Psychiatry, PGI, Chandigarh, and his testimony was recorded on 17.12.2015. As per this witness, on Gessel's Drawing Test, the mental age of the prosecutrix was found seven years and performance quotient (PQ) was 50, on Seguin Form Board Test (SFBT) her mental age was found eight years and her PQ was 57 and on Vineland Social maturity Scale (VSMS) her social age was found 6.3 years and her social quotient (SQ) was 45. In ratiocination, this witness found the prosecutrix suffering from mild mental retardation. He has issued detailed examination report, which is Ex. CW-1/A. This witness was subjected to exhaustive cross-examination, but nothing substantial could be elicited from him.

21. The accused, in defence, has examined DW-1, Shri Nasir Ali Kadri, Superintendent, Grade-II, Government Girls Senior Secondary School, Nahan. He has only brought the question papers of 9th class examination conducted in the year 2013. This witness, in his cross-examination, deposed that as per the prevailing education policy, no student is declared failed up to 8th standard.

22. Keeping in view the facts of the present case, following judicial pronouncements become relevant for adjudication of this case:

1. ***State of Kerala vs. Anilachandran @ Madhu and others, 2009 (13) SCC 565;***
2. ***Rai Sandeep @ Deepu vs. State of NCT of Delhi, 2012 (8) SCC 21;***
3. ***Narender Kumar vs. State (NCT of Delhi), 2012 (7) SCC 171;***
4. ***Abbas Ahmad Choudhary vs. State of Assam, 2010 (12) SCC 115;***
5. ***Radhu vs. State of Madhya Pradesh, 2007 (12) SCC 57;***
6. ***Aman Kumar vs. State of Haryana, 2004 (4) SCC 379.***

23. The Hon'ble Supreme Court in ***State of Kerala vs. Anilachandran alias Madhu and others, (2009) 13 Supreme Court Cases 565,*** it was held that *onus* to prove the plea of alibi lies on the shoulders of the person pleading it, but merely as the accused was not able to prove his defence, it cannot be presumed that the prosecution case is proved against him. Relevant paras of the judgment (supra) are extracted hereinbelow:

> ***"14. In the instant case the High Court found that not only the document appeared, to be suspicious but in addition there was considerable delay in sending it to Ilaka Magistrate. Added to the***

aforesaid aspects, the noticeable variation in the evidence of PWs 1 and 3 has been highlighted by the High Court. The role played by PWs 1 and 3 while the deceased was being assaulted has been analysed in great detail. The High Court has noticed that even if the prosecution version about the role of A. 1 is accepted to be true, since the genesis of the incident has not been established, it will be unsafe to record his conviction.

15. The High Court has noticed that crime was not committed in the manner as suggested by the prosecution and the genesis of the incident is not established. Even if a plea of alibi is set up by the accused and is discarded, that does not take away the duty of the prosecution to prove beyond reasonable doubt that the accused persons were guilty. It is certainly the duty of the persons who plead alibi to prove it beyond reasonable doubt. Merely because the accused was not able to prove his defence, it cannot be presumed that the prosecution case is proved against him."

24. The Hon'ble Supreme Court in ***Rai Sandeep alias Deepu vs. State (NCT of Delhi), (2012) 8 SCC 21,*** the conviction of the accused was reversed on the ground that there were material contradictions in the evidence and the prosecutrix portrayed conflicting versions from what was stated in the complaint and what she deposed before the Court. Apposite paras of the judgment (supra) are extracted hereinbelow for ready reference:

"21. The other discrepancies which are to be mentioned are the categorical statement of the prosecutrix (PW-4) herself that after the alleged forcible sexual intercourse by both the accused, she wiped of her private parts with a red colour socks which was lying in the house, though at another place it was stated that both the accused used the red colour socks to wipe of their private parts after the commission of the offence. Assuming both the versions to be true, we find that the red colour socks sent for chemical examination revealed that it did not contain any semblance of semen in it as per the FSL report Exhibit PW- 14/N. It was also pointed out that while according to her the socks was handed over to the police in the hospital when the petticoat and the socks were seized from her, according to the seizure memo the socks was recovered from the place of occurrence. She was a married woman and except the semen found in the petticoat, there is no other reliable evidence for implicating the accused-appellants to the crime alleged against them. In this background, when we refer to the oral version of the prosecutrix (PW-4), as pointed out by learned counsel for the appellant, very many facts which were not found in her original statement were revealed for the first time before the Court.

22. In our considered opinion, the sterling witness should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the

occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a sterling witness whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.

23. On the anvil of the above principles, when we test the version of PW-4, the prosecutrix, it is unfortunate that the said witness has failed to pass any of the tests mentioned above. There is total variation in her version from what was stated in the complaint and what was deposed before the Court at the time of trial. There are material variations as regards the identification of the accused persons, as well as, the manner in which the occurrence took place. The so-called eye witnesses did not support the story of the prosecution. The recoveries failed to tally with the statements made. The FSL report did not co-relate the version alleged and thus the prosecutrix failed to instill the required confidence of the Court in order to confirm the conviction imposed on the appellants.

24. With the above slippery evidence on record against the appellants when we apply the law on the subject, in the decision reported in State of Punjab v. Gurmit Singh & Ors., this Court was considering the case of sexual assault on an young girl below 16 years of age who hailed from a village and was a student of 10th standard in the Government High School and that when she was returning back to her house she was kidnapped by three persons. The victim was stated to have been taken to a tubewell shed of one of the accused where she was made to drink alcohol and thereafter gang raped under the threat of murder. The prosecutrix in that case maintained the allegation of kidnapping as well as gang rape. However, when she was not able to refer to the make of the car and its colour in which she was kidnapped and that she did not raise any alarm, as well as, the delay in the lodging of the FIR, this Court held that those were all circumstances which could not be adversely attributed to a minor girl belonging to the poor section of the society and on that score, her version about the offence alleged against the accused could not be doubted so long as her version of the offence of alleged kidnapping and gang rape was consistent in her evidence. We, therefore, do not find any scope to apply whatever is stated in the said decision which was peculiar to the facts of that case, to be applied to the case on hand.

25. In the decision reported in Ashok Kumar v. State of Haryana, this court while dealing with the offence under Section 376 (2) (g) IPC read with explanation held as under in Para 8:

> *"8. Charge against the appellant is under Section 376(2)(g) IPC. In order to establish an offence under Section 376(2)(g) IPC, read with Explanation I thereto, the prosecution must adduce evidence to indicate that more than one accused had acted in concert and in such an event, if rape had been committed by even one, all the accused will be guilty irrespective of the fact that she had been raped by one or more of them and it is not necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. In other words, this provision embodies a principle of joint liability and the essence of that liability is the existence of common intention; that common intention presupposes prior concert which may be determined from the conduct of offenders revealed during the course of action and it could arise and be formed suddenly, but, there must be meeting of minds. It is not enough to have the same intention independently of each of the offenders. In such cases, there must be criminal sharing marking out a certain measure of jointness in the commission of offence."*

26. ***Applying the above principle to the case on hand, we find that except the ipse-dixit of the prosecutrix that too in her chief examination, with various additions and total somersault in the cross examination with no support at all at the instance of her niece and nephew who according to her were present in the house at the time of occurrence, as well as, the FSL report which disclosed the absence of semen in the socks which was stated to have been used by the accused as well as the prosecutrix to wipe of semen, apart from various other discrepancies in the matter of recoveries, namely, that while according to the prosecutrix the watch snatched away by the accused was Titan while what was recovered was Omex watch, and the chain which was alleged to have been recovered at the instance of the accused admittedly was not the one stolen, all the above factors do not convincingly rope in the accused to the alleged offence of gang rape on the date and time alleged in the chargesheet.***

27. ***In the decision reported as State of Himachal Pradesh v. Asha Ram, 2006 AIR(SC) 381, this Court highlighted the importance to be given to the testimony of the prosecutrix as under in para 5:***

> *"5. ..It is now well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should*

not be a ground for throwing out an otherwise reliable prosecution case."

28. Asha Ram was a case where the father alleged to have committed the offence of rape on one of his daughters who was staying with him while his wife was living separately due to estranged relationship. While dealing with the said case, where the prosecutrix, namely, the daughter, apart from the complaint lodged by her, maintained her allegation against her father in the Court as well. This Court held that the version of the prosecutrix in the facts and circumstances of that case merited acceptance without any corroboration, inasmuch as, the evidence of rape victim is more reliable even that of an injured witness. It was also laid down that minor contradictions and discrepancies are insignificant and immaterial in the case of the prosecutrix can be ignored.

29. As compared to the case on hand, we find that apart from the prosecutrix not supporting her own version, the other oral as well as forensic evidence also do not support the case of the prosecution. There were material contradictions leave alone lack of corroboration in the evidence of the prosecutrix. It cannot be said that since the prosecutrix was examined after two years there could be variation. Even while giving allowance for the time gap in the recording of her deposition, she would not have come forward with a version totally conflicting with what she stated in her complaint, especially when she was the victim of the alleged brutal onslaught on her by two men that too against her wish. In such circumstances, it will be highly dangerous to rely on such version of the prosecutrix in order to support the case of the prosecution.

30. In the decision reported as Lalliram & Anr. v. State of Madhya Pradesh in regard to an offence of gang rape falling under Section 376 (2) (g) IPC this Court laid down the principles as under in paras 11 and 12:

> ***"11. It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in Pratap Misra v. State of Orissa where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor and if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See Aman Kumar v. State of Haryana.)***
>
> ***12. As rightly contended by learned counsel for the appellants, a decision has to be considered in the background of the factual scenario. In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In Aman Kumar case it was observed that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than the injured witness. In the latter case there is injury in the physical form while in the former both physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value, it may search for evidence direct or circumstantial."***

> ***31. When we apply the above principles to the case on hand, we find the prevaricating statements of the prosecutrix herself in the implication of the accused to the alleged offence of gang rape. There is evidence on record that there was no injury on the breast or the thighs of the prosecutrix and only a minor abrasion on the right side neck below jaw was noted while according to the prosecutrix s original version, the appellants had forcible sexual intercourse one after the other against her. If that was so, it is hard to believe that there was no other injury on the private parts of the prosecutrix as highlighted in the said decision. When on the face value the evidence is found to be defective, the attendant circumstances and other evidence have to be necessarily examined to see whether the allegation of gang rape was true. Unfortunately, the version of the so called eye witnesses to at least the initial part of the crime has not supported the story of the prosecution. The attendant circumstances also do not co-relate to the offence alleged against the appellants. Therefore, in the absence of proper corroboration of the prosecution version to the alleged offence, it will be unsafe to sustain the case of the prosecution.***
>
> ***32. In the decision reported as Krishan Kumar Malik v. State of Haryana in respect of the offence of gang rape under Section 376 (2) (g), IPC, it has been held as under in paras 31 and 32:***
>
> > ***"31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.***
> >
> > ***32. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (CrPC), FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant."***
>
> ***33. Applying the said principles to the facts of the case on hand, we find that the solitary version of the chief examination of PW-4, the prosecutrix cannot be taken as gospel truth for its face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellants."***

25. The Hon'ble Supreme Court in ***Narender Kumar vs. State (NCT Delhi), 2012 (7) SCC 171,*** it was held that in case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected. Relevant paras of the judgment (supra) are reproduced hereinbelow:

> ***"28. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader***

probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: Tukaram & Anr. v. The State of Maharashtra, 1979 AIR(SC) 185; and Uday v. State of Karnataka, 2003 AIR(SC) 1639).

30. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected.

31. The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.

32. The instant case is required to be decided in the light of the aforesaid settled legal propositions. We have appreciated the evidence on record and reached the conclusions mentioned hereinabove. Even by any stretch of imagination it cannot be held that the prosecutrix was not knowing the appellant prior to the incident. The given facts and circumstances, make it crystal clear that if the evidence of the prosecutrix is read and considered in totality of the circumstances alongwith the other evidence on record, in which the offence is alleged to have been committed, we are of the view that her deposition does not inspire confidence. The prosecution has not disclosed the true genesis of the crime. In such a fact-situation, the appellant becomes entitled to the benefit of doubt."

26. The Hon'ble Supreme Court in ***Abbas Ahmad Choudhary vs. State of Assam, 2010 (12) SCC 115,*** it was held that statement of the prosecutrix must be given primary consideration, but, at the same time, broad principle that prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully. Apt paras of the judgment (supra) are reproduced in *extensor* hereunder:

"9. We are however, of the opinion that the involvement of Abbas Ahmad Choudhary seems to be uncertain. It must first be borne in mind

that in her statement recorded on 17th September, 1997, the prosecutrix had not attributed any rape to Abbas Ahmad Choudhary. Likewise, she had stated that he was not one of those who kidnapped her and taken to Jalalpur Tea Estate and on the other hand she categorically stated that while she along with Mizazul Haq and Ranju Das were returning to the village that he had joined them somewhere along the way but had still not committed rape on her. It is true that in her statement in court she has attributed rape to Abbas Ahmad Choudhary as well, but in the light of the aforesaid contradictions some doubt is created with regard to his involvement.

10. Some corroboration of rape could have been found if Abbas Ahmad Choudhary too had been apprehended and taken to the police station by P.W.5 -Ranjit Dutta the Constable. The Constable, however, made a statement which was corroborated by the Investigating Officer that only two of the appellants Ranju Das and Md. Mizalul Haq along with the prosecutrix had been brought to the police station as Abbas Ahmad Choudhary had run away while en route to the police station. Resultantly, an inference can be rightly drawn that Abbas Ahmad Choudhary was perhaps not in the car when the complainant and two of the appellants had been apprehended by Constable Ranjit Dutta. We are, therefore, of the opinion that the involvement of Abbas Ahmad Choudhary is doubtful.

11. We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully."

27. The Hon'ble Supreme Court in ***Radhu vs. State of Madhya Pradesh, 2007 (12) SCC 57,*** found glaring discrepancies in the statements of the prosecutrix and her mother, which do not inspire confidence, thus the conviction of the accused was set aside. Apposite paras of the judgment (supra) are extracted hereunder for ready reference:

"12. Dr. Vandana (PW-8) stated that on examination of Sumanbai, she found that her menstrual cycle had not started and pubic hair had not developed, and that her hymen was ruptured but the rupture was old. She stated that there were no injuries on her private parts and she could not give any opinion as to whether any rape had been committed. These were also recorded in the examination Report (Ex. P8). She, however, referred to an abrasion on the left elbow and a small abrasion on the arm and a contusion on the right leg, of Sumanbai. She further stated that she prepared two vaginal swabs for examination and handed it over along with the petticoat of Sumanbai to the police constable, for being sent for examination. But no evidence is placed about the results of the examination of the vaginal swabs and petticoat. Thus, the medical evidence does not corroborate the case of sexual intercourse or rape.

13. We are thus left with the sole testimony of the prosecutrix and the medical evidence that Sumanbai had an abrasion on the left elbow, an abrasion on her arm and a contusion on her leg. But these marks of injuries, by themselves, are not sufficient to establish rape, wrongful confinement or hurt, if the evidence of the prosecutrix is found to be not trustworthy and there is no corroboration.

14. Lalithabai says that when Sumanbai did not return, she enquired with Gyarsibai. Sumanbai also says that she used to often visit the house

of Gyarsibai. She says that Radhu's parents are kaka and baba of her mother and Radhu was her maternal uncle. The families were closely related and their relationship was cordial. In the circumstances, the case of the prosecution that Gyarsibai would have invited Sumanbai to her house to abet her son Radhu to rape Sumanbai and that Gyarsibai was present in the small house during the entire night when the rape was committed, appears to be highly improbable in the light of the evidence and circumstances.

15. The FIR states that one Dinesh was sent by Lalithabai to fetch her husband. Lalitabai and Mangilal have stated that they did not know anyone by the name Dinesh. Sumanbai stated in her evidence that on 29.1.1991, as her father was away, her brother-in-law went to bring back her father, that the name of her brother-in-law is Ramesh, but the SHO wrongly wrote his name as 'Dinesh'. But none else mentioned about such a mistake. Neither Ramesh nor Dinesh was examined.

16. The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such an incident ever took place. The learned counsel for the respondent submitted that defence had failed to prove that Mangilal, father of prosecutrix was indebted to Radhu's father Nathu and consequently, defence of false implication of accused should be rejected. Attention was invited to the denial by the mother and father of the prosecutrix, of the suggestion made on behalf of the defence, that Sumanbai's father Mangilal was indebted to Radhu's father Nathu and because Nathu was demanding money, they had made the false charge of rape, to avoid repayment. The fact that the defence had failed to prove the indebtedness of Mangilal or any motive for false implication, does not have much relevance, as the prosecution miserably failed to prove the charges. We are satisfied that the evidence does not warrant a finding of guilt at all, and the Trial Court and High Court erred in returning a finding of guilt."

28. The Hon'ble Supreme Court in ***Aman Kumar vs. State of Haryana, 2004(4) SCC 379,*** held that where there is no material to show that the accused was determined to have sexual intercourse, the offence cannot be said to be an attempt to commit rape to attract culpability under Sections 376/511 IPC and the case can be one of indecent assault upon a woman. Apposite paras of the judgment (supra) are extracted hereinbelow:

13. There is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid background, the offence cannot be said to be an attempt to commit rape to attract culpability under Section 376/511, I. P. C. But the case is certainly one of indecent assault upon a woman. Essential ingredients of the offence punishable under Section 354, I. P. C. are that the person assaulted must be a woman, and the accused must have used criminal force on her intending thereby to outrage her modesty. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, removing her dress coupled with a request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge that modesty is likely to be outraged,

is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word 'modesty' is not defined in IPC. The Shorter Oxford Dictionary (Third Edn.) defines the word 'modesty' in relation to woman as follows :

> ***"Decorous in manner and conduct; not forward or lowe; Shame-fast; Scrupulously chast."***

14. Modesty can be described as the quality of being modest; and in relation to woman, "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct." It is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by Justice Patterson in Rex v. James Lloyd (1876) 7 C and P 817. In order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her.

15. In that view of the matter, it would be appropriate to set aside the conviction of the appellants under Section 376(2)(g) and convict them under Section 354 read with Section 34, I. P. C. Custodial sentence of two years each, with a fine of Rs. 500/- each and a default stipulation of three months rigorous imprisonment in case of failure to pay the fine would meet the ends of justice. The appeal is allowed to the extent indicated above."

29. After exhaustive discussion of the evidence and the law, as cited above, following points emerge, which are material for determination of guilt or innocence of the accused:

1. PW-1, Smt. Nirmala Devi (mother of the prosecutrix) deposed that she remained in the house of PW-4, Smt. Anju Sharma (her neighbour), for approximately 10-12 minutes, where she had gone to give vegetables. When she returned, she did not find the prosecutrix in the accommodation, so she called her and the prosecutrix was seen by her coming out from the accommodation of the accused with her shirt upwards and she was shivering and weeping. If this statement of PW-1 is seen in conjunction with statement of PW-4, Smt. Anju Sharma, in whose house the PW-1 had gone to give vegetables, there appears to be major contradiction. PW-4 has categorically deposed that PW-1, Smt. Nirmala Devi, stayed in her house for about a minute. This is a material contradiction and the same cannot be ignored, as the alleged occurrence, by no stretch of imagination, could have happened within a time span of a minute or so.

2. PW-1, Smt. Nirmala Devi, has also deposed that when the prosecutrix came out of the accommodation of the accused, she was weeping and thereafter she divulged the incidence to her, but the prosecutrix while appearing in the witness-box, as PW-2, did not say anything with regard to the fact that she was weeping when her mother (PW-1) called her. Therefore, there is variance in the statements of PW-1, who subsequently reported the matter to the police qua the occurrence, and the prosecutrix, who is the sole eye witness of the occurrence. This variance encapsulates the versions of these witnesses with doubt.

3. Another point, which emerges, is that initially the story portrayed was with regard to sexual assault, but it was unearthed only after the medical evidence that there was no biological penetration, therefore, the initial story, as divulged by the prosecutrix and her mother, is again engulfed in suspicion and

subsequently offence under Section 376 read with Section 511 IPC was registered.

4. The prosecutrix categorically deposed in her statement that earlier to the alleged occurrence the accused 2-3 times had committed bad act with her and on the day of alleged occurrence he had committed bad act with her, however, the medical evidence qua the prosecutrix unequivocally and unambiguously establish that there was nothing suggestive of sexual intercourse. Thus, the medical evidence nowhere suggests that the prosecutrix had been sexually assaulted.

5. The material collected by the prosecution has failed to establish that the accused was present in his accommodation at the time of occurrence and was not in his offence during the relevant time. It is correct that the plea of alibi, if taken, is to be proved by the accused and the onus of proving the plea is always on the accused, but the initial burden to establish that the accused was present on the spot of occurrence is always on the prosecution. The presence of the accused on the spot at the relevant time could have been proved by PW-4, Smt. Anju Sharma, who was living nearby and from whose accommodation PW-1, Smt. Nirmala Devi (complainant) had returned to her house. PW-4, Smt. Anju Sharma, in her statement did not say anything qua the presence of the accused at the relevant time and she categorically deposed that she came to know about the occurrence afterwards, thus the prosecution could not clearly establish the presence of the accused on the spot at the relevant time. Manifestly, the primary burden of proving the presence of the accused on the spot at the relevant time is on the prosecution, but the prosecution has failed to discharge this burden, which also shakes the semblance of the prosecution story. PW-4, Smt. Anju Sharma, in fact, did not support the prosecution story, which creates a dent in the the veracity of the prosecution story.

6. The medico legal certificate of the prosecutrix, Ex.PW-9/B, shows that there was no biological penetration or any signs suggesting attempt of sexual assault. The scrutiny of the statement of PW-9, Dr. Shahida Ali, reveals that she nowhere deposed that she observed any cream like substance on the private parts of the prosecutrix, which, as per the prosecution story, was *boro plus* cream. Thus, the prosecution story with respect to the fact that the accused applied *boro plus* cream on the private parts of the prosecutrix seems imaginative and highly improbable, especially in the absence of any cogent and convincing material providing lateral support to it. This facet of the prosecution story is also marred by Forensic Report, Ex. PX, which clearly portray that the *boro plus* cream sent for forensic analysis was found to be *boro plus* cream and there was no matching etc. with any cream like substance found on the samples sent by PW-9, Dr. Shahida Ali, viz., pubic hair. PW-9, Dr. Shahida Ali, did not find pubic hairs, which were 3 cm long, matted, it also creates a doubt qua the authenticity of the prosecution story. Thus, it is crystal clear that *boro plus* cream was not found on the pubic hairs of the prosecutrix and there were no injury marks on her lips, cheeks, neck, breasts, chest, back and abdomen. The hymen of the prosecutrix was found intact and her vagina admits one finger with difficulty. The statement of the prosecutrix did not match with the medical evidence and the statements of the prosecutrix and PW-1, Smt. Nirmala Devi (mother of the prosecutrix) did not get any support from independent witness, PW-4, Smt. Anju Sharma. In these circumstances, the conclusion that there was no assault and it was a concocted or imaginary story cannot be ruled out. The accused cannot be allowed to suffer conviction on the anvil of such a story which is not supported by the evidence, medical evidence and the statement of the independent

witnesses and otherwise also the prosecution has failed to prove the presence of the accused on the spot at the relevant time.

7. Nothing is emanating from the record which conclusively establishes the presence of the accused on the spot. It has come on record that the accused came on the spot when he was called from his office by the police. It is also apposite to note here that the accused was residing in the said accommodation with his children and wife.

8. The available evidence also provides a clue that there had been animosity inter se the family of the prosecutrix and the family of the accused. Although, fact qua animosity is not that much important for adjudication of guilt or innocence of the accused, but in any case it provides a ground that the complainant party may have falsely implicated the accused due to such animosity. This fact also vitiates the prosecution story and renders it doubtful and full of suspicions.

30. This Court thus comes to the conclusion that prosecution case is full of doubts and suspicions and these go to the very root of the prosecution case and renders the prosecution story doubtful. It is settled law that benefit of doubt goes to the accused and the most probable conclusion in the present set of circumstances is that the lacunae which have occurred in the present case are fatal to the prosecution case. Thus, keeping in view the overall conspectus of the case, the inescapable conclusion is that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt and the benefit of the same goes to the accused.

31. Looking at from any angle, the conclusion of convicting the accused, as drawn by the learned Trial Court, warrants interference by this Court, especially keeping in view the slippery evidence and flaws in the prosecution case. Thus, the appeal is allowed and the judgment of the learned Trial Court, whereby the accused (appellant) was convicted, is set aside, as the same is not sustainable in the eyes of law. Accordingly, the accused is acquitted and ordered to be released forthwith, if not required in any other process of law. The Registry is directed to prepare the release warrants.

32. Accordingly, the appeal, so also pending application(s), if any, stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Sarita Devi ...Appellant.

Versus

Secretary, Excise and Taxation Department & others ...Respondents.

CWP No.1673 of 2017
Reserved on : August 4, 2017
Date of Decision : August 16, 2017

Constitution of India, 1950- Article 226- Petitioner assailed the allotment of liquor vends in the revenue district of Una on the ground that bid of Rs. 46.51 crores accepted by Commissioner, Excise and Taxation, H.P. subsequent to the enhancement of bid to Rs. 46.50 crores by the petitioner is arbitrary, discriminatory and an act of colourable exercise of power since, no opportunity was afforded to the petitioner to participate in the process of negotiation – the respondent pleaded that respondent had offered the highest bid of Rs. 45.99 crores whereas the bid offered by the petitioner was for Rs. 45.11 crores - the respondent increased the bid to Rs. 46.51 crores – the offer of the petitioner of Rs. 46.50 crores was not considered as the negotiation

process stood concluded – held that initially the auction was cancelled as the highest bid had not matched the reserve price – fresh auction was conducted – petitioner quoted an amount of Rs. 42.77 crores, whereas, respondent quoted an amount of Rs. 41 crores – a notice was issued for grant of licence by negotiation – the petitioner offered a sum of Rs. 45.11 crores, whereas, the respondent quoted a sum of Rs. 45.99 crores- Commissioner recommended that the bid of private respondent be accepted- the petitioner revised her bid to 46.50 crores – she offered to be called for negotiation – the private respondent enhanced the bid from 45.99 crores to 46.51 crores – the plea of the Commissioner that negotiation stood concluded on 17.7.2017 is incorrect as the respondent had revised his offer on 18.7.2017 – the State cannot act arbitrarily and has to comply with the equality clause while granting exclusive privilege of selling liquor – the petitioner should have also been called for negotiation – Government cannot act in a manner to benefit a private party- the petitioner has increased her bid by 3.1 crorers and had agreed to deposit 20% of the bid amount- directions issued to the Chief Secretary to enter into fresh negotiation with the private parties by taking the amount of Rs. 49.51 crores to be the minimum reserve price with further conditions. (Para- 6 to 82)

Cases referred:

P.N. Kaushal & others vs. Union of India & others, (1978) 3 SCC 558
Har Shankar and others v. The Dy. Excise ad Taxation Commr. and others, (1975) 1 SCC 737
Khodey Distilleries Ltd. & others vs. State of Karnataka & others, (1995) 1 SCC 574
Secretary Home, Prohibition and Excise Department & others. Vs. K. Balu and another, (2017) 2 SCC 281
Ramana Dayaram Shetty vs. International Airport Authority of India & others, (1979) 3 SCC 489
Raunaq International Ltd. vs. I.V.R. Construction Ltd. & others, (1999) 1 SCC 492
Food Corporation of India vs. M/s Kamdhenu Cattle Feed Industries (1993) 1 SCC 71
State of M.P. & others vs. Nandlal Jailwal & others, (1986) 4 SCC 566
State of Orissa & others vs. Harinarayan Jaiswal & others, (1972) 2 SCC 36
Trilochan Mishra etc. vs. State of Orissa and others, 1971 (3) SCC 153
Haji T.M.Hassan Rawther vs. Kerala Financial Corporation, (1988) 1 SCC 166
Meerut Development Authority vs. Association of Management Studies & another, (2009) 6 SCC 171
Uttar Pradesh Avas evam Vikas Parishad & others vs. Om Prakash Sharma, (2013) 5 SCC 182
Tata Cellular vs. Union of India, (1994) 6 SCC 651
Excise Commissioner, U.P., Allahabad & others vs. Prem Jeet Singh Gujral & others, (1984) 1 SCC 270
State of Punjab vs. Yoginder Sharma Onkar Rai & Co. & others, (1996) 6 SCC 173
Nagar Nigam, Meerut vs. Al Faheem Meat Exports (P) Ltd. & others, (2006) 13 SCC 382
Bishnu Ram Borah & another vs. Parag Saikia & others, AIR 1984 SC 898
K.N.Guruswamy vs. The State of Mysore and others, AIR 1954 SC 592
Ram & Shyam Company vs. State of Haryana & others, (1985) 3 SCC 267
M/s Kasturi Lal Lakshmi Reddy vs. State of Jammu & Kashmir & another, (1980) 4 SCC 1,
Manoj I Naik & Associates vs. Official Liquidator, (2015) 3 SCC 112
Rakesh Kumar Goel & others vs. Uttar Pradesh State Industrial Development Corporation Limited & others, (2010) 8 SCC 263
Meerut Development Authority (supra); Nagar Nigam, Meerut vs. Al Faheem Mid Exports (P) Ltd. & others, (2006) 13 SCC 382
Ramchandra Murarilal Bhattad & others vs. State of Mahrashtra & others, (2007) 2 SCC 588
Eureka Forbes Limited vs. Allahabad Bank and others, (2010) 6 SCC 193
K. D. Sharma vs. Steel Authority of India Limited & others, (2008) 12 SCC 481
Dalip Singh vs. State of Uttar Pradesh & others, (2010) 2 SCC 114

Valji Khimji & Company vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. & others, (2008) 9 SCC 299
S. Soundararajan & others vs. Khaka Mohamed Ismail Saheb of Messrs. Roshan & Co. AIR 1940 Madras 42
Bishnu Ram Borah & another vs. Parag Saikia & others, AIR 1984 SC 898
Excise Commissioner of U.P. & others vs. Manminder Singh & others, (1983) 4 SCC 318

For the Petitioner	:	Mr. B.C. Negi, Senior Advocate, with Mr. Neeraj Sharma and Mr. Raj Negi, Advocates.
For the Respondents	:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocates General, for respondents No.1 to 4. Mr. Mohan Jain, Senior Advocate, with Mr. Vikram Jain and Mr. Ajay Vaidya, Advocates, for respondent No.5.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

In this petition, we are concerned with the rights of the State and the action of its functionaries in allocating Retail Excise Vends (Liquor), Licence in Form L-2 & L-14, falling within the revenue District Una, Himachal Pradesh – (a) Whether the impugned action of the Commissioner is in consonance with the Announcements of the Excise allotments pertaining to the year 2017-18; (b) the acts of the respondent – authorities meet the principle of reasonableness, non-arbitrariness; hence, not violative of Article 14 of the Constitution of India; (c) whether this Court is justified in taking on record bid of the petitioner, higher than that of the private respondent, are the questions, which arise for consideration.

2. Petitioner Smt. Sarita Devi has assailed the acceptance of the bid of M/s Rana Enterprises (private respondent No.5 – referred to as private respondent), for the allotment of liquor vends in the Revenue District of Una, on the ground that the bid of Rs.46.51 crores, so accepted by Commissioner (Excise and Taxation), Himachal Pradesh (respondent No.2), subsequent to the petitioner having enhanced her bid to Rs.46.50 crores, was arbitrary, discriminatory and further an act of colourable exercise of power, as no opportunity was afforded to her to participate in the process of negotiation alongwith the private respondent. Collusively respondents No.2 (hereinafter referred to as the Commissioner) and respondent No.3 (hereinafter referred to as the Deputy Commissioner) entered into unilateral negotiations with the said respondent, calling him to place higher bid, which act of his is per se illegal.

3. In the response filed by the Commissioner, it is averred that the respondent-authority completed the auction process strictly in accordance with the Himachal Pradesh Excise Act, 2011 and the Rules made thereunder as well as Announcements of Excise Allotments by Auction-cum-Tender for the year 2017-18 and that it accepted the final bid which was so offered by the private respondent for an amount of Rs.46.51 crores; respondent-authorities shall implement the orders of this Court in case auction proceedings are conducted in the Court and more revenue is generated for the State; pursuant to the Public Notice so issued by the authority, when negotiations took place on 17.07.2017, private respondent offered the highest bid of Rs.45.99 crores, whereas bid offered by the petitioner was only for a sum of Rs.45.11 crores; on the directions of the Commissioner, private respondent was called by the Deputy Commissioner and the amount was increased to a sum of Rs.46.51 crores; offer of the petitioner of Rs.46.50 crores sent in writing was not considered as auction/negotiation process stood completed by the Committee and that the bid of private respondent had already attained finality.

4. Private respondent in his reply has taken a stand that there was neither any breach nor any illegality in the allotment of tender. Settled position cannot be allowed to be

unsettled, especially when petitioner is not an aggrieved person as she failed to offer an amount higher than so quoted by private respondent. Further, an investment to the tune of Rs.4 crores (Appx.) has been made for procurement of liquor.

5. It is clarified that record from the authorities was called for and examined. From the pleadings of the parties as also from the said record, following undisputed facts emerge.

6. The Excise and Taxation Department of Himachal Pradesh, for allotment of liquor vends of revenue District, Una, for the year 2017-18, issued announcements, with reserve price fixed at Rs.90.05 crores.

7. Consequently liquor vends of Revenue District, Una, were put to auction in the month of April, 2017. One Shri Surender Rana, a relative of the petitioner, had given the highest bid, however, since it did not match the reserved price, during the exercise so conducted on 8.4.2017 and 18.4.2017, when the offers of Rs.60 crores (Appx.) & 62 crores (Appx.) (respectively of the bids) were not increased during the negotiations, the process was cancelled, with the State undertaking the exercise of running the vends through its instrumentality, namely, Himachal Pradesh Beverages Ltd. Record of the Department reveals that since the said entity was not in a position to deposit pro-rata amount of excise, a decision was taken to conduct the auction afresh.

8. Hence, Notice Inviting Tender from the general public, for re-allotment of the vends, was issued on 10.7.2017 (Annexure P-2). In terms of the said notice, on 14.7.2017 at 3 pm, the tender was opened. Only two persons offered their bids. Petitioner-Sarita Devi quoted an amount of Rs.42.77 crores, whereas private respondent, quoted an amount of Rs.41 Crores. The said bids were not accepted. Why so, no plausible reason is forthcoming.

9. Resultantly, another notice dated 14.7.2017 (Annexure P-3) was issued for grant of licence by holding negotiations, which reads as under:-

> "PUBLIC NOTICE
>
> GOVERNMENT OF HIMACHAL RPADESH
>
> EXCISE & TAXTION DEPARTMENT
>
> NOTICE INVITING APPLICATIONS FOR HOLDING NEGOTIATIONS FOR REMAINING LICENSES OF RETAIL SALE OF COUNTRY LIQUOR (L-14/L-14A) & FOREIGN LIQUOR (L-2) FOR THE REMAINING PERIOD OF THE YEAR 2017-18 ENDING ON 31.03.2018 OF UNA AND CHAMBA DISTRICTS H.P.
>
> It is notified for the information of all concerned that applications for holding negotiation are hereby invited for the allotment of following un-allotted/clubbed/de-clubbed liquor units/vends for the remaining period of the year 2017-18 ending on 31.03.2018 of Una and Chamba Districts H.P. The negotiation shall be held in the office of the Dy. Excise & Taxation Commissioner, (North Zone) Himachal Pradesh, Palampur on 17-07-2017 from 12:30 P.M. onwards.
>
> Terms & Conditions:
>
> 1. The applications shall be received in the office of the undersigned at 11:30 A.M.
> 2. The successful allottee will have to deposit application and license fee at the spot.
> 3. The Selection Committee shall be competent to take appropriate decision on the spot regarding allotment in order to secure the Government revenue.
> 4. The recommendations of the Selection Committee shall be subject to confirmation by the Excise & Taxation Commissioner, Himachal Pradesh, as per the law applicable.
> 5. For detailed Terms & Conditions relating to the allotment/re-allotment please refer to the Announcements of Excise Allotments/Tender for the year

2017-18 which are available on the official website of the H.P. Excise &n Taxation Department i.e. www.hptax.gov.in.

Sd/-

Collector-cum-

Dy.Excise & Taxation Commissioner,

(North Zone) H.P. Palampur"

(Emphasis supplied)

10. Pursuant to the said notice, again only two parties offered their bids. Petitioner's offer was for a sum of Rs.45.11 crores, whereas private respondent's bid was for a sum of Rs.45.99 crores**.** As such Commissioner recommended that bid of private respondent be accepted. Significantly, such recommendation of the Selection Committee never came to be confirmed by the Commissioner on 17.7.2017 itself.

11. So far so good. The game begins thereafter.

12. After the process of negotiations was over, but prior to the acceptance of the bid, on 17.7.2017 itself, at 4 pm, petitioner revised her bid by offering a sum of Rs.46.50 crores. This was so done vide Email (Annexure P-4). Though receipt of Email stands admitted, but neither the Selection Committee nor the Commissioner acknowledged, much less responded to the same. It was totally ignored in the decision making process.

13. To the contrary, the following day, i.e. on 18.7.2017, Commissioner asked the Deputy Commissioner to further negotiate, but only, with the private respondent.

14. At this juncture, we may clarify that vide letter dated 17.7.2017, so received in the office of the Commissioner on 18.7.2017, petitioner not only reiterated her enhanced offer so made the previous day, but also requested that s he be called for further negotiations by affording opportunity to make bid for issuance of liquor vends. Now even this letter came to be ignored by the Commissioner/Deputy Commissioner.

15. However, pursuant to the "directions" of the Commissioner, the Deputy Commissioner asked the private respondent to enhance the bid, which was so done from a sum of Rs.45.99 crores to Rs.46.51 crores. Enhancement was only for a sum of Rs.52 lakh and only for a sum of Rs.1,00,000/-, as compared to the enhanced bid offered by the petitioner.

16. The aforesaid facts, to some extent, though in a distorted manner, stand admitted by the State, as is evident from the affidavit dated 31.7.2017 filed by Shri D.C. Negi, Excise & Taxation Commissioner, relevant portions whereof (without being read out of context), are reproduced hereinbelow:-

> "… … …In this regard, it is submitted that the respondent no.5 has been allotted the vends of District Una in Tender/Negotiation process on dated 17.7.2017 by Tender/Negotiation Committee constituted by respondent no.3 and the same was confirmed by the respondent no.2 on 18.7.2017 for total negotiated auction amount of Rs.46.51 crore for period w.e.f. 18.7.2017 to 31.3.2018."
>
> "… … …3 to 5. That in reply to these paras it is submitted that the reserved price for the liquor vends of Una district for the year 2017-18 was fixed at Rs.90.05 crore. Since no bidder quoted bid amount exceeding the reserve price during the negotiation process held on 9.4.2017, the respondent authorities did not accept the offered bids and the vends were run by the Himachal Pradesh Beverages Ltd. w.e.f. 13.4.2017. It is pertinent to submit that during the negotiation process held on 9.4.2017, one Mr. Surinder Rana had quoted the highest bid of Rs.63,00,00,227 whereas respondent no.5 quoted Rs.62,75,79,999 during the third round of the negotiation. …"

> "7.to9. That in reply to these paras it is submitted that during negotiation process on 17.7.2017, the respondent no.5 offered the highest bid amount of Rs.45.99 crore and the petitioner offered bid amount of Rs.45.11 crore only. The highest bidder i.e. respondent no.5 was asked by respondent no.3 on the directions of respondent no.2. to further increase the offered bid amount and the respondent no.5 increased the offered amount to Rs.46.51 crore. The respondent no.2 accepted the bid offered by respondent no.5. amounting to Rs.46.51 crore. However the offer of Rs.46.50 crore made by the petitioner through e-mail as well as representation was not considered as the auction/negotiation process was completed by the committee and bid of the respondent no.5 had attained finality."
>
> "… … …The respondent no.5, the highest bidder made a increased offer of Rs. 46.51 crore which is higher than the offer of Rs. 46.50 crore made by the petitioner through email after completion of the negotiation process. … … …"
>
> (Emphasis supplied)

17. Significantly no document was placed on the record by the Commissioner alongwith affidavit, reproduced supra.

18. From the aforesaid averments, at least one thing is clear. Contrary to what the Commissioner deposed and wanted the Court to believe, the process of negotiations did not conclude on 17.7.2017 itself. He suppressed that on 18.7.2017 itself, he had asked his subordinate to negotiate only with the private respondent or that such negotiations concluded only the following day, i.e. 18.7.2017. He has taken mutually contradictory and destructive stance. His affidavit does not narrate correct and complete events which led to the acceptance of the bid.

19. If the Commissioner himself was of the view that the process of negotiations stood completed by the Committee, then how is it that the following day, he asked his subordinate to enter into fresh negotiation, and that too only with the private respondent. Noticeably the bid came to be enhanced, by a meager amount, only after: (a) the process of negotiation stood closed; and (b) an offer of higher amount had been made by the petitioner.

20. In our considered view, stand taken by the Commissioner that negotiation stood concluded on 17.7.2017 itself, is factually incorrect. He has tried to mislead the Court, for had we not seen the record, it wouldn't have been known that the private respondent revised his offer only on 18.7.2017. In case negotiations stood concluded on 17.7.2017 itself, then it was neither open for the petitioner to have enhanced the offer nor was it open for the Commissioner to have asked his subordinate to negotiate, which was for getting an enhanced offer, from the private respondent and that too to the petitioner's exclusion. Perhaps at that point in time, the only option open was to issue a fresh notice, as was so done with the issuance of the notice dated 15.7.2017 (Annexure P-3) or else invite all the parties, who had initially participated in the process of negotiation, for further negotiations.

21. At this stage, we deem it appropriate to discuss the legal position, with regard to the rights and obligations of the State, duties of its functionaries and the rights of the bidders. Also, the powers of a Writ Court to interfere with, in an auction, which is arbitrary, capricious, whimsical, malafide and illegal.

History of Alcoholism and the Paradox in Right of the State to deal in the Trade of Liquor.

22. History, social and legislative, dealing with the issue of alcoholism, best stands traced by Hon'ble the Supreme Court of India in *P.N. Kaushal & others vs. Union of India & others,* (1978) 3 SCC 558. The Court viewed the impact of alcohol on temperance on a given society. The paradox in the State indulging in the trade of liquor stands reiterated in the following terms:

> "42. … … Further, Article 47 charges the State with promotion of prohibition as a fundamental policy and it is indefensible for Government to enforce

> prohibitionist restraints on others and itself practice the opposite and betray the constitutional mandate. It suggests dubious dealing by State power. Such hollow homage to Article 47 and the Father of the nation gives diminishing credibility mileage in a democratic polity." …

23. By culling out the principles of law laid down by the Apex Court in its several decisions, moreso, in earlier Constitution Bench (Five Judges) in *Har Shankar and others v. The Dy. Excise ad Taxation Commr. and others,* (1975) 1 SCC 737, the Constitution Bench (Five Judges) in *Khodey Distilleries Ltd. & others vs. State of Karnataka & others,* (1995) 1 SCC 574 summarized the law relevant for the issue as under:

> "(a) The rights protected by Article 19 (1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19 (l) (a) to (g) are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 of our Constitution.
>
> (b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i. e. , *res extra commercium,* (outside commerce). There cannot be business in crime. … …
>
> (d) Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in Article 47, except when it is used and consumed for medicinal purposes.
>
> (e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19 (6) or even otherwise.… …
>
> (g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.
>
> (h) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory.
>
> … …"

Drunken Driving

24. Most recently the Apex Court reiterated that law of preventing drunken driving requires proper enforcement [*State of Tamil Nadu represented by its Secretary Home, Prohibition and Excise Department & others. Vs. K. Balu and another,* (2017) 2 SCC 281].

State's Right to Contract in the trade of liquor and Fairness in dealing with the same

25. In *Ramana Dayaram Shetty vs. International Airport Authority of India & others,* (1979) 3 SCC 489, the Apex Court held that it is a well settled principle of administrative law that an executive authority must rigorously be held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. The Government, in a welfare State is the regulator and dispenser of special services and provider of a large number of benefits, including licences, but they all share one characteristic. The Court further held that "The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, in granting largesse or licences, it cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant.

26. It is a settled principle of law that if the Government departs from standards, which are structured by rational, relevant and nondiscriminatory factors, unless it is shown that the departure is not arbitrary, in fact based on some valid principle, which in itself was not irrational, unreasonable or discriminatory, the action is liable to be struck down.

27. The Apex Court in *Raunaq International Ltd. vs. I.V.R. Construction Ltd. & others,* (1999) 1 SCC 492 observed as under:

> "9 The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be: (1) The price at which the other side is willing to do the work; (2) Whether the goods or services offered are of the requisite specifications; (3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important; (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality; (5) past experience of the tenderer, and whether he has successfully completed similar work earlier; (6) time which will be taken to deliver the goods or services; and often (7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services. Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.
>
> 10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the

tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods. e.g. A delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation."

28. In *Food Corporation of India vs. M/s Kamdhenu Cattle Feed Industries* (1993) 1 SCC 71, the Court observed as under:

> "7. In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Art, 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fair play in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review."

29. In *State of M.P. & others vs. Nandlal Jailwal & others,* (1986) 4 SCC 566, it is held that when State decides to grant right of privilege, it cannot escape the rigors of Article 14 of the Constitution. It cannot act arbitrarily and on its own will. It must comply with equality clause while granting exclusive grant of privilege for selling liquor. Further grant of sale of liquor would essentially be a matter of economic policy.

<u>Power to Accept or Reject</u>

30. In *State of Orissa & others vs. Harinarayan Jaiswal & others,* (1972) 2 SCC 36, the Court reiterated that the power to accept or reject the highest bid is that of the State. Such power cannot be considered as to be arbitrary and if the power is exercised for collateral purposes, the exercise of power would be struck down.

31. A Constitution Bench (Five Judges) in *Trilochan Mishra etc. vs. State of Orissa and others,* 1971 (3) SCC 153 has held as under:

> "14. With regard to the grievance that in some cases the bids of persons making the highest tenders were not accepted, the facts are that persons who had made lower bids were asked to raise their bids to the highest offered before the same were accepted. Thus there was no loss to Government and merely because the Government preferred one tenderer to another no complaint can be entertained. Government certainly has a right to enter into a contract with a person well known to it and specially one who has faithfully performed his contracts in the past in preference to an undesirable or unsuitable or untried person. Moreover, Government is not bound to accept the highest tender but may accept a lower one in case it thinks that the person offering the lower tender is on an overall consideration to be preferred to the higher tenderer."

Right to Negotiate

32. Right of the State to resort to private negotiations instead of public auction justified on account of compulsive situation stands acknowledged by Hon'ble the Supreme Court in *Haji T.M.Hassan Rawther vs. Kerala Financial Corporation,* (1988) 1 SCC 166.

Rights of Bidder

33. What are rights of a bidder stands reiterated by the Apex Court in *Meerut Development Authority vs. Association of Management Studies & another,* (2009) 6 SCC 171 in the following terms:

> "27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.
>
> 28. It is so well-settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.
>
> 29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favoritism."

34. It is a settled principle of law that with the submission of the highest bid, no right is conferred upon the bidder. [*Uttar Pradesh Avas evam Vikas Parishad & others vs. Om Prakash Sharma,* (2013) 5 SCC 182].

35. In *Tata Cellular vs. Union of India,* (1994) 6 SCC 651 the Court observed as under:

> "70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness of favoritism. However, it must be clearly stated that there are inherent limitation in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

36. In *Haji T.M.Hassan Rawther (supra),* the Apex Court clarified that the State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest when it is considered necessary to dispose of a property is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure

must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism.

37. Petitioner alleges the impugned action to be illegal *inter alia* on the ground of collusion that of the authorities with the private respondent. We find such allegation somewhat emanating from the record. Definitely conduct of the Commissioner is partisan.

38. In the month of April, 2017 itself, Commissioner did not accept the offer of Surender Rana, a relative of the petitioner. It is evident from the reply reproduced supra that his offer was for an amount of Rs.63,00,00,227/-, whereas at that time private respondent had just quoted an amount of Rs.62,75,79,999/-, yet the bid was not accepted. Further, even on 14.7.2017, bid of the petitioner was for a sum of Rs.42.77 crores, whereas bid of private respondent was much lower being Rs.41 crores. Even then the bid was not accepted. Why so? is not evidently clear. But then, we do not go into this aspect. Fact of the matter being that even during the claimed time, i.e. in the process of negotiation, so held pursuant to notice dated 14th July, 2017 bid of private respondent was in no manner lucrative or exceedingly higher than what was so quoted by the present petitioner. Offer of the petitioner, post negotiation, but before finalization, enhancing the bid amount, came to be received by the Commissioner the very same day. One notices that final amount at which the bid came to be accepted was only enhanced by Rs.1,00,000/-. Is it a co-incidence that the amount came to be enhanced by this much amount or is it that offer of the petitioner came to be disclosed to the private respondent and the amount enhanced rather conveniently, only to ensure that counter offer of the petitioner is lower than that of the private respondent at the amount on which the bid was finally accepted.

39. At this juncture, we take note of the communication dated 17.07.2017 of the Deputy Commissioner, addressed to the Commissioner, indicating that in the first two rounds of negotiations the amount of bid offered by the petitioner was much higher than that of the private respondent.

40. We deem it appropriate to reproduce three communications exchanged *inter se* respondent No.2 and respondent No.3. They read as under:-

<u>Letter dated 17.7.2017</u>

"No.EXN-NZ/-Excise-2421

Office of the Deputy Excise & Taxation Commissioner

(North zone), Palampur, District Kangra (H.P.)

To

The Excise & Taxation Commissioner

Himachal Pradesh, Shimla-9

Dated Palampur 17th July, 2017

Subject: Result of Excise negotiations in respect of Una District held on 17-07-2017.

Sir,

I have the honour to submit that the negotiations for the allotment of Excise vends of Una District for the remaining period of the year 2017-18, was held today i.e. 17-07-2017 in the office of the undersigned. First of all, offers were invited for individual Excise Units of the District for which only one bidder intended to submit offers for two Units namely Amb and Gagret. Therefore,

offers were invited for the whole Una District in which the following two bidders participated:-

1. Smt. Sarita Devi w/w Sh Ranjeet Singh, V.P.O. Hath Sultanu, Tehsil Bangana, District Una (through her Power of Attorney Sh. Rangeel Singh.
2. M/s Rana Enterprises, Vill. Umbewal, P.O. Nikku Nangal, Tehsil Nangal, District Ropar, Punjab (through its Power of Attorney Sh. Rajiv Rana.

The offers were invited in three successive rounds. The result of the offer received is as under:-

Name of the bidder	First offer	Second offer	Third offer
Smt.Sarita Devi	**Rs.42,79,27,227/-**	**Rs.43,27,27,227/-**	**Rs.45,11,27,227/-**
M/s Rana Enterprises	**Rs.41,50,00,000/-**	**Rs.42,50,000/-**	**Rs.45,99,99,999/-**

The whole District at the time of negotiations at Shimla for the year 2017-18 was offered at Rs.63,00,00,227/-.00 (highest offered bid) on 09.05.2017 but the same was not finalized in the name of the highest bidder and consequently allotted to HPBL for Rs. 90.05 Crore and after the process of re-auction the reserve price fixed on pro rate basis for the remaining period of the year 2017-18 was determined at Rs.64,47,28,074 and the highest bid offered today I for Rs.45,99,99,999.00 thereby lesser by Rs.18,47,28,075.00 and the unpaid license fee by the HPBL till 30.06.2017 is Rs.19,01,59,592. The total amount of unpaid license fee and loss of revenue on account of re-auction comes to Rs.37,48,87,667.00. Besides this the amount of license fee due with effect from 01.07.2017 to 16.07.2017 comes to Rs.3.95 Crores whereas the amount of license fee deposited by HPBL for these 16 days is not available.

Therefore, the offer received from M/s Rana Enterprises amounting to Rs.45,99,99,999/- being the highest, is recommended for approval.

Yours faithfully,

Sd/-

Deputy Excise & Taxation Commissioner,

(North Zone), Palampur, District Kangra (H.P)”

(Emphasis supplied)

Letter dated 18.7.2017

“No.7-703/2016-EXN-20843

Excise & Taxation Department

Himachal Pradesh.

From

The Excise & Taxation Commissioner

Himachal Pradesh, Shimla-9

To

The Dy.Excise & Taxation Commissioner,

(North Zone) Palampur, Himachal Pradesh.

Dated Shimla-9, the 18 July, 2017

Subject: Result of Excise Negotiations in respect of Una and Chamba Districts held on 17.07.2017.

Sir,

Kindly refer to your letters no EXN-NZ-Excise-2421 dated 17th July, 2017 and even no. 2425 on dated 17th July, 2017 on the subject cited above.

I am directed to say that, on perusal of result of excise negotiations in respect of Una and Chamba district held on 17.07.2017, submitted by you, it has been decided to further negotiate with the highest bidder for increasing the respective offer.

In view of above, you are therefore requested to further negotiate with respective highest bidder(s) in said negotiation process for increase of respective bids for revenue Districts of Una and Chamba in the interest of Govt. revenue and submit the final negotiated offers from the highest bidder for approval to this office.

Yours faithfully,

Sd/-
Jt. Excise & Taxation Commissioner (D)
Himachal Pradesh.
(Emphasis supplied)

Letter dated 18.7.2017

"No.EXN-NZ-Excise-2467
Office of the Deputy Excise & Taxation Commissioner
(North zone), Palampur, District Kangra (H.P.)

Dated Palampur 18th July, 2017

To
The Excise & Taxation Commissioner
Himachal Pradesh, Shimla-9

Subject: Result of Excise negotiations in respect of Una District held on 17-07-2017.

Sir,

Kindly refer to your office letter No. 7-703/2016-EXN-20843 dated 18.07.2017 and in continuation to this office letter No.EXN-NZ-Excise-2421 dated 17th July, 2017 of the retail vends/units of the Una district M/s Rana Enterprises offered highest bid for the whole district amounting to Rs.45,99,99,999/-. Now the said bidder vide e-mail dated 18-07-2017 has increased the bid price to Rs.46,51,00,000/- (copy enclosed).

It is, therefore, recommended that increased bid price offered by the said highest bidder amounting to Rs.46,51,00,000/- may please be approved for the remaining period of the year 2017-18.

Sd/-

Dy. Excise & Taxation Commissioner,

North Zone, Palampur."

(Emphasis supplied)

41. Now a reading of the aforesaid communications reveals that the process of negotiation was directed to be with and in fact was so done only with private respondent. Why so? is not evident from the record. It is not that petitioner's offer was not there, or she was otherwise ineligible or unsuitable. Commissioner does not assign any reason, save and except that negotiations stood completed on 17.7.2017 itself. If it was so, then how could he direct for holding further negotiations and that too only with one party.

42. It is in this backdrop, we find the Commissioner to have deposed, rather incorrectly, bordering falsehood. Communication addressed by the private respondent, enhancing his bid, is reproduced, in toto, as under:-

"To

The Excise and Taxation Commissioner,

Himachal Pradesh, Shimla.

Sir,

With due respect I wish to state that we had given bid of Rs.45,99,99,999.00 during negotiation of District Una. Now we are revising our bid to Rs.46,51,00,000/- for District Una for 2017-18.

Thanking you

Yours faithfully

Sd/-

Rajeev Rana

Dated: 18/07/2017 For Rana Enterprises"

43. We have doubts as to whether further negotiations ever took place with the Deputy Commissioner, for the above letter came to be addressed not to him but to the Commissioner. Why is it that the Commissioner never informed the Deputy Commissioner about the petitioner's subsequent offer? If the Deputy Commissioner was aware of the same then why is it that he did not exercise his authority in protecting the interests of the Revenue by also inviting the petitioner for negotiation, for after all, the duty to negotiate was only his and thereafter bid was to be confirmed by the Commissioner. We may only observe that Office of the Commissioner is situate at Shimla, whereas, that of the Deputy Commissioner is at a distant place i.e. Palampur. It is nobody's case that such revised bid came to be communicated to the Commissioner either by Email or Fax or that private respondent was in touch with the Commissioner and negotiating with him or that Deputy Commissioner had disclosed to the private respondent about the directions so issued by the Commissioner.

44. Further, it is a matter of record that liquor vends came to be allotted in favour of private respondent, vide communication dated 18.7.2017 and the vends handed over on 19.7.2017, with a deposit of a sum of Rs.3,90,14,000/-, in terms of Condition No.2.25 and 2.26 of the Excise Announcement. It is also a matter of record that pursuant to the said allotment, permit for transportation of liquor was issued on 22.7.2017.

45. While contending that petition ought to be dismissed purely on the ground of suppression and concealment of such facts, Mr. Mohan Jain, learned Senior Advocate, has further added to the facts, that petitioner being in the related trade and a business competitor,

was fully aware that out of 92 retail outlets, 60 of them had become fully functional, with 250 persons gainfully employed. Also, investments to the tune of Rs.10 crores were made.

46. The contention qua suppression and concealment is misconceived, and not borne out from the record. Except for bald statement so made at the bar, not an averment, there is nothing on record to establish – (a) opening of 60 liquor vends, (b) engagement of 250 persons, and (c) investment of Rs.10 crores. The only investment made, as is evident from the Annexures to the affidavit, so filed by the private respondent, is of a sum of Rs.3.90 crores (approximately) and that too for procurement of quota of liquor, which is imperishable.

47. Be that as it may, it is a matter of record that with the allotment in favour of private respondent, petition came to be drafted and filed in the Registry of this Court on 21.7.2017, and 22nd and 23rd being holidays, matter was taken up on 24.7.2017, when following interim order was passed:

> "Mr. B.C. Negi, learned Senior Advocate, under instructions, states that the petitioner is ready to enhance the bid amount from Rs.46.50 crores to Rs.49.51 crores. Mr. Negi further points out that the offer of private respondent No.5, as accepted by the Selection Committee, is contrary to the interest of the revenue as also the process of negotiation so adopted by the Selection Committee, as stipulated in terms of the notice inviting applications (Annexure P-3).
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> Notice. Mr. J.K. Verma, learned Deputy Advocate General, appears and waives notice on behalf respondents No.1 to 4. Dasti notice be issued to respondent No.5, returnable for 28th July, 2017. Steps for service, complete in all respects, be positively taken during the course of the day. In the event of steps being taken, Registry to hand over dasti notice to the learned counsel for the petitioners by 25th July, 2017.
>
> List on 28th July, 2017. In the meanwhile, we stay the allotment so made in favour of M/s Rana Enterprises-respondent No.5 pertaining to liquor vends in District Una, H.P.
>
> Copy dasti."

(Emphasis supplied)

48. Petitioner stands by the offer and agrees to immediately deposit 20% - 5% in excess of the Policy – of the bid amount.

49. At this juncture, we may observe that on two different dates, suggestion of the Court in matching the offer of the petitioner did not find favour with the private respondent. To the contrary, it was argued that it was not within the domain of the Court to either call upon the parties to bid or call upon the private respondent to meet the bid so made by the petitioner.

50. As far as jurisdiction of this Court under Article 226 of the Constitution of India is concerned, we are not oblivious of the fact that this Court is not to substitute its decision with that of the authorities concerned, in the matter of acceptance of bids, but in case decision of the authorities is not fair, legal and/or transparent, then obviously this Court is duty bound to interfere with the same, in exercise of its extra ordinary jurisdiction, which confers upon this Court wide powers to interfere where the order smacks of perversity or illegality as a result of arbitrary exercise of power.

51. Merely because the formula proposed by the Court was better and should have been preferred, cannot be a reason for the Court to substitute its view in a writ jurisdiction. Also the Court cannot direct the Commissioner to accept the bid. [*Excise Commissioner, U.P., Allahabad & others vs. Prem Jeet Singh Gujral & others,* (1984) 1 SCC 270]

52. The Court in *State of Punjab vs. Yoginder Sharma Onkar Rai & Co. & others,* (1996) 6 SCC 173 laid down two principles: (a) Loss to the exchequer may be a factor which may

be taken into account in genuine cases but finality of action must also be recognized to be in the interests of the exchequer. (b) A writ court can interfere with an order passed by the Commissioner only if it is found to be perverse that is to say if it found its conclusions such as not reasonable arrived at on the record.

53. The Court can ensure that the statutory functions are not carried out of the whims and caprices of the functionaries of the State in an arbitrary manner. True it is that the Court itself cannot take over these functions but then before parting with the grant, eligible persons should be afforded equal opportunity to bid in the auction, ensuring absolute transparency. [*Nagar Nigam, Meerut vs. Al Faheem Meat Exports (P) Ltd. & others,* (2006) 13 SCC 382]

54. Error apparent on the face of record in the action of the Commissioner, in exercise of grant of liquor licence would be a reason sufficient enough for the court to interfere in the writ jurisdiction. [*Bishnu Ram Borah & another vs. Parag Saikia & others,* AIR 1984 SC 898]

Arbitrariness

55. A Constitution Bench (Five Judges) in *K.N.Guruswamy vs. The State of Mysore and others,* AIR 1954 SC 592 had an occasion to deal with a case where the appellant was the highest bidder. Before his bid could be confirmed his rival, who had not participated in the auction gave a bid of an amount higher than that of the appellant. The Commissioner cancelled the process of auctioning and directed his subordinate to take action, who accepted the bid of the rival candidate and allotted the work. The Supreme Court disapproved such action by making the following observations:

> "20. The next question is whether the appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else. Here we have Thimmappa, who was present at the auction and who did not bid-not that it would make any difference if, he had, for that fact remains that he made no attempt to outbid the appellant. If he had done so it is evident that the appellant would have raised his own bid.
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> The procedure of tender was not open here because there was no notification and the furtive method adopted of settling a matter of this moment behind the backs of those interested and anxious to complete is unjustified. Apart from all else, that in itself would in this case have resulted in a loss to the State because, as we have said, the mere fact that the appellant has pursued this writ with such vigour shows that he would have bid higher. But deeper considerations are also at stake, namely the elimination of favoritism and nepotism and corruption: not that we suggest that that occurred here, but to permit what has occurred in this case would leave the door wide open to the very evils which the legislature in its wisdom has endeavoured to avoid. All that is part and parcel of the policy of the legislature. None of it can be ignored.
>
> We would therefore in the ordinary course have given the appellant the writ he seeks. But, owing to the time which this matter has taken to reach us (a consequence for which the appellant is in no way to blame, for he has done all he could to have an early hearing), there is barely a fortnight of the contract left to go. We were told that the excise year for this contract (1953-54) expires early in June. A writ would therefore be ineffective and as it is not our practice to issue meaningless writs we must dismiss this appeal and leave the appellant content with an enunciation of the law. But as he has in reality won his case and is prevented from reaping the full fruits of his victory because of circumstances for which he is not responsible, we direct that the first respondent, the State of Mysore, and the fourth respondent, Thimmappa pay the appellant his costs hear and in the High Court." ...

Disposal of Public Property partakes character of trust

56. The Government has a right not to accept the highest bid and even to prefer a tenderer other than the highest bidder, if there exists good and sufficient reasons. In *Ram & Shyam Company vs. State of Haryana & others,* (1985) 3 SCC 267 the Apex Court illustrated such reasons, inter alia, to be the highest bid not to represent the market price or need to give concession to the weaker section of the society, enabling to outbid the highest bidder. However, the Court clarified that disposal of public property partakes character of trust and disposal thereof must be by such a method as would grant an opportunity to public at large to participate in it, the State reserving to itself the right to dispose it off, as best sub-serve the public will. The Court itself undertook the exercise of calling the parties to improvise their offers and what came as a "shock and surprise" as recorded in para-6 of the report, the parties tried to outbid each other by raising their bids multiple times. It is in this backdrop the Court observed that "public property has to be dealt with for public purpose and in public interest". Disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and it must be done at the best price so that larger revenue coming into the coffers of the State administration, serves public purpose i.e. welfare measures stand sub-served. The Court observed that:

> 12. … "or further the public property has to be dealt with for public purpose and in public interest" … … "On the other hand, disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. the welfare State may be able to expand its beneficent activities by the availability of larger funds. This is subject to one important limitation that socialist property may be disposed at a price lower than the market price or even for a token price to achieve some defined constitutionally recognised public purpose, one such being to achieve the goals set out in Part IV of the Constitution. But where disposal is for augmentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market economy". … …

57. In the very same report, relying upon *M/s Kasturi Lal Lakshmi Reddy vs. State of Jammu & Kashmir & another,* (1980) 4 SCC 1, the Court reiterated that where any governmental action fails to satisfy the test of reasonableness and public interest and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid. Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. The Court held that acceptance of an offer secretly made and sought to be substantiated on the allegations would certainly amount to arbitrary action in the matter of distribution of State largesse.

58. Significantly, said decision stands followed in *Manoj I Naik & Associates vs. Official Liquidator,* (2015) 3 SCC 112; *Rakesh Kumar Goel & others vs. Uttar Pradesh State Industrial Development Corporation Limited & others,* (2010) 8 SCC 263; *Meerut Development Authority (supra)*; *Nagar Nigam, Meerut vs. Al Faheem Mid Exports (P) Ltd. & others,* (2006) 13 SCC 382; *Ramchandra Murarilal Bhattad & others vs. State of Mahrashtra & others,* (2007) 2 SCC 588; *Tata Cellular (supra)*; and *Haji T. M. Hassan Rawther (supra).*

59. Though there are no specific allegations of *malafide* in the writ petition, but the manner in which the respondent-authority has dealt with the entire matter, indicates that acceptance of bid of the private respondent is nothing but an act of colourable exercise of power. The action is per se illegal, arbitrary, irrational, illogical and unreasonable.

60. Repetitive though it may sound, but we must say.

61. Negotiations, which took place on 17.7.2017, were not accepted by the Commissioner. On the said date itself, through E-mail, petitioner had expressed her intention, enhancing the amount of bid to Rs.46.50 crores. This was followed by confirmation so received in the office of the Commissioner on 18.7.2017, vide which, while reiterating her enhanced offer of Rs.46.50 crores, petitioner requested that she be called for further negotiations. However, rather than doing so, Commissioner called upon the Deputy Commissioner to negotiate the matter only with the private respondent, seeking enhancement of the amount of bid. This led to the enhancement of the bid by the private respondent to Rs.46.51 crores i.e. by just a sum of Rs.1,00,000/- ,more than the amount which was offered by the petitioner and the said enhanced amount was accepted/confirmed by the Commissioner, without either intimating or calling upon the petitioner to participate in the negotiations. We fail to understand as to why petitioner was not associated in the negotiations, because intent of negotiations is also to generate more revenue to the State. We have already observed that earlier also even when bid of private respondent was not the highest, auction proceedings were not taken to their logical conclusion. From this also, it can be inferred that act of the authority in accepting the bid of the private respondent in the mode and manner, enumerated above, is nothing but an act of colourable exercise of power.

62. We may add, Announcements of Excise allotment for the year 2017-18 are salutary and have to be religiously followed by the respondents-authority in the matter of allotment of liquor vends. As is evident from the correspondence, decision to have the vends auctioned was only to generate maximum revenue, else vends could have been continued to be operational by an instrumentality of the State.

63. Allotment of the vends is required to be confirmed by the Commissioner, Excise and Taxation, Himachal Pradesh, in terms of clause 1.3 of the Liquor Policy. Being custodian of public property and trust, he could not have allowed the private respondent to benefit, by compromising the interests of the State.

64. In the present case, from the facts and circumstances enumerated above, we find that rather than adhering to the clauses of Announcements of Excise allotment for the year 2017-18, issued by the Excise and Taxation Department, the authorities acted in an arbitrary manner, while accepting the bid of private respondent. Right to decide coupled with duty to do so in the manner, which is just, fair and reasonable.

65. Acceptance of such a bid cannot be said to be a result of a process of negotiations, which is just, fair, reasonable or in the interest of Revenue. When on 17.7.2017 itself, petitioner had enhanced her bid to Rs.46.50 crores, then why the authorities rather than having the matter re-negotiated between the private bidders, unilaterally called upon the private respondent to enhance his bid. This act of the authorities, in our considered view, is wholly arbitrary and not in consonance with the spirit of announcements of excise allotment for the year 2017-18. Definitely, it was not to protect the interest of the Revenue.

66. It is not the case of any one of the respondents herein that petitioner was otherwise ineligible or unsuitable to have participated either in the process of auction or negotiations. She is not a person of bad character or suspected to have indulged in the activity of pooling or any other activity prejudicial to the interest of Revenue/Government. Twice she had participated. She was not barred from making the bid. In fact positively interested to go ahead with the bidding process.

67. The Constitution Bench in *Khodey Distilleries Ltd. (supra),* held the purpose of selling licences for trade in alcohol was also to maximize revenue. It cautioned that while distributing the State largesse, method adopted should not be discriminatory. This mandate of Constitution Bench stands reiterated subsequently in several decisions referred to in paras 22 to 29 (*supra).* Yes, the right to negotiate and select the bidder as has been so held by the Apex Court in *Haji T.M.Hassan Rawther (supra) and Meerut Development Authority (supra)* is that of the

State and that *ipso facto* fact does not confer any right on the bidder of confirmation of his bid but then as has been held in *Tata Cellular (supra),* action of the authorities finalizing the process can subject to judicial review. To us, the instant case appears to be identical to the one with which the Apex Court was seized in *Ram & Shyam Company (supra).* We are reminded of the observations made by the Constitution Bench of Apex Court in *K.N.Guruswamy (supra)* to the effect that negotiation, which is secretive cannot meet the test of reasonableness or non-arbitrariness. Presumably, it is expected of the functionaries of the State to be aware of this position of law. Their acts must not smack of illegality or arbitrariness. Hence such actions are subject to judicial scrutiny.

68. During the course of hearing learned Advocate General, expressed concern of the State in protecting the interests of revenue. Both the learned counsel appearing for the petitioner and for the private respondent clarified that they were willing to abide by the terms of Excise Policy, inasmuch as requisite quota of liquor so stipulated in Clause 2.17 shall be lifted.

69. The period in issue, for which the offers came to be made by the parties, was from 18.7.2017 upto 31.3.2018. Private parties have clarified that in the event of liquor vend allotted/continued to be allowed to be operated, in terms of the allotment, time spent in the Court shall be taken to be period of contract, not adversely affecting the interests of Revenue. In effect, parties are ready and willing to accept the contract, even without opening the vends, for such time this Court was seized of the matter.

70. Thus, on all counts, we find interests of the State stands adequately protected. In fact, State stands to benefit with the increase of the offer by the present petitioner to the tune of Rs.3.1 crores. Also, petitioner has agreed to deposit 20% of the bid amount. This is also in public interest.

71. We have already recorded about the conduct of the Commissioner, which, to our mind is definitely not reflective of interests of the State or the Revenue. We are of the considered view suppression of fact amounts to abuse of process of law. Suppression is of relevant and material fact having bearing on the outcome of the decision of the petition. Also had the Commissioner disclosed the factum of petitioner's counter-offer to his subordinate, perhaps the decision would have been different. In such circumstances, ordinarily we would have issued notice of contempt, for not disclosing complete facts in his affidavit, but refrain from doing so. However, we find it not prudent to have the present Commissioner associated any longer with the process of allotment of the vends in question. As such, we direct the Chief Secretary, Government of Himachal Pradesh to either himself or through the Principal Secretary (Finance) or any other Officer but not below the rank of Principal Secretary, so nominated in accordance with law and Announcements of the Excise Allotments, take further decisions with respect to the allotment of the vends in question.

72. In *Eureka Forbes Limited vs. Allahabad Bank and others,* (2010) 6 SCC 193, the Apex Court observed:

> 78. The concept of public accountability and performance is applicable to the present case as well. These are instrumentalities of the State and thus all administrative norms and principles of fair performance are applicable to them with equal force as they are to the Government department, if not with a greater rigor. The well established precepts of public trust and public accountability are fully applicable to the functions which emerge from the public servants or even the persons holding public office. In *State of Bihar v. Subhash Singh,* (1997) 4 SCC 430, this Court, in exercise of the powers of judicial review stated that, the doctrine of full faith and credit applies to the acts done by officers in the hierarchy of the State. They have to faithfully discharge their duties to elongate public purpose.
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> 79. Inaction, arbitrary action or irresponsible action would normally result in dual hardship. Firstly, it jeopardizes the interest of the Bank and public

funds are wasted and secondly, it even affects the borrower's interest adversely provided such person was acting bonafide. Both these adverse consequences can easily be avoided by the authorities concerned by timely and coordinated action. The authorities are required to have a more practical and pragmatic approach to provide solution to such matters. The concept of public accountability and performance of functions takes in its ambit proper and timely action in accordance with law. Public duty and public obligation both are essentials of good administration whether by the State instrumentalities and/or by the financial institutions.

80. In *Centre for Public Interest Litigation & Anr. v. Union of India & Anr.,* (2005) 8 SCC 202, this Court declared the dictum that State actions causing loss are actionable under public law and this is as a result of innovation to a new tool with the court, which are the protectors of civil liberty of the citizens and would ensure protection against devastating results of State action. The principles of public accountability and transparency in State action even in the case of appointment, which essentially must not lack bonafides were enforced by the Court. All these principles enunciated by the Court over a passage of time clearly mandate that public officers are answerable both for their inaction and irresponsible actions. What ought to have been done, if not done, responsibility should be fixed on the erring officers then alone the real public purpose of an answerable administration would be satisfied.

81. The doctrine of full faith and credit applies to the acts done by the officers and presumptive evidence of regularity of official acts done or performed, is apposite in faithful discharge of duties to elongate public purpose and to be in accordance with the procedure prescribed. It is known fact that, in transactions of the Government business, none would own personal responsibility and decisions are leisurely taken at various levels [refer : State of Andhra Pradesh v. Food Corporation of India, (2004) 13 SCC 53.]

82. Principle of public accountability is applicable to such officers/officials with all its vigour. Greater the power to decide, higher is the responsibility to be just and fair. The dimensions of administrative law permit judicial intervention in decisions, though of administrative nature, but are ex facie discriminatory. The adverse impact of lack of probity in discharge of public duties can result in varied defects not only in the decision making process but in the decision as well. Every public officer is accountable for its decision and actions to the public in the larger interest and to the State administration in its governance."

Judgments cited by the private respondent

73. While contending that the petitioner committed an act of fraud by concealing relevant material information which led to the passing of interim order, Sh. Mohan Jai, learned Senior Counsel, has invited our attention to paragraphs 34 to 41 of the decision rendered in *K. D. Sharma vs. Steel Authority of India Limited & others,* (2008) 12 SCC 481.

74. The jurisdiction of the court to interfere in the nature of the contract with which we are dealing is now well settled. So also that the petitioner must come out with clean breast and if the Court found the facts to be otherwise, the claim howsoever tenable can be rejected purely on such ground. But then, these are not the facts here, as we have already discussed.

75. For similar reasons, we find the decision rendered in *Dalip Singh vs. State of Uttar Pradesh & others,* (2010) 2 SCC 114, not to be applicable.

76. Reliance on the decision rendered by the apex Court in *Valji Khimji & Company vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. & others,* (2008) 9 SCC 299 is also of no consequence. Reliance is laid on para-31 of the report which reads as under:

> "28. If it is held that every confirmed sale can be set aside the result would be that no auction-sale will ever be complete because always somebody can come after the auction or its confirmation offering a higher amount." … …

Submission that no confirmation of the bid in an auction can be set aside is untenable in law. In this regard reliance on para 28 of the report is misconceived. It is not ratio decidendi that under no circumstance sale can be set aside. On the contrary, in para-27 of the said report the Court held it to be otherwise.

77. Reliance in *S. Soundararajan & others vs. Khaka Mohamed Ismail Saheb of Messrs. Roshan & Co.* AIR 1940 Madras 42 is also of no consequence and is totally misplaced.

78. Reliance in Bishnu Ram Borah & *another vs. Parag Saikia & others,* AIR 1984 SC 898 is not applicable to the given facts and circumstances.

79. In *Excise Commissioner of U.P. & others vs. Manminder Singh & others,* (1983) 4 SCC 318, Court only stated that the Commissioner is not bound to re-auction every time he receives a better offer and the Court will not interfere if he refuses to entertain better offers after the auction is held. On the other hand, if he receives substantially better offers and so, in the interest of the revenue, he orders re-auction, then too the Court should not interfere. The said observations were made in a case where the action of the Commissioner was not found to be violative of Article 14 of the Constitution of India.

80. Decision rendered in *Prem Jeet Singh Gujral (supra)* already dealt with.

81. Reliance is placed on the observations made by the Apex Court in paras-14 & 15 of decision rendered in *Harinarayan Jaiswal* (supra) wherein it is held that the State can grant licence by adopting any of the methods prescribed in the statute. Significantly in para-13 of the report itself, Court clarified that exercise of such power for collateral purpose is liable to be struck down by the Courts.

82. Under these circumstances, we hold (a) the action of Excise and Taxation Commissioner (respondent No.2) in allotting liquor vends of District Una, in favour of M/s Rana Enterprises (private respondent No.5) to be illegal and as such quash the allotment letter; (b) notwithstanding the fact that private respondent had refused to enter into any exercise of negotiation before this Court, we direct the Chief Secretary, Government of Himachal Pradesh/Officer nominated to immediately hold fresh negotiations with the private parties, by taking the amount of Rs.49.51 crores, as quoted by the petitioner, to be the minimum reserve price; (c) the process of negotiation shall positively be completed within next 24 hours and accordingly we direct the petitioner and the private respondent to make themselves available in the office of the Chief Secretary on 17.8.2017 at 10 a.m.; (d) we direct that, in any event, petitioner is bound by such offer; (e) if for whatever reason, petitioner fails to participate in the said process, she shall be liable to pay a sum of Rs.3,90,14,000/-, the amount equivalent to the sum deposited by the private respondent on 19.7.2017, which shall be recovered as arrears of land revenue and also in future she shall be debarred from participating in the auction of liquor vends. Also, in that eventuality, it shall be open for the private respondent to claim damages, if any, from the petitioner, in accordance with law; (f) if the private respondent fails to participate, it shall be open for the Chief Secretary/ nominated Officer to accept the bid of the petitioner, which decision, we clarify shall be taken by him in exercise of his statutory power; (g) in the event of the State cancelling the process, petitioner shall be deemed to be discharged of all commitments and liabilities; (h) the Chief Secretary/nominated Officer shall take a decision with regard to the quota of liquor already received by the private respondent.

In view of the above, writ petition stands disposed of, so also pending application(s), if any.

Copy dasti.

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

Vikas Kumar & ors. …….. Petitioner.
Versus
State of H.P. & Another ……. Respondents.

Cr. MMO No. 219 of 2016.
Decided on: 16th August, 2017

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioners for the commission of offences punishable under Sections 498-A and 406 read with Section 34 of I.P.C.- challan was filed and the Court took cognizance – the petitioners filed the present petition challenging the order taking cognizance – held that a detailed order is not required to be passed at the time of taking cognizance- the petitioners are at liberty to raise all the pleas before the Court at the time of framing of charge-the present petition is premature and is dismissed. (Para-4 to 7)

For the petitioner Mr. N.S.Chandel, Advocate.
For the Respondents Mr. Pramod Thakur, Addl. A.G. for respondent No.1.
Mr. J.R.Poswal, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Petitioners herein are accused in case No. 22-II/2016 pending disposal in the Court of learned Addl. Chief Judicial Magistrate, Dehra, District Kangra, H.P. Respondent No. 2 is the complainant as it is at her instance FIR No. 69 of 2015 has been registered against the accused-petitioners under Sections 498-A, 406 read with Section 34 IPC in PS Dehra Gopipur, District Kangra, H.P.

2. The order under challenge is Annexure P-3 whereby learned trial Magistrate, on going through the report under Section 173 Cr.P.C. filed against the accused-petitioners and on finding grounds to proceed further against them for the commission of offence punishable under Sections 498-A, 406 read with Section 34 IPC, has issued process against them.

3. The challenge to the impugned order is on the grounds *inter alia* that though against the accused-petitioners, no case is made out, however, the learned trial Magistrate has issued the process against them mechanically and without application of mind. The FIR and the investigation conducted do not disclose the commission of offence punishable under Sections 498-A and 406 IPC by either of the accused persons. Otherwise also, the alleged occurrence being of dated 29.11.2010, no Court can take cognizance of an offence after the expiry of the period of limitation prescribed under Section 468 (2) of the Cr.P.C. The marriage according to the accused petitioners was not at all consummated as the complainant, respondent No. 2 herein fell ill on 29.11.2010, the day when after solemnization of marriage she came to matrimonial home and had to be sent back to her parental house with her parents on that day itself. She never visited the matrimonial house thereafter.

4. True it is that as per the FIR itself, the complainant left matrimonial home on 29.11.2010. However, as per the allegations against the accused-petitioners, she fell ill all of a sudden after having milk which was served to her in the matrimonial home. Taking benefit of her condition, the accused petitioners removed all ornaments gifted to her in the marriage by her parents. Thereafter, they called her parents, declared her to be an insane, abused her parents and asked them to take their daughter with them. Her clothes were also kept by the accused petitioners with them of course with an assurance that as and when she is back to the

matrimonial home, the same would be returned to her. It is with these allegations FIR for the commission of offence punishable under Sections 498-A, 406 read with Section 34 IPC came to be registered against the accused-petitioners.

5. As per the own admission of the accused petitioners, at the time of taking cognizance of the offence, a detailed order is not required to be passed and satisfaction of the Magistrate seized of the matter to issue process against the accused is sufficient to issue process against them. The accused-petitioners, therefore, cannot be said to be aggrieved or dissatisfied from the issuance of process against them, in any manner whatsoever, at this stage as in the opinion of this Court, the record discloses grounds on which learned trial Court has recorded its satisfaction before resorting to issuance of process against the accused petitioners. On entering appearance by them, they are at liberty to raise all questions, including that the report filed by the police does not disclose the commission of any offence by them and also that in view of Section 468 Cr.P.C., the case registered against them after the expiry of the period of limitation, cognizance of the case against them could have not been taken. As a matter of fact, the accused-petitioners are at liberty to raise all such questions in the Court below even at the stage under Section 227 Cr.P.C. also and in case they are able to convince the trial Court, may seek their discharge from the case. Even they are at liberty to approach this Court again also in case charge against them is ultimately framed on the basis of the final report and the documents annexed thereto.

6. In this view of the matter, in my considered opinion, the relief sought in this petition, at this stage, is pre-mature. Therefore, the petition is dismissed, of course with liberty reserved to the accused petitioners to raise all legal questions in the trial Court at an appropriate stage and if they still feel aggrieved or dissatisfied, to approach this Court again for redressal of their grievances, if so advised.

7. The petition is accordingly disposed of, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Issar Goods Carrier …Petitioner
Versus
The State of Himachal Pradesh and others …Respondents

CWP No. 553 of 2017
Decided on: August 17, 2017

Constitution of India, 1950- Article 226- A tender was invited for the transportation of food articles from Principal Distribution Centre of Food Corporation of India to whole sale godowns of H.P. State Civil Supplies Corporation – the work was allotted to respondent No. 5 – aggrieved from the order, the petitioner filed the present writ petition- held that Deputy Commissioner stated that in his affidavit that before the tender could be opened, respondent No. 5, who was supplying food grains for more than 30 years, had offered to carry out the work at 5% less rates than the rate for the previous year – the rates of transportation were increasing every year and the offer of respondent No. 5 would have reduced financial burden on public exchequer – therefore, this offer was accepted – the decision to award work was taken in public interest – the decision was not taken to favour any person – the State can enter into an agreement with any person but it has to keep in mind the requirement of reasonableness – the Court can interfere with the decision making process when the decision was malafide or made to favour someone –malafide and favouritism have not been established - writ petition dismissed. (Para-6 to 25)

Cases referred:
Tata Cellular versus Union of India, (1994) 6 SCC 651
Air India Ltd. versus Cochin International Airport Ltd., (2000) 2 SCC 617
Michigan Rubber (India) Limited versus State of Karnataka and others, (2012) 8 SCC 216
Reliance Telecom Ltd. & Anr. v Union of India & Anr, 2017 SCC OnLine 36
State of Jharkhand v. M/s. CWE-SOMA Consortium, AIR 2016 SCW 3366
Central Coalfields Limited v. SLL-SML (Joint Venture Consortium), AIR 2016 SCW 3814
E.P. Royappa v. State of Tamil Nadu (1974) 4 SCC 3
Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800
Union of India v. Ashok Kumar, (2005) 8 SCC 760

For the petitioner: Mr. Dalip K. Sharma, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 3.
Mr. Arvind Sharma, Advocate, for respondent No.4.
Mr. Pratap Singh Goverdhan, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

Petitioner being aggrieved and dissatisfied with the issuance of communication dated 21.3.2017 (Annexure P-4), whereby work for transportation of food grains i.e. specified articles from Principal Distribution Centres (*Pramkush Vitaran Kendra*) of Food Corporation of India to HP State Civil Supplies Corporation whole godowns in District Solan, came to be allotted to respondent No.5 i.e. M/s Kalka Shimla Goods Transport Union, Solan, for the years 2017-2018, preferred instant petition, seeking therein following main reliefs:

"(i) That Annexure: P-4, dated 21.3.2017 , by virtue of which tender 2017 has been allotted to the respondent no 5 without completion of the tender process may kindly be quashed and set-aside, and be declared as an act without jurisdiction, illegal, unconstitutional and void-ab-initio.

(ii) That the respondent no 5 may be restrained from performing the transportation work and to further restrain from participating in the tender process .

(iii) That appropriate order, writ or directions be issued to respondent to complete the tender process in pursuant to the notice dated 8.3.2017 (P-14) within time bound period ."

2. Facts as emerge from the record are that respondents No. 1 to 3, with a view to ensure smooth supply of specified articles under targeted public distribution system, available with the whole sale godowns of the HP State Civil Supplies Corporation, located in Solan District, invited tenders for transportation of food grains i.e. specified articles from Principal Distribution Centre of Food Corporation of India to HP State Civil Supplies Corporation whole sale godowns located in different locations of the District, with the prior approval of the Deputy Commissioner, Solan. It also emerges from the record that there are two Principal Distribution Centre of Food Corporation of India in Solan District, namely at Solan and Parwanoo. HP State Civil Supplies Corporation, Solan, Dharampur, Kandaghat and Arki are fed from Solan Principal Distribution Centres and Nalagarh and Ramshahar godowns are fed from Principal Distribution Centre, Parwanoo. For the financial years 2017-18, Food, Civil Supplies and Consumer Affairs Department invited tender vide Notice Inviting Tender dated 8.3.207 (Annexure P-3) from the interested parties, to participate and submit their quotations, in a sealed cover, on or before 28.3.2017, in the office of District Controller, Food, Civil Supplies and Consumer Affairs, Solan, for Principal Distribution Centres, Solan and Parwanoo. Petitioner had submitted its application

on 24.1.2017. Respondents, vide annexure P-3, intimated/circulated that tenders/applications submitted by interested parties would be opened on 28.3.2017, in the presence of the Deputy Commissioner, Solan, however, the fact remains that, on 21.3.2017, a communication came to be issued by District Controller, Food, Civil Supplies and Consumer Affairs, disclosing therein that work stands allotted to respondent No.5, who, vide its communication dated 2.3.2017, had agreed to work at a rate 5% less than those of the previous years. Perusal of aforesaid communication (Annexure P-4), further suggests that work pertaining to Solan and Parwanoo was awarded to respondent No.5, whereas, tenders with regard to transportation from Principal Distribution Centres, Parwanoo to Nalagarh and Ramshahar was to be opened on 28.3.2017. Vide Annexure P-5, i.e. communication addressed to respondents No.3 and 4, petitioner, while making protest against decision of the respondents, in awarding work to respondent No.5 also submitted that it is also ready and willing to work at rate 10% less. However, the fact remains that aforesaid offer made by the petitioner was not accepted by the authorities concerned. In the aforesaid background, petitioner, terming action of the respondents, in awarding work to respondent No. 5 to be illegal, unjust and colourable exercise of power, approached this Court, seeking reliefs as have been reproduced herein above.

3. Mr. Dalip K. Sharma, learned counsel representing the petitioner, while inviting attention of this Court to annexure P-3, (Notice Inviting Tender), strenuously argued that once, specific tender for transportation of food grains from Principal Distribution Centres, of Food Corporation of India to HP State Civil Supplies Corporation whole sale godowns situate in different locations, in the District Solan, was floated there was no occasion for the Deputy Commissioner, Solan as well other respondents to award work to respondent No.5, merely on the basis of its representation dated 2.3.2017, if any, having been furnished by respondent No.5, without following due process of law. Mr. Sharma, further contended that since work came to be awarded to respondent No.5, without completion of tender process, communication dated 21.3.2017, annexure P-4, deserves to be quashed and set aside, being arbitrary, illegal, and unconstitutional and against all canons of law and principles of natural justice. Mr. Sharma, learned counsel representing the petitioner, further contended that the respondent-State, being a 'welfare State', is expected to act judiciously and its all actions should be beyond suspicion, but, in the instant case, as clearly emerges from the record, authorities, solely with a view to favour respondent No.5, bid goodbye to the settled principles of law and natural justice.

4. We have heard the learned counsel representing the parties and also gone through the record.

5. Respondent No.3 i.e. Deputy Commissioner, in his affidavit filed in compliance to direction issued by this Court on 22.7.2017, admitted that tender notice was issued on 8.3.2017, asking interested parties to participate and submit their quotations on or before 28.3.2017. Deputy Commissioner has further stated that before the actual bidding took place, it was brought to his notice that M/s Kalka Shimla Goods Transporters Union, respondent No.5, has been supplying food grains for the last more than thirty years and it is ready and willing to transport the food grains, at 5% less rates than the rates for the previous years i.e. 2016-17. It also emerges from the affidavit that as per office record of District Controller, Food, Civil Supplies and Consumer Affairs, Solan, that since the year 2006-07, work was being awarded on the basis of tender, however, for the year 2007-08, no tender was called and rates approved for 2006-07 were extended. Deputy Commissioner, further submitted in his affidavit that since year 2000, every year the rates have increased for subsequent year after the tender except for the years 2015-16, when there was a decrease as compared to the years 2014-15, therefore, proposal of the Union was considered in the light of prices and inflation and it was felt that the rates of transportation were likely to increase in tender. Deputy Commissioner, while justifying aforesaid action of the respondents further cited example of tender invited for Principal Distribution Centre, Parwanoo, where rates increased by 12% as compared to that of previous year. It has also come in the affidavit of the Deputy Commissioner that the Union (respondent No.5) had about 100 trucks and there had been no serious complaint against Union for the last three decades and as such, keeping in view past record of the Union and to reduce financial burden on State

Exchequer, and further to ensure that food grains are transported in time, without any problem, he accepted the offer made by respondent No.5 in the public interest, and, accordingly, allotted transportation work to respondent No.5, in respect of Principal Distribution Centre, Solan. It also emerges from the affidavit having been filed by respondents No.1 to 3 that area of Principal Distribution Centre, Solan was inadvertently mentioned in the notice, since respondent No.5 had already requested the Deputy Commissioner, vide communication dated 2.3.2017 that it is ready and willing to work at rates 5% less than that of 2016-17, there was no occasion for respondents No. 1 to 3 for calling /inviting tender for transportation of food grains from Principal Distribution Centre, Solan. At this stage, it may be taken note of that annexure P-3 i.e. Notice Inviting Tender, for transportation of food grains, for the year 2017-18, came to be issued on 8.3.2017 i.e. definitely after submission of letter dated 2.3.2017 by respondent No.5, wherein it had agreed to do the work at 5% less than rates for the year 2016-17. It also emerges from the affidavit of respondent No.3 that since respondent No.5 had a fleet of approximately hundred trucks with it, it had unblemished past record, respondents vide notice dated 21.3.2017 decided to drop the area of Principal Distribution Centre, Solan from the notice dated 8.3.2017, issued by the respondents.

6. Though this Court, after having perused annexure P-3, finds considerable force in the submissions having been made by Mr. Dalip K. Sharma, learned counsel representing the petitioner that respondents ought to have awarded work strictly in terms of Notice Inviting Tender, issued vide communication dated 8.3.2017, wherein, admittedly work pertaining to Solan Principal Distribution Centre, was also included, but, this Court, is unable to accept the contention of learned counsel representing the petitioner that petitioner had the ability to carry out work of such a magnitude and it had the capacity to execute work at 10% lesser rates. There is no document placed on record by the petitioner to the effect that it had past experience in the field of transportation and it had actually worked in this field.

7. True it is, that perusal of annexure P-5, suggest that petitioner had offered to work at 10% lesser rates, but it is not understood, that 10% of what rate, petitioner was ready and willing to do the transportation work, rather, there is nothing on record, from where it can be inferred that petitioner had earlier rendered its services to the respondents in transportation of food grains.

8. Similarly, petitioner has not placed on record any material suggestive of the fact that it has sufficient vehicles as compared to respondent No. 5, who, admittedly, has/had a fleet of hundred trucks. Apart from above, this is not the case of the petitioner that decision to award work to respondent No.5 by Deputy Commissioner, Solan was taken after opening bids furnished by other bidders including petitioner, rather, it is admitted case of the parties that decision to award work to respondent Nno.5 with regard to Solan Principal Distribution Centre, was taken prior to 28.3.2017, the scheduled date of opening tenders.

9. It is also not in dispute that respondent No.5 had offered to work at rates 5% less than as compared to rates offered by it for the year 2016-17, vide communication dated 2.3.2017, whereas Notice Inviting Tender, annexure P-3 came to be issued on 8.3.2017, as such, this Court, is inclined to accept the contention put forth by respondents No.1 to 3 that area of Principal Distribution Centre, Solan was inadvertently mentioned in Notice Inviting Tender.

10. Leaving everything aside, it clearly emerges from the affidavit having been filed by Deputy Commissioner, Solan that decision to award work to respondent No. 5 was taken in public interest. It also emerges from the affidavit of Deputy Commissioner, Solan that respondents had also awarded work of transportation without inviting any tenders in the year 2007-08 and at that time, rates approved for the year 2006-07 were extended. Deputy Commissioner, Solan, keeping in view likely increase in the rates of transportation, coupled with the fact that respondent No. 5 has/had a fleet of approximately hundred trucks, proceeded to award work to respondent No. 5, which had unblemished record for the last three decades.

11. This court can not lose sight of the fact that food grains are required to be transported in time, without any problem and as such, this Court finds no infirmity and illegality in the decision of respondents/Deputy Commissioner, who awarded work qua Principal Distribution Centre, Solan to respondent No.5, in larger public interest.

12. Reasoning offered by Deputy Commissioner, in his affidavit for awarding work to respondent No. 5, appears to be justified in view of rates offered by various bidders for Parwanoo, Principal Distribution Centre, wherein, admittedly rates came to be increased by 12% as compared to previous years rates. Condition No. 13 of the terms and conditions of the Notice Inviting Tender, annexure P-3, specifically empowers the Deputy Commissioner to cancel the tender notice or re-invite tenders, without citing any reason. No doubt, aforesaid power as is vested with Deputy Commissioner, can not be exercised arbitrarily, rather same is required to be exercised sparingly, with utmost circumspection, but, in the instant case, decision to award work to respondent No. 5 came to be taken by respondents before opening of tenders and more over no right as such has accrued in favour of petitioner to lay challenge to the action of respondent, especially when no acceptance, if any, of tender submitted by petitioner was communicated to it, rather, tender was cancelled before actual opening, in the public interest.

13. It is well settled by now that the Courts would normally not interfere in the tender/contractual matters while exercising powers of judicial review. Power of judicial review can only be exercised by constitutional courts if it is proved on record that process adopted or decision so made by the authorities is intended to favour someone or the authority has acted with malafide or decision made is so arbitrary and irrational that no responsible authority acting reasonably could have reached. Needless to say that Court can also exercise power of judicial review in case it is shown that public interest is affected. In this regard, reliance is placed upon judgment rendered by Hon'ble Apex Court in **Tata Cellular** versus **Union of India**, reported in (1994) 6 SCC 651.

14. Hon'ble Apex Court in **Air India Ltd.** versus **Cochin International Airport Ltd.** reported in (2000) 2 SCC 617 held that even when some defect is found in the decision-making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

15. Hon'ble Apex Court, in **Michigan Rubber (India) Limited** versus **State of Karnataka and others**, reported in (2012) 8 SCC 216, while discussing power of an authority in setting up terms and conditions of a tender, has specifically held that the Government undertakings should have a free hand while framing terms and conditions and Courts should only interfere in case there is material on record to demonstrate that same are arbitrary, discriminatory, malafide or actuated by bias. The Hon'ble Apex Court has held as under:

> "35…….As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical……."

16. Recently, Hon'ble Apex Court in **Reliance Telecom Ltd. & Anr.** v **Union of India & Anr**, reported in 2017 SCC OnLine 36 has specifically held that the condition to put a cap and make a classification not allowing certain entities to bid is not an arbitrary one as it is based on the acceptable rationale of serving the cause of public interest. Hon'ble Apex Court has further held that aforesaid exercise allows new entrants and enabled the existing entities to increase their cap to make the service more efficient. Moreover, the Court cannot get and dwell as an appellate authority into complex economic issues on the foundation of competitors advancing the

contention that they were not allowed to bid in certain spheres. Hon'ble Apex Court, in the aforesaid case has further approved the action of the authorities concerned, who put stringent conditions to ensure competition in the market by preventing large/big operators from acquiring large amount of spectrum. The Hon'ble Apex Court held as under:

> "33. The objective behind Spectrum capping is to ensure competition in the market by preventing large/big operators from acquiring large amount of spectrum, which they may not require but only hoard to prevent the small operators from effectively competing in the market, and that is why, TRAI has recommended on 02.07.2015 that the basic objective of prescribing a spectrum cap is to prevent a TSP from acquiring large holdings of spectrum through auction, M&A or trading, as it may lead to non-level playing field thereby disturbing the competition in the market. It cannot be left to the market forces alone to decide the maximum spectrum holding as a TSP and, hence, the provision of cap should continue on the spectrum holding that a TSP may acquire or otherwise. The argument that the respondent should have notionally included the spectrum surrendered by BSNL/MTNL would result in creating a situation where though the spectrum put to auction remains the same (i.e., limited), yet a large/big player will be able to bid for the entire spectrum (which it otherwise could not have done due to Clause 5.3.1.) thereby effectively giving a tool to the large/big operators to deprive/starve small operators, who quite avowedly, cannot match the buying power of larger operators of spectrum.
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> 78. We have already discussed that the condition to put a cap and make a classification not allowing certain entities to bid is not an arbitrary one as it is based on the acceptable rationale of serving the cause of public interest. It allowed new entrants and enabled the existing entities to increase their cap to make the service more efficient. The Court cannot get and dwell as an appellate authority into complex economic issues on the foundation of competitors advancing the contention that they were not allowed to bid in certain spheres. As the stipulation in the tender was reasonable and not based on any extraneous considerations, the Court cannot interfere in the NIA in exercise of the power of judicial review. The contention is that the State cannot hoard the spectrum as per the 2G case. We are disposed to think that in the case at hand, it cannot be said that there has been hoarding. The directions given in the 2G case had been complied with and the auctions have been held thereafter from the year to year. The feasibility of communication, generation of revenue and its maximization and subserving of public interest are to be kept in view. The explanation given by the Union of India for not putting the entire spectrum to auction is a reasonable one and it is put forth that an endeavour would be made to put it to auction when it becomes available in sufficient quantum. The Court cannot interfere with eth tender conditions only on the ground that certain amount of spectrum has not been put to auction. The submission is that whatever has been put to auction and is available should have been notionally added so that the entities which have certain quantum of spectrum in praesenti could have participated in the auction and put forth their bids for a higher quantum. This argument may look attractive on a first blush but pales into insignificance on a studied scrutiny. As is evincible, one of the petitioners had earlier more than 65 MHz in a bad and because of the limited auction and non-addition of available spectrum on notional basis, it has obtained less quantum. With this submission, the contention of legitimate expectation has been associated. We have already repelled the submission pertaining to legitimate expectation. If there has been a reduction for a particular entity because of the terms and conditions of the tender, it has to accept it, for he cannot agitate a grievance that he could have obtained more had everything been added notionally. Notionally adding up or not

adding up, we think, is a matter of policy and that too a commercial policy and in a commercial transaction, a decision has to be taken as prudence would command. In this regard, reference to the decision in Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd. would be apt. In the said case, the Court referred to the authority in Tata Cellular (supra) and thereafter opined that though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised I the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. In the instant case, we are unable to perceive any arbitrariness or favouritism or exercise of power for any collateral purpose in the NIA. In the absence of the same, to exercise the power of judicial review is not warranted. In the case at hand, we think, it is a prudent decision once there is increase of revenue and expansion of the range of service."

17. The Apex Court in **State of Jharkhand v. M/s. CWE-SOMA Consortium** reported in AIR 2016 SCW 3366, has held that the State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. Apex Court held as under:

> "13. The appellant-state was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-
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> > "Clause 24 of NIT: "Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof." Clause 32.1 of SBD: "...the Employer reserves the right to accept or reject any Bid to cancel the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action." In terms of the above clause 24 of NIT and clause 32.1 of SBD, though Government has the right to cancel the tender without assigning any reason, appellant-state did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the government to cancel the tender.
>
> 14. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the state found it advisable not to proceed with the tender with only one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the tender committee decided to cancel the tender and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness."

18. The Apex Court in **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)** reported in AIR 2016 SCW 3814, has further held that Court can go into the question of malafides raised by a litigant, but in order to succeed, much more than a mere allegation is required. Bald and unfounded allegations of malafides are not sustainable and that malafides must be specifically pleaded and proved. Hon'ble Apex Court has held as under:

> "44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of the NIT

and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.

55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.

56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of the NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever."

19. By now it is settled law that burden of proving malafides is on the person making allegations and burden is very heavy as has been held by the Hon'ble Apex Court in **E.P. Royappa** v. **State of Tamil Nadu** (1974) 4 SCC 3.

20. In ***Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800*** Hon'ble Apex Court has held, *"It (malafides) is the last refuge of a losing litigant."*

21. In the judgments referred herein above, Hon'ble Apex Court has held that there is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of malafides are often more easily made than proved and proof of high degree is required to prove the same.

22. In the instant case, it would be profitable to have a look at judgment passed by Hon'ble Apex Court in case **Union of India** v. **Ashok Kumar**, reported in (2005) 8 SCC 760, wherein it has been held that seriousness of allegations of malafides demands proof of high order of credibility and the Courts should be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office having high responsibility. It was held:

"21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill- will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab AIR 1964 SC 72). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in E. P. Royappa v. State of Tamil Nadu and Another (AIR 1974 SC 555), Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office

which has a high responsibility in the administration. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579)."

23. Careful perusal of expositions of law, as discussed herein above, certainly suggests that Courts should normally not interfere in the contractual matters in exercise of powers of judicial review and it can only be exercised in case it is satisfied that process adopted was malafide or made to favour someone or process adopted or decision made is so arbitrary that no man of ordinary prudence could have reached.

24. This Court, while placing reliance upon aforesaid judgments having been passed by Hon'ble Apex Court, has repeatedly held in CWP No. 9337 of 2013 titled **Ashok Thakur** v. **State of Himachal Pradesh and others** decided on 6.5.2014, CWP No. 765 of 2014 titled **Namit Gupta** v. **State of H.P. and others** decided on 27.3.2014 and CWP No. 2544 of 2016 titled **M/s Quality Industries Corporation** v. **State of Himachal Pradesh and another** decided on 7.12.2016, that in cases involving award of contracts/tenders, courts should not exercise judicial review where decision appears to be bonafide without any perceptible injury to the public interest.

25. After having carefully perused the pleadings and material adduced on record by the respective parties, this Court has no hesitation to conclude that the decision of the Deputy Commissioner, in awarding work to respondent No. 5, is in public interest and, by no stretch of imagination, it can be said that process adopted by the authorities concerned, was malafide or made to favour respondent No. 5, rather, respondents by way of awarding work of transportation to respondent No. 5, which had a fleet of about hundred trucks, not only saved the public money but also ensured timely supply of essential articles.

26. Applying the aforesaid test to the instant writ petition, same deserves to be dismissed and is accordingly dismissed. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Madan Lal Verma ...Petitioner

Versus

Municipal Corporation, Shimla and others ....Respondents

CWP No. 579 of 2017
Decided on: August 17, 2017

Constitution of India, 1950 - Article 226- Respondent No. 3 and 4 had surrendered some portion of their land for the public path at the time of sanctioning of building plan- however, the respondents failed to honour the undertaking given by them on which the complaints were filed- Deputy Commissioner directed the District Revenue Officer to carry out the inspection- District Revenue Officer found that respondent No. 3 had raised construction of compound wall on the area being used for the purpose of public path- Commissioner, M.C. Shimla was requested to take action in accordance with law – an order was passed declaring the path as public path – the respondents filed a revision before Divisional Commissioner who asked the Commissioner, M.C. Shimla to keep the order in abeyance till the disposal of the revision petition- aggrieved from the order, present writ petition has been filed – held that the building plans of respondent No. 3 and 4 were sanctioned subject to undertaking furnished by the respondents regarding surrender of portion of their land for making the public path wider- there was no illegality in declaring the path as a public path – the respondents could not have violated the undertaking given by them – it is the duty of the land owners/building owners to provide proper path/streets giving proper access to the plots/houses of the persons residing adjacent to their buildings/lands – writ petition allowed- order passed by Divisional Commissioner quashed and set aside – Municipal

Corporation Shimla directed to insure that the path in question is restored/widened after including the land undertaking to be surrendered by the private respondents. (Para-7 to 14)

For the petitioner	Mr. B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, Advocate.
For the respondents:	Mr. Hamender Singh Chandel, Advocate, for respondent No. 1. 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 respondent No.2. Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate, for respondent No.3. Mr. Ashwani Kaundal, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

Petitioner being aggrieved with encroachment having been made by private respondent, on the public path and with the order dated 30.1.2017, (annexure P-16), passed by Divisional Commissioner, Shimla, in case No. 13/2016, titled Mitter Singh versus Madan Lal & others, whereby, Commissioner, Municipal Corporation, Shimla, has been ordered to keep order dated 24.12.2016, passed by him, in abeyance/in-operative, till the final disposal of revision petition having been filed by private respondent No.3, namely M.S. Thakur, filed instant writ petition, under Article 226 of the Constitution of India, seeking therein following main relief(s): -

> "i) Issue a writ of certiorari to quash **Annexure P- 15 and P- 16** i.e. appeal and impugned order dated 30-01-2017.
>
> ii). Issue a writ of mandamus directing the Respondent authorities not to implement **Annexure P-16** i.e. impugned order dated 30-01-2017.
>
> iii). Issue a writ of mandamus directing the respondent authorities to initiate appropriate necessary action for removal of encroachments made by the private respondents on the public path.
>
> iv). Issue a writ of mandamus directing the respondent authorities to initiate appropriate necessary action for having filed false affidavits for obtaining sanction to construct their respective buildings.
>
> v). Issue a writ of mandamus directing the respondent authorities to initiate appropriate necessary action for cancellation of building sanction accorded in favour of the private respondents.
>
> vi). Issue a writ of mandamus directing the respondent authorities to initiate appropriate necessary action to have the public path in question built at the earliest."

2. Key facts, which may be necessary for the adjudication of the present case are that respondents No.3 and 4, while getting their building plans sanctioned from Municipal Corporation, Shimla, surrendered some portion of their lands for the purpose of public path. Copy of sanctioned plan annexure P-10, placed on record also depicts public path having width of 3.05 metres. Aforesaid plan of buildings owned and possessed by respondents No.3 and 4 were approved/sanctioned on 21.3.2003 and 18.10.2003, by Municipal Corporation, Shimla, taking note of the specific affidavit dated 5.3.2003, 29.6.2004, 22.12.2006, having been filed by aforesaid respondents, wherein, they had categorically undertaken to surrender certain pieces of land from their lands, on share basis, solely with a view to widen the public path. Perusal of annexure P-6 clearly suggests that respondent No.3 had undertaken to surrender a strip of 30 cms of land to increase existing path to 3.05 metres. It is not in dispute as clearly emerges from

the pleadings adduced on record by respective parties that aforesaid condition having been imposed by Municipal Corporation, Shimla, while granting approval, was not objected to by the private respondents, rather, they, themselves, furnished affidavits undertaking therein to surrender certain portion of land out of their lands to make public path already existing on the spot, more wider. It emerges from the material available on record that private respondents after having got their plans sanctioned, failed to honour the undertaking given by them, as a result of which, representations/ complaints on behalf of the petitioner as well as other residents of the area came to be received by Deputy Commissioner, Shimla as well as Municipal Corporation, Shimla. It also emerges from the record that Deputy Commissioner, Shimla, taking note of the aforesaid complaints, directed District Revenue Officer, Shimla, to carry out inspection on the spot (vide communication dated 7.3.2015), who, in turn inspected the spot on 23.4.2015, after issuance of proper notices to all concerned and conducted inspection in the presence of various stakeholders including respondents No.3 and 4. District Revenue Officer, in its report (Annexure P-4), specifically concluded that Mr. M.S. Thakur, respondent No. 3, has raised construction of compound wall on the area being used for the purpose of public path and which path has also been shown in joint ownership of the cosharers, during partition, bearing Khasra Nos. 4348/1, 4349/1 and 4350, and has violated provisions of Building Bye-laws, for which authority concerned is competent to proceed as per provisions of law. Deputy Commissioner, taking note of the aforesaid report, submitted by District Revenue Officer, requested the Commissioner, Municipal Corporation, Shimla, to take necessary action on the basis of report (annexure P-). It also emerges from the perusal of Annexure P-7 and Annexure P-8 that the Architect Planner, Municipal Corporation, Shimla, repeatedly, asked respondent No.3 to submit *Tatima* showing public path to the plot. Vide communication dated 27.10.2014, the Architect Planner, Municipal Corporation, Shimla, specifically reminded respondent No.3, that there is mandatory provision in the MC Building Bye-laws to have 3.05 metre wide path abutting to the one side of individual building/plot and at the time of revised sanction, said respondent had shown a path 2 Karam wide and 30 cm wide strip of land was surrendered by him for the provision of path and in the *Tatima* submitted by aforesaid respondent, path had not been shown abutting to the plot. Subsequently, Municipal Corporation, Shimla, vide order dated 24.12.2016, after having invited objections from the general public, for declaring public path, 77 metres in length and 3 metres in width, passing through Khasra Nos. 4346/1, 4348/1, 4350/1, 4350/2 and 4350/3, Baragaon, Block No. 7, Sector 6, Phase III, Shimla, for use of general public, declared path in question to be public path, under Section 226 of Municipal Corporation Act. It clearly emerges from the order dated 24.12.2016 (Annexure P-1) that aforesaid order was passed by Municipal Corporation, after having taken note of the objections raised by respondents No.3 and 4, which were not found tenable in view of the fact that path was already available abutting to their properties and they had undertaken to surrender certain portions of their lands to make public path wider. It also emerges from the record (annexure P-14) that Municipal Corporation, floated tender for repair and maintenance of aforesaid road leading to Bara Gaon from HIMUDA Block Nos. 7, 11 and 12 (removal of slips and construction of retaining wall, Ward No. 23) and in this regard, work came to be awarded to contractor namely Kuldip Kumar, for a an amount of Rs.74,945/-.

3. Private respondents being aggrieved and dissatisfied with the aforesaid order dated 24.12.2016 (Annexure P-1), preferred revision petition, annexure P-15, before the Divisional Commissioner, Shimla, who, vide order dated 30.1.2017, directed the Commissioner, Municipal Corporation, Shimla, to keep the aforesaid order dated 24.12.2016, annexure P-1, in abeyance/inoperative, till the final disposal of revision petition. In the aforesaid background, petitioner approached this Court, seeking reliefs, as have been reproduced herein above.

4. Mr. B.C. Negi, Senior Advocate duly assisted by Mr. Pranay Pratap Singh, Advocate, while inviting attention of this Court to sanctioned plans as well as undertakings, annexures P-10, P-11, P-12 and P-6, furnished by private respondents, vehemently argued that there was no occasion for the Divisional Commissioner to pass impugned order dated 30.1.2017. Mr. Negi, learned Senior Advocate, further contended that no revision petition could be entertained by Divisional Commissioner, against order dated 24.12.2016, passed by Municipal

Corporation, Shimla, declaring path in question to be a 'public path'. While inviting attention of this Court to Clause 7.11 of Building Bye-laws, 1998, of Municipal Corporation, Shimla, annexure P-17, Mr. Negi, learned Senior Advocate contended that it is statutory duty of the Municipal Corporation, Shimla to provide public path. Clause 7.11 of the Building Bye-law makes it obligatory on the part of owner to provide proper path/street giving access to the plots into which the land may be divided and path/streets will be so provided that it shall connect with a regular public or private street. While inviting attention of this Court to the sanctioned plan as well as undertakings given by private respondent, Mr. Negi, learned Senior Advocate contended that had private respondents not furnished undertakings, whereby they agreed to surrender certain portions of their lands for making public path more wide, their plans would not have been sanctioned, as such, they are required to be dealt with, in accordance with law.

5. Mr. G.D. Verma, Senior Advocate duly assisted by Mr. B.C. Verma, Advocate and Mr. Ashwani Kaundal, Advocate, representing respondents No.3 and 4, respectively, were unable to dispute factum with regard to affidavits having been furnished by respondents No.3 and 4 at the time of getting their plans sanctioned from competent authority. Mr. Verma, learned Senior Advocate, while invitation attention of this Court to Annexures P-4 and P-16, made an attempt to persuade this Court that present petition is not maintainable, in view of pendency of revision petition before Divisional Commissioner, who is seized of the matter. Aforesaid counsel, representing private respondents, also contended that apart from path in question, alternative approach to the plot of petitioner is available, which has been already declared to be public path and as such present petition be dismissed being devoid of merit.

6. We have heard the learned counsel representing the parties and also gone through the record.

7. It is not in dispute before us that building plans of respondents No.3 and 4, only came to be sanctioned subject to undertakings furnished by aforesaid respondents that they shall be surrendering certain portions of lands from their own lands to make public path wider. It is also not in dispute that path was already in existence at the time of submission of plans/maps by private respondents. Since private respondents had bound themselves to surrender some portions of their lands, we see no illegality or infirmity in the order dated 24.12.2016, passed by Municipal Corporation, Shimla, declaring land measuring 77 metres in length and 3 metres in width, passing through Khasra Nos. 4346/1, 4348/1, 4350/1, 4350/2 and 4350/3, situate at Bara Gaon, Block No. 7, Sector 6, Phase III, Shimla, as public path. It also emerges from the record, which has been taken note of above, that inquiry was got conducted by Deputy Commissioner, through District Revenue Officer, who subsequently pointed out towards encroachment having been made by private respondents on the public path.

8. This Court, after having carefully perused material available on record, sees substantial force in the arguments of Mr. Negi, learned Senior Counsel, representing petitioner that an attempt has been made to hoodwink the authorities by not complying with the undertakings given by them by way of affidavits given at the time of getting their plans sanctioned. Since, building plans of private respondents were sanctioned subject to specific undertakings given by the private respondents, they can not be allowed to state at this stage that there is an alternative path available to the plot of the petitioner. There may be more than one paths leading to the plot of the petitioner but once, private respondent had undertaken to provide certain lands for the construction/ widening of public path, that too, to get their plans sanctioned, no fault, if any, can be found with the action of the Municipal Corporation, Shimla, declaring land in question, to be 'public path'.

9. It is quite evident from the record that building plans of private respondents were sanctioned on 18.10.2003 and 21.3.2003, respectively i.e. fourteen years back, that too with the condition of making land available for widening of public path, but, till date, private respondents, on one pretext or the other, have succeeded in not allowing authorities concerned to widen public path, strictly in terms of sanctioned building plans. Now, private respondent No.3 has further

filed revision petition before Divisional Commissioner, laying therein challenge to order passed by Municipal Corporation, Shimla, declaring path in question to be a 'public path'.

10. We do not see any force in the arguments of Mr. G.D. Verma, learned Senior Advocate, representing respondent No.3, that present petition is not maintainable in view of pendency of revision petition before Divisional Commissioner.

11. In the instant case, petitioner has prayed for a writ of mandamus directing respondent authorities to initiate appropriate necessary action for removal of encroachment made by private respondent on the public path. There is no dispute that path was already in existence at the spot, and the same was only required to be widened, for making it usable for the residents of the area. Municipal Corporation, Shimla, is well within its right to remove obstruction, if any, on the path, which has been subsequently declared to be 'public path', especially when building plans of private respondents were approved and sanctioned by Municipal Corporation, Shimla, taking into consideration affidavits having been filed by the aforesaid respondent, undertaking therein to surrender certain portions of land for widening of public path.

12. At the cost of repetition, as has been taken note above, it is bounden duty of the land owners/building owners to provide proper path/streets giving proper access to the plots/houses of the persons residing adjacent to their buildings/lands.

13. Consequently, in view of the detailed discussion made herein above, we see valid reasons to interfere with the order dated 30.1.2017 passed by Divisional Commissioner, Shimla, who, apparently, without taking note of the undertakings having been filed by the private respondents, proceeded to stay order dated 24.12.2016, passed by Municipal Corporation, Shimla, declaring path in question to be a 'public path'.

14. Accordingly, the writ petition is allowed. Impugned order dated 30.1.2017 passed by Divisional Commissioner, (Annexure P-16) is quashed and set aside. Municipal Corporation, Shimla is directed to ensure that path in question is restored/ widened, after having included land, undertaken to be surrendered by private respondents by way of affidavits, forthwith. Needless to say, private respondents shall render all cooperation to the authorities in widening the public path, failing which they shall render themselves liable for contempt of this Court.

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

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

Sansar Chand ….Petitioner.

Vs.

State of Himachal Pradesh and another …..Respondents.

CWP No.: 7117 of 2012

Date of Decision:17.08.2017

Industrial Disputes Act, 1947- Section 14, 15- Labour Court held that the reference petition was not maintainable as the claim of the workman that he was retrenched in the year 2005 is not correct- held that once an award is received by the Labour Court, it is bound to make an award and it cannot dismiss the petition as not being maintainable- further the wrong year of retrenchment will not make any difference in the ultimate outcome- the court was bound to see whether the workman had worked continuously and his services were illegally terminated or not, which it had not done- appeal allowed and the case remitted to the Labour Court for adjudication on merits. (Para 4 to 9)

For the petitioner: Ms. Anjali Soni Verma, Advocate.

For the respondents: Mr. Vikram Thakur, Deputy Advocate, General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

By way of this writ petition, the petitioner/workman has assailed the award passed by the learned Labour Court-cum-Industrial Tribunal, Dharamshala in Reference No. 421/2009, dated 02.06.2012, vide which, learned Labour Court has dismissed the Reference Petition/Claim Petition as not maintainable, on the ground that the petitioner was not retrenched from service in the year 2005, as claimed by him.

2. Feeling aggrieved, petitioner/workman has challenged the award so passed by the learned Labour Court-cum-Industrial Tribunal, *inter alia*, on the ground that the learned Labour Court could not have had dismissed the Reference by holding that the same was not maintainable and the learned Labour Court was duty bound to have had answered the Reference.

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

4. Learned Labour Court dismissed the Reference/Claim Petition *inter alia* by holding as under:

> *"16. The assertion of the respondent that the petitioner abandoned the job way back in the year 2004 pales into insignificance in view of the foregoing reasons. The reference/ claim petition is not maintainable as the petitioner was not retrenched from service in the year 2005 (as claimed)."*

5. Sections 14 and 15 of the Industrial Disputes Act, 1947 provide as under:

> *"14. Duties of Courts.—A Court shall inquire into the matters referred to it and report thereon to the appropriate Government ordinarily within a period of six months from the commencement of its inquiry.*
>
> *15. Duties of Labour Courts, Tribunals and National Tribunals.—Where an industrial dispute has been referred to a Labour Court, Tribunal or National Tribunal for adjudication, it shall hold its proceedings expeditiously and shall, 6 [within the period specified in the order referring such industrial dispute or the further period extended under the second proviso to sub-section (2A) of section 10], submit its award to the appropriate Government."*

6. A perusal of the above mentioned statutory provisions demonstrate that once a Court receives a Reference, then the said Court which also includes the Labour Court, has to submit its award upon the reference to the appropriate Government. In other words, it will not be within the domain of the learned Labour Court to reject a Reference by holding that it is not maintainable, as has been done in the present case by the learned Labour Court. Once a reference has been received by the learned Labour Court, then on the basis of the evidence which is so adduced before it by the respective parties, an award is to be passed by the learned Labour Court and, in my considered view, the award cannot be to the effect that the Reference Petition is not maintainable, especially when it was not in dispute that claimant was a workman, who had served the department as such from 1995 to 2004 and dispute as raised was an industrial dispute.

7. Besides this, even otherwise, the award so passed by the learned Labour Court in the present case is not sustainable in law, as the learned Labour Court has totally mis-directed itself by rejecting the Reference Petition by holding that the same is not maintainable. Now, the reason which has been assigned by the learned Labour Court by holding that the Reference Petition was not maintainable, is that the petitioner claimed to have been retrenched from service in the year 2005, whereas records demonstrated that the petitioner was not retrenched from service in the year 2005 and, therefore, the Reference Petition was not maintainable. While doing so, in my considered view, learned Labour Court has adopted a highly hypertechnical approach. Learned Labour Court has not appreciated that the claim as was put forth by the claimant in the

Statement of Claim was that he was engaged on daily wages in IPH Department under Executive Engineer, Pangi at Killar from the year 1995 to 2004 and he worked as such under the control of the said Executive Engineer till the year 2004 and thereafter in the year 2005, his services were illegally terminated.

8. Be it year 2004 or 2005, the allegation of the workman was that his services were illegally terminated by the Executive Engineer ignoring the fact that there was no break or interruption in his services since his engagement in the year 1995. This contention so raised by the workman in his Claim Petition had to be answered by the learned Labour Court by deciding as to whether the claim of the workman was sustainable or the same was not borne out from the records. However, rather than doing this, learned Labour Court by harping upon the fact that the petitioner had mentioned that he was retrenched from service in the year 2005, went on to dismiss the Reference Petition by holding the same as not maintainable on the ground that the petitioner was not retrenched in the year 2005.

9. Therefore, in my considered view, the decision so rendered by the learned Labour Court, which stands impugned by way of this writ petition, is not sustainable in the eyes of law and accordingly, Award dated 02.06.2012, passed by the learned Labour Court in Reference No. 421/2009 is quashed and set aside and the matter is remanded back to the learned Labour Court with the direction to answer the Reference in accordance with law, after taking into consideration the respective submissions and evidence placed on record by the parties.

10. Parties are directed to appear before the learned Labour Court through their respective counsel on ***18th September, 2017***. Keeping in view the fact that the Reference Petition is of the year 2009, this Court hopes and expects that the learned Labour Court shall dispose of the Reference Petition as expeditiously as possible. Registry is directed to forthwith return back the records of the case to the learned Labour Court.

Petition stands disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Ved Prakash and another ….Appellants/Plaintiffs.

Versus

Krishan Kumar Gupta and another ….Respondents/Defendants.

RSA No.368 of 2016.
Judgment reserved on: 01.08.2017.
Date of decision: 17th August, 2017.

Specific Relief Act, 1963- Section 20- Plaintiff No. 1 entered into an agreement with defendant No. 1 for the purchase of the land for a consideration of Rs. 7 lacs- a cheque of Rs. 1 lac was issued towards part payment - remaining consideration was to be paid at the time of registration of the sale deed- the cheque was dishonoured – a notice was issued to the plaintiff No. 1 – plaintiff No. 1 sent a demand draft of Rs. 1 lac and asked the defendant No. 1 to execute the sale deed within 15 days – however, when the deed was not executed, the present suit was filed – the defendant No. 1 pleaded that plaintiff No. 1 is not an agriculturist and is not entitled to purchase the land- defendant No. 2 claimed that he had purchased the land for a valuable consideration and is a bona fide purchaser having no notice – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that a person has to show his readiness and willingness to perform his part of the agreement before specific performance can be ordered – since the cheque issued by the plaintiff No. 1 was dishonoured, there was no readiness and willingness on his part – the demand draft was sent after two months of the agreement – the

sale deed was to be executed within two months – High Court cannot interfere with the findings of facts recorded by the Courts – there is no perversity in the findings – appeal dismissed.

(Para-9 to 24)

Cases referred:

Arulvelu and another vs. State Represented by the Public Prosecutor & anr (2009) 10 SCC 206
Rubi Sood and another vs. Major (Retd.) Vijay Kumar Sud and others, ILR 2015 (III) HP 771
Damodar Lal vs.Sohan Devi and others (2016) 3 SCC 78
Padmakumari and others versus Dasayyan and others (2015) 8 SCC 695
A.K. Lakshmipathy (D) & Ors. versus Rai Saheb Pannalal H.Lahoti Charitable Trust & Ors., AIR 2010 SC 577
Janak Dulari Devi & Anr. versus Kapildeo Rai & Anr., AIR 2011 SC 2521
Santosh Hazari vs. Purushottam Tiwari (deceased) by LRs (2001) 3 SCC 179

For the Appellants : Mr.H.S.Rana, Advocate.
For the Respondents : Mr.Harsh Khanna, Advocate, for respondent No.1.
Mr.Janesh Gupta, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The plaintiffs are the appellants, who after having lost in both the learned Courts have filed this Regular Second Appeal assailing therein the judgments and decrees so passed against them.

2. The brief facts of the case are that plaintiff No.1 entered into an agreement with defendant No.1 on 17.04.2011 for purchase of land measuring 159.80 square metres, bearing Khasra Nos. 692 and 693, situate at Fingask Estate near Kali Bari Temple, Shimla, for a consideration of Rs.7,00,000/-. As per the agreement, the plaintiff issued a cheque No.669255 dated 21.04.2011, amounting to Rs.1,00,000/-, drawn on Punjab National Bank, Shimla, towards part payment, while the remaining sale consideration was agreed to be paid at the time of registration of the sale deed before the Sub Registrar, Shimla. The sale deed in terms of the agreement was to be executed within a period of two months. However, when defendant No.1 on 09.06.2011 presented the cheque for encashment, the same was dishonoured on the ground of 'insufficient funds'. Plaintiff No.1 thereafter issued a legal notice to defendant No.1 accusing him of adopting delaying tactics and requested him to execute the sale deed after receiving the balance amount of sale consideration before the Sub Registrar. At the same time, defendant No.1 got issued a legal notice bringing to the notice of plaintiff No.1 that the cheque had been dishonoured. It is thereafter that the plaintiff No.1 sent a demand draft bearing No.453826 dated 21.06.2011 for Rs.1,00,000/- and asked defendant No.1 to execute the sale deed within 15 days of the receipt of the notice. It is alleged that the plaintiff No.1 kept on waiting for the response of defendant No.1 and later learnt that defendant No.1 had already executed sale deed in favour of defendant No.2 on 13.07.2011 which according to him was null and void and not binding upon his rights. It is further pleaded that as per the terms and conditions of the agreement to sell, plaintiff No.1 was free to buy land in the name of any person and plaintiff No.2, who is the wife of plaintiff No.1 was an agriculturist of Himachal Pradesh and as such sale deed was to be executed in her favour. On the basis of such allegations, the plaintiffs filed a suit for specific performance of agreement, declaration and also sought permanent prohibitory injunction.

3. When put to notice, the defendants contested the suit by filing separate written statements wherein defendant No.1 took preliminary objection that the suit was bad for mis-joinder of parties as plaintiff No.2 had nothing to do with the alleged transaction and as regards plaintiff No.1, he was not entitled to purchase the land in question. Preliminary objections regarding valuation, court fee, jurisdiction and cause of action were taken. On merits, the suit

was contested on the ground that a formal writing was executed and post dated cheque of Rs.1,00,000/- was issued in favour of defendant No.1 towards consideration. However, the cheque when presented as per the direction of plaintiff No.1 came to be dishonoured on account of 'insufficient funds'. Therefore, the plaintiff No.1 himself had frustrated the contract.

4. Defendant No.2, on the other hand, filed a separate written statement raising therein various preliminary objections regarding estoppel, cause of action, maintainability, non-joinder of necessary parties, valuation etc. On merits, it was averred that the replying defendant had purchased the suit land through a registered sale deed on 13.07.2011 for valuable consideration of Rs.10,29,000/-. It was specifically averred that before purchasing the suit land due inquiries were made and as such the plea of bonafide purchaser for consideration was raised by this defendant.

5. Plaintiffs filed replications to the written statements denying the averments contained therein and reasserted the averments contained in the plaint.

6. On 21.07.2012, the following issues were framed by the learned trial Court:-

> "1. Whether defendant No.1 had entered into an agreement to sell dated 17.04.2011 with plaintiff No.1 and thereby he had agreed to sell the suit land in his favour for total consideration of Rs.7 lacs out of which, he had paid Rs.1,00,000/- by way of cheque, as alleged? OPP.
>
> 2. If issue No.1 is proved in affirmative, whether after the execution of aforementioned agreement, the defendant No.1 had failed to discharge his obligation undertaken by him vide aforementioned agreement despite of the fact that plaintiffs had remained ready and willing to execute their part of agreement, as alleged? OPP.
>
> 3. If issue No.2 is proved in affirmative, whether subsequent sale deed dated 13.07.2011 executed by defendant No.1 in respect of the suit land in favour of defendant No.2 is liable to be declared null and void, as alleged? OPP.
>
> 4. If issue No.3 is proved in affirmative, whether plaintiffs are entitled to decree of specific performance of the aforementioned agreement as alleged? OPP.
>
> 5. If issue No.2 and 3 are proved in affirmative, whether plaintiffs are also entitled to relief of perpetual injunction as prayed for? OPP.
>
> 6. Whether plaintiff No.1 was not competent to purchase the suit land, as alleged? OPD-1.
>
> 7. Whether plaintiff No.1 has not come to court with clean hands as alleged? OPD.
>
> 8. Whether plaintiffs are estopped by their act and conduct from filing the present suit, as alleged? OPD.
>
> 9. Whether defendant No.2 is bonafide purchaser for consideration without notice, as alleged, if so, its effect? OPD-2.
>
> 10. Relief."

7. The learned trial Court after recording the evidence and evaluating the same dismissed the suit filed by the plaintiffs. The appeal preferred against the judgment and decree passed by the learned trial Court, came to be dismissed by the learned first appellate Court constraining the plaintiffs to file the instant appeal.

8. It is vehemently argued by learned counsel for the appellants that the findings recorded by the learned Courts below are perverse and, therefore, require to be set aside.

9. What is 'perverse' was considered by the Hon'ble Supreme Court in a detailed judgment in ***Arulvelu and another*** *vs.* ***State Represented by the Public Prosecutor and another (2009) 10 SCC 206*** wherein it was held as under:-

"26. In M. S. Narayanagouda v. Girijamma & Another AIR 1977 Kar. 58, the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough, (1878) 1 LR 1r 331 the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In Godfrey v. Godfrey 106 NW 814, the Court defined 'perverse' as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct etc.

27. The expression "perverse" has been defined by various dictionaries in the following manner:

> *1. Oxford Advanced Learner's Dictionary of Current English Sixth Edition*
>
> *PERVERSE:- Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable.*
>
> *2. Longman Dictionary of Contemporary English - International Edition*
>
> *PERVERSE: Deliberately departing from what is normal and reasonable.*
>
> *3. The New Oxford Dictionary of English - 1998 Edition*
>
> *PERVERSE: Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.*
>
> *4. New Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition)*
>
> *PERVERSE: Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.*
>
> *5. Stroud's Judicial Dictionary of Words & Phrases, Fourth Edition*
>
> *PERVERSE: A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.*

28. In Shailendra Pratap & Another v. State of U.P. (2003) 1 SCC 761, the Court observed thus: (SCC p.766, para 8

> *"8…We are of the opinion that the trial court was quite justified in acquitting the appellants of the charges as the view taken by it was reasonable one and the order of acquittal cannot be said to be perverse. It is well settled that appellate court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. In the present case, the High Court has committed an error in interfering with the order of acquittal of the appellants recorded by the trial court as the same did not suffer from the vice of perversity."*

29. In Kuldeep Singh v. The Commissioner of Police & Others (1999) 2 SCC 10, the Court while dealing with the scope of Articles 32 and 226 of the Constitution observed as under: (SCC p.14, paras 9-10)

> *"9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny.*
>
> *10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."*

30. The meaning of 'perverse' has been examined in H. B. Gandhi, Excise and Taxation Officer-cum- Assessing Authority, Karnal & Others v. Gopi Nath & Sons & Others 1992 Supp (2) SCC 312, this Court observed as under: (SCC pp. 316-17, para 7)

"7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

10. What is 'perverse' has further been considered by this Court in ***RSA No.436 of 2000***, titled ***'Rubi Sood and another*** *vs.* ***Major (Retd.) Vijay Kumar Sud and others****,* decided on 28.05.2015 in the following manner:-

"25….. A finding of fact recorded by the learned Courts below can only be said to be perverse, which has been arrived at without consideration of material evidence or such finding is based on no evidence or misreading of evidence or is grossly erroneous that, if allowed to stand, it would result in miscarriage of justice, is open to correction, because it is not treated as a finding according to law.

26. If a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or even the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then the finding is rendered infirm in the eye of the law.

27. If the findings of the Court are based on no evidence or evidence, which is thoroughly unreliable or evidence that suffers from vice of procedural irregularity or the findings are such that no reasonable persons would have arrived at those findings, then the findings may be said to be perverse.

28. Further if the findings are either ipse dixit of the Court or based on conjectures and surmises, the judgment suffers from the additional infirmity of non application of mind and thus, stands vitiated."

11. What is 'perversity' recently came up for consideration before the Hon'ble Supreme Court in ***Damodar Lal*** *vs.****Sohan Devi and others (2016) 3 SCC 78*** wherein it was held as under:-

"8. "Perversity" has been the subject matter of umpteen number of decisions of this Court. It has also been settled by several decisions of this Court that the first appellate court, under Section 96 of The Civil Procedure Code, 1908, is the last court of facts unless the findings are based on evidence or are perverse.

9. In Krishnan v. Backiam (2007) 12 SCC 190, it has been held at paragraph-11 that: (SCC pp. 192-93)

> *"11. It may be mentioned that the first appellate court under Section 96 CPC is the last court of facts. The High Court in second appeal under Section 100 CPC cannot interfere with the findings of fact recorded by the first appellate court under Section 96 CPC. No doubt the findings of fact of the first appellate court can be challenged in second appeal on the ground that the said findings are based on no evidence or are perverse, but even in that case a question of law has to be formulated and framed by the High Court to that effect."*

10. In Gurvachan Kaur v. Salikram (2010) 15 SCC 530, at para 10, this principle has been reiterated: (SCC p. 532)

> *"10. It is settled law that in exercise of power under Section 100 of the Code of Civil Procedure, the High Court cannot interfere with the finding of fact recorded by the first appellate court which is the final court of fact, unless the same is found to be perverse. This being the position, it must be held that the High Court was not justified in reversing the finding of fact recorded by the first appellate court on the issues of existence of landlord-tenant relationship between the plaintiff and the defendant and default committed by the latter in payment of rent."*

11. In the case before us, there is clear and cogent evidence on the side of the plaintiff/appellant that there has been structural alteration in the premises rented out to the respondents without his consent. Attempt by the respondent-defendants to establish otherwise has been found to be totally non-acceptable to the trial court as well as the first appellate court. Material alteration of a property is not a fact confined to the exclusive/and personal knowledge of the owner. It is a matter of evidence, be it from the owner himself or any other witness speaking on behalf of the plaintiff who is conversant with the facts and the situation. PW-1 is the vendor of the plaintiff, who is also his power of attorney. He has stated in unmistakable terms that there was structural alteration in violation of the rent agreement. PW-2 has also supported the case of the plaintiff. Even the witnesses on behalf of the defendant, partially admitted that the defendants had effected some structural changes.

12. Be that as it may, the question whether there is a structural alteration in a tenanted premises is not a fact limited to the personal knowledge of the owner. It can be proved by any admissible and reliable evidence. That burden has been successfully discharged by the plaintiff by examining PWs-1 and 2. The defendants could not shake that evidence. In fact, that fact is proved partially from the evidence of the defendants themselves, as an admitted fact. Hence, only the trial court came to the definite finding on structural alteration. That finding has been endorsed by the first appellate court on re-appreciation of the evidence, and therefore, the High Court in second appeal was not justified in upsetting the finding which is a pure question of fact. We have no hesitation to note that both the questions of law framed by the High Court are not substantial questions of law. Even if the finding of fact is wrong, that by itself will not constitute a question of law. The wrong finding should stem out on a complete misreading of evidence or it should be based only on conjectures and surmises. Safest approach on perversity is the classic approach on the reasonable man's inference on the facts. To him, if the conclusion on the facts in evidence made by the court below is possible, there is no perversity. If not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity.

13. In Kulwant Kaur v. Gurdial Singh Mann (2001) 4 SCC 262, this Court has dealt with the limited leeway available to the High Court in second appeal. To quote para 34: (SCC pp.278-79)

"34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-à-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication — what is required is a categorical finding on the part of the High Court as to perversity. In this context reference be had to Section 103 of the Code which reads as below:

***'103. Power of High Court to determine issues of fact.**- In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,—*

> *(a) which has not been determined by the lower appellate court or by both the court of first instance and the lower appellate court, or*
>
> *(b) which has been wrongly determined by such court or courts by reason of a decision on such question of law as is referred to in Section 100."*

The requirements stand specified in Section 103 and nothing short of it will bring it within the ambit of Section 100 since the issue of perversity will also come within the ambit of substantial question of law as noticed above. The legality of finding of fact cannot but be termed to be a question of law. We reiterate however, that there must be a definite finding to that effect in the judgment of the High Court so as to make it evident that Section 100 of the Code stands complied with."

14. In S.R. Tiwari v. Union of India (2013) 6 SCC 602, after referring to the decisions of this Court, starting with Rajinder Kumar Kindra v. Delhi Administration, (1984) 4 SCC 635, it was held at para 30: (S.R.Tewari case[6], SCC p. 615)

> *"30. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. The finding may also be said to be perverse if it is "against the weight of evidence", or if the finding so outrageously defies logic as to suffer from the vice of irrationality. If a decision is arrived at on the basis of no evidence or thoroughly unreliable evidence and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, the conclusions would not be treated as perverse and the findings would not be interfered with. (Vide Rajinder Kumar Kindra v. Delhi Admn. [(1984) 4 SCC 635 : 1985 SCC (L&S) 131 : AIR 1984 SC 1805] , Kuldeep Singh v. Commr. of Police [(1999) 2 SCC 10 : 1999 SCC (L&S) 429 : AIR 1999 SC 677] , Gamini Bala Koteswara Rao v. State of A.P. [(2009) 10 SCC 636 : (2010) 1 SCC (Cri) 372 : AIR 2010 SC 589] and Babu v. State of Kerala[(2010) 9 SCC 189 : (2010) 3 SCC (Cri) 1179] .)"*

This Court has also dealt with other aspects of perversity.

15. We do not propose to discuss other judgments, though there is plethora of settled case law on this issue. Suffice to say that the approach made by the High Court has been wholly wrong, if not, perverse. It should not have interfered with concurrent findings of the trial court and first appellate court on a pure question of fact. Their inference on facts is certainly reasonable. The strained effort made by the High Court in second appeal to arrive at a different finding is wholly unwarranted apart from being impermissible under law. Therefore, we have no hesitation to allow the appeal and set aside the impugned judgment of the High Court and restore that of the trial court as confirmed by the appellate court."

12. It is settled principle of law that Section 16(c) of the Specific Relief Act provides that the specific performance of contract would not be enforced in favour of a person, who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than the terms the performance of which has been prevented or waived by the other side. Language of Section 16(c) clearly stipulates that the "readiness and willingness" has to be in spirit and substance and not in letter and form. The continuous "readiness and willingness" on the part of the plaintiff is a condition precedent to grant the relief of specific performance. Right from the date of execution till the date of decree, he must prove that he is ready and willing and has always been willing to perform his part of contract. The view that the averments "*plaintiff is and has been ready and willing to perform his part of contract*" stems out of the principle that the plaint must show the plaintiff's intention to treat the contract as subsisting. "Readiness and willingness" cannot be treated as a straightjacket formula and have to be determined from the entirety of the facts and circumstances relevant to the intention and conduct of the party concerned.

13. Adverting to the facts, it would be noticed that the learned Courts below have rejected the claim of the plaintiffs on the ground that even though the agreement/document Ex.PW-1/A/Ex.DA dated 17.04.2011 was executed, however, the cheque issued by plaintiff No.1 stood dishonoured. Therefore, there was no question of its enforcement. It is apt to reproduce para-42 of the judgment of the learned first appellate Court which reads thus:-

"42. This fact has not been disputed by the plaintiff No.1, however, he has put forward the plea that the cheque was intentionally deposited late by the defendant No.1. Admittedly the parties have replied to each other by various notices. From the respective stand of the parties, it is clear that the document Ex.PW-1/A/Ex.DA was executed on 17.04.2011and part payment was made by way of cheque No.669255 dated 21.04.2011. This payment was the condition of the document Ex.PW-1/A which has not been fulfilled by the plaintiff No.1 as it was his bounden duty of plaintiff No.1 to ensure that the cheque given by him as part payment should be honoured as and when the same would be presented for encashment. The very condition of the document Ex.PW-1/A has not been fulfilled by the plaintiff No.1 in this case. Had the plaintiff No.1 been interested to purchase the suit land, then he would have ensured the fact that the post dated cheque must be honoured on its presentation. Situation would have been otherwise, if the factum of payment of Rs.1,00,000/- (One lac) through cheque No.669255 would not have been mentioned in the document Ex.PW-1/A. It has rightly been argued by the learned counsel appearing for the plaintiffs that the payment of earnest money is not the sine-qua-non for entering into agreement to sell. The arguments of Sh.H.S.Rana, Advocate appearing for the appellants would sound only nice, if this condition regarding payment of the token amount has not been mentioned in the document Ex.PW-1/A. Judging the above facts, in the light of settled proposition of law that the decree of specific performance is discretionary in nature which is to be granted on the basis of justice, equity good conscious and fairness to both the parties. Considering the above facts, the document Ex. PW-1/A cannot be said to the agreement to sell."

14. Ex.PW-1/A reads thus:-

“<u>Agreement to sell</u>

1. First party (Seller) Krishan Kumar Gupta S/o late Sh.Harcharan Dass Gupta, R/o 19A Power House Road, Saproon, Solan, do hereby solemnly declare that our Khasra No.692 and 693 Mohal Kali Bari Shimla stands as yes.

2. Second party (Purchaser) Sh.Ved Prakash S/o Sh. Chiranji Lal, Sharma Niwas, near DAV School, Sector-4, New Shimla.

The above plot of land bearing Kh.No.693 and 692 measuring 159-80 Sq.meter stands as present. The settlement of this land is in process and in the final stage.

The seller and purchaser agreed to purchase this land for an total cash of Rs.7.00 lacs total consideration.

The registration charges will be borne 50% & 50%. If this land is further sold to 3rd party the registration charges and other expenditure will be borne by the 3rd party himself.

The purchaser has paid a token amount of Rs.1.00 lac vide cheuqe No.669255 dt. 21-4-2011 of Punjab National Bank, Shimla, balance payment will be made at the time of registration within a maximum period of 2 (two) months i.e. Rs.6.00 lacs.

If the registration is not done by the purchaser within a period of two months, the advance payment of Rs.1.00 lacs will be forfeited. If the registration is not being done by the seller, the same will be got done by the Court with cost.

If the purchaser wants to sell this land to 3rd party, the seller has got no objection.

After settlement if this plot of land increases or decreases, both the parties will have no objection and the selling amount will remain the same.

This agreement is made by us in our full sense and knowledge in presence of under mentioned witnesses at Solan dt. 17-4-2011.

-sd/-	*-sd/-*
Ved Parkash.	*(K.K.Gupta)*
	Seller.
Witness:-	*Witness:-*
-sd/-	*-sd/-*
Jagdish Sharma s/o Sh. Paras Ram Sharma, Vill.Nigam Bihar (Anji) Bye Pass Borog,Solan(HP).	*Sudhanshu Rai 19A Power House Road, Saproon,Solan.”*

15. From a close and careful reading of the aforesaid agreement, the intention of the parties can clearly be gathered that defendant No.1 agreed to sell the property only after receipt of the token money which clearly depicts that defendant No.1 had no intention to pass on the property without payment of token money. It was paid by cheque which was dishonoured when sought to be encashed by defendant No.1. Once, the intention of the parties is absolutely clear whereby defendant No.1 did not want to part with his property except after receipt of token sale consideration of Rs.1,00,000/-, it cannot be said that defendant No.1 had no intention to sell the property in dispute, rather it was plaintiff No.1, who despite having issued the cheque of Rs.1,00,000/- did not ensure that at least the said amount is available in his bank account for at least two months that had been specified in the agreement.

16. It has come on record that even the demand draft of Rs.1,00,000/- which was sent by plaintiff No.1 to defendant No.1 was sent only on 21.06.2011 i.e. after two months of date of writing/agreement dated 17.04.2011. Therefore, neither equities nor law are in favour of plaintiff No.1. Indisputably, the time for payment of prices is not necessarily a sine-qua-non to the completion of the sale if the intention is that the property should pass on registration of the sale deed. However, where a deed clearly mentions that a sum of Rs.1,00,000/- has been paid by cheque, but the cheque is dishonoured, this would amount to fraud and would, therefore, be void.

17. Adverting once again to the contents of the agreement, it would be noticed that the time for execution of the sale deed was fixed two months and in case the registration was not so done by the purchaser within a period of two months, the advance payment of Rs.1,00,000/- was to be forfeited and similarly in case the registration was not done by the seller, the same will be got done by the Court.

18. Somewhat, similar issue came up for consideration before the Hon'ble Supreme Court in ***Padmakumari and others*** *versus* **Dasayyan and others (2015) 8 SCC 695** wherein the Hon'ble Supreme Court while dealing with a suit for specific performance of agreement to sell immovable property was dealing with a aspect of plaintiff's failure to perform his part of contract within the time stipulated in the agreement i.e. to pay balance sale consideration of Rs.63,000/- within nine months from the date of execution of agreement and it was held that such failure disentitled the plaintiff to obtain decree of specific performance. It is apt to reproduce paras 19 and 20 of the aforesaid judgment which read thus:-

> "19. *The said legal contention urged on behalf of defendant Nos. 12 to 15 has been strongly rebutted by learned counsel on behalf of the plaintiff contending that the question of payment of balance consideration amount of Rs.63,000/- within nine months would have arisen after the terms and conditions of the contract agreed upon by defendant Nos. 1 to 11 if they had measured the suit schedule property. They have not discharged their part of the contract stipulated in the agreement to sell, therefore, it is urged by him that time was not the essence of the contract as defendant Nos. 1 to 11 themselves have failed to perform their part of the agreement.*
>
> *20. The said contention urged on behalf of the plaintiff is unacceptable to us that the question of taking measurement would not arise before the plaintiff perform his part of the contract regarding the balance consideration within the period stipulated in the agreement. Undisputedly, that had not been done by the plaintiff in the instant case within the stipulated time and the notice was issued by the plaintiff only after one year, therefore, the plaintiff has not adhered to the time which is stipulated to pay the balance consideration amount to defendant Nos. 1 to 11 which is very important legal aspect which was required to be considered by the Courts below at the time of determining rights of the parties and pass the impugned judgment. The Courts below have ignored this important aspect of the matter while answering the contentious Issue Nos. 1 and 2 in favour of the plaintiff and granted decree of specific performance in respect of the suit schedule property. The said finding of fact is contrary to the terms and conditions of the agreement, pleadings and the evidence on record. Accordingly, we answer the said issues in favour of defendant Nos. 12 to 15 after setting aside the concurrent finding of fact recorded by the High Court."*

19. Even otherwise, the findings recorded by the learned Courts below regarding "readiness and willingness" of the parties to perform their part of obligation are pure findings of fact and cannot be interfered with by this Court in exercise of its powers under Section 100 of the Code of Civil Procedure in the instant appeal. (*Refer*: ***A.K. Lakshmipathy (D) & Ors.*** *versus* ***Rai Saheb Pannalal H.Lahoti Charitable Trust & Ors., AIR 2010 SC 577*** & ***Janak Dulari Devi & Anr.*** *versus* ***Kapildeo Rai & Anr., AIR 2011 SC 2521***).

20. It is otherwise more than settled that the appellate Court continues to be a final court of fact and law and second appeal to the High Court lies only where there is a substantial question of law. Meaning thereby, the pure findings of fact remain immune from challenge before this Court in second appeal. It shall be apt to refer to three Judges Bench decision of the Hon'ble Supreme Court in ***Santosh Hazari vs. Purushottam Tiwari (deceased) by LRs (2001) 3 SCC 179*** wherein it was observed as follows:

> "*15……The first appellate Court continues, as before, to be a final Court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate Court is also a final Court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate Court even on questions of law unless such question of law be a substantial one.*"

21. What would be the substantial question of law was thereafter considered in para 12 of the judgment, which reads thus:

> *"12. The phrase 'substantial question of law', as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of substantial question of law by suffixing the words of general importance as has been done in many other provisions such as Section 109 of the Code or Article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In Guran Ditta & Anr. Vs. T. Ram Ditta, AIR 1928 Privy Council 172, the phrase "'substantial question of law" as it was employed in the last clause of the then existing Section 110 of the C.P.C. (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In Sir Chunilal V. Mehta & Sons Ltd. Vs. The Century Spinning and Manufacuring Co., Ltd., (1962) Supp.3 SCR 549, the Constitution Bench expressed agreement with the following view taken by a Full Bench of Madras High Court in Rimmalapudi Subba Rao Vs. Noony Veeraju, ILR 1952 Madras 264:-*
>
> > *"When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative view, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decision of the highest Court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular fact of the case it would not be a substantial question of law."*
>
> *and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial:-*
>
> > *"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative*

> *views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."*

22. Finally, in paragraph 14, the Hon'ble Supreme Court laid down the guidelines on the test of as to what is the substantial question of law, which reads thus:

> *"14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial", a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."*

23. No question of law much less substantial question of law arises for consideration in this appeal.

24. Accordingly, there is no merit in this appeal and the same is dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Hari Ram Dhiman ...Petitioner.
Versus
State of Himachal Pradesh ...Respondent.

CWP No.128 of 2017
Date of Decision : 18.7.2017

Constitution of India, 1950- Article 226- **Right to Information Act, 2005-** Section 7- Petitioner challenges the demand of postal charges for furnishing information – held that according to Rule 4(g) of Right to Information Rules, 2012 framed by the Central Government, the postal charges in excess of Rs. 50/- are payable - however, according to Rule 3 of H.P. Right to Information Rules, 2006 additional fee is payable for supply of information- the authorities are entitled to demand additional fee for the supply of information, which includes the postal charges as well - the State cannot be directed to bear the burden of postal charges in lakhs of application- petition dismissed. (Para-5 to 17)

For the Petitioner	:	Petitioner in person.
For the Respondent	:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocates General, and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

Petitioner makes out a grievance that action of the authorities in insisting for payment of postal charges for furnishing information, under the provisions of the Right to Information Act, 2005 (hereinafter referred to as the Act), is ultra vires, unconstitutional and illegal.

2. The Act came to be enacted with the solitary object of setting up a practical regime of right to information so that citizens could secure access to information, which was under the control of public authorities, so that transparency and accountability in the working of every public authority could be promoted. The constitution of a Central Information Commission and State information Commissions and for matters connected therewith or incidental thereto was provided for.

3. India is a Democratic Republic. Object of the Act postulates that a democracy requires an informed citizenry and transparency of information, which are vital to its functioning and also to contain corruption and to hold Governments and their instrumentalities accountable to the governed. The Act harmonizes the conflicting interests. Optimum use of physical resources and preservation of confidentiality of sensitive information being one of them.

4. It is with this backdrop, the Act came to be notified on 21.6.2005.

5. Now under the Act, every public authority is under an obligation to maintain all of its records duly catalogued and indexed in a manner and the form which facilitates the right to information under the Act and ensures that all records that are appropriate to be computerised are, within a reasonable time and subject to availability of resources, computerised and connected through a network all over the country on different systems so that access to such records is facilitated.

6. Section 6 enables a person to obtain information under the Act. Such request made, by virtue of Section 7, is required to be processed and information furnished, in accordance with law, upon payment of fee, so prescribed under the Act.

7. Sub-section (3) of Section 7 of the Act stipulates payment of additional fee by the applicant.

8. Sections 27 & 28 of the Act empower the appropriate Government and competent authority to frame Rules, more specifically that of payment of fee, payable for seeking information under the Act.

9. Noticeably, the Central Government notified Rules, known as Right to Information Rules, 2012. Clause (g) of Rule 4 prescribes that fee for providing information under sub-sections (1) and (5) of Section 7 of the Act shall be charged at the rate "so much of postal charge involved in supply of information that exceeds fifty rupees". Thus, if the postal charges are less than Rs.50/-, no fee is payable.

10. However, in exercise of its Rule making power (sub-section (1) of Section 27 of the Act), the State of Himachal Pradesh, being the appropriate Government, has also framed Rules, known as Himachal Pradesh Right to Information Rule, 2006 (hereinafter referred to as State Government Rules).

11. For the purpose of adjudication of the present *lis*, relevant Rules are reproduced as under:

> "3. Application for seeking information:- (1) Any person seeking information under the Act shall make an application in Form 'A' to the Public Information Officer/Assistant Public Information Officer accompanied by fee prescribed in rule 5 and the Public Information Officer/ Assistant Public Information Officer

shall duly acknowledge the receipt thereof and shall enter the particulars in Part I of the Application Register maintained for the purpose in Appendix I.

(2) Except in the case of an applicant who is determined by the State Government as being below poverty line, the application shall be accepted only if it is accompanied by a challan in support of payment of the requisite application fees as specified in rule 5. A separate application shall be made in respect of each subject and in respect of each year to which the information relates.

(3) When the information sought for is ready and requires payment of additional fee, if any, the Public Information Officer/ Assistant Public Information Officer shall communicate to the applicant the fact in Form 'B' specifying the additional fee to be paid, on his address given in the application. The particulars of information being supplied shall be entered in Part II of the Application Register.

(4) When the information is ready the Public Information Officer/Assistant Public Information Officer will inform the applicant in Form 'C'.

(5) Any information supplied under sub rule (4) shall be in the language available in the office record."

"5. Charging of fee:- (1) Except in the case of persons who are below poverty line as determined by the State Government, the Public Information Officer/Assistant Public Information Officer shall charge the fee for supply of information at the following rates, namely:-

	Description of Information.	Price/Fees in Rupees
1	Fee alongwith application.	Rs.10 per application.
2	Where the information is available in the form of a priced publication.	On printed price.
3	For other than priced publication.	Rs.10 per page of A-4 size or smaller and actual cost subject to minimum of Rs.20 per page in case of larger size.
4	Where information is available in electronic form and is to be supplied in electronics form e.g. Floppy, CD etc.	Rupees 50 per floppy and Rs.100 per CD
5	Fee for inspection of Record/document	Rs.10 per 15 minutes or fraction thereof.

(2) Every page of information to be supplied shall be duly authenticated giving the name of the Applicant (including below poverty line status if that is the case), and shall bear the dated signatures and seal of the concerned Public Information Officer/ Assistant Public Information Officer supplying the information.

(3) Fees/Charges shall be deposited in a Government Treasury under the head of account "0070 - OAS, 60 - OS, 800 - OR, 11 - Receipt head under Right to Information Act, 2005". Accruals into this head of account may be placed in a separate fund by way of grant-in-aid for furthering the purposes of the Act, including purchase of equipment and consumables, providing training to staff etc."

12. Petitioner wants the Court to hold that since no fee towards postal charges is specifically prescribed in Rule-5 and since the Rules framed by the Central Government also do

not require payment of postal charges, in excess of Rs.50/-, the authority should not insist on payment of postal charges, be it more or less than Rs.50/-. Emphasis is laid on the fact that fee can be charged only and only if there is a charging section.

13. Firstly, what needs to be ascertained is as to whether there is any conflict between the Rules framed by the Central Government and the State Government. Legislative competence to frame Rules is there. Rules so framed by the Central Government pertain to and are operative only to the legislative extent and the authority to which the Central Government exercises its power. It definitely does not exercise its power under the Act, insofar as the State Government is concerned. The State Government has not adopted the Rules so framed by the Central Government. To the contrary, the State has framed its own Rules. There is no conflict between the ambit, scope and applicability, insofar as the two Rules are concerned. In any event, there is no challenge to the Rules.

14. This takes us to the next issue, as to whether the State/authorities are well within their right to charge fee towards postal charges.

15. Bare reading of Rule-5 of State Government Rules reveals that no fee is prescribed for postal charges, but then this Rule pertains only to preparation of record and not supply thereof, through postal services. This Rule itself provides for payment of additional fee.

16. Sub-rule (3) of Rule 3 of the State Government Rules specifically provides for payment of additional fee.

17. Thus, in our considered view, the authorities are well within their right to ask for postal charges, as additional fee, under the State Government Rules. After all, the information sought is to be communicated, in writing and not by electronic mode but through postal services. If an applicant is seeking information he must pay for it. The Act does not prohibit charging of fee or prescribe furnishing of information free of charge. After all, the State also has limited fiscal resources. It can be said that after all, the mighty State can afford payment of postal charges, which are meager in amount, but then issue is not restricted to a single person. Several applications, not in thousands but in lakhs, are being filed and the State cannot be allowed to bear the burden of postal charges.

Hence, for all the aforesaid reasons, present petition is dismissed. Pending application(s), if any, also stand disposed of.

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

Jagarnath ....Petitioner.
Versus
State of H.P & Another ....Respondents.

Cr.MMO No. 179 of 2017.
Decided on: 18th August, 2017

Code of Criminal Procedure, 1973- Section 210- A case was registered against the petitioner for the commission of offence punishable under Section 354 of I.P.C. – another case has been filed by the petitioner against the father of the prosecutrix – a prayer was made to consolidate two cases, which was allowed – held that no prejudice would be caused to the petitioner by clubbing the two cases – the order passed by Learned Special Judge upheld and petition dismissed. (Para-2 to 4)

For the appellant : Mr. Lovneeesh Kanwar, Advocate.
For the Respondents : Mr. Pramod Thakur, Additional Advocate General for respondent No.1.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

The order under challenge in this petition has been passed by learned Special Judge, Mandi in an application filed under Section 210 of the Code of Criminal Procedure registered as Cr.M.A. No.1A of 2017 by accused Prem Lal in Sessions case No.4 of 2017. The case came to be instituted consequent upon FIR No.214 of 2015 registered in Police Station, Sarkaghat at the instance of the petitioner herein. The applicant-accused (respondent No.2 herein) is facing trial before learned Special Judge, Mandi, H.P.

2. Admittedly against the petitioner herein, a case was registered on the same day at the instance of one Neelam Devi wife of Praveen Kumar under Section 354 of the Indian Penal Code vide FIR No.215/15. Said Smt. Neelam Devi, is the daughter of accused (respondent No.2 herein) Prem Lal in Sessions case No.4 of 2017, registered at the instance of the petitioner herein.

3. As per the allegations in the FIR, the complainant immediately after joining of her duties on 5.7.2014, as Data Entry Operator in the office of the petitioner, he asked for her cell number. She had given her cell number to him. He thereafter, started making calls to her even during odd hours. As and when she was called inside his office used to behave abnormally with her and also using obscene language. On 22.8.2015, he allegedly called her to his office and asked her to set his computer right. His complaint was that e-mails on the computer system were not clearly visible. She while checking his computer system was, however, caught hold by him from backside and started pressing her breasts. She anyhow or other, could manage her escape from him and came outside. It appears that the petitioner was manhandled by accused Prem Lal, the father of aforesaid Neelam Devi only on account of the incident of dated 22.8.2015 with her. Therefore, it is in the ends of justice that criminal cases originated out of FIR Nos.214/15 and 215/15, are tried and decided together in order to avoid conflicting findings and reproduction of evidence.

4. Though it is argued on behalf of the petitioner that two FIRs not constitute cross-cases, however, without any substance for the reason that the assault on the petitioner prima-facie is the outburst of his alleged molestation of Neelam Devi, aforesaid. Therefore, cases originated out of two FIRs have to be tried and decided together. The Court below as such has not committed any irregularity or illegality by requisitioning the record of criminal case No.229 of 2015, originated out of FIR No.215/15, from the Court of learned Additional Sessions Judge-II, Mandi Camp at Sarkaghat and tagged the same with case No.4 of 2017, originated out of FIR No.214/15. No prejudice is likely to be caused to the petitioner by the order under challenge. The same, as such, is affirmed and this petition, being devoid of merits, is dismissed. Pending application(s), if any, shall also stand disposed of.

5. The parties are directed to appear in the Court of Special Judge, Mandi on ***30th August, 2017***, the date stated to be already fixed.

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

Court on its own motion
Versus
Bakshi Ram …..Respondent.

Cr. MP (M) No. 1500 of 2016.
Decided on: 22nd August, 2017

Code of Criminal Procedure, 1973- Section 340- The respondent had made an incorrect statement before the Court – show cause notice was issued by the Court as to why proceedings be not initiated against him for making a false statement – respondent filed a reply that he had put the signatures at the instance of the police and the passengers as the bus was getting late - the reply filed by the respondent is not satisfactory – prima facie respondent has committed an offence punishable under Section 193 of I.P.C.- Registrar (Judicial) directed to file a complaint against the respondent before CJM. (Para- 2 to 6)

For the petitioner	:	Court on its own motion.
For the Respondents	:	Mr. Vivek Chandel, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Respondent Bakshi Ram (PW-6) is one of the witnesses in Sessions Trial No.51 of 2010 having arisen out of FIR No.143/10, registered in Police Station, Balh, District Mandi, H.P. against one Arun Kumar on 26.4.2010, under Section 20 of Narcotic Drugs and Psychotropic Substances Act, 1985.

2. Accused Arun Kumar was convicted by learned Special Judge, Mandi, District Mandi vide judgment dated 17.4.2015. In Criminal Appeal No.181 of 2015, preferred by the accused-convict, though the findings of conviction recorded against him was affirmed by us, however, he was sentenced to the imprisonment, he had already undergone and the fine was also reduced to Rs.10,000/- from Rs.1,00,000/- vide judgment dated 21.10.2016. At the same time, we also formed an opinion that the respondent herein has deposed falsely while in the witness-box as PW-6 to the reasons best known to him. He, as such, prima facie, was found to have committed an offence within the meaning of Section 193 of the Indian Penal Code. We also deemed it appropriate to make a complaint in writing to the Magistrate having jurisdiction over the matter, in terms of the provisions contained under Section 340 of the Code of Criminal Procedure against the respondent, after holding preliminary inquiry in the matter and affording an opportunity of being heard to him. We have dealt with this aspect of the matter in our judgment passed in the main appeal as under:

> "12……………..PW-6 Bakshi Ram is the conductor of the bus, whereas, Hari Singh was its driver. As per prosecution case which even has been admitted by the convict also while answering question No. 3 in his statement recorded under Section 313 of the Code of Criminal Procedure, the bus reached at village Nagchala where the police had laid the 'nakka' at 4.15 p.m. No doubt, PW-6 Bakshi Ram who has been associated as an independent witness has stated that the bus reached at the place of 'nakka' i.e. Nagchala at 4.00 p.m., however, when he had already issued the ticket to the convict at 16:07:37 hours (04:07:37 pm) well before the arrival of the bus at Nagchala, as is apparent from the xeroxed copy of the original ticket Ext. PA allowed to be placed on record by learned defence counsel, how the bus could have reached at Nagchala at 4.00 p.m. The ticket has been recovered from the convict vide memo Ext. PW-6/C. PW-6 though has denied this aspect of the prosecution case, however, in the same breath when he has admitted that ticket Ext. PA was issued by him, his testimony to the contrary is absolutely false. It would not be improper to conclude that he has deposed falsely in connivance with the convict may be for some extraneous considerations. The bus was fully packed because as per admitted case of the parties on both sides, some passengers were even standing also in the bus. The prosecution case that during the checking of the bus the convict occupying seat No. 36 was found to be holding a bag on his legs find support from the documentary evidence such as seizure memo Ext. PW-6/A and

the rukka Ext. PW-7/A. Such version even finds corroboration from the testimony of PW-1 HC Kamal Kant and the I.O. PW-9. The seizure memo Ext. PW-6/A and other documents such as Ext. PW-6/B, Ext. PW-6/C and Ext. PW-6/D bear signature of Hari Singh, the driver of the bus and its conductor Bakshi Ram PW-6. Bakshi Ram PW-6 has admitted so while in the witness box. Sh. Bakshi Ram in his cross-examination conducted on behalf of the prosecution has stated that the contents of these documents were not gone into by him when put his signatures thereon. He admits that he is matriculate and can read as well as understand Hindi language. He is a conductor, therefore, he is not expected to have signed the documents, that too, in a case of this nature involving the freedom and liberty of an individual without going through the contents thereof. Being so, to our mind he is a liar and to the reasons best known to him, he has concealed the factual position from the Court. Neither in his examination-in-chief nor in his cross-examination conducted on behalf of the prosecution, he has no-where stated that papers on which aforesaid documents i.e. Ext. PW-6/A, Ext. PW-6/B, Ext. PW-6/C and Ext. PW-6/D have been reduced into writing were blank………"

xxx xxx xxx

xxx xxx xxx

xxx xxx xxx

"21. Before parting with the case, we would be failing in our duty, if ignore the manner in which PW-6 Bakshi Ram, the conductor of the bus has conducted himself while in the witness box. Taking note of the statement, he made while in the witness box, we have prima-facie formed an opinion that he is a liar and has not disclosed true facts to the Court. Admittedly, he was on duty as conductor with HRTC bus intercepted by the police at the place of 'nakka' at village Nagchala. As per the prosecution case, during the checking of luggage charas was recovered from the bag which the convict was holding on his legs. As we already observed in earlier part of this judgment, PW-6 is a liar and has deposed falsely to help the convict to the reasons best known to him, may be for some extraneous considerations. In our opinion, he while in the witness box has made a false statement, most probably, at the behest of the convict. When he has issued the ticket Ext. PA at 16:07:37 hours (04:07:37 pm) i.e. in all probability at Mandi or on the way at a place behind Nagchala, how he could have said while in the witness box that the bus reached at Nagchala at 4.00 p.m. that too, well before the issuance of ticket to the convict. According to him, the charas was recovered from the bag on the spot itself. When no evidence to the contrary that the police had enmity with the convict has come on record, it is proved that the charas was recovered from the bag which the convict was carrying with him. His denial to this part of the prosecution case itself speaks in plenty about his conduct and credibility. In his cross-examination conducted on behalf of the convict, he has introduced a new story that when the bag from which the charas recovered was not claimed by any passenger, the police directed the driver to take the bus to police station. Such plea in his defence raised by the convict is an afterthought because had it been so, he could have examined someone to substantiate this aspect of this matter. Had the bus been taken to police station, some record like entries in the log book of the bus etc., would have been there with the HRTC. Otherwise also, some evidence that permission was sought by the driver to take diversion from Ner Chowk for driving the bus to police station should have been there and produced during the course of trial. He has admitted the issuance of ticket, however, denied the same having been taken into possession in his presence, irrespective of he has admitted his signature on the recovery memo Ext. PW-6/C. It was no-where his version in his examination-in-

chief or in his cross-examination conducted on behalf of the prosecution that he along with the driver of bus Hari Singh were made to sign blank papers. Interestingly enough, in his cross-examination conducted on behalf of the prosecution, he has admitted his signature on the seizure memo Ext. PW-6/A, personal search of accused vide memo Ext. PW-6/B, search of police officials given vide memo Ext. PW-6/C and arrest of accused vide memo Ext. PW-6/D. When he tells us that he has not gone through the contents of these documents, it leads to the only conclusion that contents were duly written in these documents. He is a matriculate and as per his version, not only he can read and write Hindi but he can also understand the same. When he is conductor, it cannot be expected that he would have signed blank papers, that too, at the instance of police and in a case of recovery of charas involving the freedom and liberty of an individual. Therefore, to our mind PW-6 has intentionally and deliberately made a false statement with a view to screen the evidence and to save the convict from the prosecution and as such liable himself to be dealt with in accordance with law.

22. Section 340 of the Code of Criminal Procedure takes care of such a situation. The provisions contained under the Section ibid reveal that if on an application made to it or otherwise, the Court is of the opinion that it is expedient and in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code, which appears to have been committed in relation to proceedings of a case in that Court, the Court shall hold a preliminary inquiry and after recording a finding that by producing a document or giving a statement in evidence, an offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code is made out, order to make a complaint in writing to a Magistrate of the first class having jurisdiction over the matter.

23. Section 340 of the Code of Criminal Procedure Code contemplates a preliminary inquiry to be conducted by the Court to form an opinion that it is expedient and in the interest of justice to hold inquiry into the offence which appears to have been committed. It is not mandatory for the trial Court to hold preliminary inquiry, because it has the opportunity to see the witness while in the witness box and to observe his demeanour. We, however, feel that the appellate Court, having no such opportunity to observe the demeanour of the witness, should hold an inquiry and give an opportunity of being heard to him, before forming an opinion that an offence within the meaning of clause (b) of sub-Section(1) of Section 195 of the Code of Criminal Procedure appears to have been committed by him. It is only thereafter, an order qua filing a complaint, as contemplated under Section 340 of the Code of Criminal Procedure, should be passed.

24. Therefore, before initiating any action against PW-6 Bakshi Ram, we deem it expedient and in the interest of justice to call upon him to show cause as to why an action be not initiated against him in the light of the observations in this judgment. Consequently, there shall be a direction to the Registry to issue show cause notice to PW-6 Bakshi Ram for ***30.12.2016*** and the proceedings be registered against this witness separately. A copy of judgment be also sent to him alongwith show cause notice. Office of learned Advocate General to collect notice from the Registry of this Court for onward transmission to the Superintendent of Police, Mandi, for effecting service thereof upon the witness aforesaid well before the date fixed. The record of the trial Court be retained for being referred to at the time of further consideration of the matter, after taking on record the version of the witness, to be referred to as 'the respondent' in the proceedings ordered to be drawn separately against him."

3. Consequent upon the above directions, notice to show cause was issued to the respondent herein. In response thereto he filed reply. The relevant portion whereof reads as follows:

> "2. That the replying respondent is a simple layman having no knowledge of technicalities of law. Replying respondent with bonafide intention helped the police official and at their instance appended his signature as per the directions of police officials. Since the passengers were getting late and making pressure over the driver, conductor and police party to do hurry and continue the journey, the police official taken the signatures of the driver conductor and some passengers on some blank papers and clothes. The reply respondent signed the documents at the instance of police officials in good faith. It is respectfully submitted that the replying respondent appeared first time in his life as witness in the court of law and before police and having no knowledge of the technicalities of law. It is admitted that the contraband has been found and recovered in the bus No.HP65 1768 and enquired about the bag from the passengers and staff of the bus and police detained five to several passenger in the Police Station for investigation.
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> 3. That it is submitted that the replying respondent stated the truth before learned trial court below and further explained in his statement that how the signature of the replying respondent was got appended by the police during investigation. The replying respondent signed the blank documents in good faith at the instance of police party and while appeared before the learned court in pursuance to summons issued by the trial court, the replying respondent/witness No.6 deposed true facts on oath before the ld. Trial Court. The replying respondent admitted the fact that ticket Ex.PA is issued by him but replying respondent do not know whether Ex.PA was given to the accused or any other person. The replying respondent admitted his signature on the exhibits PW-6/A, Ex.PW-6/B, Ex.PW-6/C and Ex.PW-6/D and further deposed in his cross examination that he signed the aforesaid exhibits/documents in blank at the instance of Police and having no knowledge about the contents of aforesaid exhibits. The replying respondent has not actively participated the complete investigation hence, failed to state the facts which were not witnesses by him. The replying respondent has stated true facts on oath from his personal knowledge in his statement before ld. Trial Court."

4. The explanation so forthcoming is neither plausible nor reasonable for the reason that normally a man of ordinary prudence is not expected to act at the behest of anyone else, more particularly, at that of the Police, investigating a criminal case involving high stakes. As a matter of fact, we have considered and discussed the role of the respondent as a witness in detail in the judgment and formed an opinion that a person like the respondent is not expected to sign the document that too during the search and seizure conducted by the Police in a case registered under Narcotic Drugs and Psychotropic Substances Act. Therefore, prima-facie the respondent has committed an offence punishable under Section 193 of the Indian Penal Code. In terms of the provisions contained under Clause 'b' (i) of sub-section (1) of Section 195 of the Code of Criminal Procedure, the cognizance of such an offence can only be taken on a complaint to be filed in writing against a person found to have indulged in the commission of offence punishable under the provisions of the Indian Penal Code mentioned, which in the case in hand is Section 193 IPC, in the Court of Judicial Magistrate 1st Class having jurisdiction to entertain and try the same.

5. In view of what has been said hereinabove, the respondent has deliberately deposed falsely and made contradictory statement while in the witness box and thereby perjured and his prosecution, as such, is expedient in the interest of justice. Therefore, we hereby direct the Registrar (Judicial) of this Court to file a complaint against respondent

Bakshi Ram (PW-6) in the Court of Chief Judicial Magistrate, Mandi, in terms of Section 340 read with Section 195 (b) (1) of the Code of Criminal Procedure. The respondent to furnish personal bond in the sum of Rs.10,000/- to the satisfaction of learned Registrar (Judicial) of this Court today itself, undertaking thereby to appear in the Court below as and when summoned in the complaint. These proceedings stand disposed of accordingly.

6. The observations, if any, hereinabove shall remain confined to the disposal of these proceedings alone and shall have no bearing in the complaint to be filed against the respondent, which has to be decided on merits, after affording opportunity of being heard to the parties and uninfluenced thereby.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Hem Raj …Petitioner.
Versus
State of H.P. & others …Respondents.

CWP No.1871 of 2017
Date of Order: August 22, 2017

Constitution of India, 1950- Article 226- The appointment of M as member of H.P. Public Service Commission was challenged and it was prayed that directions be issued for framing guidelines for appointing the chairman and member of Commission- it was contended that petitioner is a student of law and has no locus standi to file the present petition- held that the petitioner had taken information under Right to Information Act and found that no prescribed procedure for appointment to the constitutional post was followed – the petitioner is not a busy body – his petition is not motivated or filed for extraneous consideration- the issued raised by the petitioner is of vital importance – the objection overruled and notice ordered to be issued.

(Para-8 to 27)

Cases referred:

Hari Bansh Lal v. Sahodar Parasad Mahto & others, (2010) 9 SCC 655
Dr. B. Singh v. Union of India & others, (2004) 3 SCC 363
Ashok Kumar Pandey v. State of W.B., (2004) 3 SCC 349
State of Punjab v. Salil Sabhlok & others, (2013) 5 SCC 1
Inderpreet Singh Kahlon v. State of Punjab, (2006) 11 SCC 356
R/o Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission, (2000) 4 SCC 309
Ashok Kumar Yadav v. State of Haryana, (1985) 4 SCC 417
Dr. P. Nalla Thampy Thera v. Union of India & others, (1992) 4 SCC 305
Sheonandan Paswan v. State of Bihar & others, (1987) 1 SCC 288
Manoj Narula v. Union of India, (2014) 9 SCC 1

For the Petitioner : Mr. Rajnish Maniktala, Advocate.

For the Respondents : Mr. Shrawan Dogra, Advocate General, with Mr. Anoop Rattan, Mr. Romesh Verma, Additional Advocates General; Mr. J.K. Vema & Mr. Kush Sharma, Deputy Advocates General, for respondent No1.

Mr. D.K. Khanna, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Order

By way of a preliminary objection, so raised by the learned Advocate General, we are called upon to decide the issue of locus of the present petitioner, in filing the present petition.

2. Petitioner lays challenge to the appointment of Ms Meera Walia (hereinafter referred to as the private respondent), as a Member of the Himachal Pradesh Public Service Commission (hereinafter referred to as the Commission). Also, in the alternative, a prayer is made, seeking direction to the State for framing guidelines for appointing the Chairman and Members of the Commission.

3. Petitioner, inter alia, alleges that no criteria stands prescribed for appointment of Chairman and Members of the Commission; there has been no deliberative process in the appointment of private respondent; per se the appointment, without any deliberative process, as per the desire of Hon'ble the Chief Minister of the State of Himachal Pradesh, is in violation of rules of conduct of business of the Government and in excess of the executive power of the State; appointment made is without verifying the antecedents of private respondent, who allegedly is not a person of impeccable integrity to be considered for appointment to a constitutional post.

4. It is not disputed that petitioner is a student of law. A reading of the petition reveals that prior to the filing of the instant petition, with regard to process of selection and appointment of respondent, petitioner had obtained information, under the provisions of the Right to Information Act, 2005 (hereinafter referred to as RTI Act),.

5. Prayer is twofold - (a) quash the order of appointment, which obviously is with a prayer for the issuance of the writ of quo warranto, (b) direction to frame guidelines and lay down parameters for appointment of Chairman and Members.

6. Learned Advocate General points out that the letter and spirit of Article 316 of the Constitution of India (hereinafter referred to as Constitution) stands complied with and there is no breach of any of the conditions so prescribed therein. Further, the apex Court in *Hari Bansh Lal v. Sahodar Parasad Mahto & others,* (2010) 9 SCC 655, has dealt with the maintainability of Public Interest Litigation and deprecated the practice of filing of frivolous petitions in matters relating to appointments to public offices (Paras 11 to 19). Our attention is also invited to the earlier decisions rendered by the Apex Court in *Dr. B. Singh v. Union of India & others,* (2004) 3 SCC 363; and *Ashok Kumar Pandey v. State of W.B.,* (2004) 3 SCC 349.

7. Writ, in the nature of quo warranto, by a student, pursuing his studies in the subject of law, is not maintainable, is primarily what stands argued.

8. Chapter-II of Part-XIV of the Constitution deals with the establishment of and appointment of President and Chairman/Members of the Public Service Commission by the Union and the State Governments. Appointments are made by virtue of and in consonance with Article 316 of the Constitution. Any person appointed as Chairman or a Member can be removed or suspended from office by virtue of Article 317. Article 318 enables the State to regulate and make provisions with regard to conditions of service of Members and staff of the Public Service Commission.

9. In *State of Punjab v. Salil Sabhlok & others,* (2013) 5 SCC 1, to which our attention is invited by Mr. Maniktala, the Apex Court had the occasion to deal with the issue of appointment of Chairman of State Public Commission (State of Punjab). The Court specifically framed the question: "whether High Court in exercise of its writ jurisdiction under Article 226 of the Constitution can lay down the procedure for the selection and appointment of the Chairman of the State Public Service Commission and quash his appointment in appropriate cases"? The question, so framed, came to be answered in the affirmative.

10. In *Salil Sabhlok (supra),* appointment of Chairman to Punjab Public Service commission was assailed by a practicing Lawyer of Punjab and Haryana High Court, by way of Public Interest Litigation. In Paras 88 & 89 of the Report, the Court observed as under:

> "88. The significance of these decisions is that they prohibit a PIL in a service matter, except for the purposes of a writ of quo warranto. However, as I have concluded, the appointment of the Chairperson in a Public Service Commission does not fall in the category of a service matter. Therefore, a PIL for a writ of quo warranto in respect of an appointment to a constitutional position would not be barred on the basis of the judgments rendered by this Court and mentioned above.
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> 89. However, in a unique situation like the present, where a writ of quo warranto may not be issued, it becomes necessary to mould the relief so that an aggrieved person is not left without any remedy, in the public interest. This Court has, therefore, fashioned a writ of declaration to deal with such cases. Way back, in *T. C. Basappa v. T. Nagappa*, 1955 1 SCR 250 it was said:
>
> > "6. The language used in articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions of our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges.""

11. Now significantly, by referring to and relying upon its earlier decisions in *Inderpreet Singh Kahlon v. State of Punjab,* (2006) 11 SCC 356; *In R/o Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission,* (2000) 4 SCC 309; and *Ashok Kumar Yadav v. State of Haryana,* (1985) 4 SCC 417, the Court reiterated the principle that only persons of integrity can be considered for selection and appointment to a constitutional post or public office of significance and importance.

12. A four-Judges Bench of the Apex Court in *Ashok Kumar Yadav (supra)*, while dealing with selection and appointment of Member of Public Service Commission, clarified that the posts are to be manned by "competent, honest and independent persons of outstanding ability and high reputation who command the confidence of the people and who would not allow themselves to be deflected by any extraneous considerations from discharging their duty of making selections strictly on merit".

13. When the issue relates to the appointment of a person to a constitutional post, the locus that of the student, who is pursuing law, in our considered view, cannot be assailed. It is not that a fishing or roving enquiry is sought for by the petitioner, as prior to the filing of the instant petition, he has obtained relevant information from the authorities, under the provisions of the RTI Act. Allegedly, finding the appointment to be illegal or at least questionable, in the absence of prescribed procedure for appointment of persons to the constitutional posts, petitioner has filed the instant petition, inter alia, claiming relief of quo warranto.

14. In our considered view, reliance on the decision in *Hari Bansh Lal (supra)* is misplaced. No doubt, as was held by the Court, strangers and a busybody cannot be allowed to indulge into misadventure of assailing appointments to public posts, but this was in the backdrop where on merit, the Court found the person so appointed to be suitable and having been appointed in accordance with and not contrary to the statutory provisions.

15. In *Ashok Kumar Pandey (supra),* the Court emphasized the need of striking balance between two conflicting interests – (a) a person indulging in wild and reckless allegations besmirching the character of others, (b) avoidance of public mischief so filed with oblique motives. In fact, in the very same report, the Court dwelt on the question as to what really is "public interest". It need not be an interest gratifying the curiosity or a love for information and amusement, it must have some interest by which legal rights or liabilities are affected. It should also be such which a citizen generally is concerned with, like the affairs of the local, State or National Government.

16. Relying on *Dr. P. Nalla Thampy Thera v. Union of India & others,* (1992) 4 SCC 305, the Court clarified "PIL" to mean a legal action initiated in a Court of law for enforcement of public or general interest, in which the public or a class of the community have some interest by which their legal rights and liabilities are affected.

17. In *Dr. B. Singh (supra),* the Apex Court only reiterated the aforesaid position, by further clarifying that it is the duty of the Court to ensure that the complaint so filed is prima facie genuine and aimed at redressal of public wrong or public injury.

18. A Constitution Bench (Five Judges) of the Apex court in *Sheonandan Paswan v. State of Bihar & others,* (1987) 1 SCC 288, in fact held the proceedings initiated for the purpose of punishment to the offender in the interest of society to be maintainable by a public spirited person, including a political opponent.

19. A Constitution Bench (Five Judges) of the Apex Court in *Manoj Narula v. Union of India,* (2014) 9 SCC 1, has held as under:

> "82. In a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as primary one and any other interest secondary. The maxim Salus Populi Suprema Lex, has not only to be kept in view but also has to be revered. The faith of the people is embedded in the root of the idea of good governance which means reverence for citizenry rights, respect for Fundamental Rights and statutory rights in any governmental action, deference for unwritten constitutional values, veneration for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decisions are taken by the decision making authority with solemn sincerity and policies are framed keeping in view the welfare of the people, and including all in a homogeneous compartment. The concept of good governance is not an Utopian conception or an abstraction. It has been the demand of the polity wherever democracy is nourished. The growth of democracy is dependant upon good governance in reality and the aspiration of the people basically is that the administration is carried out by people with responsibility with service orientation."

20. At this stage, it cannot be said that the petition is motivated or so filed with extraneous considerations, for the objection with regard to maintainability of the petition came to be raised prior to issuance of notice.

21. In the instant petition, challenge to the appointment of private respondent is alleged on the ground that at certain stage, i.e. in the year 2014, challan for having committed offences under the provisions of the Prevention of Corruption Act, 1988 was filed against the private respondent, in relation to which, eventually, closure report was filed. Also, prosecution sanction, in relation to the very same crime, never came to be accorded by the appropriate authority in the case of her husband, who allegedly is working in the Office of the Hon'ble Chief Minister of the State of Himachal Pradesh.

22. At this stage, we are deliberately not going into the correctness of the factual matrix, as also the aspect of ineligibility or unsuitability of private respondent, who stands appointed as a Member of the Commission.

23. However, applying the law discussed supra to these alleged facts, can it be said that the petitioner, a student of law, has no locus to enforce the rule of law. In our considered view, the answer has to be in the negative. Petitioner, per se, cannot be said to be a stranger in pursuing the enforcement of rule of law and justice.

24. We clarify that we have not expressed any opinion on the merits of the petition, as also suitability of private respondent No.3 - Ms Meera Walia as a Member of the Commission.

25. However, the issues raised by the present petitioner are of vital public importance and significance, hence, the petition cannot be dismissed in limine, solely on the ground of locus, for we have already held that a student of law can have as much interest in the enforcement and upholding the rule of law as an Advocate would have, as was so held by the Apex Court in *Salil Sabhlok (supra)*.

26. As such, we are inclined to issue notice in the petition to all the respondents.

27. Notice. Mr. Kush Sharma, learned Deputy Advocate General, and Mr. D.K. Khanna, Advocate, appear and waive service of notice on behalf of respondents No.1 and 2, respectively. Separate notice be issued to private respondent No.3. Steps for service be taken within two days. Service upon respondent No.3 be also effected through respondent No.2. Notice be made returnable for 12.9.2017.

List on 12.9.2017.

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

Hans Raj & Another …Petitioners.

Versus

Bajaj Allianz Insurance Company Ltd. & Others …Respondents.

Review Petition No. 97 of 2016.
Decided on: 24th August, 2017

Code of Civil Procedure, 1908- Order 47 Rule 1- An application for review was filed on the ground that the driving licence was issued in favour of the petitioner by the Competent Authority not only to drive light motor vehicle but also heavy goods vehicles and heavy transport vehicles throughout India- the petitioner cannot suffer for the fault of Competent Authority of issuing the licence for a period of six years instead of three years- held that the licence was issued for more than six years, whereas, it should have been legally issued for three years- owner cannot be expected to verify the validity of the licence from the issuing authority – if the judgment sought to be reviewed is allowed to remain in force, the petitioner will suffer irreparable loss and injury leading to miscarriage of justice – the petition allowed and the order passed in the petition recalled. (Para-3 to 8)

Cases referred:

United India Insurance Company Ltd. versus Lehru and Others, (2003) 3, SCC 338
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC, 217
Rajo Devi versus Kailash Giri Bus Service Society and others, 2010(1) ACJ 572
Oriental Insurance Company Limited versus Angad Kol and others, 2009 (2) ACJ, 1411

For the petitioners Mr. Desh Raj Thakur, Advocate.
For the Respondents Mr. Jagdish Thakur, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

In this petition judgment dated 9.8.2016 has been sought to be reviewed on the grounds inter alia that the findings to recover the awarded amount from the petitioners (appellants in FAO (MVA) No.14/2015) are contrary to the facts of the case and also the law laid down by the apex Court by way of various judicial pronouncements. The driving licence Ex.P-5 was issued in favour of the petitioner-appellant No.2 Subhash Chand by the competent authority not only to drive the light motor vehicles, but also heavy goods vehicles and heavy transport vehicles throughout India. While admitting that the driving licence to drive transport vehicle under Section 14(2) of the Motor Vehicles Act is required to be issued for three years, it is canvassed that the lapse, if any, on the part of the Transport Officer to issue the licence Ex.P-5 for six years, the petitioners-appellants cannot be made to suffer for that.

2. Mr. Jagdish Thakur, Advocate learned counsel representing respondent No.1-insurance Company, while inviting the attention of this Court to the provisions contained under Section 14(2) of the Motor Vehicles Act, has strenuously contended that the driving licence Ex.P-5 having been issued for a period over three years itself demonstrates that the same was not issued to drive the category of vehicles i.e. truck, a heavy transport vehicle, involved in the accident. Mr. Thakur, has also relied upon the law laid down by this Court and also the Apex Court qua this aspect of the matter.

3. On analyzing the rival submissions and also the legal position brought to the notice of this Court during the course of arguments, it would not be improper to conclude that a valid and effective driving licence to drive the category of vehicle i.e. truck involved in the accident, in the case in hand should be issued by the competent authority only for a period of three years. In the case in hand the District Transport Officer, however, has issued the driving licence Ex.P-5 for a period over three years i.e. for six years. The driving licence, however, has been issued to drive the vehicles i.e. light motor vehicles, heavy goods vehicles and heavy transport vehicles.

4. Now if coming to the law laid by the Apex Court in ***United India Insurance Company Ltd.*** versus ***Lehru and Others, (2003) 3, SCC 338***, it is held that when an owner hire a driver to drive the vehicle, he is required to check and satisfy himself that the driver is holding a driving licence. If the driving licence is produced by the driver, which, on the fact of it, looks genuine, the owner is not expected to find out whether the licence has been issued by a competent authority or not. The owner would take the test of the driver and if finds competent to drive the vehicle, to hire him as driver. It has further been observed in this judgment that the Insurance Company expects the owners to make enquiries with RTO's spread all over the country, would be a strange situation.

5. The apex Court while taking similar view of the matter in ***Pepsu Road Transport Corporation*** versus ***National Insurance Company, (2013) 10 SCC, 217*** has further held that the owner cannot be expected to go to the extent to verify the genuineness of the licence from Licencing Authority before hiring the services of the driver.

6. No doubt, a co-ordinate Bench of this Court in ***Rajo Devi*** versus ***Kailash Giri Bus Service Society and others, 2010(1) ACJ 572*** has held that as per the provisions of Section 14 of the Motor Vehicles Act, the licence to drive a transport vehicle is required to be issued only for a period of three years. As stated hereinabove, there is no quarrel qua such legal requirement, however, in view of the ratio of the judgment of the apex Court in the judgments referred supra, the owner is not required to go into the question of validity of the driving licence and if satisfied that the person being engaged as driver holding a licence and competent to drive the vehicle is sufficient to hire his services as driver. The facts in ***Oriental Insurance Company Limited*** versus ***Angad Kol and others, 2009 (2) ACJ, 1411*** are distinguishable from the case

in hand as in that case the disputed driving licence was issued only to drive light motor vehicles whereas in the case in hand the driving licence Ex.P-5, besides light motor vehicles, has also been issued for driving heavy goods vehicles and heavy transport vehicles.

7. Another contention of Mr. Thakur, learned counsel that in cross-appeal FAO (MVA) No. 404/2014 filed by the Insurance Company-respondent No.1, the quantum of compensation awarded by learned Motor Accidents Claims Tribunal, has been reduced and that the award so passed has attained finality, also does not find favour for the reason that in that appeal filed by the Insurance Company the dispute as adjudicated upon was qua the quantum of compensation and not qua the liability to pay the same. Otherwise also, the observations hereinabove in this judgment are only for the purpose of the decision of this petition and on review, the parties on both sides will be heard qua this aspect of the matter afresh.

8. In view of the discussion hereinabove, in the event of the judgment sought to be reviewed is allowed to remain inforce, the appellants-petitioners, are likely to suffer with irreparable loss and injury and in that event miscarriage of justice is also likely to be caused to both of them. This petition is accordingly allowed and the judgment dated 9.8.2016 passed by this Court in the main appeal is recalled and the appeal to be heard afresh on merits.

9. With the above observations, this petition is disposed of. The appeal be listed for hearing before appropriate Bench as per Roster of Boards.

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

Hansa Devi ....Petitioner.

Vs.

Kaushalya Devi and others ....Respondents.

CWP No.: 6234 of 2012

Date of Decision: 24.08.2017

Constitution of India, 1950- Article 226- The respondent No.1 was appointed as Aanganwari worker – her appointment was assailed by the petitioner- the appointment of respondent No.1 was set aside – an appeal was filed, which was allowed – a writ petition was filed, which was disposed of with the direction to decide the veracity of the income certificate of the selected candidate – the income certificate was upheld by Tehsildar – an appeal was filed against this order, which was dismissed – aggrieved from the order, present writ petition has been filed- held that guidelines framed by the Government provide the cut of date for ascertaining the status of family as 1.1.2004- private respondent was reflected as part of the family of her brother – the correction ws made after 1.1.2004, which is irrelevant for determining the status- petition allowed- order passed by the authorities set aside. (Para-8 to 10)

For the petitioner: Mr. Mukesh Sharma, Advocate, vice Mr. Paresh Sharma & Rajiv Rai, Advocates.

For the respondents: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondent No.1.

Mr. Vikram Thakur, Deputy Advocate, General, for respondents No. 2 and 3.

None for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

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

"A. That the Hon'ble Court may kindly be pleased to issue the writ of certiorari whereby the order dated 30.09.2011 vide Annexure P/1 passed by the learned Sub-Divisional Collector, Chachyot, in appeal or Fine No. 09/11 may kindly be quashed and set aside.

B. That the Hon'ble Court may kindly be pleased to quash the inquiry report submitted by the learned Tehsildar, Thunag, vide Annexure P/2 in pursuant to the order of learned Additional District Magistrate vide office order No. ADM/Reader/2010-59439-41 dated 10.12.2010.

C. That the Hon'ble Court may kindly be pleased to call entire record of the case.

D. That the present petition may kindly be allowed with cost."

2. Undisputed facts as they emerge from the pleadings are that respondent No. 1 was appointed as an Anganwari Worker at Anganwari Centre Gad at Seraj Janjehali, Mandi in August 2007, which appointment was assailed by the present petitioner by way of an appeal before the learned Deputy Commissioner, Mandi. Learned Deputy Commissioner, Mandi vide order dated 09.06.2008 while allowing the appeal so filed by the present petitioner, set aside the appointment of the private respondent. The order so passed by the learned Deputy Commissioner, Mandi was assailed by the private respondent further by way of an appeal before the learned Divisional Commissioner, Mandi Division, who vide order dated 12.11.2008, set aside the order so passed by the learned Deputy Commissioner, Mandi dated 09.06.2008. The order passed by the learned Divisional Commissioner, dated 12.11.2008 stood assailed by way of a writ petition before this Court, i.e., CWP No. 786 of 2009. Said writ petition was disposed of by this Court vide order dated 17.05.2010 by way of remand of the matter to the authority concerned to decide the veracity of the income certificate of the selected candidate.

3. On the directions so issued by the learned Additional District Magistrate, Mandi, an inquiry was conducted by respondent No. 3, *inter alia,* qua the income of the selected candidate. Vide inquiry report appended with the petition as Annexure P-2, respondent No. 3, i.e., Tehsildar, Tehsil Thunag, District Mandi, upheld the income certificate so issued in favour of the private respondent by holding that Smt. Hansa Devi, i.e., the present petitioner had failed to substantiate the allegation/objections raised by her in the petition. The findings so returned in the inquiry report were assailed before the Sub-Divisional Collector, Chachiot by the present petitioner. Sub-Divisional Collector, Chachiot vide order dated 30.09.2011 (Annexure P-1) while upholding the findings so returned by respondent No. 3, dismissed the appeal so filed by the petitioner.

4. Feeling aggrieved, the petitioner has filed this writ petition praying for the reliefs already quoted above.

5. As per learned counsel for the petitioner, authorities below erred in not appreciating that the cut off date to ascertain family status was 01.01.2004 as per the Guidelines framed by the State for appointing Anganwari Workers and Anganwari Helpers and the findings returned by the authorities to the effect that because father of the private respondent had already moved an application for correction of family status to the Pradhan of the Gram Panchayat before 01.01.2004, therefore, it was to be construed that private respondent was a member of the family of her father are perverse findings.

6. On the other hand, learned counsel for the private respondent argued that as before 01.01.2004 father of the private respondent had filed an application for correction of the family status and the correction was carried out, though after 01.01.2004, therefore, the private respondent cannot be made to suffer because of the family status as was there in the Parivar register as on 01.01.2004, as fault stood committed by the concerned Gram Panchayat.

7. I have heard the learned counsel for the parties and have also gone through the documents appended with the pleadings by the parties.

8. A perusal of the order passed in appeal by Sub-Divisional Collector, Chachiot demonstrates that the said authority held that the private respondent had asserted that she had been staying with her father as he was her natural guardian and her name entered with her brother was because of some error in the Panchayat record and when the said error came to the notice of her father, he had submitted written requests on 10.07.2002 and 06.01.2003 to Pradhan, Gram Panchayat, namely, Sh. Dhim Kataru for correcting the said entry and recording her as a member of his family, but the Panchayat officials did not take any action on the said application till 17.07.2005, when the said wrong entry was corrected. On these basis, it was held by the learned Appellate Authority that there was sufficient enough evidence to prove that respondent was living with her father before 01.01.2004, i.e., cut off date qua separation of family and entry in Panchayat record was an error on the part of the Panchayat officials and thus calculating the income of the respondent showing her as member of her brother's family was incorrect.

9. In my considered view, the findings so returned by the learned Appellate Authority are perverse. Guidelines framed by the respondent-State for engaging Anganwari Workers/Helpers provide that the cut off date for ascertaining status of the family as is contained in the Parivar Register is 01.01.2004. In other words, what is contained in the Parivar Register as on 01.01.2004 has to be taken as the basis while calculating the family income of a candidate. It is not in dispute that as per the Parivar Register, as on 01.01.2004, the private respondent was being reflected as part of the family of her brother. The justification of the private respondent, which in my considered view, has been erroneously accepted by Sub Divisional Collector, Chachiot, is this that her name was being wrongly reflected in the family of her brother and for correction of the same, her father had already moved an application before the appropriate authorities before 01.01.2004. Be that as it may, the fact of the matter still remains that the application so filed by the father of the private respondent had not been acted upon as on 01.01.2004 and correction in Parivar Register came to be incorporated only after 01.01.2004. In this view of the matter, it was neither open to the Tehsildar nor to the Appellate Authority to have had come to the conclusion that because there was an application filed on behalf of the father of the private respondent for correction in the Parivar Register, therefore, it was to be deemed that the private respondent was not part of the family of her brother as was being reflected in the Parivar Register. This is because family status had to be ascertained as on 01.01.2004. In fact, what has been held by the learned Appellate Authority by way of impugned order amounts to both re-writing the Guidelines framed by the State for appointment of Anganwari Workers as well as supplanting the Clause contained therein qua the cut off date for ascertaining the family status. Hence, as the Guidelines very clearly, categorically and unambiguously contemplate that cut off date to ascertain family status is 01.01.2004, the findings to the contrary returned by way of impugned orders by the authorities below are therefore not sustainable in the eyes of law. Both the authorities thus erred in holding that income certificate submitted by the private respondent was a valid income certificate.

10. In view of the above discussion, this petition is allowed and Annexures P-1 and P-2 are quashed and set aside with all consequences. Respondents are directed to forthwith dispense with the services of the private respondent as Anganwari Worker at Anganwari Centre Gad at Seraj Janjehali, Mandi and take consequential action in this regard. As no prayer has been made in the writ petition by the petitioner for offering her appointment against the post of Anganwari Worker, therefore, the State may either offer appointment to the person who was second in merit or State shall be at liberty to fill up the post afresh after initiating process for filling up the post as per the Guidelines. Miscellaneous applications, if any, also stand disposed of. No order as to costs.

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

State of H.P. ....Appellant
Versus
Prem Kumar @ Shegalu Ram ....Accused/Respondent.

Cr. Appeal No. 164 of 2008
Date of Decision: 28.08.2017

Indian Penal Code, 1860- Section 279 and 304-A- Accused was driving a jeep in a rash and negligent manner – the jeep hit a cycle – the cyclist was declared brought dead in the hospital – the accused was tried and acquitted by the Trial Court- held in appeal that statement of PW-2 was contrary to the site plan and the prosecution version – no other eyewitness was examined- in these circumstances, the rashness and negligence was not proved- the accused was rightly acquitted by the Trial Court- appeal dismissed. (Para-8 to 21)

Cases referred:
C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645
Braham Dass v. State of Himachal Pradesh, (2009) 3 SCC (Cri) 406
State of Karnataka v. Satish,"1998 (8) SCC 493
Ravi Kapur versus State of Rajasthan (2012) 9 SCC 285
State of H.P. Vs. Manpreet Singh, Latest HLJ 2008 (HP) 538

For the appellant: Mr. M.L. Chauhan, Additional Advocate General.
For the respondent: Mr. Maan Singh, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal appeal filed under Section 378 of the Cr.PC., is directed against the impugned judgment dated 11.12.2007, passed by the learned Chief Judicial Magistrate, Lahaul-Spiti at Kullu, H.P., in Cr. Case No. 338-I of 2003/44-II of 2007, whereby respondent accused came to be acquitted of offences punishable under Sections 279 and 304-A of the IPC.

2. Briefly stated facts as emerge from the record are that on 14.6.2003, at about 8:30 a.m., one Kaule Ram, R/o Bajaura, was going towards Bhunter on National High Way-21. As per prosecution story, aforesaid person (Kaule Ram) was carrying bicycle with him at that relevant time and when he was just in front of house of Hem Raj at Village Kalehali, a jeep bearing No. HP-34-A-0978, being driven rashly and negligently by the respondent-accused came from Bajaura side and hit Kaule Ram, as a result of which, he fell down on the road and received injuries on head and arm. Injured though was taken to the R.H. Hospital for medical checkup but unfortunately, he was declared brought dead. Police after completion of investigation presented challan in the competent court of law.

3. Learned Chief Judicial Magistrate, Lahaul-Spiti at Kullu, H.P., after being satisfied that prima-facie case exists against the respondent-accused put notice of accusation for having committed offence punishable under Sections 279 and 304-A of the IPC, to which the accused pleaded not guilty and claimed trial. Learned trial Court on the basis of evidence adduced on record by the prosecution acquitted the respondent-accused of offences punishable under Section 279 and 304-A of the IPC.

4. Being aggrieved and dis-satisfied with the aforesaid judgment of acquittal recorded by the court below, appellant-State has approached this Court by way of instant

proceedings, seeking therein conviction of the respondent-accused after setting aside judgment of conviction recorded by the court below.

5. Mr. M.L. Chauhan, learned Additional Advocate General, while inviting attention of this Court to the impugned judgment of acquittal recorded by the court below, strenuously argued that the impugned judgment is not sustainable in the eye of law as the same is not based upon the proper appreciation of evidence and as such, same deserves to be quashed and set-aside. Mr. Chauhan, further contended that bare perusal of evidence led on record, clearly suggests that prosecution successfully proved beyond reasonable doubt that at that relevant time, offending vehicle was being driven rashly and negligently by the respondent-accused and as such, there was no occasion for the court below to record acquittal of respondent accused. With a view to substantiate his aforesaid argument, Mr. Chauhan, invited attention of this Court to the statements of prosecution witnesses, to demonstrate that PW1 Shri Chet Singh & PW2 Shri Rajesh Kumar, who fully supported the case of the prosecution, also disclosed the number of vehicle involved in the accident. While inviting attention of this Court to the site plan Ext.PW4/F, learned Additional Advocate General, contended that it is apparently clear from the site plan that bicycle at point mark C-1, was just in front of jeep at about 15 feet, whereas width of the road was 24 feet. He also stated that there were skid marks on the road, which were upto 90 feet making it abundantly clear that at the time of accident, jeep was being driven rashly and negligently by the respondent-accused, who was unable to control the vehicle in question. With the aforesaid submissions, Mr. Chauhan, contended that respondent-accused deserves to be convicted after setting aside the judgment of acquittal recorded by the court below.

6. Per contra, Mr. Maan Singh, learned counsel representing the respondent-accused supported the impugned judgment of acquittal recorded by the court below. While refuting the aforesaid submissions having been made by the learned Additional Advocate General, Mr. Maan Singh contended that bare reading of impugned judgment of acquittal recorded by the court below clearly suggests that there is proper appreciation of evidence adduced on record by the prosecution and court below has dealt with each and every aspect of the matter very meticulously and there is no scope of interference, whatsoever, of this Court. While refuting the submissions having been made by the learned Additional Advocate General, that prosecution successfully proved its case beyond reasonable doubt, Mr. Maan Singh contended that there is no evidence worth the name available on record suggestive of the fact that vehicle in question was being driven rashly and negligently, rather perusal of statement having been made by PW2 Rajesh Kumar, itself belies spot map Ext.PW4/F prepared by the police after the alleged incident. While referring to the statement of PW2 Rajesh Kumar, learned counsel for the respondent-accused contended that as per statement of PW2, vehicle being driven by the respondent accused came from opposite side and hit the deceased, whereas case of prosecution is that both (deceased and accused) were proceedings towards one direction. Mr. Singh further contended that no version, if any, could be placed on the statement of PW1 Chet Singh, who is brother of the deceased, because he reached at the spot after hearing the news of the accident. Similarly, there was no one to prove the contents of the complaint/statement made under Section 154 of the Cr.PC., as the complainant-Shri Kamal Kishore, had expired before his statement could be recorded. With the aforesaid submissions, learned counsel prayed for dismissal of the present appeal being devoid of any merits.

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

8. This Court after having carefully perused evidence adduced on record by the respective parties vis-à-vis impugned judgment of acquittal recorded by the court below, is not persuaded to agree with the contention of the learned Additional Advocate General that there is mis-reading, mis-apprehension and mis-construction of evidence adduced on record by the prosecution, rather this Court is fully convinced and satisfied that the court below while acquitting respondent-accused of notice of accusation under Sections 279 and 304-A of the IPC,

dealt with each and every aspect of the matter very meticulously and there appears to be no illegality and infirmity in the judgment of acquittal recorded by the court below.

9. In the case at hand, prosecution with a view to prove its case beyond reasonable doubt examined as many as four witnesses. Respondent-accused in his statement recorded under Section 313 of the Cr.PC, denied the case of the prosecution in toto and claimed that he has been falsely implicated. However, fact remains that he did not lead any evidence in his defence.

10. It is undisputed that PW1 Mr. Chet Singh, who is brother of the deceased, was in his house when he heard of accident and thereafter, he went to Kullu, Hospital. As per his statement, he was told with regard to the accident by Kamal Kishore, and he had no occasion to see the accident with his eyes and as such, statement made by this witness is not at all material for determining rashness and negligence, if any, on the part of the accused.

11. PW2 Rajesh Kumar, in his statement stated that he and his friend Rajesh Kumar were going towards Bajaura, which is North to South in the site plan Ext.PW4/F on their scooter and were exactly at that point, where the accident occurred. Aforesaid witness in his statement recorded under Section 161 of the Cr.PC stated that vehicle being driven by accused in high speed came from Bajaura side and hit Kaule Ram while going ahead of him and accident happened because of rash and negligent driving on his part. Aforesaid witness in his statement recorded by the court below on 6.6.2006, also stated that he was going on a scooter for collection of amount due from other shopkeepers and when he reached Kalehali, at about 8:30 am, one person coming from Bajaura side with a bicycle on his own side of the road (left side) was hit by jeep coming from Bajaura side, as a result of which he fell down.

12. Careful perusal of aforesaid deposition having been made by PW2, runs contrary to the recitals made in the site plan Ext.PW4/F. Perusal of site plan suggests that accused went to the extreme right side of the road and then struck against the injured Kaule Ram, as a result of which, he suffered injuries. But if position as depicted in site plan is taken into consideration, deceased was on his side of the road (left side), then position as depicted in site plan that he was hit by jeep at point 'C', who was coming from the right side of the road towards Kullu-Bhunter, appears to be totally incorrect. Though, PW4 HC Upinder Singh, in his statement stated that he had prepared site plan Ext.PW4/F and road was very wide and there was no obstruction of any type on it but perusal of statement having been made by PW2 Rajesh Kumar totally belies the position as depicted in the spot map prepared by the HC Upinder Singh. Similarly Photographs as placed on record Exts.P1 to P4 are totally contradictory to the statement of PW2 Rajesh Kumar, who happened to be the sole eye witness of the alleged incident.

13. In the instant case, complaint at the first instance, came to be registered at the behest of informant (Shri Kamal Kishore), who in his statement recorded under Section 154 Cr.PC, stated that deceased Kaule Ram was going towards Bhunter on his foot carrying bicycle with him. As per version made by Kamal Kishore in his statement recorded under Section 154 Cr.PC, accused was driving his vehicle from Bhunter towards Bajaura side. Even if his version recorded under Section 154 of the Cr.PC is examined/analyzed juxtaposing site plan Ext.PW4/A, it clearly emerge that deceased as well as accused, both were proceeding towards South to North side. Even as per prosecution case, deceased as well as the accused were on the right side, meaning thereby, both were on the wrong side at the time of the alleged accident.

14. After having carefully perused evidence led on record by the prosecution, this Court has no hesitation to conclude that no reliance, if any, could be placed upon the version put forth by the prosecution witnesses, which are otherwise contradictory. There are material contradictions in the statements of prosecution witnesses with regard to the direction of vehicle as well as injured, who at that relevant time, was carrying bicycle with him. As has been taken note above, version put forth by prosecution witnesses is totally contrary to the position depicted in the spot map Ext.PW4/A and as such, learned court below rightly did not place reliance upon the contrary evidence led on record by the prosecution.

15. Reliance is also placed on Judgment passed by the Hon'ble Apex Court in ***C. Magesh and Ors. v. State of Karnataka*** (2010) 5 SCC 645, wherein it has been held as under:-

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

16. Be that as it may, in the instant case, this Court was unable to lay its hand to specific evidence, if any, led on record by the prosecution suggestive of the fact that vehicle at that relevant time was being driven rashly and negligently that too at high speed. In this regard, reliance is placed on judgment rendered by the Hon'ble Apex Court in **Braham Dass v. State of Himachal Pradesh, (2009) 3 SCC (Cri) 406**, which reads as under:-

> ***"6. In support of the appeal, learned counsel for the appellant submitted that there was no evidence on record to show any negligence. It has not been brought on record as to how the accused- appellant was negligent in any way. On the contrary what has been stated is that one person had gone to the roof top and driver started the vehicle while he was there. There was no evidence to show that the driver had knowledge that any passenger was on the roof top of the bus. Learned counsel for the respondent on the other hand submitted that PW1 had stated that the conductor had told the driver that one passenger was still on the roof of the bus and the driver started the bus.***
>
> ***8. Section 279 deals with rash driving or riding on a public way. A bare reading of the provision makes it clear that it must be established that the accused was driving any vehicle on a public way in a manner which endangered human life or was likely to cause hurt or injury to any other person. Obviously the foundation in accusations under Section 279 IPC is not negligence. Similarly in Section 304 A the stress is on causing death by negligence or rashness. Therefore, for bringing in application of either Section 279 or 304 A it must be established that there was an element of rashness or negligence. Even if the prosecution version is accepted in toto, there was no evidence led to show that any negligence was involved."***

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

> ***"1. Truck No. MYE-3236 being driven by the respondent turned turtle while crossing a "nalla" on 25-11-1982 at about 8.30 a.m. The accident resulted***

in the death of 15 persons and receipt of injuries by about 18 persons, who were travelling in the fully loaded truck. The respondent was charge-sheeted and tried. The learned trial court held that the respondent drove the vehicle at a high speed and it was on that account that the accident took place. The respondent was convicted for offences under Sections 279, 337, 338 and 304A IPC and sentenced to various terms of imprisonment. The respondent challenged his conviction and sentence before the Second Additional Sessions Judge, Belgaum. While the conviction and sentence imposed upon the respondent for the offence under Section 279 IPC was set aside, the appellate court confirmed the conviction and sentenced the respondent for offences under Sections 304A, 337 and 338 IPC. On a criminal revision petition being filed by the respondent before the High Court of Karnataka, the conviction and sentence of the respondent for all the offences were set aside and the respondent was acquitted. This appeal by special leave is directed against the said judgment of acquittal passed by the High Court of Karnataka.

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

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

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

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

The appeal fails and is dismissed. The respondent is on bail. His bail bonds shall stand discharged. Appeal dismissed."

18. Careful perusal of aforesaid judgment clearly suggests that there cannot be any presumption of rashness or negligence, rather, onus is always upon the prosecution to prove beyond reasonable doubt that vehicle in question was being driven rashly and negligently. In the aforesaid judgment, it has been specifically held that in the absence of any material on record, no presumption of rashness or negligence can be drawn by invoking maxim *res ipsa loquitur*.

19. The Hon'ble Apex Court in case titled **Ravi Kapur** versus **State of Rajasthan** (2012) 9 SCC 285, has held as under:

> ***"15. The other principle that is pressed in aid by the courts in such cases is the doctrine of res ipsa loquitur. This doctrine serves two purposes – one that an accident may by its nature be more consistent with its being caused by negligence for which the opposite party is responsible than by any other causes and that in such a case, the mere fact of the accident is prima facie evidence of such negligence. Secondly, it is to avoid hardship in cases where the claimant is able to prove the accident but cannot prove how the accident occurred. The courts have also applied the principle of res ipsa loquitur in cases where no direct evidence was brought on record. The Act itself contains a provision which concerns with the consequences of driving dangerously alike the provision in the IPC that the vehicle is driven in a manner dangerous to public life. Where a person does such an offence he is punished as per the provisions of Section 184 of the Act. The courts have also taken the concept of 'culpable rashness' and 'culpable negligence' into consideration in cases of road accidents. 'Culpable rashness' is acting with the consciousness that mischievous and illegal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite consciousness (luxuria). 'Culpable negligence' is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him and that if he had, he would have had the consciousness. The imputability arises from the neglect of civic duty of circumspection. In such a case the mere fact of accident is prima facie evidence of such negligence. This maxim suggests that on the circumstances of a given case the res speaks and is eloquent because the facts stand unexplained, with the result that the natural and reasonable inference from the facts, not a conjectural inference, shows that the act is attributable to some person's negligent conduct. [Ref. Justice Rajesh Tandon's 'An Exhaustive Commentary on Motor Vehicles Act, 1988' (First Edition, 2010].***
>
> ***20. In light of the above, now we have to examine if negligence in the case of an accident can be gathered from the attendant circumstances. We have already held that the doctrine of res ipsa loquitur is equally applicable to the cases of accident and not merely to the civil jurisprudence. Thus, these principles can equally be extended to criminal cases provided the attendant circumstances and basic facts are proved. It may also be noticed that either the accident must be proved by proper and cogent evidence or it should be an admitted fact before this principle can be applied. This doctrine comes to aid at a subsequent stage where it is not clear as to how and due to whose negligence the accident occurred. The factum of accident having been established, the Court with the aid of proper evidence may take assistance of the***

attendant circumstances and apply the doctrine of res ipsa loquitur. The mere fact of occurrence of an accident does not necessarily imply that it must be owed to someone's negligence. In cases where negligence is the primary cause, it may not always be that direct evidence to prove it exists. In such cases, the circumstantial evidence may be adduced to prove negligence. Circumstantial evidence consists of facts that necessarily point to negligence as a logical conclusion rather than providing an outright demonstration thereof. Elements of this doctrine may be stated as :

- ***The event would not have occurred but for someone's negligence.***
- ***The evidence on record rules out the possibility that actions of the victim or some third party could be the reason behind the event.***
- ***Accused was negligent and owed a duty of care towards the victim."***

20. Reliance is also placed on judgment rendered by this Court in **State of H.P. Vs. Manpreet Singh**, Latest HLJ 2008 (HP) 538, relevant para whereof is as under:

> ***"4. Legally, in a case of rash and negligent act, if the prosecution is able to prove the essential ingredients of the offence, the onus to disprove it shifts upon the respondent to show that he had taken due care and caution to avoid the accident. It is an admitted fact that said Shri Daya Ram had died in the accident caused by the respondent but still it is incumbent upon the prosecution to prove that it was the rash and negligent act of driving to conclude the rash and negligent driving of the respondent. In other words, it must be proved that the rash or negligent act of the accused was causa causans and not causa sin qua non (cause of the proximate cause). There must be some nexus between the death of a person with rash or negligent act of the accused. According to Rupinder Parkash (PW4) deceased was hit by the motor cycle which was in a high speed but the speed is not criteria to hold the act as rash or negligent. The respondent in his statement under Section 313 of the Code of Criminal Procedure has explained that on seeing the deceased, he had blown the horn and he (deceased) stopped on the road. As soon as he reached near him, he immediately tried to cross the road and got hit. His version has been duly corroborated by Hardeep Singh (DW1) who was a pillion rider with him. Ajay Kumar (PW-1) has admitted this version that the respondent had blown the horn and Daya Ram on hearing it, had stopped for a while. In these circumstances, if a person suddenly crosses the road, without taking note of the approaching vehicle and its driver may not be in a position to save the accident, it will not be possible to hold the Driver guilty of the offence. In the instant case, the deceased knowing fully well at least the approaching vehicle stopped on hearing the horn while crossing the road but when the motor cycle reached near him, he darted before it and the accident took place. Thus in my opinion the prosecution could not prove the offence charged against the respondent beyond reasonable doubt that the respondent was driving the vehicle rashly or negligently. Therefore, in these circumstances, the learned trial Court had rightly acquitted the respondent of the charges framed against him. As such, no interference in the impugned judgment of acquittal is called for. Accordingly the appeal is dismissed. The respondent is discharged of his bail bounds entered upon by him at any stage of the trial."***

21. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court sees no reason to differ with the well reasoned judgment passed by the learned court below which appears to be based upon the proper

appreciation of evidence adduced on record and the same is accordingly upheld. Accordingly, the appeal is dismissed being devoid of any merits.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

M/s CNN-IBN7. …Petitioner.

Versus

Maulana Mumtaz Ahmed Quasmi & Ors. …Respondents.

CrMMO No.52 of 2017 a/w
CrMMO Nos. 103, 104 and 120 of 2017
Reserved On: 2.8.2017
Decided on: 29.8. 2017

Code of Criminal Procedure, 1973- Section 482- Complainant filed a complaint pleading that he was defamed by publishing a news item stating that the complainant had received a bribe of Rs. 10,000/- - the Court issued the notices to the accused – aggrieved from the order, present petition has been filed seeking to quash the complaint – held that the Court has to be careful while quashing the complaint – Magistrate has to conduct an inquiry where he is not satisfied with the evidence led before him – the evidence led before the Magistrate also amounts to inquiry – there is no necessity of sending the complaint to the police for investigation – the Court summoning the accused must be satisfied that there are sufficient reasons to summon the accused – he must apply his mind to the material before him – however, the complainant has failed to make specific averments in the complaint – the responsibility of the editor cannot be fixed without specific averments – CDRs are not admissible under Section 65-B of Evidence Act- the petition allowed and the order taking cognizance and summoning the petitioners set aside.

(Para-5 to 56)

Cases referred:

State of Madhya Pradesh vs. Awadh Kishore Gupta, (2004) 1 SCC 691
Amit Kapoor versus Ramesh Chander and another, (2012) 9 SCC 460
C.P. Subhash vs. Inspector of Police Chennai and others (2013) 11 SCC 599
Vadilal Panchal Vs Dattatraya Dulaji Ghadigaonkar, AIR 1960 SC 1113
Chandra Deo Singh V/S Prakash Chandra Boseair 1963 SC 1430
Nagawwa Vs Veeranna Shivalingappa Konjalgi (1976) 3 SCC 736
National Bank of Oman vs. Barakara Abdul Aziz and another, (2013) 2 SCC 488
Udai Shankar Awasthi vs State of Uttar Pradesh and another, (2013) 2 SCC 435
Mehmood Ul Rehman vs Khazir Mohammad Tunda and others and connected matter, (2015) 12 SCC 420
Sham Sunder and others vs State of Haryana, 1989 (4) SCC 630
Hira Lal Hari Lal Bhagwati vs CBI, (2003) 5 SCC 257
Maksud Saiyed vs State of Gujarat, 2008 (5) SCC 668
R. Kalyani vs Janak C. Mehta, 2009 (1) SCC 516
Sharon Michael vs State of Tamil Nadu, 2009 (3) SCC 375
K Sunder vs State of Haryana, 1989 (4) SCC 630
HDFC Securities Limited and others vs State of Maharashtra and another, (2017) 1 SCC 640
Anvar P V Vs P K Basheer And Others, 2014 (10) SCC 473
State (N C T Of Delhi) Vs Navjot Sandhu @ Afsan Guru, 2005 (11) SCC 600
Sonu alias Amar vs. State of Haryana, AIR 2017 SC 3441

For the Petitioner(s):	Mr. Bimal Gupta, Sr. Advocate with Mr. Satish Sharma, Advocate for the petitioners in CrMMO Nos.52, 103 and 104 of 2017. Mr. Ankush Dass Sood, Sr. Advocate with Ms. Shweta Joolka, Advocate for the petitioner in CrMMO No.120 of 2017
For the respondent	Mr. Arjun Lall and Mr. Naveen Awasthi Advocates for respondent No.1 in all the petitions..

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

Since common questions of law and facts are involved in all these petitions, therefore, the same were taken up together for hearing and are being disposed of by a common judgment.

2. The petitioners have invoked the provisions of section 482 of the Code of Criminal Procedure questioning the summoning order dated 1.4.2015 passed by the learned Chief Judicial Magistrate on the ground that the same has been passed without application of any judicial mind and in a highly mechanical manner and, therefore, the entire proceedings should be quashed.

3. The facts giving rise to the filing of these petitions are that respondent No.1/complainant filed a criminal complaint against the petitioners and respondents No. 5 to 7 for offences punishable under Section 500 read with Sections 34 and 120-B of the Indian Penal Code to the effect that he is Convener of All India Muslim Personal Law and member of the Rabita Madaris Darul-Uloom Deoband, Uttar Pradesh and prior to 28.9.2006, he remained member of Himachal Waqf Board and Himachal Haj Committee and he had good name and fame in the public. On 27.12.2012, CNN-IBN-7 published a news item in order to defame him by way of sting operation in the name of "Cobra Post", while respondent No.4 edited news in connivance with all the accused, in which he was shown to be receiving a bribe of Rs.10,000/-. However, nothing of that sort had happened. According to the complainant, the accused intended to send their 15 persons to Haj, however, time for filing applications for their enrolment for going to Haj had already expired and the accused persons gave him Rs.10,000/- forcibly to go to Bombay for taking permission. He being Muslim intended to help those persons, but the petitioners and respondents No. 5 to 7 depicted him accepting bribe of Rs.10,000/- and it was so published in the newspaper by fabricating pictures, thereby his reputation was tarnished. The Complainant also issued notices to the petitioners as well as respondents No. 5 to 7 through his counsel, but they did not respond to the same.

4. I have heard the learned counsel for the parties and have perused the material placed on record.

5. Section 482 of the Code empowers the High Court to exercise its inherent powers to prevent abuse of the process of Court and to quash the proceedings instituted on the complaint but such power should be exercised only in cases where the complaint does not disclose any offence or is vexatious or oppressive. If the allegations set out in the compliant do not constitute the offence of which cognizance is taken by the Magistrate it is open to the High Court to quash the same in exercise of the inherent power under section 482 of the Code.

6. In ***State of Madhya Pradesh vs. Awadh Kishore Gupta, (2004) 1 SCC 691***, Hon'ble Supreme Court culled out the following principles for exercise of power under Section 482 of the Code:-

> "(i) To give effect to an order under the Code.
>
> (2) To prevent abuse of the process of court.
>
> (3) To otherwise secure the ends of justice.

(4) Court does not function as a court of appeal or revision.

(5) Inherent jurisdiction under Section 482 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.

(6) It would be an abuse of process of court to allow any action which would result in injustice.

(7) In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts t abuse of the process of court.

(8) When no offence is disclosed by the complaint, the court may examine the question of fact.

(9) When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an inquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it acquisition would not be sustained-That is the function of the trial Judge.

(10) Section 482 is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death.

(11) It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed.

(12) If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same.

(13) When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance-It is the material collected during the investigation and evidence led in Court which decides the fate of the accused person-The allegations of mala fides against the informant are of no consequence and cannot be itself be the basis for quashing the proceedings."

7. In ***Amit Kapoor*** versus ***Ramesh Chander and another***, (2012) 9 SCC 460**,** the Hon'ble Supreme Court laid down the principles to be considered for proper exercise of jurisdiction, particularly with regard to quashing criminal proceedings, particularly, the charge either in exercise of jurisdiction under Section 397 or Section 482 and same are summarized as follows:-

"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.

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.

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.

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 loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

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.

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.

7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

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.

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.

10. It is neither necessary nor is the court called upon to hold a fullfledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

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.

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 therewith by the prosecution.

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.

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.

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]}.

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 of the requirements of the offence."

8. In **C.*P. Subhash vs. Inspector of Police Chennai and others (2013) 11 SCC 599***, it was once again reiterated by the Hon'ble Supreme Court that where complaint prima facie makes out commission of offence, High Court in ordinary course should not invoke its powers to quash such proceedings, except in rare and compelling circumstances and it was observed as under:-

"[7] The legal position regarding the exercise of powers under Section 482 Cr.P.C. or under Article 226 of the Constitution of India by the High Court in relation to pending criminal proceedings including FIRs under investigation is fairly well settled by a long line of decisions of this Court. Suffice it to say that in cases where the complaint lodged by the complainant whether before a Court or before the jurisdictional police station makes out the commission of an offence, the High Court would not in the ordinary course invoke its powers to quash such proceedings except in rare and compelling circumstances enumerated in the decision of this Court in State of Haryana and Ors. v Ch. Bhajan Lal and Others, 1992 Supp1 SCC 335.

8. Reference may also be made to the decision of this Court in Rajesh Bajaj v. State, NCT of Delhi, 1999 3 SCC 259where this Court observed:

"...If factual foundation for the offence has been laid down in the complaint the Court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence."

9. To the same effect is the decision of this Court in State of Madhya Pradesh v. Awadh Kishore Gupta, 2004 1 SCC 691where this Court said:

> "11...The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. 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. High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code "

10. Decisions of this Court in V.Y. Jose and Anr. v. State of Gujarat and Anr., 2009 3 SCC 78and Harshendra Kumar D. v. Rebatilata Koley etc., 2011 3 SCC 351reiterate the above legal position."

9. Thus, what can be considered to be settled on the basis of the exposition of law by the Hon'ble Supreme Court is that while exercising its jurisdiction under Section 482 of the Code, High Court has to be both cautious as also circumspect. This power is to be used sparingly and only for the purpose of preventing abuse of the process of any Court or otherwise to secure ends of justice. Whether a complaint/FIR/charge-sheet etc. discloses a criminal offence or not depends upon the nature of facts alleged therein.

10. Learned counsel for the petitioners have mainly raised the following five points:

i) the procedure contemplated in section 202 of the Code of Criminal Procedure not followed;

ii) the summoning order does not record any satisfaction;

iii) the complaint on the face of it not maintainable as it contains allegations of conspiracy, however, no specific role has been assigned to any individual;

iv) there is no vicarious liability under the criminal law, therefore, respondent No.4 could not have been impleaded as a party; and

v) CDRs exhibited in this case could not have been taken into consideration as the same have not been exhibited as per section 65-B of the Indian Evidence Act.

Point No.1:

11. Before proceeding to deal with the contentions raised by the petitioner, it would be appropriate to proceed with the relevant provisions of the Code of Criminal Procedure (for short "Code"), i.e. 2 (g), 2 (h), 156, 200, 201, 202, 203 and 204, which read as under:

"2 (g) "Inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;

2 (h) "Investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf,

156. Police officer's power to investigate cognizable cases.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one, which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above mentioned.

200. Examination of complainant.

A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) If a public servant acting or purporting to act in the discharge of his official duties or a court has made the complaint; or

(b) If the Magistrate makes over the case for inquiry, or trial to another Magistrate under section 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

201. Procedure by Magistrate not competent to take cognizance of the case.

If the complaint is made to a Magistrate who is not competent to take cognizance of the offence he shall, -

(a) If the complaint is in writing, return it for presentation to the proper court with to that effect;

(b) If the complaint is not in writing, direct the complainant to the proper court.

202. Postponement of issue of process.

(1) Any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, [1][and shall in a case where the accused is residing at a place beyond the area in which he exercises his Jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by, a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made, -

(a) Where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions or

(b) Where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Court on an offer in charge of a police station except the power to arrest without warrant.

203. Dismissal of complaint.

If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

204. Issue of process.

(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-

(a) A summons-case, he shall issue his summons for the attendance of the accused, or

(b) A warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

12. Under section 200 of the Code, the Magistrate taking cognizance of an offence is empowered to examine the complainant and the witnesses produced by the complainant before him. If the complaint in writing is made by the public servant, then examination of complainant or his witnesses is not required but under section 202 of the Code any Magistrate on receipt of a complainant of an offence/offences of which he is authorized to take cognizance shall hold an inquiry himself or direct the investigation by a Police Officer or such other person as he thinks fit or may thinks fit postpone the issue of process against the accused when the accused is residing at a place beyond the area in which he exercises the jurisdiction.

13. The object of the enquiry under section 202 (1) is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant.

14. The scope of section 202 of the Code has been well explained by the Hon'ble Supreme Court in ***Vadilal Panchal Vs Dattatraya Dulaji Ghadigaonkar***, AIR 1960 SC 1113, ***Chandra Deo Singh V/S Prakash Chandra Boseair*** 1963 SC 1430, ***Nagawwa*** Vs ***Veeranna Shivalingappa Konjalgi*** (1976) 3 SCC 736, in which it has been held that the scope of inquiry under section 202 of the Code is limited to find out the truth or falsehood of the complaint in order to determine the question of issue of process. The inquiry is for the purpose of ascertaining the truth or falsehood of the complaint, i.e. for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. However, the section does not lay down that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage, for the person complained against can be legally called upon to answer the accusation made against him only when a process has been issued and he is put to trial.

15. Even otherwise section 202 (1) of the Code uses the expression "*either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit.*"

16. "***Inquiry***" has been defined in section 2 (g) and "***investigation***" has been defined in section 2 (h). From the perusal of definition of ***inquiry*** and ***investigation***, it is crystal clear that the inquiry is conducted by the Magistrate and the investigation is conducted by the Police Officer.

17. The inquiry contemplated under section 202 (1) of the Code has been explained in section 202 (2), which shows that recording of statements of witnesses on oath is also part of inquiry suggested in section 202 (1) of the Code.

18. The Magistrate has ample power to enlarge scope of inquiry for the purpose of coming to a prima facie conclusion that the case has been made out for issuance of process under the aforesaid provisions of law. He can undertake thorough inquiry as to the offence/offences of the complaint. Thereafter he can arrive at a conclusion that a prima facie case is made out for issuance of process or not.

19. In other words, whether or not there is sufficient ground for the Magistrate to proceed further on account of allegations mentioned in the complaint of the pre-summoning evidence of the complainant and his witnesses.

20. The examining of the witnesses on oath during the inquiry embarked upon by him under section 202 of the Code is akin to the examination of the witnesses as contemplated under section 202 of the Code.

21. Therefore, once the statements of the complainant and his witnesses have been recorded by the Magistrate at pre-summoning stage, this amounts to inquiry by the Magistrate himself and it is not at all necessary for him to send the case for investigation by the Police Officer when the accused like in the instant cases are residing outside his jurisdiction.

22. It is not in dispute that all the petitioners reside outside the jurisdiction of the learned Magistrate and, therefore the Magistrate is required to comply with the amended provisions of section 202 (1) of the Code whereby the learned Magistrate is required to postpone the issue of process against the accused and either inquiry into the case himself or direct an investigation to be made by a Police Officer or by any such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding against the accused.

23. In the case of ***National Bank of Oman*** vs. ***Barakara Abdul Aziz and another***, (2013) 2 SCC 488, the Hon'ble Supreme Court had the occasion to deal with the effect of amendment brought by sub-section (1) of section 202 by Act No. 25 of 2005 and it was held that in case where the accused resides beyond area over which Magistrate concerned exercises jurisdiction, then it is incumbent upon Magistrate to carry out an enquiry or order investigation under section 202 before issuing process.

24. In ***Udai Shankar Awasthi*** vs ***State of Uttar Pradesh and another***, (2013) 2 SCC 435, the Hon'ble Supreme Court in para 40 of the judgment observed that the provisions of section 202 as amended making it mandatory to postpone the issue of process where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. It was further observed that the postponement of issuance of process was found necessary to protect innocent persons from being harassed by unscrupulous persons and, therefore, it is obligatory upon the Magistrate to enquiry into the case himself or direct investigation to be made by the Police Officer, or by such other person as he thinks fit for the purpose of finding out whether or not there are sufficient grounds for proceeding against the accused before issuing summons in such cases.

25. Adverting to the facts, it would be noticed that the statement of the complainant was recorded on 16.7.2007 alongwith the statement of one of the witnesses Adarsh Kumar Sood and thereafter the statement of another witness Mansoor Alam was recorded on 18.2.2007, yet the process was not issued and came to be issued only on 1.4.2015, therefore, it can conveniently be held that the requirement of section 202 (1) of the Code has been substantially complied with by the Magistrate.

26. Once this had been done nothing further was required to be done as far as inquiry as contemplated under section 202 (1) of the Code is concerned. There is summoning note of issue of process by the Court, which is underlying object of the introduction of amended provisions.

27. In view of the aforesaid discussion I have no hesitation to conclude that the procedure as contemplated under section 202 of the Code has been duly followed by the learned Magistrate and, therefore, the complaint cannot be quashed on this ground alone.

Points No.2 to 5:

28. Indisputably, judicial process should not be an instrument of oppression or needless harassment. The Court should be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of a private complainant as vendetta to harass persons needlessly.

29. It is equally well settled that summoning of an accused in a criminal case is a serious matter and the order taking cognizance by the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. Section 482 of the Code empowers this court to exercise its inherent powers to prevent abuse of process of the court and to quash the proceedings instituted on complaint, but such powers can be exercised only in cases where the complaint does not disclose any offence or is vexatious or oppressive. If the allegations as set out in the complaint do not constitute the offence for which cognizance is taken by the Magistrate, it is open to this court to quash the same in exercise of powers, under sections 482 of the Code.

30. As regards the contention of the petitioners that the summoning order does not record any satisfaction, the entire law on the subject has been lucidly set out by the Hon'ble Supreme Court in ***Mehmood Ul Rehman*** vs ***Khazir Mohammad Tunda and others*** and connected matter, (2015) 12 SCC 420 and after making a detailed reference to the exposition of law laid down in the judgments quoted therein, the legal position was summarized as under:

> [20] The extensive reference to the case law would clearly show that cognizance of an offence on complaint is taken for the purpose of issuing process to the

accused. Since it is a process of taking judicial notice of certain facts which constitute an offence, there has to be application of mind as to whether the allegations in the complaint, when considered along with the statements recorded or the inquiry conducted thereon, would constitute violation of law so as to call a person to appear before the criminal court. It is not a mechanical process or matter of course. As held by this Court in Pepsi Foods Limited , to set in motion the process of criminal law against a person is a serious matter.

[21] Under Section 190(1)(b) of Code of Criminal Procedure, the Magistrate has the advantage of a police report and Under Section 190(1)(c) of Code of Criminal Procedure, he has the information or knowledge of commission of an offence. But Under Section 190(1)(a) of Code of Criminal Procedure, he has only a complaint before him. The Code hence specifies that... "a complaint of facts which constitute such offence". Therefore, if the complaint, on the face of it, does not disclose the commission of any offence, the Magistrate shall not take cognizance Under Section 190(1) (a) of Code of Criminal Procedure. The complaint is simply to be rejected.

[22] The steps taken by the Magistrate Under Section 190(1) (a) of Code of Criminal Procedure followed by Section 204 of Code of Criminal Procedure should reflect that the Magistrate has applied his mind to the facts and the statements and he is satisfied that there is ground for proceeding further in the matter by asking the person against whom the violation of law is alleged, to appear before the court. The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court. No doubt, no formal order or a speaking order is required to be passed at that stage. The Code of Criminal Procedure requires speaking order to be passed Under Section 203 of Code of Criminal Procedure when the complaint is dismissed and that too the reasons need to be stated only briefly. In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation Under Section 202 of Code of Criminal Procedure, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused Under Section 204 of Code of Criminal Procedure, by issuing process for appearance. Application of mind is best demonstrated by disclosure of mind on the satisfaction. If there is no such indication in a case where the Magistrate proceeds Under Sections 190/204 of Code of Criminal Procedure, the High Court Under Section 482 of Code of Criminal Procedure is bound to invoke its inherent power in order to prevent abuse of the power of the criminal court. To be called to appear before criminal court as an accused is serious matter affecting one's dignity, self respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."

31. The petitioners admittedly have been ordered to be proceeded against under section 500 read with sections 34 and 120-B of the IPC. However, the allegations of so called abatement or conspiracy have not been spelt out and only vague and general allegations, which in itself are not making out an offence of conspiracy, have been made. This would be clearly evident from para 2 of the complaint, which alone contains allegations of conspiracy in the following terms:

"2. That the accused 1 to 7 hatched a criminal conspiracy with each other to publish an imputation against the complainant intending to harm, or knowing or

> having reasons to believe that such imputation will harm, the fair reputation of the complainant conspired with each other, in furtherance of their common intention to harm him and his reputation and social standing. Therefore, on the 27th of December, 2006, the accused Nos. 1 to 3, broadcast on the news channel, a news item, under the news heading of "Haj Ke Dalal". In this highly defamatory and derogatory news item, which was repeatedly published by the accused on several occasions, they repeatedly defamed the Complainant. The name of the complainant, was mentioned time and again in the news item in question. The said news item, which was very cleverly and selectively edited and doctored, in no uncertain terms falsely stated and claimed on television, that the complainant, had misused and abused his very responsible position and office of the Chairman of Himachal Pradesh State Haj Committee. The news item falsely imputed to the complainant, his alleged readiness/involvement and willingness, relating to the matter of approving/including the names of persons, in the list of Hajis, from the Himachal Pradesh State Quota of Hajis, without their being entitled to be so included in that list, the clear unequivocal suggestion in no uncertain terms, was that the complainant was willing to illegally and unauthorisedly include such names, for unlawful and extraneous monetary consideration in the list and quota of Himachal Muslims, for the Haj Pilgrimage."

32. No doubt the complainant is not required to plead the evidence but there must be basic averments/allegations as to how one is involved in the alleged crime. Once there is lack of specific allegations of an offence after taking into consideration the entirety of allegations set out in the complaint, it is obvious duty of the Court to save the accused person(s) from unnecessarily facing the agony of trial. Not only that, it would be sheer wastage of public time and money to permit the proceedings to continue against the accused.

33. Therefore, the question at this stage is whether the Magistrate has applied his mind to the facts and statements and is satisfied that there is ground for proceeding further in the matter by asking the person against whom the allegations have been alleged to appear before him.

34. As per the complainant, the sting operation is alleged to have been carried out by respondents No. 4 to 7, i.e. Anirudh Bahal, Founder and Editor-in-Chief, Cobra Post, Jamshed Khan, Sayeed Mansoor and Sushant Pathan, Reporter of Cobra Post, but there is no allegation to show that all the accused persons were in collusion or in conspiracy with the aforesaid persons in either preparing the false C.D. or were culpably responsible in publishing or broadcasting the defamatory material. Therefore, mere allegations that the accused persons are office-bearers in the Broadcasting Company and that they failed in their responsibility of checking that false information is not published/ disseminated through their channel, is not sufficient to infer their culpability in the publication/dissemination of the defamatory material aired in the Channel, particularly in absence of any provision fastening vicarious liability on them.

35. At this stage, it would be noticed that the allegations against the accused Nos. 1 to 3, i.e. M/s CNN IBN 7, Rajdeep Sardesi and Ashutosh are only that they broadcast the news item prepared by accused Nos. 4 to 7 under the heading "***Haj Ke Dalal",*** which according to the complainant was defamatory and derogatory. There is no specific allegation in the complaint or even in the statement of the complainant and his two witnesses recorded under section 202 of the Code with regard to role of various accused in the publication or televising the offending programme. In fact, there is no positive averments with regard to role played by each of the accused in the publication or televising the offending programme. The statements only disclose that the offending programme containing defamatory and derogatory imputations were televised. Therefore, in absence of allegations in the complaint as also the statements recorded under section 202 of the Code as to how various accused were involved/responsible for the broadcast of the news item, which was defamatory and derogatory, issuance of process to them is not legally sustainable.

36. Mere mention of the names in the title of the complaint that such and such person is Editor or Director or Managing Director would not be sufficient to infer the culpability of that person.

37. Unlike civil liability, the penal provisions have to be strictly construed wherein there is no vicarious liability in criminal law unless the statute takes that also within its fold. Therefore, it was incumbent upon the complainant to have made specific allegations as to how and on what basis each of the accused is guilty or has committed the alleged offence. Merely because some of the accused happen to be the Managing Director, Editor-in-Chief, Editor and Founder Editor-in-Chief would not make them vicariously liable for the acts of their employees, who in the instant case happen to be three in number, i.e. respondent Nos. 3 to 5. Distinct and separate allegations qua each of them as to how they were responsible or had committed the offence had to be spelt out.

38. In ***Sham Sunder and others*** vs ***State of Haryana***, 1989 (4) SCC 630, the Hon'ble Supreme Court has held as under:

> "[9] But we are concerned with a criminal liability under penal provision and not a civil liability. The penal provision must be strictly construed in the first place. Secondly, there is no vicarious liability in criminal law unless the statute takes that also within its fold. Section 10 does not provide for such liability. It does not make all the partners liable for the offence whether they do business or not."

39. In ***Hira Lal Hari Lal Bhagwati*** vs ***CBI***, (2003) 5 SCC 257, the Hon'ble Supreme Court has held as under:

> "[30] In our view, under the penal law, there is no concept of vicarious liability unless the said statute covers the same within its ambit. In the instant case, the said law which prevails in the field i.e. the Customs Act, 1962 the appellants have been therein under wholly discharged and the GCS granted immunity from prosecution."

40. In ***Maksud Saiyed*** vs ***State of Gujarat***, 2008 (5) SCC 668, the Hon'ble Supreme Court has held as under:

> "[13] Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.

41. In ***R. Kalyani*** vs ***Janak C. Mehta***, 2009 (1) SCC 516, the Hon'ble Supreme Court has held as under:

> "32. Allegations contained in the FIR are for commission of offences under a general statute. A vicarious liability can be fastened only by reason of a provision of a statute and not otherwise. For the said purpose, a legal fiction has to be created. Even under a special statute when the vicarious criminal liability is fastened on a person on the premise that he was in- charge of the affairs of the company and responsible to it, all the ingredients laid down under the statute

must be fulfilled. A legal fiction must be confined to the object and purport for which it has been created."

42. In ***Sharon Michael*** vs ***State of Tamil Nadu***, 2009 (3) SCC 375, the Hon'ble Supreme Court has held as under:

> "[16] The First Information Report contains details of the terms of contract entered into by and between the parties as also the mode and manner in which they were implemented. Allegations have been made against the appellants in relation to execution of the contract. No case of criminal misconduct on their part has been made out before the formation of the contract. There is nothing to show that the appellants herein who hold different positions in the appellant-company made any representation in their personal capacities and, thus, they cannot be made vicariously liable only because they are employees of the company."

43. In ***K Sunder*** vs ***State of Haryana***, 1989 (4) SCC 630, the Hon'ble Supreme Court has held as under:

> "16. We have noticed hereinbefore that despite of said road being under construction, the first respondent went to the Police Station thrice. He, therefore, was not obstructed from going to Police Station. In fact, a firm action had been taken by the authorities. The workers were asked not to do any work on the road. We, therefore, fail to appreciate that how, in a situation of this nature, the Managing Director and the Directors of the Company as also the Architect can be said to have committed an offence under Section 341 of the IPC.
>
> 17. Indian Penal Code, save and except some matters does not contemplate any vicarious liability on the part a person. Commission of an offence by raising a legal fiction or by creating a vicarious liability in terms of the provisions of a statute must be expressly stated. The Managing Director or the Directors of the Company, thus, cannot be said to have committed an offence only because they are holders of offices. The learned Additional Chief Metropolitan Magistrate, therefore, in our opinion, was not correct in issuing summons without taking into consideration this aspect of the matter. The Managing Director and the Directors of the Company should not have been summoned only because some allegations were made against the Company.
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> 18. In Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors. , this Court held as under:
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>> 28. Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.
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> 19. Even as regards the availability of the remedy of filing an application for discharge, the same would not mean that although the allegations made in

the Complaint Petition even if given face value and taken to be correct in its entirety, do not disclose an offence or it is found to be otherwise an abuse of the process of the Court, still the High Court would refuse to exercise its discretionary jurisdiction under Section 482 of the Code of Criminal Procedure.

44. The legal position was reiterated in a recent judgment of the Hon'ble Supreme Court in ***HDFC Securities Limited and others*** vs ***State of Maharashtra and another***, (2017) 1 SCC 640 wherein it was observed as under:

> "19. With the meticulous understanding of the orders of the Courts below in the instant case, we can see that general and bald allegations are made in the context of appellant No.1 who is a juristic person and not a natural person. The Indian Penal Code, 1860, does not provide for vicarious liability for any offence alleged to be committed by a company. If and when a statue contemplates creation of such a legal fiction, it provides specifically therefor, e.g. Negotiable Instruments Act, 1881. Further, reliance was made on S. K. Alagh Vs. State of Uttar Pradesh & Ors., 2008 5 SCC 662, where at paragraph 16, this Court observed that
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> > "Indian Penal Code, save and except some provisions specifically providing therefor, does not contemplate any vicarious liability on the part of a party who is not charged directly for commission of an offence."
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> 20. Further in Maksud Saiyed Vs. State of Gujrat & Ors., 2008 5 SCC 668, at paragraph 13, this Court observed that:
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> > "where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. Indian Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The Learned Magistrate failed to pose unto himself the correct question viz. as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liability. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability.
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> 21. In Thermax Limited & Ors. Vs. K. M. Johny & Ors., 2011 13 SCC 412, and in Sunil Bharti Mittal Vs. Central Bureau of Investigation, 2015 4 SCC 609, at para 39, this Court held: "Apart from the fact that the complaint lacks necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of 'vicarious liability' is unknown to criminal law. As observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the appellant-Company".

45. Mr. Arjun Lall, Advocate, would however contend that the petitioners are holding different positions/responsibility. Once the petitioners are remiss in discharge of their duties and responsibility, they obviously are vicariously liable for the offence. Reliance was placed upon the following judgments:

i. Tarun Tejpal vs. Jayalakshmi Jaitly, 2007 SCC Online Del 881;

ii. Gambhirsinh R. Dekare vs. Falgunbhai Chimanbhai Patel, 2013 (3) SCC 697;

iii. Rajdeep Sardesai v. State of Andhra Pradesh; 2015 (8) SCC 239; and

iv. M.J. Akbar v. State of A.P., 2011 SCC Online AP 935.

46. On the basis of these judgments, it was submitted that the Editors have to take responsibility of every thing they publish and being responsible for the publication, they are prima facie guilty of offence of defamation. It was further submitted that it is for the petitioners to appear before the court and plead that the news item published was without their knowledge/consent as at this stage the court is only required to see that a prima facie case is made out for the issuance of process and in the given circumstances no exception to the issuance of process can be taken by the petitioners.

47. As observed above, the complainant has failed to make positive averments against the petitioners in the complaint and attribute specific role of each of them in committing the alleged offence warranting initiation of criminal proceedings. It has not been stated as to how various petitioners were involved/responsible for the broadcast of the news item, which is alleged to be defamatory. The decisions, which have been relied upon by the learned counsel for the respondents to contend that the Editor is responsible for the item which was published are mainly in relation to the print media which is governed by the Press and Registration of Books Act, 1867 (for sort 'Press Act'). So far as the broadcast of the channels in the cable network/electronic media is concerned, it is the provisions of the Cable Television Networks (Regulation) Act, 1955 (for short 'Cable T.V. Act') that are applicable. Therefore, the responsibility of an Editor of a T.V. Channel cannot be fixed by taking recourse to the Press Act. Even the Cable T.V. Act and the Rules framed thereunder did not provide for defamation of an Editor of any Channel, rather the said terms is conspicuously absent. Therefore, the only provision which one may find of some relevance is section 17 of the Cable T.V. Act, which provides that where an offence is committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

48. It would be noticed that even this provision, i.e. section 17 would only be applicable to the offence punishable under the Act and not to the provisions of the Indian Penal Code, therefore, merely because a person is alleged to be a Director or an Editor or an employee of the company cannot be held responsible for defamation on account of broadcasting defamatory material unless it is shown that the said person is responsible for making/publishing of the same.

49. Thus, on the basis and in the light of discussion made above, considering the facts that in the complaint as also statements recorded under section 202 of the Code, there is no specific allegations with regard to the role played by each of the petitioners in making or publication of the defamatory material against the complaint, the issue of process against them by virtue of they being office holders / position holders in the Broadcasting Company/ news channel that is by invoking the principle of vicarious liability is neither legally justifiable nor sustainable in law.

50. It is next contended by the learned counsel for the petitioners that the CDRs are not admissible under section 65-B of the Indian Evidence Act, as admittedly they have not been certified in accordance with sub-section (4) thereof. Reliance as placed upon the judgment of the Hon'ble Supreme Court in ***Anvar P V*** Vs ***P K Basheer And Others***, 2014 (10) SCC 473, wherein the earlier view of the two Hon'ble Judges in ***State (N C T Of Delhi)*** Vs ***Navjot Sandhu @ Afsan Guru***, 2005 (11) SCC 600 was over ruled and and it was observed as under:

> "[22] The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of

secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case , does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

[23] The appellant admittedly has not produced any certificate in terms of Section 65B in respect of the CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground."

51. In view of the law laid down in ***Anvar's*** case, petitioners would submit that the CDRs at this stage are liable to be excluded from consideration. However, on the other hand, Mr. Arjun Lal, learned Advocate would argue that the judgment in ***Anvar's*** has been held to be prospective in nature and reference in this regard has been made to the judgment of the Hon'ble Supreme Court in ***Sonu alias Amar*** vs. ***State of Haryana***, AIR 2017 SC 3441.

52. I have gone through the said judgment and find that though the Bench of two Hon'ble Judges did feel that the ratio of judgment of ***Anvar's*** case should be prospective as is evident from para 32 of the judgment, which reads thus:

"[32] The interpretation of Section 65B (4) by this Court by a judgment dated 04.08.2005 in Navjot Sandhu held the field till it was overruled on 18.09.2014 in Anvar's case. All the criminal courts in this country are bound to follow the law as interpreted by this Court. Because of the interpretation of Section 65B in Navjot Sandhu, there was no necessity of a certificate for proving electronic records. A large number of trials have been held during the period between 04.08.2005 and 18.09.2014. Electronic records without a certificate might have been adduced in evidence. There is no doubt that the judgment of this Court in Anvar's case has to be retrospective in operation unless the judicial tool of 'prospective overruling' is applied. However, retrospective application of the judgment is not in the interests of administration of justice as it would necessitate the reopening of a large number of criminal cases. Criminal cases decided on the basis of electronic records adduced in evidence without certification have to be revisited as and when objections are taken by the accused at the appellate stage. Attempts will be made to reopen cases which have become final."

53. However, the fact remains as to whether the Hon'ble Supreme Court in fact held the judgment in ***Anvar's*** case to be prospective? The answer is found in para 35 of the judgment wherein after taking into consideration that the decision in ***Anvar's*** case was rendered by a Bench of Three Hon'ble Judges, the Hon'ble Judges on the basis of the propriety refrained from declaring that the judgment to be prospective in operation and left it open to be decided in an appropriate case by Three Judges Bench, as would be evident from para 35 of the report, which reads thus:

35] This Court did not apply the principle of prospective overruling in Anvar's case. The dilemma is whether we should. This Court in K. Madhav Reddy v. State of Andhra Pradesh, 2014 6 SCC 537 held that an earlier judgment would be prospective taking note of the ramifications of its retrospective operation. If the judgment in the case of Anvar is applied retrospectively, it would result in unscrambling past transactions and adversely affecting the administration of

justice. As Anvar's case was decided by a Three Judge Bench, propriety demands that we refrain from declaring that the judgment would be prospective in operation. We leave it open to be decided in an appropriate case by a Three Judge Bench. In any event, this question is not germane for adjudication of the present dispute in view of the adjudication of the other issues against the accused."

54. Therefore, this Court for the time being is bound by the law laid down by the Hon'ble Three Judges in ***Anvar's*** case and the CDRs having admittedly not been certified in accordance with Section 65-B have essentially to be excluded from consideration at this stage.

55. Thus, on the basis of the aforesaid discussion, it is established that:

i. the complainant has failed to make a positive averments against the petitioners in the complaint as also in the evidence led to attribute specific role of each of them in committing the alleged offence warranting initiation of criminal proceedings;

ii. Unlike civil liability, the penal provisions have to be strictly construed wherein there is no vicarious liability in criminal law unless statute takes that within its fold and thus the petitioners merely by virtue of their being Managing Director, Editor-in-Chief, Editor and Founder Editor-in-Chief would not make them vicariously liable for the acts of their employees;

iii. CDRs which formed the sheet anchor of the case of the complainant have not been certified in accordance with law, more particularly, section 65-B of the Indian Evidence Act and will have to be excluded from consideration. Therefore, once the CDR is excluded from consideration, then obviously the process against the petitioners could not have been ordered to be issued on the basis of the material available with the Magistrate; and

iv. Once the Magistrate has failed to take into consideration all the aforesaid facts as have been noticed above, it can conveniently be held that the learned Magistrate has not applied his judicial mind before issuing process against the petitioners.

56. Accordingly, there is merit in the petitions and the same are allowed. Order dated 1.4.2015 passed in Criminal complaint No. 113A-2 of 15/2007 against the petitioners is quashed and set aside.

57. However, before parting, it is made clear that the order dated 1.4.2015 taking cognizance on the complaint is maintained against the other accused i.e. respondents No. 5 to 7.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Ashok Kumar ....Petitioner

Versus

State of Himachal Pradesh ....Respondent

Cr.MP(M) No. 1032 2017

Decided on: 30th August, 2017

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 406, 420 and 506 of IPC and Section 24 of the Passports Act – the petitioner filed a petition seeking pre arrest bail- held that the plea of the petitioner that payment has been made is not supported by any document- the investigation is at initial stage and the petitioner is not co-operating in the investigation - the discretion to admit the petitioner on bail is not required to be exercised at this stage – the petition dismissed.

(Para-5 to 9)

For the petitioner:	Mr. I.P.S. Kohli and Mr. Vir Bahadur Verma, Advocates.
For the respondent/State:	Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Deputy Advocate General, and Mr. Rajat Chauhan, Law Officer.
For the complainant:	Mr. R.K. Bawa, Sr. Advocate, with Mr. Jeevesh Sharma, Advocate. ASI Santosh Kumar, Police Station, Indora, District Kangra, 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 438 of the Code of Criminal Procedure for releasing him on bail, in the event of his arrest, in case FIR No. 136 of 2017, dated 20.05.2017, registered under Sections 406, 420 and 506 of Indian Penal Code, 1860 (for short "IPC") and Section 24 of the Passports Act, registered at Police Station Indora, District Kangra, Himachal Pradesh.

2. As per the learned counsel for the petitioner, the petitioner is innocent and has been falsely implicated in the present case. He is permanent resident of Ludhiana (Punjab) and neither in a position to tamper with the prosecution evidence nor in a position to flee from justice, thus he may be released on bail.

3. Police reports stand filed. As per the prosecution story, on 20.05.2017 complainant, Shri Aman Joshi, made a complaint to the police alleging that the petitioner met him in the month of March, 2016, and he told to his father that he does the work of making work permits of youth for sending them abroad. The petitioner also told that he would send the complainant on work permit to Australia and the petitioner demanded rupees twenty five lac for doing so. The petitioner also told that he would take rupees twenty lac beforehand and rest of the money after the approval of the viza. Thereafter, the complainant and his father on different dates gave rupees twenty lac in total to the petitioner for sending the complainant to Australia and the petitioner also took the passport, school certificates and eight passport size photographs of the complainant. After lapse of considerable time, the complainant did nothing and on asking he used to give evasive replies. Lastly, when the complainant asked for return of his money, then the petitioner threatened to do away with his life. The complainant also alleged that he is apprehending that his passport and other documents may be illegally used by the petitioner. On the basis of the above complaint of the complainant, police registered a case against the petitioner. Police investigated the matter and found that on the pretext of sending the complainant to Australia, the petitioner took the money from the complainant. The petitioner was interrogated and he divulged that being contractor he entered into an agreement to execute the construction work of a hotel in Damtal and the said hotel was being constructed by four partners, viz., Moti Lal (father of the complainant), Aman Joshi (complainant), Raj Vikram Rai and Ram Muhammad Isa @ Rami. He also handed over a copy of said agreement. Raj Vikram Rai disclosed that he is building a hotel on his land and he entered into a contract for construction work of the said hotel with the petitioner. He also disclosed that Moti Lal and Aman Joshi have no concern with the hotel. The petitioner further divulged that the hotel for which he has been engaged, grand-mother of Aman Joshi is also partner therein, however, grand-mother of Aman Joshi disclosed that no land is registered in her name at Damtal. The petitioner also disclosed that he took the decoration work of the hotel for thirty one/thirty two lac, but due to non-payment, he left the work amidst. It was unearthed during the investigation that the petitioner and Raj Vikram Rai have entered into the agreement and Raj Vikram Rai is the owner of the hotel. The matter was reinvestigated and it was found that in DR Resorts, Damtal, Aman Joshi, Moti Lal, Raj Vikram Rai, Ram Muhammad Isa @ Rami and Savitri Devi are the partners. As per the prosecution, the petitioner is not disclosing true facts and is also not co-operating in the investigation. The petitioner is very clever person and in case he is enlarged on bail, he may flee from justice.

4. I have heard the learned counsel for the petitioner, learned Additional Advocate General for the State, learned Senior counsel for the complainant and gone through the record, including the police reports, carefully.

5. The learned counsel for the petitioner has argued that the material, which has come on record, demonstrates that the complainant made demands from the petitioner because of the fact that petitioner was making internal decoration of the resort and one Raj Vikram Rai, for which as per the arrangement between the parties, the complainant was to make the payments. He has further argued that the documents on record further demonstrate that said Raj Vikram Rai asked the petitioner to stop the work if no further payment is made by the complainant party. Conversely, the learned Additional Advocate General has argued that the petitioner is not co-operating in the investigation and so the bail application may be dismissed, as the investigation is at its initial stage.

6. Learned Senior Counsel, appearing for the complainant has argued that in fact the petitioner has demanded amount for sending the complainant abroad and now he is coming up with a different plea and he is also not co-operating in the investigation. He has further argued that the petitioner has cheated the complainant, so the bail application of the petitioner may be dismissed.

7. In rebuttal, the learned counsel for the petitioner has argued that *'bail is rule and jail is exception'.* He has further argued that there is nothing on record to show that the petitioner is not joining and co-operating in the investigation.

8. After hearing the learned counsel for the parties and going through the record, at this stage, this Court finds that as per the petitioner there was an agreement between the petitioner and DR resorts for interior decoration of the resort for which the payment was to be made by the complainant, as there was an internal arrangement *inter se* DR Resorts and the complainant, this submission of the petitioner does not convince this Court to conclude that the petitioner has received the payment from the complainant qua the agreement, as there is nothing in the documents placed on record or nothing is emanating from the investigation to conclude that the complainant and his mother made the payment to the petitioner and they were liable to make the payment to the petitioner for the work he has done for DR Resorts. It is not a ground available with the petitioner for grant of bail that the father of the complainant was a witness to the agreement, entered into *inter se* the petitioner and the DR Resorts, therefore, this Court finds that the complainant made payment of the amount to the petitioner and at this stage the investigation is in nascent stage. Considering all the above mentioned facts in mind, the present is a fit case where the judicial discretion to admit the petitioner on bail is not required to be exercised in his favour, as the records reflect that the petitioner is not co-operating in the investigation and the truth is yet to be elicited. This Court finds that there is no plausible reason to enlarge the petitioner on anticipatory bail.

9. In view of what has been discussed hereinabove, the petition, which sans merits, deserves dismissal and is accordingly dismissed.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE.

Ashok Leyland Limited …Petitioner.

Versus

Himachal Pradesh Road Transport Corporation and another. …Respondents.

CWP No.601 of 2017
Reserved on: 26.7.2017
Date of Decision: August 30, 2017

Constitution of India, 1950- Article 226- Certain directions were issued by National Green Tribunal (NGT) for preservation and protection of the natural environment and ecology of Rohtang Pass- respondent No. 1 floated expression of interest for supply of 25 battery operated passengers transport vehicles – one party expressed its interest – the time was extended and 7 manufacturers expressed their interest – specifications were finalized and draft of request for proposal (RFP) was forwarded to all the participants – RFP was finalized after consultation and a tender was issued – since none was the manufacturer, therefore, a consortium having a technology alliance/partnership with foreign companies was allowed to bid - a corrigendum was issued – trial of the buses was conducted in which the buses of the petitioner failed while that of G succeeded – the order was given to G – aggrieved from the order, the present writ petition has been filed- held that HRTC was not aware of the technical specification – the project was unique in nature – hence, suggestions were sought from all the persons – right was reserved to amend RFP – RFP was amended due to deliberations in the pre bid conference- the consortium was necessary as no single party was competent to fulfill the condition – the petitioner had participated in the bid and is estopped from challenging the terms of the same - the Court can interfere with the policy decision, unless there is violation of public policy or some illegality – it has not been shown that there was some violation- petition dismissed. (Para-27 to 120)

Cases referred:

JSW Infrastructure Limited and another vs. Kakinada Seaports Limited and others, (2017) 4 SCC 170
Central Coalfields Limited and another vs. SLL-SML (Joint Venture Consortium) and others, (2016) 8 SCC 622
Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489
Villianur Iyarkkai Padukappu Maiyam v. Union of India & others, (2009) 7 SCC 561
Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & another, (2016) 16 SCC 818
Raunaq International Ltd. vs. I.V.R. Construction Ltd. and others, (1999) 1 SCC 492
Tata Cellular vs. Union of India, (1994) 6 SCC 651
Master Marine Services (P) Ltd. vs. Metlalfe & Hodkinson (P) Ltd. and another, (2005) 6 SCC 138
Jagdish Mandal vs. State of Orissa and others, (2007) 14 SCC 517
Maa Binda Express Carrier and another vs. North-East Frontier Railway and others, (2014) 3 SCC 760
Haryana Urban Development Authority and others vs. Orchid Infrastructure Developers Private Limited, (2017) 4 SCC 243
Reliance Telecom Limited and another vs. Union of India and another, (2017) 4 SCC 269 (Two Judges)
Montecarlo Limited vs. National Thermal Power Corporation Limited, (2016) 15 SCC 272
Elektron Lighting Systems Private Limited and another vs. Shah Investments Financial Developments and Consultants Private Limited and others, (2015) 15 SCC 137
New Horizons Limited and another vs. Union of India and others, (1995) 1 SCC 478
Joshi Technologies International Inc. vs. Union of India and others, (2015) 7 SCC 728
Tata Iron & Steel Co. Ltd. vs. Union of India and another, (1996) 9 SCC 709
Heinz India (P) Ltd. & Anr. v. State of U.P. & Ors, (2012) 5 SCC 443
Tafcon Projects (I) (P) Ltd. vs. nion of India & others, (2004) 13 SCC 788
M.P. Oil Extraction & another vs. State of Madhya Pradesh & others, (1997) 7 SCC 592
Natural Resources Allocation, In Re, Special Reference 1 of 2012, (2012) 10 SCC 1
Manohar Lal Sharma vs. Principal Secretary and others, (2014) 9 SCC 516
M&'T Consultants Secunderabad vs. S.Y. Nawab & another, (2003) 8 SCC 100
Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed, (1976) 1 SCC 671
Mithilesh Garg & others vs. Union of India & others, (1992) 1 SCC 168

Sanjay Kumar Shukla vs. Bharat Petroleum Cooperation Limited, (2014) 3 SCC 493

For the Petitioner	:	Ms Jyotsna Rewal Dua, Senior Advocate, with Mr. Raman Sethi, Advocate.
For the Respondents	:	Mr. Shrawan Dogra, Senior Advocate, with Mr. Sunil Mohan Goel & Mr. Gulzar Singh Rathore, Advocates, for respondent No.1. Mr. P.S. Patwalia, Mr. B.C. Negi, Senior Advocates, with Mr. Yashwardhan Chauhan & Mr. Abhinav Mukherji, Advocates, for respondent No.2.

The following judgment of the Court was delivered:

Sanjay Karol, Acting Chief Justice

In this petition, so filed under Article 226 of the Constitution of India, petitioner - Ashok Leyland Limited (hereinafter referred to as petitioner) lays challenge to the Letter of Award of contract, dated 22.4.2017 (Page-283), so issued by respondent No.1 - Himachal Road Transport Corporation (hereinafter referred to as HRTC), in favour of respondent No.2 – M/s Goldstone Infratech Limited (hereinafter referred to as Goldstone), with a further prayer that HRTC be directed to consider the petitioner's revised bid dated 24.2.2017.

2. The issues which require our consideration being:

A. Whether action of HRTC in issue of process of tender and award of contract, as alleged, is opaque, non-transparent, against public interest and as such illegal. Has it unfairly prejudiced the petitioner's interest;

B. whether after having participated in the tender process, without any demur, is it open for the petitioner to assail the same;

C. whether the conditions of tender were tailor-made favouring a particular party;

D. whether the successful bidder was eligible to have participated in the tender process;

E. the scope of judicial interference in an award of tender.

3. Facts, emerging from record, i.e. pleadings and the documents, are as under.

4. While dealing with the matter for preservation and protection of the natural environment and ecology of legendry Rohtang Pass (an international tourists' destination), certain directions came to be issued by the National Green Tribunal (NGT), inter alia, exploring the possibility of running CNG buses.

5. On 13.3.2015 (Page-428), Government of India notified a Scheme, known as Faster Adoption and Manufacture of (Hybrid and Electric Buses) in India (for short, FAME). For implementation of the said Scheme, Government of Himachal Pradesh approached the Department of Heavy Industries, Government of India (hereinafter referred to as DHI), seeking support for purchase of 25 electric buses. Vide communication dated 8.1.2016 (Page-428), such request came to be communicated with two riders – (a) funding to be in the ratio of 75% : 25% that of Government of India and Government of Himachal Pradesh, respectively, (b) technical specification for the buses to be finalized, in consultation with DHI.

6. Pursuant thereto, on 10.2.2016, HRTC floated Expression of Interest (hereinafter referred to as EOI) (Annexure P-3) for supply of Battery Operated Passenger Transport Vehicles, 25 in number, having overall length of 9-10 metres and floor height of 900 mm. It was a totally unique programme, with no background or history of manufacture or plying of non-traditional vehicles in the area. By 20.2.2016, the last date so prescribed, only one party expressed its interest. Hence, as desired by others, time to submit the EOI was extended till 15.3.2016 (Page-

29). In all, seven vehicle manufacturers expressed their interest and the details/ specifications so collected and collated were forwarded to the Director (Auto), Ministry of Heavy Industries and Public Enterprises, DHI (Page-429).

7. On 12.4.2016, DHI called a joint meeting of the interested parties/stakeholders, including, (i) HRTC, (ii) Department of Transport, Government of Himachal Pradesh, (iii) Association of State Transport Undertaking (ASRTU), (iv) all State Transport Undertakings/ Associations of State Road Transport Undertakings, (v) Society of Indian Auto Mobiles Association (SIAM), (vi) International Centre for Automatic Technology (ICAT), (vi) Central Institute of Road Transport (CIRT).

8. At this juncture, it be observed that none was manufacturing Battery Operated Vehicles, which could be plied in the difficult and hilly terrain of Manali-Rohtang. As such, pursuant to directions dated 7.4.2016, so passed by the NGT, specifications discussed in the joint meeting held on 12.4.2016, were finalized and draft of Request for Proposal (hereinafter referred to as RFP), inviting tenders, forwarded to all the participants, inviting their suggestions.

9. After considering the views and suggestions of all, including that of SIAM (see Para-7 supra), whose Chairman is the Managing Director of the petitioner-company, RFP was finalized and formally issued on 11.5.2016. The said document (Annexure P-5), inter alia contained terms and conditions as also the schedule to be adhered to, in finalizing purchase of such vehicles. Following is the schedule, so prescribed:

S.No.	Event Description	Date
1.	Date of issue of RFP	11.5.2016
2.	Last date of receiving queries	27.7.2016
3.	Pre-Bid meeting	30.7.2016 at 2PM
4.	Bid due date	30.9.2016 at 2PM
5.	Opening of Envelop 1	30.09.2016 3PM
6.	Trial of EV on Manali-Rohtang Sector	To be intimated later
7.	Opening Envelop 2	To be intimated later
8.	Letter Award (LOA)	As per RFP
9.	Signing of the Contract	As per RFP

10. Accordingly, on 30.7.2016, a pre-bid meeting was held at New Delhi, with all the manufacturers, in which both the petitioner and Goldstone also participated, wherein again the stakeholders were asked to give their suggestions by 12.8.2016.

11. The fact that since none was a manufacturer of electric buses, hence, Indian manufacturer of conventional vehicles having technology alliance/ partnership with foreign companies with proven technology, may be allowed to bid as a Consortium, meeting the benchmark with global standards, was a view which emerged during the course of such meeting.

12. Consequently on 26.8.2016, after deliberating upon the issue with the authorities, HRTC forwarded the proposed corrigendum to be carried out in the RFP to the Secretary (Transport), Government of Himachal Pradesh for its approval. The said corrigendum was also forwarded to all the participant stakeholders, including those who had attended the meeting held at New Delhi on 12.4.2016, soliciting their response to be furnished on or before 22.9.2016. Eventually, by taking a holistic view and after seeking approval of the State

Government, which was so accorded on 17.9.2016, HRTC amended the RFP, by issuing a corrigendum dated 11.10.2016 (Page-157) (hereinafter referred to as the first amendment). Essentially, following changes were made – (i) calendar of events was rescheduled; (ii) concept of consortium was introduced; (iii) amount of financial turnover and net worth of the bidder was reduced marginally; (iv) Technical specifications were altered with the introduction of evaluation sheet.

13. Subsequently, Board of Directors of HRTC took a decision to modify the terms of first amendment and consequently issued addendum dated 31.10.2016 (Annexure P-8) (hereinafter referred to as the second amendment).

14. As per the schedule prescribed in the RFP, by 10.11.2016, the last date for submission of bids, only two manufacturers, i.e. Ashok Leyland (petitioner) and Goldstone (private respondent), submitted their bids, which were to be opened on 5.1.2017.

15. At this stage, it be observed that pursuant to constitution of a nine-member Committee, so constituted by the State Government, for conducting trial of electric buses (EV-Prototype) from Manali to Rohtang, trial of prototype electric bus of Goldstone was conducted from 20.10.2016 to 2.11.2016, and that of petitioner from 5.12.2016 to 20.12.2016. This was prior to the stipulated date of 31.12.2016.

16. Affidavit of HRTC demonstrates, though trial of Goldstone was successful, but that of petitioner was unsuccessful, for the bus never reached Rohtang with a single charge, as the battery had to be re-charged midway. Yet, a conscious decision was taken by the Chairman of HRTC that notwithstanding such fact, petitioner's bid be opened, subject to their procuring necessary battery, to enable the bus to undertake journey to Rohtang from Manali and return, without charging the battery midway.

17. Despite petitioner being ineligible, such decision was taken, perhaps keeping in view the fact that (a) the petitioner claimed itself to be a manufacturer of electric buses in India, (b) exclusion of the petitioner would have resulted into Goldstone being the sole bidder, which may not have been in the interest of Revenue.

18. Taking a holistic view, bids, technical as also financial, of both the bidders, were opened on 6.1.2017 and 9.1.2017, respectively.

19. The bidders were informed to clarify the terms of the bid, vide communication dated 24.1.2017 (Annexure R-1/10). Overall, evaluation of technical and financial bids revealed Goldstone to have complied with the specifications of RFP.

20. As per the financial bid, Goldstone quoted the price of one bus @ Rs.1,95,99,976.17 plus Rs.23,56,650/- as AMC charges, whereas petitioner quoted Rs.2,01,94,132.5 plus Rs.50,97,300/- as AMC charges.

21. On 30.1.2017 (Page-435), both the bidders were called for discussions and submission of necessary documents, establishing credentials and creditworthiness of their respective bids.

22. In principle, HRTC decided to (a) hold negotiations with Goldstone for reducing the price of the bus as also the amount and terms and conditions of AMC, (b) hold negotiations with the petitioner for award of 30% of the purchase order, subject to their willing to match the commercial offer of Goldstone. This of course was subject to their fulfillment of conditions of RFP.

23. HRTC desired to hold such meeting on 9.2.2017, but however on the petitioner's request, meeting was postponed for 22.2.2017, on which date, negotiations were held with both the bidders. Goldstone agreed to reduce the price of the bus from Rs.1,95,99,976.17 to Rs.1,90,99,999.16 and the amount of AMC, so quoted, to be for a period of eight years, with certain payments to be deferred. Since negotiations between the petitioner and HRTC failed,

resultantly, on 22.2.2017 itself, Letter of Award (Annexure R-1/6) was issued in favour of Goldstone.

24. In view of the mandate of DHI (GOI), 31.3.2017 being the deadline for release of funds under the Scheme, contract agreement dated 27.3.2017 (Annexure R-1/7) for supply of buses, in terms of Clause 3.6 of Part-E of RFP was executed and purchase order (Annexure R-1/9) issued.

25. However, vide Email dated 24.2.2017 (Annexure P-13), petitioner gave a counter offer, reducing the price of the bus at Rs.1,86,99,976/-, without mentioning anything about the cost of AMC, which offer was not considered, in view of finalization of the bidding process.

26. At this juncture, it be observed that even in the Court, HRTC offered to allot 30% of purchase order, but despite Court's persuasion, petitioner did not agree.

27. Let us first examine the contents of the RFP. It is a proposal for design, manufacture, supply and commissioning of Battery Operated Passenger Transport Vehicle (known as EV Bus) with AMC and charging station for operation on Manali-Rohtang section of Himachal Pradesh.

27.1 It contains nine parts and 16 Annexures. First part, i.e. Part-A is the "Disclaimer" clause, which unambiguously clarifies that the document is neither an agreement nor an offer. Purpose of the document being to provide "information to assist in the formulation of their proposal submission". "Document does not purport to contain all the information Bidders may require". Each bidder was to "conduct its own investigation and analysis" and check the "accuracy, reliability and completeness of information in the RFP" and "obtain independent advice from appropriate sources".

27.2 Part-B of the RFP deals with the Notice Inviting Tender (NIT), which clarified that views of various agencies were solicited and "corrigendum shall be issued, if required, on the basis of suggestions received from them".

27.3 Part-C of the RFP contains specifications.

27.4 Part-D contains the definitions.

27.5(i) Part-E contains instructions to bidders. It is this Part with which we are concerned. In terms of Clause 1.3, bidding in the form of Consortium is not permitted and the bidding and "Bidder" is defined in Clause 1 of Part-D to mean "the bidder meeting the eligibility criteria in Clauses 2.5.2", who submitted the bid in response to the RFP".

27.5(ii) Clause 2.1 of Part-E lays down Brief Description of the Bidding Process. Relevant clause reads as under:

> "2.1 Brief Description of the Bidding Process
>
> a. The Corporation shall adopt a single bid process with evaluation as per the RFP (referred to as the "Bidding Process)n for selection of the Successful Bidder for award of the Project. The Bidders shall submit their Bids in accordance with this RFP. <u>The Bidders need to offer bid which conforms to the draft Contract provided as part of this RFP Document and the Technical Specifications</u>.
>
> The bid submitted by each Bidder will comprise of two envelopes:
>
> <u>Envelop 1" "Key Submissions and Techno-commercial Bid</u>", which will further have two envelopes-(i) Envelop 1A with "Key submissions, and (ii) Envelop 1B with "Techno-commercial id", and
>
> <u>Envelop 2: "Price Bid</u>"
>
> The two separate envelops will contain the information and date as stipulated in this RFP below.

b. Bidders must note that the Envelop 2 "Price Bid" of only such Bidders who submit responsive bids and who meet the Qualification Criteria alongwith successful trial of EV on the terrain are determined to be "Eligible Bidders" in accordance with the provisions of this RFP will be opened." (Emphasis supplied)

27.5(iii) Clause 2.5.1 prescribes the Eligibility of Bidders, whereby bidding by Consortium is not permitted. Technical and financial capacity is prescribed in clause 2.5.2. Sub clause (D) of Clause 2.5.3 provides for Trial of Product as under:

"The bidder shall provide the prototype EV as per technical specifications mentioned in the RFP and shall be put to trial for operation in Manali-Rohtang sector (hilly terrain of H.P.) and only after successful trial of vehicle, the bidder shall be considered as eligible."

27.5(iv) Clause 2.13 specifically provided that:

"2.13 Contents of the RFP

This RFP comprises the Disclaimer set forth hereinabove, the contents thereof, and will additionally include any Addenda issued in accordance with Clause 2.15.

The draft Contract provided by the Corporation as part of the Bid Documents shall be deemed to be part of this RFP."

27.5(v) Further, right of amendment of RFP is prescribed in Clause 2.15 of Part-E, in the following terms:

"2.15 Amendment of RFP

At any time prior to the Bid Due Date, the Corporation may, for any reason, whether at its own initiative or in response to clarifications requested by a Bidder, modify the RFP by the issuance of Addenda."

27.5(vi) Clause 5 stipulates that:

"5. PRE-BID CONFERENCE:

5.1 Pre-bid conference of the Bidders shall be convened 1400 hours on 30.07.2016 in office of Managing Director, Himachal Pradesh Road Transport, Shimla-171003. Bidders shall their own cost of attending any pre-bid conference.

5.2 During the course of pre-bid conference(s), the Bidders will be free to seek clarifications and make suggestions for consideration of the Corporation. The Corporation shall endeavour to provide clarifications and such further information as it may, in its sole discretion, consider appropriate for facilitating a fair, transparent and competitive Bidding Process.

5.3 Details of proposed/suggested variations/deviations/additions from the proposal specifications/conditions, if any, should be clearly indicated while sending queries before Pre-Proposal Conference. No further suggestions for deviations / variations / additions shall be entertained after the Pre-Proposal Conference.

5.4 The Corporation may clarify on variations/deviations, alternative proposals, which ensure equal or higher quality/performance to the Technical Specifications during Pre-Proposal Conference. However, the decision of the Corporation in this regard shall be final.

5.5 After incorporating amendments acceptable to Corporation, RFP Document shall be frozen through issuance of an Addendum(s) Addendum to RFP Document shall be sent by e-mail to all prospective Proposers, who purchased the RFP Document. The addendum to the RFP Document can also be downloaded from Corporation website www.hrtc.gov.in

5.6 Non-attendance at the pre-bid conference shall not be a cause for disqualification of a Bidder. However, terms and conditions of the Addendum(s) shall be legally binding on all the Bidders irrespective of their attendance at the Pre-Bid-Conference." (Emphasis supplied)

27.6 Part-F deals with the Format of Cover Agreement Comprising the Contract.

27.7 Part-G deals with the Technical Specifications for Design, Manufacture, Supply and Commissioning. Clause 4 of the said Part reads as under:

"4. Corporation reserves the right to alter, modify, change the specifications as per requirement to suit the latest provisions of CMVR/ any other Notifications, safety aspects, emission aspects besides any practical/ operational difficulties etc. faced by the Corporation. Vehicle Manufacturer shall ensure that all the alterations, changes or modifications in the specifications, if necessary, as mentioned above shall be carried out in the buses built by them as per advice of the Corporation without attributing any additional cost. Complete Bus has to be type approved from the approved test agency under CMVR as per specifications laid herein before any proto type is given to the H.R.T.C. Corporation. The buses shall comply with the HP Motor Vehicle Rules." (Emphasis supplied)

27.8 Part-H prescribes for the Annual Maintenance Contract.

27.9 Technical specifications are also specified in Annexure-13 of the RFP.

28. The primary question, which arises for consideration is as to whether HRTC was well within its right to amend the RFP or not?

29. Significantly, vide Clauses 2.13, 2.15 & 5 of Part-E; the Disclaimer Clause, Part-A; NIT Clause, Part-B; and Clause 4 of Part-F, of the document itself of RFP, HRTC reserved its right to update, amend or supplement the information of the RFP, including the right not to proceed with the purchase or to change the process or procedure to be applied.

30. Let us also examine the nature of the RFP and the backdrop, in which it came to be finalized and issued.

31. For cleaner and greener environment at Rohtang Pass, pursuant to directions issued by the NGT and the Scheme framed by the Central Government, HRTC ventured for providing EV Buses to be operated from Manali to Rohtang. At that time, no vehicle manufacturer in India was manufacturing such vehicle. Neither the State nor the Central Government had the mechanism or the wherewithal of procuring from open market, EV Buses manufactured in India.

32. HRTC itself had no clue of any specifications. A project, unique in nature, was to be conceptualized and implemented by the proponent. Directions issued by the DHI (GOI) and specifications of the Project Implementation and Sanctioning Committee (PISC) that of Government of India were also required to be considered. It is this piquant situation, HRTC sought suggestions from various stakeholders, including bodies of manufacturers of vehicles and persons in the related trade.

33. Hence, the RPF (Part-B, being NIT), clarified the tender to be global, reserving right to incorporate suggestions received from ASRTU, ARAI, CIRT, SIAM, ICAT, Director (Auto), Department of Heavy Industries & Director Transport, Government of H.P. At this juncture, it be noticed that reference is there of SIAM, whose Chairman is the Managing Director of the petitioner-company.

34. Right to amend the RFP was specifically reserved in the Disclaimer Clause, Part-A; NIT Clause, Part-B; Clauses 2.13, 2.15 & 5 of Part-E; and Clause 4 of Part-F, of the document itself.

35. The Apex Court in *JSW Infrastructure Limited and* another *vs. Kakinada Seaports Limited and others,* (2017) 4 SCC 170 (Two Judges), while applying the principle of construction observed that the document has to be construed in the backdrop in which it came to be prepared and has to be read as a whole.

36. In *Central Coalfields Limited and another vs. SLL-SML (Joint Venture Consortium) and others,* (2016) 8 SCC 622 (Two Judges), the Court reiterated the principle that terms of NIT cannot be ignored, as being redundant or superfluous. Acceptance or rejection of the bid should be examined not only from the point of view of unsuccessful party but also from the point of view of employer. The soundness of the decision by the employer ought not to be questioned, but the decision making process can certainly be subjected to judicial review. Soundness of the decision can be questioned, if it is irrational or malafide or intended to favour someone or the decision is such that no reasonable authority, acting reasonably, and in accordance with relevant law, could have reached at such a conclusion. Further, even if the terms of the NIT is held to be essential, the employer has the inherent authority to deviate from it, provided deviation is made applicable to all the bidders and potential bidders, as per the law laid down in its earlier decision in *Ramana Dayaram Shetty v. International Airport Authority of India,* (1979) 3 SCC 489.

37. In *Villianur Iyarkkai Padukappu Maiyam v. Union of* India *& others,* (2009) 7 SCC 561, the Court had a occasion to deal with the facts where the authorities were seeking development of Pondicherry Port. Attempts to get private participation in the project also failed. Lateron, the Government issued an advertisement, seeking Expression of Interest from consultants for preparation of feasibility study report. During the course of examination of such interest, one of the parties expressed its willingness to undertake the process of development with its own investment. By adopting the mechanism of 'Build, Operate and Transfer', the Government approved the request of such party, which came to be assailed by third parties, by way of a Public Interest Litigation. Holding that unless and until an illegality is committed in the execution of the policy or that the action is malafide, applying the settled principles of judicial review, the Apex Court refrained from quashing the action of the Government, also holding that mere change in the political dispensation would make no difference.

38. Further, in *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & another,* (2016) 16 SCC 818, while dealing with a case where tenders were invited for allotment of work, as a joint venture, for construction of Nagpur Metro Rail Corporation Ltd, the Court, after examining the law on joint venture consortium, reiterated the principle that decision making process of the employer, in accepting or rejecting the bid of the tenderer, should not be interfered with, unless and until the decision is so arbitrary or irrational that the Court could arrive at a conclusion that the decision is one which no reasonable authority, acting reasonably, and in accordance with law, could have reached. The decision came in the backdrop where the unsuccessful party challenged the eligibility of the successful tenderer, on the ground that the joint venture did not meet the eligibility condition of constructing Metro Civil Construction work. We find the facts to be similar in the instant case, for the experience of the consortium partner, i.e. BYD is required to be considered for the purpose of RFP.

39. Thus, in our considered view, HRTC was well within its right to amend the RFP.

40. The next question, which arises for consideration, is as to whether the document was "Tailor-made" to favour Goldstone.

41. The factum of amendment of RFP, firstly on 11.10.2016 and then on 31.10.2016, is not in dispute.

42. Significantly, this was much prior to the last date of submission of the bids, by which date none knew who all were going to be the bidders.

43. Let us examine the terms of the RFP, which came to be amended. Amendments, relevant for adjudication of the lis, are indicated in a tabulated form:

Reference	Original RFP issued on	Corrigendum-I issued	Corrigen

<table>
<tr><td>to RFP</td><td>11.5.2016</td><td>on 11.10.2016</td><td>dum-II issued on 29.10.2016</td></tr>
<tr><td>Part-C RFP Summary 11. Qualification Criteria</td><td>Following are the qualifications criteria for the bidders: Annual average Turnover of Rs. 500 Cr. In last three financial years starting from, 2013-14, 2014-15 and 2015-16.

A net-worth of Rs. 1000 Cr. As on the last day of financial year preceding the due date of submission of bid.</td><td>Following are the qualification criteria for the bidders / consortium:

Annual average turnover of Rs. 75 Cr.in last here financial years starting from 2013-14, 2014-15 and 2015-16.

A net worth of Rs. 50 Cr. As on the last day of financial year preceding the due date of submission of bid.</td><td></td></tr>
<tr><td>Instructions to Bidder 2.2 schedule of bidding process</td><td>
<table>
<tr><td>S.No.</td><td>Event Description</td><td>Date</td></tr>
<tr><td>1.</td><td>Date of issue of RFP</td><td>11.5.2016</td></tr>
<tr><td>2.</td><td>Last date of receiving queries</td><td>27.7.2016</td></tr>
<tr><td>3.</td><td>Pre-Bid meeting</td><td>30.7.2016 at 2PM</td></tr>
<tr><td>4.</td><td>Bid due date</td><td>30.9.2016 at 2PM</td></tr>
<tr><td>5.</td><td>Opening of Envelop 1</td><td>30.09.2016 3PM</td></tr>
</table>
</td><td>
<table>
<tr><td>Date</td><td></td></tr>
<tr><td>Date of issue of RFP</td><td>11.05.2016</td></tr>
<tr><td>Last date of receiving queries</td><td>27.7.2016 upto 5PM</td></tr>
<tr><td>Pre-Bid meeting</td><td>30.7.2016 at 2PM</td></tr>
<tr><td>Bid due date</td><td>10.11.2016 at 11AM</td></tr>
<tr><td>Opening of Envelop 1</td><td>5.1.2017 at 12 noon</td></tr>
<tr><td>Trial of Ev on Manali-Rohtang Sector</td><td>Trials to be completed 31.12.2016</td></tr>
</table>
</td><td></td></tr>
</table>

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<tr>
<td></td>
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<table>
<tr><td>6.</td><td>Trial of EV on Manali-Rohtang Sector</td><td>To be intimated later</td></tr>
<tr><td>7.</td><td>Opening Envelop 2</td><td>To be intimated later</td></tr>
<tr><td>8.</td><td>Letter Award (LOA)</td><td>As per RFP</td></tr>
<tr><td>9.</td><td>Signing of the Contract</td><td>As per RFP</td></tr>
</table>
</td>
<td>
<table>
<tr><td>Opening of Envelop 2</td><td>To be intimated later</td></tr>
<tr><td>Letter of attest (LOA)</td><td>As per RFP</td></tr>
<tr><td>Signing of contract</td><td>As per RFP</td></tr>
</table>
</td>
<td></td>
</tr>
<tr>
<td>Clause 2.5.2(D)</td>
<td>Trial of product

The bidder shall provide the prototype EV as per technical specifications mentioned in the RFP and shall be put to trial for operation on Manali-Rohtang Sector (Hilly Terrain of H.P.) and only after successful trial of vehicle, the bidder shall be considered as eligible.</td>
<td>

To ensure maximum participation, bidders are allowed to conduct trials with their existing products equivalent to the EV as required in the RFP. For clarification, equivalent product should be within 10% of the technical bid evaluation parameters as defined as Annexure 14A. These products shall be put to trial of operation on Manali Rohtang Sector (hilly terrain of H.P.) and only after successful trial of vehicle, the bidder shall be considered as successful if bidder is able to demonstrate that the fully charge electric bus completes the round trip of approved route with minimum distance of 110 Km. (for round trip) without any gliches and without any additional battery charging requirement and the same is demonstrated for minimum 10 days</td>
<td></td>
</tr>
</table>

		within 2 weeks. Bidder should inform HRTC of its trial schedule alongwith Bid i.e. 10th November, 2016.	
New Clause 2.6 (ix) being inserted after 2.6 (viii) in PART E of RFP		**Final evaluation of bids by all the Bidders shall be based upon technical and commercial parameters as given in newly inserted Annexure 14A.**	

Part-1 - Annexure-13

Technical specifications for Electric Vehicles.

Motor / Generator Description	Integrated Motor Generator	As per OE Standard fitment	
Normal Operating Range	Maximum 150 Km. (rated), Maximum 170 Km. (rated)	Minimum 110 Km for operation on hilly terrain for minimum one round trip from Manali-Rohtang-Manali on single charge	
Angle of approach	Between 15 deg to 20 deg	As per OE subject to successful trial	
Angle Departure	Not less than 11 dg	As per OE subject to successful trial	
Batteries	24 Volt/2* 12V.160Ah.	24 Volt/2*12V.160Ah/as per OE standard fitment.	
Off Board Fast Charger	Should charge within 75 minutes at one of the two terminus for full capacity of batteries.	Should charge within 180 minutes at one of the two terminus for full capacity of batteries.	
Max Speed	Min 75 kmph @ UBS II	Min 60 kmph @ UBS II	
Suspension Type	Parabolic leaf spring at Front and Rear / Air suspension at rear	Parabolic leaf spring / Air suspension at Front and Air suspension at rear	
Vehicle specified	35-44 seats +D	Minimum of 25 seats +D	

Seating Capacity			
Floor height	900mm	Minimum 650mm subject to trial on Manali-Rohtang road and confirming to angle of approach / departure as per RFP	Minimum 900mm”
Normal operating Range	Minimum 150 km (rated), Maximum 170 kms (rated)	Minimum 110 km for operation on hilly terrain for minimum one round trip from Manali-Rohtang – Manali on single charge	
Angle of approach	Between 15 deg to 20 deg	As per OE subject to successful trial	
Angle of departure	Not less than 11 deg	As per OE subject to successful trial	
Batteries	24 Volt/2*12V. 160 Ah	24 Volt*12V. 160 Ah/As per OE standard fitment	
Off Board Fast Charger	Should charge within 75 minutes at one of the two terminus for full capacity of batteries	Should charge within 180 minutes at One of the two terminus for full Capacity of batteries.	
Max Speed	Min 75 kmph @ UBS II	Min 60 kmph @ UBS II	
Suspension type	Parabolic leaf spring at Front and Rear/Air Suspension at rear	Parabolic leaf spring/Air suspension at front and Air suspension at rear.	
Vehicle specification Seating capacity	35-44 seats +D	Minimum of 25 seats +D	
Floor height	900mm	Minimum 900mm	
Bus Body-AIS 052 and MoUD-II Compliant. Doors	2 Nos-Flap Type; one Behind front axle, one Behind rear axle	2 Nos-Flap Type/Jack Knife door having Control with driver subject to confirming To angle of approach/departure as per RFP.	
Bus body	v) Inner panels- light weight PVC laminated.	v) Inner panels- light weight PVC laminated/as per OE fitment.	

Passenger Seats	iii) Number of Seats:- 35-44	iii)Number of seats:- Minimum of 25 seats in 2x2 configuration +D with reclining Seats.

Annexure 14A - Bid Evaluation Sheet

Bid evaluation	Weightage Max	Weightage	Justification
Technical bid evaluation		45	
Technology	20	20	
Proven technology : deployment of electric buses from bidder/consortium globally	5	5	Proven product and technology
10-25 buses		1	
26-100 buses		3	
>100 buses		5	
Electricity consumption / km (for Manali Rohtang route)	10	10	Lower operating cost
<1 kWh/km		10	
1.1-1.5 Kwh/km		6	
1.6 –2.0 kwh/km		2	
Charging	5	5	Operational requirement
Full charging from 0 to 100% SOC< 1 hour		5	
Full charging from 0 to 100% SOC 1-3 hour		3	
Full charging from 0 to 100% SOC >3 hours		0	
Specifications	25	25	
Range on Manali Rohtang Route	5	5	Operational requirement
<110 km		0	Not eligible bidder as per tender condition
110-125 km		2	
125-150 km & above		5	
Front suspension	3	3	Comfort

Leaf spring		1	
Air suspension		3	
Number seats	10	10	
25		3	
26-30		7	
>30		10	
Floor Height	4	4	
650 mm		0	
900 mm		2	
1100 mm & above		4	
Peak motor power	3	3	Performance in hilly terrain
<100 kw		0	
101-150		1	
>150		3	
Commercial bid evaluation	55	55	
Supply bid+NPV@ 10% of 8 years of AMC		45	45 Marks will be allotted to L-1 & subsequently bidders proportionately
Financing of 25% of payment of HRTC		10	
1 year		2	
2 year		4	
3 year		6	
4 year		8	
5 year		10	
Total		100"	

44. In the petition, it is averred that (a) first corrigendum was issued (i) arbitrarily and unilaterally (Page-8), (ii) to benefit and facilitate Goldstone, without disclosing or making known the bidders of such fact in the pre-bid meeting held on 30.7.2016 (Page-8), and (b) petitioner was not provided adequate time for meeting the requirements stipulated in the Second Amendment (Page-12).

45. We do not find anyone of the averments, or submissions made during the course of hearing, to be factually correct or borne out from the record.

46. Firstly, let us examine the law on the issue.

47. It is a settled principle of law as laid down by the Apex Court in *Raunaq International Ltd. vs. I.V.R. Construction Ltd. and others,* (1999) 1 SCC 492 (Two Judges) that: (a)

before entertaining a petition, Court must be satisfied that some element of public interest is involved; (b) the dispute purely is not *inter se* private parties; (c) difference in price offer between the two tenderers may or may not be decisive in deciding the question of public interest; (d) where a decision is taken bonafide and the choice exercised on legitimate consideration, without any arbitrariness Court should not show indulgence; (e) While granting interim injunction, Court must carefully weigh conflicting public interest; (f) where the decision making process stands structured and the tender conditions do set out requirements, Court is entitled to examine application thereof to the relevant fact circumstances; (g) relaxation if otherwise permissible, in terms of the conditions must be exercised for legitimate reasons; (h) nature and urgency in getting the project implemented is a relevant factor; (i) judicial review is permissible only on the established grounds, including malifide, arbitrariness or unreasonableness of the variety of *Wednesbury* principle.

48. The Apex Court in *Tata Cellular vs. Union of India,* (1994) 6 SCC 651 (Three Judges), laid down the following principle of judicial review of the nature of the contract with which we are dealing:-

> "(1) The modern trend points to judicial restraint in administrative action.
>
> (2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.
>
> (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than, such decisions are made qualitatively by experts.
>
> (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative or quasi-administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness (including its other facts pointed out above) but must be free from arbitrariness, not affected by bias or actuated by mala fides.
>
> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

49. The Apex Court in *Master Marine Services (P) Ltd. vs. Metlalfe & Hodkinson (P) Ltd. and another,* (2005) 6 SCC 138 (Two Judges), Court reiterated the principles that: (a) State can choose its own method to arrive at a decision; (b) State and its instrumentalities have duty to be fair to all concerned; (c) even when some defect is found in decision making process, Court must exercise its extra ordinary writ jurisdiction with great caution and that too in furtherance of public interest; and (d) larger public interest in passing an order of intervention is always a relevant consideration.

50. The Apex Court in *Jagdish Mandal vs. State of Orissa and others,* (2007) 14 SCC 517 (Two Judges), reiterated the aforesaid principles by stating that before interfering in a tender and contractual matter, in exercise of its power of judicial review, Court should pose itself the following question:-

> "(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;
>
> OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected."

51. If the answer is in the negative, there should be no interference under Article 226. Most recently the Apex Court in *Central Coalfields Limited (supra)*, observed that:-

> "……….If an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation….."

52. In *Maa Binda Express Carrier and another vs. North-East* Frontier *Railway and others,* (2014) 3 SCC 760 (Two Judges), the Apex Court relied upon its earlier decisions reiterated the following principles:-

> "23… …
>
> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
>
> (b) *fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable*. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
>
> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
>
> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
>
> (e) *If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.*
>
> ……………………*"* (Emphasis supplied)

53. The *principles* stand reiterated in *Haryana Urban Development Authority and others vs. Orchid Infrastructure Developers Private Limited*, (2017) 4 SCC 243 (Two Judges) and *Reliance Telecom Limited and another vs. Union of India and another,* (2017) 4 SCC 269 (Two Judges).

54. We apply the said principles to the given facts.

55. It is a matter of record that prior to the issuance of RFP, Expression of Interest was issued by HRTC. National and International manufacturers of buses were requested to respond by 15.3.2016. Separate letters were also sent to various manufacturers of transport vehicles, including the present petitioner (Annexure P-2).

56. Certain queries were raised by the manufacturers, including the present petitioner, but whether addressed or not is immaterial. However, after receipt of suggestions and pursuant to meeting held at New Delhi on 14.2.2016 with various stakeholders and after consultation with DHI, RFP was duly approved by the authorities.

57. As per the prescribed schedule, a pre-bid meeting was held at New Delhi on 30.7.2016, in which following manufacturers participated:

1. M/s Ashok Leyland Ltd.
2. M/s Mahindra & Mahindra Ltd.
3. M/s Impact (KPIT)
4. M/s Goldstone Infratech Ltd.
5. M/s Tata Motors Ltd.
6. M/s JBM Auto Ltd.

58. The suggestions, queries and qualifications that of the manufacturers were forwarded to the stakeholders/participants of the meeting so held at Delhi on 12.4.2016.

59. It is not that petitioner and Goldstone were the only ones who participated or expressed their interest or concerns. Need for amending the RFP was necessitated more out of deliberations so held in the pre-bid meeting and the queries raised by the manufacturers, considering the fact that none was a manufacturer of electric buses in India and as such Indian manufacturers having technological alliance/ partnership with foreign companies, with proven technology, could be allowed to bid, as a Consortium.

60. This would have brought benchmarking with global standards.

61. It is in this backdrop, in a meeting held on 26.8.2016, Managing Director of HRTC formulated certain amendments, which were approved by the Government of Himachal Pradesh on 17.9.2016. In fact, as is evident from Para-20 of the supplementary affidavit dated 12.6.2017, the proposed amendments were made known to ASRTU, ARAI, CIRT, SIAM, ICAT, Director (Auto), Department of Heavy Industries & Director Transport, Government of H.P (Page-432), which averment remains unrebutted. The RFP was formally approved by the appropriate authority on 4.10.2016 and only thereafter corrigendum issued on 11.10.2016.

62. We find the amendments to have been carried out, taking a holistic view, necessitated out of attending circumstances, after due consultation, consideration and application of mind. It is not that RFP came to be amended either surreptitiously or in undue haste. It took two-three months to complete the process of finally amending the RFP (twice) and that too with due deliberations and consultation.

63. This Court cannot go into the technical evaluation of the changes sought to be incorporated by amending the RFP. The criteria, technical or commercial, which is best suited, is to be adjudged by the authorities. In the given facts and circumstances, we do not find any reason sufficient enough to adjudicate any element of unreasonableness in the actions of the respondent warranting any interference. Is it that, so to say, petitioner wants to create a monopoly in the trade, by ousting Goldstone from the bidding process.

64. Amendment qua reduction in average annual turnover for the last three financial years (2013-14, 2014-15, 2015-16) from Rs.500 crore to Rs.75 crore and reduction in the net worth from Rs.1000 crore to Rs.50 crore is based on the consensus having emerged after completion of consultative process. Significantly, there is no change in the condition that buses to be supplied should be built in India. The concept of Consortium was introduced with the amendment. It stands clarified that the bidders/ Consortium shall be engaged in the manufacture of electric buses in India and should have been in the business of manufacturing and selling electric buses in India. Hence, the concept of 'Make in India' stands neither diluted nor deviated. The prototype of EV vehicle, as per proposed specification, put to trial for operation on Manali-Rohtang section has not been diluted.

65. It be only observed that the amendment incorporated is not restricted to the body with whom Goldstone has collaborated as a Consortium partner. It is a global tender. Anyone in the world, fulfilling the criteria, having collaboration with an Indian entity, willing to manufacture buses in India, was free to participate in the tender process.

66. Principles to be applied for interpreting a tender document involving the technical work and requiring special skill are different from interpreting contract document concerning other branches of law. On this issue, we find the following observations made by the Apex Court in *Montecarlo Limited vs. National Thermal Power Corporation Limited,* (2016) 15 SCC 272 (Two Judges), to be most appropriate to the instant case:-

> "26. ……. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third-party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impressible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

67. Similar view stands taken in earlier decision in *Elektron* Lighting *Systems Private Limited and another vs. Shah Investments Financial Developments and Consultants Private Limited and others,* (2015) 15 SCC 137 (Two Judges).

68. The purpose of accepting the Consortium Bidding is that in modern commercial tenders where varied fields of expertise are required, a single party may or may not possess all the requisite qualifications and therefore, Consortium Bidding is permitted. In that, the members of the Consortium may collectively bring with them, their varied expertise into the tender bid. Whenever Consortium Bidding is done, it is necessary, at least for any one of the constituents of the Consortium, to satisfy each of the tender qualifications. The term "Consortium" literally means a combination of several companies, banks, etc. for a common purpose. In the case of a Bidding Consortium, the Lead Developer/Lead Consortium Member shall be that Consortium Member vested with the prime responsibility of developing the project. The Lead Consortium Member shall necessarily make the maximum entity contribution in the project among the consortium members. As long as the norms are clear and properly understood by the decision-

maker and the bidders satisfy the requirements, then, there is no difficulty in accepting Consortium Bidding.

69. On the plea that introduction of concept of consortium is illegal, learned counsel for the petitioner seeks reliance upon the decision rendered by the Apex Court in *New Horizons Limited and another vs. Union of India and others,* (1995) 1 SCC 478 (Two Judges). The decision in no manner helps the petitioner. The Apex Court clarified that the terms and conditions of the document inviting offer for commercial transaction has to be construed from the stand point of a prudent businessman. When a businessman enters into a contract, whereunder some work is to be performed, he seeks to assure himself about the credentials of a person who is to be interested with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a Company he will look into the background of the Company and the persons who are in control of the same and their capacity to execute the work. The doctrine of lifting the veil in a case of joint venture was invoked by the Court. The Court affirmatively was of the view that while evaluating the issue of experience as contemplated in the document, experience of the constituents of the petitioner had to be included while considering the experience that of the corporate entity, that submitted the bid. Now in the instant case, one notices that M/s BYD is an organization engaged in the business of manufacture of EV buses, which stands supplied and operated throughout the world. Hence Goldstone cannot be said to be ineligible on this count.

70. The background in which the decision to ply EV Buses was taken cannot be forgotten. The NGT was constantly monitoring the matter and the deadline of 31.3.2017, so prescribed in the Scheme (FAME) for finalizing the contract could not have been ignored. It is in this backdrop, after due deliberations, amendments came to be incorporated. Hence, it cannot be said that the document was tailor-made to favour Goldstone.

71. Having participated in the process for tender, is it open for the petitioner to agitate the issue, is the question which we proceed to examine further.

72. It is a matter of record that prior to 11.10.2016 or 31.10.2016, petitioner did not even whisper, expressing its concern, muchless protest about any one of the amendments carried out in the RFP or for that matter, even thereafter.

73. Stand of the petitioner that RFP stood locked with its issuance and as such was unamendable is contradictory, as is evident from communication dated 31.3.2017 (Annexure P-10), to the following effect:

> "In that regard we would like to submit the enclosed deviations to be granted to AL so as to enable to bid competitively."

74. In fact, vide communication dated 3.11.2016 (Page 190), petitioner had submitted queries regarding Bid Evaluation Sheet and other terms and conditions so amended with the issuance of corrigendum. Further vide communication dated 14.11.2016 (Page-191), petitioner, inter alia, stated that:

> "………….
>
> While we are planning to conduct trials on the Manali-Rohtang route as mentioned above, we require <u>HRTC to enable and facilitate the temporary registration and other necessary approvals required for conducting the product trials</u> as mentioned in the RFP considering that the subject prototype is meant for internal R&D use and hence does not possess a valid CMVR certificate.
>
> It will be our endeavour that the demo vehicle will be complying to the requirements as mentioned in Clause 2.5.2 D – <u>Trial of product, Corrigendum I released by HRTC dated 11.10.2016, since this is a test vehicle used internally by our product development team for testing and validation in Indian conditions.</u>
>
> The brief specification of the trial vehicle is enclosed with this letter for approval.

…………………”   (Emphasis supplied)

75. In fact in the very same document, petitioner goes on to state that “The Trial prototype will not be representative of the actual production bus that Ashok Leyland intends to launch and hence should not be construed for any other purposes other than successful demonstration of EV technology”.

76. Thus, petitioner had accepted the terms and conditions of the RFP in its amended form.

77. On 14.12.2016, petitioner expressed its gratefulness for all support and facilities extended by HRTC. It agreed to comply with 10% of the specifications prescribed in the RFP. It cannot be disputed that the prototype bus of the petitioner had just two batteries as against requirement of three batteries and the reason for failure to do so, is the effect of demonetization, which is palpably false. Petitioner is a limited company and procurement of a single battery had nothing to do with demonetization. On this issue, what is also contended is that petitioner was not afforded sufficient time for procuring the prototype EV Bus as per the revised specifications. But then, as is evident from communication dated 19.12.2016 (Page-206), petitioner did not protest of such fact. It only furnished explanation for not incorporating the third battery.

78. Petitioner was itself seeking modification in the corrigendum, which is evident from communication dated 10.1.2017 (Page-209). But then, such request did not find favour with the authorities and petitioner did not pursue the matter any further. To the contrary, openly accepted the same, by furnishing a revised bid. Not only that, as is evident from communication dated 14.2.2017 (Annexure P-12), HRTC informed the petitioner about its failure in conducting the trial as per prescribed specifications and schedule.

79. Petitioner chose not to assail the amendments at the appropriate time. And the reason is not far to seek. They are not an established manufacture of EV Buses. Even for the purpose of trials, petitioner had also brought a prototype of the Bus sought to be supplied as per RFP.

80. Prior to October, 2016, petitioner was not a manufacturer of EV Buses, though it claims to have established some infrastructure. Whether in terms of ‘Make in India’ programme, it has actually started manufacturing any EV Buses, is not on record. As is so averred, petitioner may have got some orders for supply of EV Buses from some State Transport Undertakings, but then this fact ipso facto would not amount to fulfillment of the eligibility criteria prescribed in the RFP, more so in the absence of similarity in the specifications of RFP with that of the EOI so awarded in favour of the petitioner by such undertakings.

81. Petitioner participated in the bidding process, openly accepting the terms of the bid document, hence, is otherwise precluded from assailing the terms thereof.

82. Now, let us examine petitioner’s eligibility.

83. Sub-clause (b) of Clause 2.1 of Part-E of RFP prescribes as to who would be an eligible bidder. Only those persons who met the qualification criteria alongwith successful trial of EV on the terrain are to be considered to be eligible bidders. This also is a stipulation of 2.5(D) of Part-E. Undoubtedly, petitioner did not fulfill such condition. Prototype of EV Bus did not complete the trip with a single charge.

84. Further averment in the rejoinder that parties were not afforded adequate time to fulfill the condition contained in Clause 21.5 (i) and 2.15 (ii) is untenable in law. Amendments were incorporated prior to the submission of bid, which was so done on 11.10.2016 and 31.10.2016. At that point in time, none of the parties either protested or submitted the bid, reserving their rights to assail the amendments. Also none sought legal remedy, in accordance with law.

85. We now examine the financial bids so submitted by the parties.

86. From the affidavit dated 6.4.2017 (Page-240), it is clear that despite being ineligible, financial bids were opened and petitioner was called for negotiations. Now, petitioner suppressed this fact. There is no averment in the petition. Petitioner also did not disclose that HRTC had offered 30% of its supply order. Why such fact came to be concealed, is not clear. We may also observe that petitioner did not disclose the factum of his initial offer to be much higher than what was so offered by Goldstone

87. Be that as it may, it is evident from the affidavit that petitioner was insisting for award of work to the extent of 100%. .

88. Offers, original and revised, that of the petitioner and Goldstone, are as comparatively indicated as under:

	Original Bid	Revised Bid	Original AMC	Revised AMC/EMI
Ashok Leyland (Petitioner)	Rs.2,01,94,132.5	Rs.1,86.99.976/-	Rs.50,97,300/-	
Gold Stone	Rs.1,95,99,976.17	Rs.1,90,99,999.16	Rs.23,56,650/-	AMC, so quoted, to be for eight years, and EMIs over 3 years.

89. Quite apparently, petitioner cannot be said to be L-1 nor its offer so lucrative, materially affecting public revenue. We do not find submission of the petitioner that their contracted price is lower than Goldstone, to be correct.

90. HRTC can adjudge best as to who is better suited in discharging and fulfilling all contractual obligations.

91. In the instant case, petitioner has not made out a case for interference, for we do not find the action to be unreasonable, arbitrary, capricious, whimsical and hence illegal.

92. In fact, grievance so made out in the present petition is purely an afterthought, which fact is evident from Email dated 24.2.2017, whereby revised offer came to be furnished by the petitioner, contents whereof (relevant portion), are reproduced as under:

"………………

To

Managing Director,

Himachal Road Transport Corporation,

Shimla-171003

Dear Sir,

Subject: Regarding the tender for purchase of electric bus qty. 25 nos.

Reference: Our meeting at your office on 22nd Feb 2017 at Shimla at 12 noon

At the outset, we would like to congratulate the Himachal Pradesh government for evaluating the feasibility of electric buses at one of the highest altitude roads of Manali – Rohtang Sector. This project implementation would definitely bolster the ambitious vision of the State of Himachal Pradesh to provide an enabling environment for providing quality service to its users while preserving the environment and leveraging other opportunities to promote efficient mobility solutions in the State.

We would also like to convey our sincere thanks to HRTC officials and Technical committee members who extended their fullest cooperation and support to Ashok Leyland for a successful prototype user end trial. We are also very proud to be part of the Himachal Pradesh Government's green initiative and would in this regard and with reference to the meeting dated 22.02.2017 at Shimla and based on your request for us to confirm to you in writing, we take great pleasure to revise our offer and be part of Himachal Pradesh's green initiative. All other terms and conditions remaining unchanged Ashok Leyland's revised offer given below. We would welcome a further discussion to discuss and close this at the earliest. We also confirm meeting your request for trials with third battery at our agreed date prior to Proto acceptance.

Ashok Leyland Offer:

	Ashok Leyland Circuit Electric Bus Price				
Description & Model No. of	Basic price	ED @ 6.125%	VAT	TCS @ 1%	End Rate
		6.125%		1%	
01 Unit of Ashok Leyland Electric Bus Including Charger	1,74,46,245/-	10,68,583/-	NIL	1,85,148/-	1,86,00,976/-

The above mentioned offer price is valid till 28th February 2017. We request HRTC to kindly acknowledge our revised commercial offer (lower than current L1 price of 1.91 crores per bus) and sincerely hope HRTC will consider allocating 25 buses order with this revised offer from Ashok Leyland.

We once again confirm that our offered Electric bus will meet HRTC's tender requirement and we sincerely hope and believe that Ashok Leyland has always played a pivotal role in improving urban mobility and sincerely looking forward to partner this endeavour of HRTC TO RUN ELECTRIC BUSES.

Assuring our best services,

Thanking you

Yours faithfully

For Ashok Leyland Ltd.
Amol Vaishampayan
Area Sales Manager-STU" (Emphasis supplied)

93. Averment with regard to talks of petitioner being offered work to the extent of 30%, in the meeting held on 22.2.2017, is not in dispute, as is evident from the averments made in the rejoinder (Page-349). However, further averment that petitioner expressed its willingness to match the price that of Goldstone, subject to award of full contract, is only an afterthought. This we say so for two reasons, (a) it is not reflected in the revised offer dated 24.2.2017, (b) petitioner suppressed the factum of negotiations on 22.2.2017, in the petition, wherein there is not even a whisper about such fact.

94. Petitioner has placed on record various letters, exchanged inter se the parties. However, on 16.12.2016 itself, in response to various queries, HRTC clarified as under:

> "…………
>
> Kindly refer to your letter No.ROC:AV:1412A, dated 14.12.2016 on the subject cited above.
>
> As intimated vide our letter dated 14.12.2016 and 21.11.2016 (before the beginning of your trial), it was clearly mentioned as per Clause No.2.5.2 (D) of RFP, which is once again reproduced as under:-
>
> "*To ensure maximum participation, bidders are allowed to conduct trials with their existing products equivalent to the EV as required in the RFP. For clarification, equivalent product should be within 10% of the technical bid evaluation parameters as defined in Annexure 14A. These products shall be put to trial for operation on Manali-Rohtang sector (hilly terrain of H.P.) and only after successful trial of vehicles, the bidder shall be considered as eligible and its bid will be evaluated. The trial shall be considered as successful if bidder is able to demonstrate that the fully charged electric bus completes the round trip of approved route with minimum distance of 110 km. (for round trip) without any glitches and without any additional battery charging requirement and the same is demonstrated for minimum 10 days within 2 weeks. Bidder should inform HRTC of its trial schedule alongwith Bid i.e. 10th November, 2016.*"
>
> It has been noticed that your vehicle during trial has not been able to complete even one way journey from Manali to Rohtang (51 kms.) in one single charge, which is not in conformity with the aforesaid RFP condition, for successful trial.
>
> Your attention is also invited to your email dated 14.11.2016 (*Annexure 'A'*), wherein you had mentioned under Technical specification of the trial product that the range of the vehicle in single charge would be 80 kms, but on the other hand, as mentioned above distance from Manali to Rohtang in one way is 51 kms and yet your vehicle has not been able to cover 51 kms in single charge.
>
> So far as issue of certification of trial is concerned, the State Government has notified a Committee consisting of SDO (Civil) Manali (Chairman, DSP, Manali, RTO Flying Squad, Kullu, Director, Environment & Technology, DM (Tech)/WM, HRTC, Head Office, Manager (Tech.), DW, HRTC, Mandi, RM, HRTC, Kullu alongwith expert Members from IIT/NIT. After receipt of report from the Committee, HRTC will make the final report about the trial.
>
> ………………………"

95. Prior thereto, on 8.11.2016 (Page-383), petitioner was made known that since parties had participated in the pre-bid meeting and response to the queries/ corrigendum was issued accordingly, further queries would not be entertained.

96. There are other issues, so raised by the petitioner, which need to be addressed – (i) whether the prototype of the EV bus was a dummy or actually what was intended to be purchased or supplied inter se the parties, (ii) evaluation of the technical bids, (iii) eligibility of Goldstone, (iv) whether there was any third amendment to the RFP, and.

97. Submission that bidders were allowed to conduct trials with their existing product, with the understanding that supplies under the contract would be in terms of the RFP, moreso without the bus operating on a single charge, is untenable in law. Clause 2.5 (D) of Part-E of RFP itself provided that the bidders were to conduct trials with their existing products, equivalent to the EV, as required in the RFP, with variation of 10% of technical evaluation parameters, as defined in Annexure-14A. It was not a dummy but prototype of the bus to be eventually supplied by the bidder.

98. On the issue of trial run, petitioner was informed vide letter dated 16.12.2016 (Annexure R-1/4) that the bidders were required to fulfill the criteria so prescribed in the RFP. It is not in dispute that prototype of EV Bus, that of the petitioner was subjected to trial, on the Manali-Rohtang-Manali track. On a single charge, the vehicle could not complete one side of the trip, i.e. from Manali to Rohtang and fell short by 5-10 kms. The reason assigned by the petitioner is that they were unable to procure the third battery on account of demonetization. The reason, to say the least, is bordering absurdity, for petitioner claims to be an established player in the field having marketed seven lakh vehicles, having footprints in more than 50 countries, with a turnover of more than $2.3 billion. It is not that the petitioner was asked to have the trial conducted overnight. Nature of energy sought to be used for running the vehicle was well within their knowledge. According to the petitioner, in October, 2016 itself, they had established infrastructure for manufacture of EV Buses. Hence, under these circumstances, the explanation is absolutely unbelievable.

99. Be that as it may, the fact of the matter is that despite the shortcomings and the petitioner not having fulfilled the eligibility criteria, as prescribed in RFP, mandating successful trial to a condition precedent for fulfillment of criteria (Clause 2.1 (b) Part E), HRTC went ahead and offered 30% of the total project, which did not find favour with the petitioner. Perhaps, one of the reasons to do so was also to ensure compliance of the orders passed by NGT and avail benefit, pecuniary in nature, that of the Scheme floated by the Central Government. The 'Make in India' criteria cannot be said to have been diluted, for the vehicles of that of the petitioner and Goldstone are to be manufactured in India, either independently or in collaboration with third party, as per the conditions of RFP.

100. Grievance is made out that HRTC unilaterally changed the floor height, first from 900 mm to 650 mm and thereafter back to 900 mm. Well all these are technical specifications, which are subject to change. Further averment that the prototype bus of Goldstone not fulfilling the specifications, inasmuch as floor height of the bus being 650 and not 900 mm with seating capacity was 24 plus driver, stands seriously disputed. Hence, it cannot be said that the prototype bus of Goldstone was not RFP compliant. Whether factors like angle of report, angle of departure, floor height are faulty or not, are all technical aspects to be evaluated by the experts and not Courts. It is for the experts to examine the issue and there is nothing on record to even remotely demonstrate that such decision is based on extraneous factors or considerations or against the criteria or procedure prescribed in the RFP.

101. It is further contended that evaluation criteria was introduced in the first amendment. We see no reason as to how such act of HRTC can be said to be arbitrary or violative of Article 14 of the Constitution of India. After all, there had to be some criteria for evaluating the bids, both technical and financial. In the instant case, evaluation criteria prescribed 45 marks for technical bid and 55 marks for financial bid. Significantly, evaluation is not by ordinary

persons, but by experts. There is nothing wrong with the same. Submission that evaluation by the Committee is faulty, remains unsubstantiated on record. Allegations of malafide, with regard to evaluation, are absolutely vague and unspecific, with regard to time, place and manner. It cannot be said that petitioner has made out a case of malice, either of fact or law. We may only observe that tender came to be submitted on 10.11.2016, whereafter no condition or parameter prescribed in RFP was changed.

102. On the issue of evaluation vide Annexure-14A, one finds that letters dated 10.1.2017, 16.1.2017 and 6.2.2017 that of the petitioner were addressed by HRTC vide response dated 14.2.2017, in which issue of eligibility of Goldstone also came to be considered.

103. The Apex Court in *Joshi Technologies International Inc. vs. Union of India and others,* (2015) 7 SCC 728 (Two Judges), while dealing with the issue as to whether the successful bidder was entitled to the benefit under Section 42 of the Income Tax, 1961, as a condition of the contract or not held that:-

> "70.1 At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.
>
> 70.2 State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.
>
> 70.3 Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, Involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc.
>
> 70.4 Writ jurisdiction of High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.
>
> 70.5 Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the license if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.

104. The Apex Court in *Tata Iron & Steel Co. Ltd. vs. Union of* India *and another*, (1996) 9 SCC 709 (Two Judges), observed as under:-

> "68. … … This is a case of the type where legal issues are intertwined with those involving determination of policy and a plethora of technical issues. In such a situation, courts of law have to be very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policy making, unless the policy is inconsistent with the Constitution and the laws. In the present matter, in its impugned judgment, the High Court had directed the Central Government to set up a Committee to analyse the entire gamut of issues thrown up by the present controversy. The Central Government had consequently constituted a Committee comprising high level functionaries drawn from various Governmental/Institutional agencies who were equipped to deal with the entire range of technical and long term consideration involved. This Committee, in reaching its decision, consulted a number of policy documents and approached the issue from a holistic perspective. We have sought to give our

opinion on the legal issues that arise for our consideration. From the scheme of the Act it is clear that the Central Government is vested with discretion to determine the policy regarding the grant or renewal of leases. On matters affecting policy and those that require technical expertise, we have shown deference to, and followed the recommendations of, the Committee which is more qualified to address these issues."

105. Also this Court in CWP No.9337 of 2013-D, titled as *Shri Ashok Thakur vs. State of Himachal Pradesh,* decided on 06.05.2014, reiterated that:-

"..... that such technical matters can hardly be the subject matter of judicial review. The Court has no expertise to determine such an issue, which, besides being a scientific question, would have very serious and far-reaching consequences."

And that "the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical......."

106. Also, the principle laid down by Hon'ble the Supreme Court of India in Heinz India (P) Ltd. & Anr. v. State of U.P. & Ors, (2012) 5 SCC 443, to the following effect:

"......It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse, or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence."

107. Emphasis is laid on the fact that HRTC could not have allowed Goldstone to bid as a Consortium. From the response filed by the respondents, it is evident that BYD is a company having its office in China. Goldstone, BYD and Mytrah, in Consortium, are having turnover with Rs.60,000/- crore with a net worth of over Rs.35,000/- crore. Globally, DYD has deployed more than 10000 vehicles. Goldstone is registered in India as a manufacturer of electric buses, with DYD as its technological partner. Goldstone has clarified that all 25 vehicles would be brought in a Complete Knocked Down and Semi Knocked Down state and assembled at Bengaluru through CMVR approved contract manufacturing facility. It is nobody's case that this is impermissible in law. It is not that a bus is built in China and as it is imported in India. Be that as it may, Goldstone has already designed a Bus body in India complying to Urban Bus Code. Also, necessary permissions and sanctions under various laws of the land stand obtained, as is so averred in Para-8(d) (Page-301) of the reply-affidavit.

108. Much emphasis is laid on the fact that criminal cases stand registered against the Managing Director of Goldstone and as such, by virtue of Clause (9) of AMC (Annexure P-16), is precluded from participating in the bid process. Clause (9) (Page-378) only defines what is "Corrupt or Fraudulent Practices", which reads as under:

"HRTC requires the contractor under this tender to observe the highest standards of ethics during the procurement and execution of such contracts. In

pursuance of this policy, the HRTC defines for the purposes of this provision, the terms set forth as follows:

a. 'Corrupt practice' means the offering, giving, receiving or soliciting of any thing of value of influence the action of the public official in the AMC process or in contract execution; and

b. 'Fraudulent practice' means a misrepresentation of facts in order to influence a Contract process or execution of a contract to the detriment of HRTC and includes collusive practice among the bidders (prior to or after bid submission) designed to establish bid prices at artificial noncompetitive levels and to deprive the HRTC of the benefits of the free and open competition."

109. Goldstone has not indulged into corrupt or fraudulent practices in soliciting or executing the contract in question. Mere initiation of some proceedings is of no consequence, insofar as execution of the contract in question is concerned. In fact, reliance on this document only contradicts the petitioner's stand of the document not open to amendment.

110. Annexure-14 of RFP deals with the format of Price Bid with AMR. It is contended that with the issuance of Comprehensive Annual Maintenance Contract Agreement (Annexure P-16) (Page-370), the HRTC has changed original terms of RFP. In our considered view, it is not so. Annexure P-16 only lays down the terms and conditions.

111. There is a background, which led to the issuance of this document. As is evident from the document (Page-421), comparative analysis of the observations and alleged deviations so prepared by the HRTC, was recorded:

"14	RFP page no 89 Part H Annual Maintenance Contract.	Terms and conditions as mentioned in the RFP	M/s Ashok Leyland has noted but requested HRTC to refer Annexure A for terms and conditions of AMC, hence conditional bid."

112. In response thereto, petitioner, as is evident from Page 426 of the paperbook, observed as under:

"We require detailed briefing and clarifications from HRTC regarding comprehensive AMC terms including contractual obligations."

113. In this backdrop, document (Annexure P-16) came to be issued. The document is to be either accepted or rejected as a whole. Also, what is objectionable about the terms of the said document has not been spelt out. But then, petitioner cannot be allowed to blow hot and cold in the same breath. When it comes to highlighting ineligibility of Goldstone, reliance is placed on Clause-9 of the very same document, which deals with the issue of corrupt or fraudulent practices.

114. In Para-3 of reply-affidavit dated 7.5.2017 (Page-414), HRTC has explained the circumstances, which led to the issuance of such clarification. In a meeting held on 30.1.2017, petitioner had itself sought clarification on AMC.

115. It is a settled principle of law that bidder participates in the tendering process after fully appreciating and understanding the terms and consequences thereof. Having participated once, it is not open for the bidder to assail the terms thereof. [See: *Tafcon Projects (I) (P) Ltd. vs. nion of India & others,* (2004) 13 SCC 788 (Two Judges)].

116. It is also a settled principle of laws that in matters of economic rights and Policy decisions of the State, scope of judicial review is limited and circumscribe unless the Policy is absolutely capricious, unreasonable and arbitrary and mere *ipse dixit* of the executive authorities or violative of Constitution and Statutory mandate, normally Court would not interfere. [See: *M.P. Oil Extraction & another vs. State of Madhya Pradesh & others,* (1997) 7 SCC 592 (Two Judges)].

117. The Apex Court in *Natural Resources Allocation, In Re, Special Reference 1 of 2012,* (2012) 10 SCC 1 (Five Judges), has observed as under:-

> "149. Regard being had to the aforesaid precepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle. Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximizing private entrepreneurs, adoption of means other than those that are competitive and maximize revenue may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than the prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution."

118. The principle stands followed in *Manohar Lal Sharma vs. Principal Secretary and others,* (2014) 9 SCC 516 (Three Judges). To similar effect are the decisions rendered in *5 M&'T Consultants Secunderabad vs. S.Y. Nawab & another,* (2003) 8 SCC 100 (Two Judges) and *Shivashakti Sugars vs. Shree Renuka Sugars,* CA No.5040 of 2014, dated 09.05.2017, Supreme Court of India, wherein the Court reiterated the principle that the Courts are required to consider the economic impact of its decisions, which should be in the larger interest of the society and development.

119. While contending that a petitioner is a stranger and not a person aggrieved, learned counsel seeks reliance upon the decisions rendered in *Jasbhai Motibhai Desai vs. Roshan Kumar, Haji Bashir Ahmed,* (1976) 1 SCC 671 (Four Judges); *Mithilesh Garg & others vs. Union of India & others,* (1992) 1 SCC 168 (Three Judges); *Raunaq International Limited vs. IVR Construction Limited,* (1999) 1 SCC 492 (Two Judges); and *Sanjay Kumar Shukla vs. Bharat Petroleum Cooperation Limited,* (2014) 3 SCC 493 (Two Judges). In our considered view, the ratio *decidendi* in these judgments is not to the effect that unsuccessful bidder is not a person aggrieved and can under no circumstances assail the action of the authorities, even if it is violative of Article 14 of the Constitution of India.

120. In view of our discussion supra, we are of the considered view that the issue of process of tender and award of contract cannot be said to be against public policy or the actions of the State/HRTC to be in any manner illegal. It cannot be said that in any manner interest of the petitioner stands unfairly prejudiced or that the conditions were tailor-made to favour the private party. In our considered view, no scope for judicial review is made out by the present petitioner.

With the aforesaid observations, writ petition stands dismissed. Pending application(s), if any, also stand disposed of.

****

BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Naresh Kumar ……Petitioner.
Versus
Kali Dass & others ….. Respondents.

CMPMO No. 456 of 2016
Reserved on : 09.8.2017
Date of Decision: 30.8.2017

Code of Civil Procedure, 1908- Order 6 Rule 17- An application for amendment of plaint was filed – the application was dismissed by the Trial Court – held that the proviso to Order 6 Rule 17 provides that the amendment cannot be allowed after the commencement of trial, unless the party seeking the amendment satisfies the Court as to why it could not move the application for amendment despite exercise of due diligence – in the present case, the suit is at an advanced stage – no reason was assigned for not filing the application at the earliest – the application was rightly dismissed- petition dismissed. (Para-8 to 16)

For the Petitioner : Mr. Rajesh Mandhotra, Advocate.
For respondents : Mr. Ajay Chandel, Advocate for respondents No.1 to 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, J.

The present petition is maintained by the petitioner under Article 227 of the Constitution of India, against the impugned order, dated 17.9.2016, passed by the learned Civil Judge(Junior Division), Court No.2, Sarkaghat, District Mandi, H.P., whereby the application of the petitioner under Order 6 Rule 17 of the Code of Civil Procedure, was dismissed. Further, a prayer has been made to allow the present petition and to set aside the impugned order and also to allow the application under Order 6 Rule 17 of the Code of Civil Procedure.

2. Brief facts giving rise to the present petition are that the petitioner/plaintiff (hereinafter referred to as 'plaintiff') maintained a civil suit against the respondents/ defendants (hereinafter referred to as 'defendants') for declaration to the effect that the entries with regard to Khasra No.642, land measuring 00-00-69 hectares are wrong and illegal and the plaintiff, alongwith the proforma defendant, has become owner by way of adverse possession and consequential relief for permanent prohibitory injunction. It has been alleged that the civil suit was filed in the year 2014 and in the said suit, notices were issued to the defendants and they also filed written statement. After completing the pleadings, issues were framed by the learned trial Court and evidence was also led by both the parties.

3. It has also been averred that when the matter was listed for arguments, it was transpired that the suit is liable to be amended and an application was filed by the petitioner seeking amendment of plaint alongwith the application, amended plaint was also filed, wherein it was prayed that in case, the plaintiff is not found entitled to a decree of adverse possession, then defendants be restrained to dispossess the plaintiff without due course of law or without legal process of law. It has been alleged that this amendment is necessary and it will not change the nature of the suit in any manner and no further evidence is required to be led for adjudication of the suit. It has also been averred that this amendment is necessary for just decision of the case.

4. It has been averred that notices were issued to the respondents/defendants. They filed reply and objected the amendments sought for on the ground that application is not maintainable and the application for amendment has been filed just to linger on the proceedings

and the application has been filed at the time when the matter was fixed for arguments, as such, the application filed at the belated stage is not maintainable and liable to be dismissed.

5. The applicant filed rejoinder to the reply wherein the grounds, as stated in the application, were reiterated and that the said application came up for consideration and the learned Court below, vide its order, dated 17.9.2016, dismissed the application for amendment, hence the present petition.

6. Heard. Learned counsel appearing for the petitioner has argued that the learned Court below should have allowed the amendment, when the amendment is only with regard to the relief clause and nothing more and no evidence was to be led after the amendment. On the other hand, the learned counsel appearing for the respondents/defendants has argued that earlier also, an application was made by the petitioner, under Order 1 Rule 10 C.P.C. and there is also no error in the impugned order passed by the learned Court below. Therefore, the present petition deserves to be dismissed.

7. I have also gone through the records in detail. The plaintiff has maintained a suit for declaration that the plaintiff, alongwith proforma defendant, has become owner by way of adverse possession and consequential relief for permanent prohibitory/mandatory injunction.

8. It has been alleged that, as per the plaintiffs, prior to settlement, an exchange of land took place between Rania, predecessor-in-interest of Plaintiff and Dhani Ram, predecessor-in-interest of defendant and Khasra No.760/1001, land measuring 0-00-96 corresponding to Khasra No.642 of consolidations, as per missal haquiat attached, which was also given to Dhani Ram alongwith other land, but Khasra No.760/1001, measuring 0-00-96 remained in the possession of Rania, the predecessor-in-interest of the plaintiff and proforma-defendant. It has also been averred that on 8th August, 1972, a report to record the possession of Rania S/o Dandu, was made by Dhana son of Govind and Tulsi with regard to Khasra No.1001 min and Khasra No.1002 min Land measuring 0-0-79 hect. As the same was in the possession of Rania, the predecessor-in-interest of the plaintiff and proforma defendant.

9. It has also been alleged that since 8th October, 1972, the predecessor-in-interest of the plaintiff and proforma defendant remained peaceful possession of this land and after the death of Rania, it is the plaintiff and proforma defendant, who are in peaceful possession of the suit land and the plaintiff has constructed a septic tank on this land, thus, the possession of the plaintiff and proforma defendant is peaceful. Consequently, the plaintiff and proforma defendant have become owner, by way of adverse possession, as the open necked and hostile possession of the plaintiff and proforma defendant matured, in the title by way of adverse possession.

10. It has also been averred that since the plaintiff and proforma defendant are in adverse possession of the suit land and have become owner by way of adverse possession, the defendants started creating problem by giving consent to construction of road on the suit land and called the revenue staff for demarcation with an intention to dispossess the plaintiff and proforma defendant, on 20.3.2014, and right to sue accrued on 26.3.2014, when the defendants finally refused to admit the claim of the plaintiff.

11. The prayer clause in the said suit reads as under:

> ***"It is therefore, prayed that keeping in view the aforesaid facts and circumstances, the plaintiff be declared owner of Khasra No.642, land measuring 0-00-69 hectare by passing decree for adverse possession in favour of the plaintiff and against the defendant and in consequent to this the defendants be restrained from interfering the suit land in any manner by passing a decree for permanent and prohibitory injunction in favour of plaintiff and against the defendant or any other relief for which the plaintiffs be found entitled to under the aforesaid facts and circumstances of the case with the cost of the suit and justice be done."***

12. Order VI, Rule 17 provides as under:

> ***"17. Amendment of pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.***
>
> ***Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial."***

13. The proviso hereinabove, makes it clear that no amendment can be allowed after the trial commences. In the instant case, the suit is at the advanced stage and the plaintiff has failed to show any reason as to why he could not move application for making amendment as sought for earlier, though, he has already made an application for amendment, which was allowed. The plaintiff has already moved an application under Order 1 Rule 10 Code of Civil Procedure, which was allowed. In these circumstances, this Court finds no error in the order passed by the learned Court below. At the same point of time, the plaintiff has already prayed for any other relief for which the plaintiff be found entitled to in the facts and circumstances of this case. In these circumstances also, if the plaintiff satisfies the conscious of the Court, he may be held entitled for any other relief. In these circumstances also, amendment as sought for, by the plaintiff, cannot be allowed.

14. The net result of the above discussion is that the order passed by the learned Court below is as per law and the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India is not required to be exercised in the present case for the reasons given hereinabove.

15. In view of the above enumerated circumstances, the present petition sans merits, deserves dismissal and is accordingly dismissed with no order as to costs. The parties are directed to appear before the learned Court below on **20th September, 2017.**

16. The pending miscellaneous application(s), if any, shall also stand(s) disposed of.

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

State of H.P. and another ….Petitioners.
Vs.
Smt. Vishambri Devi …..Respondent.

CWP No.: 2082 of 2011
Date of Decision: 30.08.2017

Industrial Disputes Act, 1947- Section 25- Claimant was engaged as beldar – her services were terminated on the pretext that project in which she was engaged stood closed – reference was made to the Labour Court which held that the State had not complied with the provision of Section 25 – held that there is no evidence that claimant was informed that her engagement was project specific and was liable to be terminated in case of closure of project – provisions of Industrial Disputes Act were not followed while terminating the services of the claimant – appeal dismissed. (Para-6 to 10)

Case referred:

S.M. Nilajkar and others Vs. Telecom District Manager, Karnataka, (2003) 4 Supreme Court Cases 27

For the petitioner: Mr. Vikram Thakur and Ms. Parul Negi, Deputy Advocate Generals.
For the respondent: *Ex parte.*

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*:

By way of this writ petition, the State has challenged the award passed by the learned Labour Court in Ref. No. 4 of 2008, dated 07.08.2010, vide which, while answering the Reference, learned Labour Court granted the following relief to the claimant/workman:

> *"As a sequel to my findings on the aforesaid issues, the claim of the petitioner is allowed and it is ordered that she (petitioner) be reinstated in service with seniority and continuity but without back wages. Consequently, the reference stands answered in favour of the petitioner and against the respondent. Let a copy of this award be sent to the appropriate Government for publication in official gazette. File, after completion be consigned to records."*

2. I have heard the learned Deputy Advocate General and also gone through the records as well as the award passed by the learned Labour Court.

3. It is not in dispute that the respondent-claimant (hereinafter referred to as "the claimant") was initially engaged as a Beldar in January, 1999 in Kandi Project and thereafter, her services were terminated w.e.f. 30.09.2005, on the pretext that the Project in which she was engaged, stood closed.

4. Feeling aggrieved by the said termination of her services on the closer of the Project in issue, the claimant had sought recourse to the provisions of the Industrial Disputes Act, 1947, which resulted in the following reference being made by the appropriate Government to the learned Labour Court for adjudication:

> *"Whether the termination of services of Smt. Vishmbari Devi, W/o Shri Ram Nath w.e.f. 30.9.2005 by the employer, without complying with the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what relief of service benefits, back wages and amount of compensation the aggrieved workman is entitled to."*

5. Learned Labour Court while answering the reference, held that while terminating the services of the claimant w.e.f. 30.09.2005 on the pretext that the Project in which the claimant was engaged stood closed, State had not complied with the statutory provisions of the Industrial Disputes Act, 1947 in general and Section 25 in particular. Learned Labour Court also held that no evidence had been adduced on record by the State from which it could be inferred that at the time when the claimant was initially engaged, she was made aware of the fact that her appointment was Project specific and was liable to be terminated with the closer of the Project. While arriving at the conclusion that the closer of a Project did not absolve the employer from statutory provisions of Section 25 of the Industrial Disputes Act, learned Labour Court relied upon the judgment of the Hon'ble Supreme Court in ***S.M. Nilajkar and others* Vs. *Telecom District Manager, Karna*taka**, (2003) 4 Supreme Court Cases 27. Learned Labour Court also held that there was no evidence on record from which it could be inferred that after the termination of her services, the claimant remained gainfully employed. On these bases, learned Labour Court while answering the reference, granted the relief of reinstatement in service with seniority and continuity in favour of the claimant, though no back wages were awarded in her favour.

6. In my considered view, the findings so returned by the learned Labour Court do not call for any interference. This is for the reason that it stands established from the record that at the time when the claimant was initially engaged in the year 1999, she was not informed that

her engagement was project specific and was liable to be terminated in case of closer of the Project. Besides this, a perusal of the record in general and the statement of the claimant in particular demonstrates that after the closer of the Kandi Project, the respondent-State had offered her employment in H.P. Mid Himalyan Water Shed Development, Project, which project as per the State, was the successor Project of Kandi Project, however, the claimant did not accept the said engagement as probably this engagement was offered by the State to her as a fresh engagement and the claimant was asking for seniority also. A perusal of the judgment passed by the Hon'ble Supreme Court which has been relied upon by the learned trial Court demonstrates that it is settled law that even in the case of engagement of a workman in a Project, at the time of termination of the services of such workman, the provisions of the Industrial Disputes Act have to be religiously adheared to. Admittedly, this has not been done in the present case.

7. In ***S.M. Nilajkar and others*** **Vs.** ***Telecom District Manager, Karna*****taka**, the Hon'ble Supreme Court has held as under:

> "*11. It is common knowledge that the Government as a welfare State floats several schemes and projects generating employment opportunities, though they are short-lived. The objective is to meet the need of the moment. The benefit of such schemes and projects is that for the duration they exist, they provide employment and livelihood to such persons as would not have been able to secure the same but for such schemes or projects. If the workmen employed for fulfilling the need of such passing-phase-projects or schemes were to become a liability on the employer-State by too liberally interpreting the labour laws in favour of the workmen, then the same may well act as a disincentive to the State for floating such schemes and the State may opt to keep away from initiating such schemes and projects even in times of dire need, because it may feel that by opening the gates of welfare it would be letting-in onerous obligations entailed upon it by extended application of the labour laws. Sub-clause (bb) in the definition of retrenchment was introduced to take care of such like-situations byIndustrial Disputes (Amendment) Act, 1984 with effect from 18.8.1984.*
>
> *12. 'Retrenchment' in its ordinary connotation is discharge of labour as surplus though the business or work itself is continued. It is well-settled by a catena of decisions that labour laws being beneficial pieces of legislation are to be interpreted in favour of the beneficiaries in case of doubt or where it is possible to take two views of a provision. It is also well-settled that the Parliament has employed the expression "the termination by the employer of the service of a workman for any reason whatsoever" while defining the term "retrenchment", which is suggestive of the legislative intent to assign the term 'retrenchment' a meaning wider than what it is understood to have in common parlance. There are four exceptions carved out of the artificially extended meaning of the term 'retrenchment', and therefore, termination of service of a workman so long as it is attributable to the act of the employer would fall within the meaning of 'retrenchment' de hors the reason for termination. To be excepted from within the meaning of 'retrenchment' the termination of service must fall within one of the four excepted categories. A termination of service which does not fall within the categories (a), (b), (bb) and (c) would fall within the meaning of 'retrenchment'.*
>
> *13. The termination of service of a workman engaged in a scheme or project may not amount to retrenchment within the meaning of Sub-clause (bb) subject to the following conditions being satisfied:-*
>
> > *(i) that the workman was employed in a project or scheme of temporary duration;(ii) the employment was on a contract, and not as a daily-wager simplicitor, which provided inter alia that the employment shall come to an end on the expiry of the scheme or project; and(iii) the employment came to an end simultaneously with the termination of the*

scheme or project and consistently with the terms of the contract.(iv) the workman ought to have been apprised or made aware of the abovesaid terms by the employer at the commencement of employment.

14. The engagement of a workman as a daily-wager does not by itself amount to putting the workman on notice that he was being engaged in a scheme or project which was to last only for a particular length of time or upto to occurrence of some event, and therefore, the workman ought to know that his employment was short-lived. The contract of employment consciously entered into by the workman with the employer would result in a notice to the workman on the date of the commencement of the employment itself that his employment was short-lived and as per the terms of the contract the same was liable to termination on the expiry of the contract and the scheme or project coming to an end. The workman may not therefore complaint that by the act of employer his employment was coming to an abrupt termination. To exclude the termination of a scheme or project employee from the definition of retrenchment it is for the employer to prove the abovesaid ingredients so as to attract the applicability of Sub-clause (bb) abovesaid. In the case at hand, the respondent-employer has failed in alleging and proving the ingredients of Sub-clause (bb), as stated hereinabove. All that has been proved is that the appellants were engaged as casual workers or daily-wagers in a project. For want of proof attracting applicability of Sub-clause (bb), it has to be held that the termination of the services of the appellants amounted to retrenchment."

8. In this case, the services of the workman were terminated without following the statutory procedure prescribed in the Industrial Disputes Act. It is not the case of the State that as on the date of the termination of the services of the claimant, she had not completed more than 240 days of service in the preceding 12 months thereof. It is relevant to refer at this stage that the finding returned by the learned Labour Court to the effect that after termination of the services of the claimant, there is nothing on record to suggest that she was gainfully employed, is duly borne out from the records of the case and the said finding is not a perverse finding.

9. Though at the time of arguments, learned Deputy Advocate General had impressed upon this Court that the learned Labour Court erred in not appreciating that the reference petition, which was so adjudicated by it, was not maintainable before it, as the Project in which the claimant was deployed, was not an Industry within the definition Industry as provided under the Industrial Disputes Act, however, in my considered view, this contention of the learned Deputy Advocate General is totally misconceived. As per the learned Deputy Advocate General, the Project in which the claimant was engaged was not declared as an Industry under the Industrial Disputes Act under Section 2(ee) of the Industrial Disputes Act. A perusal of Section 2(ee) of the Industrial Disputes Act demonstrates that the said Section defines a "controlled industry". As per the said statutory provision, an industry, the control of which by the Union has been declared by any Central Act to be expedient in the public interest, is a controlled industry. In other words, an industry which fulfills the criteria provided in Section 2(ee) can be declared as a controlled industry. In my considered view, this definition, as contained in Section 2(ee) of the Industrial Disputes Act, has got nothing to do with the dispute in issue. The contention of the learned Deputy Advocate General that until an industry is declared as a controlled industry, as defined in Section 2(ee) of the Industrial Disputes Act, the learned Labour Court can not adjudicate upon any reference so made before it, is totally misconceived. Declaration of an industry as controlled industry in Section 2(ee) of the Industrial Disputes Act, in my considered view, has got nothing to do with the adjudication of claim of a workman by the learned Labour Court.

10. In this view of the matter, as this Court does not finds any infirmity with the award so passed by the learned Labour Court in Ref. No. 4 of 2008, dated 07.08.2010, accordingly while concurring with the findings so returned by the learned Labour Court, this

petition is dismissed being devoid of any merit. Miscellaneous applications, if any, also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

State of H.P. and Ors. .....Appellants
Versus
Sh. Keshav Ram .....Respondent.

LPA No. 645 of 2011
Date of Decision: 30.8.2017

Constitution of India, 1950- Article 226- Petitioner was engaged as daily wage beldar in the year 1994 – he continued to render services - the petitioner filed an original application, which was transferred to High Court pleading that the department was giving fictional breaks to prevent him from completing 240 days- the respondent pleaded that petitioner remained willfully absent and no breaks were given- the Writ Court allowed the writ petition- held in appeal the practice of giving artificial breaks has been deprecated by the Supreme Court – there is no evidence that petitioner had abandoned his job- the Writ Court rightly granted the relief to the petitioner- appeal dismissed. (Para-6 to 10)

Case referred:
Mohd. Abdul Kadir and Anr. V. Director General of Police, Assam and others, (2009) 6 SCC 611

For the appellants:	Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.
For the Respondent:	Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(oral)*

By way of instant letters patent appeal, challenge has been laid to judgment dated 9.7.2010, passed by the learned Single Judge, in CWP(T) No. 5752 of 2008 (OA No. 1032 of 1999), titled as *Keshav Ram v. State of HP and Ors.*, whereby the learned Single Judge, while allowing writ petition having been preferred by the petitioner-respondent herein (in short "petitioner"), held that the petitioner shall be deemed to be in continuous service from the date of his initial engagement for the period as mentioned in Annexure R-1 after ignoring the fictional breaks given by the respondents-appellants herein, from the year, 1994. Apart from above, learned Single Judge, also held the petitioner entitled to all consequential benefits of continuous service of period as mentioned herein above.

2. Succinctly, facts necessary for adjudication of the case are that the petitioner was engaged as daily wage (Baildar), in the year, 1994, and thereafter, he continued to render his services with the respondents-appellants herein (herein after referred to as the respondents). Petitioner by way of original application, preferred before the learned H.P. State Administrative Tribunal, which was subsequently registered as CWP (T) No. 5752 of 2008, alleged that respondents-department gave artificial breaks to him solely with a view to prevent him from completing 240 days in each calendar year and deprived him the benefits of salary and leave of Sunday etc. Respondents while refuting aforesaid claim of the petitioner submitted before the

court below that the petitioner never completed 240 days since 1994 and in every year, he remained willfully absent and reported for duty casually. To substantiate the aforesaid stand, respondents also placed on record mandays chart (Annexure R-1). Learned Single Judge, taking note of the pleadings adduced on record by the respective parties, allowed the petition having been preferred by the petitioner and granted him relief as has been taken note above.

3. Mr. Anup Rattan, learned Additional Advocate General, duly assisted by Mr. J.K. Verma, learned Deputy Advocate General, while referring to the impugned judgment passed by the learned Single Judge, strenuously argued that since learned Single Judge has failed to consider the reply filed by the present appellant while disposing of the petition, there is an error apparent on the face of the record and as such, impugned judgment is liable to be quashed and set-aside. While referring to Annexure R-1 annexed with the reply, learned Additional Advocate General, further contended that it stands duly proved on record that there was shortfall of mandays ranging from 10 to 15 days during calendar year from 1994 to 1998 as far as completion of 240 days in one calendar year is concerned. Learned Additional Advocate General further contended that onus, if any, to prove factum with regard to the completion of 240 days in a calendar year was upon the petitioner, not upon the respondent-department and as such, learned Single Judge, has fallen in grave error while condoning the shortfalls of the mandays ignoring the position explained in Annexure R-1. With the aforesaid submissions, learned Additional Advocate General, prayed that instant appeal be allowed and judgment of learned Single Judge, be quashed and set-aside.

4. On the other hand, Mr. Sanjeev Bhushan, Senior Advocate, duly assisted by Ms. Abhilasha Kaundal, Advocate, representing the respondent herein (petitioner), while inviting attention of this Court to the impugned judgment passed by the learned Single Judge, contended that there is no illegality and infirmity in the same and as such, same is based upon the law laid down by the Hon'ble Apex Court in *Mohd. Abdul Kadir and Anr. V. Director General of Police, Assam and others,* (2009) 6 SCC 611, wherein issue with regard to artificial breaks stands duly settled. Learned senior counsel further contended that judgment rendered by the Division Bench of this Court in CWP No. 4367 of 2009, which has also been taken note by the learned Single Judge, has also attained finality and as such, there is no merit in the present appeal and same deserves to be quashed and set-aside.

5. We have heard the learned counsel for the parties and carefully gone through the record.

6. It is quite apparent from the perusal of the impugned judgment passed by the learned Single Judge that same is based upon the judgment passed by the Hon'ble Apex Court in Mohd. Abdul case supra, wherein practice of giving artificial breaks from time to time and reappointing the same staff, has been held to be contrary to the service jurisprudence, relevant paras of the aforementioned judgment, are being reproduced herein below:-

> ***"16. We may next consider the challenge to the procedure of annual termination and reappointment introduced by the circular dated 17.3.1995. The PIF Scheme and PIF Additional Scheme were introduced by Government of India. The scheme does not contemplate or require such periodical termination and re-appointment. Only ex-servicemen are eligible to be selected under the scheme and that too after undergoing regular selection process under the Scheme. They joined the scheme being under the impression that they will be continued as long as the PIF Additional Scheme was continued. The artificial annual breaks and reappointments were introduced by the state agency entrusted with the operation of the Scheme. This Court has always frowned upon artificial breaks in service.***
>
> ***17. When the ad-hoc appointment is under a scheme and is in accordance with the selection process prescribed by the scheme, there is no reason why those appointed under the scheme should not be continued as long as the scheme continues. Ad-hoc appointments under schemes are normally***

co-terminus with the scheme (subject of course to earlier termination either on medical or disciplinary grounds, or for unsatisfactory service or on attainment of normal age of retirement). Irrespective of the length of their ad hoc service or the scheme, they will not be entitled to regularization nor to the security of tenure and service benefits available to the regular employees. In this background, particularly in view of the continuing Scheme, the ex-serviceman employed after undergoing selection process, need not be subjected to the agony, anxiety, humiliation and vicissitudes of annual termination and re-engagement, merely because their appointment is termed as ad hoc appointments.

18. We are therefore of the view that the learned Single Judge was justified in observing that the process of termination and re-appointment every year should be avoided and the appellants should be continued as long as the Scheme continues, but purely on ad hoc and temporary basis, co- terminus with the scheme. The circular dated 17.3.1995 directing artificial breaks by annual terminations followed by fresh appointment, being contrary to the PIF Additional Scheme and contrary to the principles of service jurisprudence, is liable to be is quashed."

7. Question with regard to the condonation of short breaks also came to be considered by the Division Bench in CWP No. 4367 of 2009, decided on 1.12.2009, wherein Division Bench of this Court drawing strength from aforesaid judgment passed by the Hon'ble Apex Court in Mohd. Abdul Kadir case supra, categorically held that in light of law laid down by the Hon'ble Supreme Court , respondents ought to have condoned the shortage of few days while calculating 240 days in a particular calendar year in the case at hand. It also emerges from perusal of Annexure R-1 placed on record by the respondents that petitioner had worked for 210 days from April, 1994 to December, 1994 and thereafter, in the years, 1995, 1996, 1997, 1998, petitioner had worked for 227, 230, 229 and 227 days respectively. It also emerge from the record that in the year, 1999 (January, 1999 to April, 1999), petitioner had worked for 76 days. There is nothing on record suggestive of the fact that the petitioner at any point of time abandoned the job, rather learned Single Judge has rightly observed that endeavor of such person would be always to complete 240 days to earn the benefit of regularization.

8. After having taken note of man days chart (Annexure R-1) particularly qua years, 1994 till 1999, we find force in the arguments of learned senior counsel representing the petitioner that the artificial breaks were given by the respondents solely with a view to stop him from completing 240 days in every year so that prayer, if any, for regularization, is not made by the petitioner.

9. During proceedings of the case, it is also brought to our notice that SLP(C) bearing No. 21833 of 2010 having been preferred by the respondents against the similar judgment passed by the Division Bench of this Court in CWP(T) No. 1807 of 2009, titled *Satish Kumar v. State of HP and Ors*. and SLP (Civil) No. 20740 of 2008 titled *Sarvjeet v. State of H.P. and Ors*, stand dismissed and as such, judgment passed by the Division Bench of this Court in CWP No. 4367 of 2009, wherein directions were issued to respondents to condone the shortage of few days in a particular year while calculating 240 days, has attained finality. Learned Additional Advocate General, was not able to dispute the factum as brought to our notice with regard to dismissal of the aforesaid SLP preferred by the respondents-State.

10. Leaving everything aside, after having carefully perused the impugned judgment, we find that judgment impugned before us is squarely based upon law laid down by the Hon'ble Apex Court, in Mohd. Abdul Kadir case supra, and as such, there is no scope of interference by this Court.

11. Consequently, in view of the detailed discussion made herein above, we see no reason to interfere with the judgment passed by the learned Single Judge, which is otherwise

based upon proper appreciation of material adduced on record by the respective parties. Present appeal fails and dismissed accordingly.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR.JUSTICE CHANDER BHUSAN BAROWALIA, J.

Maheshwar Singh and another …Petitioners
Versus
State of Himachal Pradesh and others ….Respondents.

CWP No. 1978 of 2016 .
Judgment reserved on: 7.7.2017
Date of Decision : 31.08. 2017.

Himachal Pradesh Hindu Public Religious Institutions and Charitable Endowments Act, 1984- Section 29- Petitioner No. 1 claims himself to be the owner in possession of the land and temp of Sri Raghunath situated over the land – petitioner No. 1 is managing the temple exclusively as a private temple with the assistance of the petitioner No. 2, who has been appointed as a Kardar- the Government appointed Deputy Commissioner, Kullu as commissioner of temple and entered the temple in Schedule-I of H.P. Hindu Public Religious Institutions and Charitable Endowments Act, 1984 by issuing a notification- the notification was challenged on the ground that it was arbitrary illegal, unconstitutional, violative of principle of natural justice, politically motivated and actuated with malice – the State contended that there is public interest and many festivals are being organized for which various arrangements have to be made, repeated thefts had taken place in the temple which has caused resentment in the public and public had made representation for taking over the temple and for creating the trust – held that the question whether religious endowment is public or private is a mixed question of law and facts- in case of private endowment beneficiaries are specific individuals while in case of public endowment, the beneficiaries are general public – the Court has to rely upon the historical origin of the temple, manner in which the affairs of temple have been managed and the manner in which expenses are being met, offering worship as a matter of right, dedication of temple for the benefit of public, how the temple is being treated and location of temple etc. – the disputed question of facts cannot be adjudicated in exercise of writ jurisdiction and the remedy lies with the civil court – the petition disposed of with a direction to institute a civil suit. (Para-20 to 66)

Cases referred:

Pujari Lakshmana Goundan and Anr. v. Subramania Ayyar and Ors., AIR (1924) PC 44
Babu Bhagwan Din v. Gir Har Swaroop, AIR 1940 PC, 7
Deoki Nandan v. Murlidhar, 1956 SCR 756: (AIR 1957 SC 133)
Ram Saroop Dasji v. S. P. Sahi, Special Officer-in-Charge of the Hindu Religious Trusts, (1959)Suppl (2) SCR 583: (AIR 1959 SC 951)
Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayhak Gosavi, (1960) 1 SCR 773:(AIR 1960 SC 100)
The Poohari Fakir Sadavarthy of Bondilipuram vs. The Commissioner, Hindu Religious and. Charitable Endowments, AIR 1963 SC 510
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Kuldip Chand and another vs. Advocate General to Government of H.P. & others, (2003) 5 SCC 46
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T.D. Gopalan vs. Commr. of Hindu Religious and Charitable Endowments (1972) 2 SCC 329
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Sree Panimoola Devi Temple and others vs. Bhuvanachandran Pillai & others (2015) 12 SCC 698
Sohan Lal vs. Union of India and another AIR 1957 SC 529
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New Satgram Engineering Workers and another vs. Union of India and others AIR 1981 SC 124
Ghan Shyam Das Gupta and another vs. Anant Kumar Sinha and others AIR 1991 SC 2251
Parvatibai Subhanrao Nalawade vs. Anwarali Hasanali Makani and others, AIR 1992 SC 1780
State of Rajasthan vs. Bhawani Singh, AIR 1992 SC 1018
Mohan Pandey and another vs. Smt. Usha Rani Rajgaria and others AIR 1993 SC 1225
Mahant Bal Dass vs. State of Himachal Pradesh and another 1988 (1) Sim. L.C. 226

For the Petitioners: Mr. Bhupender Gupta, Senior Advocate, with Mr. Neeraj Gupta and Mr. Janesh Gupta, Advocates.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. V.S. Chauhan, Mr. Mr. Anup Rattan, Addl. Advocate Generals and Mr. J.S. Guleria, Asstt. Advocate General, for respondents No. 1 & 2.
Mr. Dilip Sharma, Senior Advocate, with Mr. Om Pal and Mr. Deven Khanna, Advocates, for respondent No. 3.
Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate, for legal representatives 4(a) and 4(b).

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

In the instant writ petition, the petitioners have assailed notification issued by the State Government under Section 29 of the Himachal Pradesh Hindu Public Religious Institutions and Charitable Endowments Act, 1984 (hereinafter referred to as the 'Act') whereby the Raghunathji temple has been included in Schedule I of the Act.

2. The petitioner No.1 claims himself to be the owner in possession of land comprised in Khasra No. 994 entered at Khewat No. 1626 min, Khatauni No. 2106 min situated at Phati Dhalpur, Mauja Maharaja, Pargana Lag Maharaja, Tehsil and District Kullu and in support of such contention placed reliance upon the jamabandi for the year 2006-2007 wherein the suit land is recorded as '*Abadi Patti*'. It is averred that :-

(i) The palaces of the petitioners as well as temple of Shri Raghunathji is also situate over the aforesaid land. The petitioners are residing in the palace which is commonly known as 'Rupi Palace Sultanpur', Phati Dhalpur, Tehsil and District Kullu, H.P. The temple of Shri Raghunathji was built and established by late Raja Jagat Singh, who during the years 1637 to 1672 AD was reigning the Kingdom at Kullu and the reasons for constructing and establishing the temple and installing the idol of Shri Raghunathji (Rama) along with idol of Sita Mata, Hanumanji, Narsinghji, Saligramji is contained in the history of Punjab Hill States and the relevant extract thereof has been annexed as Annexure P-2 with the petition. The temple is very ancient one and from the very beginning i.e. at the time of construction of the temple and installing of the idols of the aforesaid Gods, the temple is being maintained by the Raja and his successors. As per the traditions maintained by the Rajas of Kullu, the eldest son of the Raja is designated as '*Chharibardar'* (Vice Regent) of Lord Raghunathji without any interference or interruption.

(ii) Kullu was earlier part of Kangra District which formed part of Punjab and during the year 1865 to 1872 was under settlement. Mr. J.B. Lyall made a report of the settlement wherein he traced the history of establishing the temple and installing of idols which according to the petitioners clearly establishes that it was the Raja, who had constructed the private temple for his own use to get rid of the curse which was pronounced upon him by one Brahmin named Durga Dutt, resident of Village Tipri (Madoli) while Raja was going towards Manikaran. It is averred that the Raja ran from pillar to post for his cure and get rid of the sin of '*Brahm Hatya'* and ultimately fell on the feet of Mahatama Krishan Dass Paihari, who was residing in Village Jhiri near Naggar. Mahatama directed the Raja to fetch the idol from Shri Tretanath Temple Ayodhaya where these idols were made during Tretayug when Lord Rama performed Ashamedha Yagya while Sita Mata was in exile. Idol of Sita Mata was made on the direction of Guru Vishwamitter for performing the said Yagya. Mahatama also directed Raja to declare Raghunathji as chief deity and Raja of Kullu and the Raja was to become first servant of Lord Raghunathji and designated as '*Chharibardar'* and serve the public and in future the eldest son of Raja would also serve as '*Chharibardar'* of Lord Raghunathji. A copy of the relevant extract of the settlement has been annexed as Annexure P-3 with the petition.

(iii) Similarly, Forest Settlement was undertaken in Kullu during the period 1868 to 1874. As per the then prevailing Forest Act, the Forest Settlement was carried out wherein the rights of Rai, who in fact was the Raja of Kullu have been mentioned. Records also mention the existence of the temple of Raghunathji at Sultanpur and it is clearly mentioned that the temple is in reality a part of the Mahal (Palace) of Rai of Rupi, the then Raja. It is also recorded therein that it was Rai's private chapel. The copy of the relevant extract has been annexed as Annexure P-4 with the petition.

(iv) As per the traditions when Rai Bhagwant Singh of Rupi was managing the temple as well as properties attached thereto, some disgruntled people of Kullu, who wanted to unnecessarily interfere in the affair of the temple of Raghunathji, approached the learned District Judge, Hoshiarpur at Dharamshala by a petition under Section 3 of Local Boards Act XIV of 1920 claiming therein that the entire Hindu population of Kullu pay homage to Lord Raghunathji in Sultanpur Kullu and one of the main grounds raised therein was that the donation from the public was though being taken but there was mismanagement and misappropriation of the funds of the temple. Accordingly, a direction against Damodar Dass owner of Laxmi Narain Temple in Sultanpur and Rai Bhagwant Singh owner of the temple for rendition of accounts of income and expenditure

for the last three years was sought. The said petition after due contest came to be decided by the learned District Judge Hoshiarpur at Kangra vide his judgment dated 25.2.1942 in which it was held that the temple of Lord Raghunathji as well as temple of idol Laxmi Narainji are private temples and rejected the application with costs. The copy of the judgment has been annexed with the petition as Annexure P-5.

(v) Lord Raghunathji installed in the temple at Sultanpur is considered from time immemorial to be the chief deity of Kullu District and traditional Dussehra festival is celebrated every year. During this festival, the owner of the temple, who is also '*Chharibardar'* takes out religious procession of the chief deity alongwith other idols installed in the temple and heads the procession from Sultanpur to Rath Ground in Dhalpur for the purpose of Rath Yatra. About 360 Gods and Goddesses come to pay homage to Lord Raghunathji in Sultanpur Temple. They also participate in the traditional religious ceremonies for seven days including Rath Yatra. The Pooja in the *sanctum sanctoram (garbh grih*) is carried out by Pujaris appointed by the owner, who manages the temple through *Kardars.* Except '*Chharibardar'* and Pujaris, no person is permitted to enter *garbh grih* and performed Pooja therein. Even the other family members including his wife and children of '*Chharibardar'* are not permitted to enter the *garbh grih*. The obeisance to the idol is only from the outside.

(vi) The aforesaid temple is being managed by the petitioner No.1 exclusively as a private temple as he is owner thereof and even *Kardars* have been appointed by him. The same at present is being managed by petitioner No.2, who is the son of petitioner No.1 and has been appointed as a *Kardar* by him.

(vii) In the Dussehra festival held in the month of October, 1971 the traditional religious procession which was being headed by Raja Mohinder Singh Kullu was intercepted by the police at the behest of the Government and other politicians and then firing took place which resulted in the arrest of Raja Mohinder Singh. Petitioner No.1 and his father Mohinder Singh were arrested by the police and ultimately the Government appointed Hon'ble Mr. Justice D.B. Lal, Judge of this Court as a Single Man Inquiry Commission to enquire into the episode. After making due inquiry and examination of many witnesses and considering the documents produced, it was found that the temple was the private property of Raja and Government had no right to interfere with the same.

(viii) It is thereafter averred that on 19.2.2015 Hon'ble Chief Minister visited Kullu on the occasion of laying of foundation stone in Kullu Town of 24 x 7 drinking water supply scheme and during the course of his visit, one Uttam Sharma, President, Block Congress Committee, Kullu submitted a complaint that makes mention of some resolution regarding creating a Trust for Raghunath Mandir, Kullu. The reason mentioned therein was that some thefts had taken place in the temple during 2014 and, therefore, in order to maintain the security of temple, a Trust should be created. It is averred that Uttam Sharma had his own axe to grind against the petitioners as he is the grandson of Sh. Hukam Ram alias Hukami, resident of Village Puid, Kothi Kais, Tehsil and District Kullu. Shri Hukami at one point of time had been appointed as Kardar by the great grandfather of petitioner No.1 and had abandoned the post of *Kardar* when it was found that he was acting against the interest of the owner of the temple. It is further averred that one Nanak Chand son of Shri Hukam Ram alias Hukami i.e. uncle of Shri Uttam Sharma was in fact one of the applicants in the application filed before the learned District Judge, Hoshiarpur, who had also sought the similar relief, but was denied the same.

(ix) The aforesaid representation so submitted by Sh. Uttam Sharma was actuated with malice and ill-will towards the petitioners keeping in view the old enmity. Similarly one representation/complaint was submitted by Om Prakash Sharma, who claimed to be the managing trustee of one Dev Sanskriti Charitable Trust, Kullu and was on the similar lines as the one submitted by Uttam Sharma (supra). Om Prakash Sharma was an active worker of the Congress Party and making false complaints against petitioner No.1. He had also filed a Public Interest Litigation against petitioner No.1, which was dismissed by this Court. Sh. Om Prakash Sharma misused the signatures of the persons which have been annexed with the representation/complaint. The signatures were not meant for the purpose of the subject mentioned in the representation/complaint.

(x) On similar grounds, third representation was submitted by one Dinesh Sain, the then Member of Zila Parishad, Kullu dated 8.6.2015, which too, contained the false assertions.

(xi) On 26.7.2016, the Deputy Commissioner, Kullu was designated as Commissioner of Temple under the Act wherein the name of Shri Raghunath Temple Trust has been mentioned and the said notice in turn based upon another notification on the same date i.e. 26.7.2016 by the Government of Himachal Pradesh through Secretary (LAC) wherein Shri Raghunath Temple has been entered in Schedule-I of the aforesaid Act. The copies of notice and notification dated 26.7.2016 have been annexed with the petition as Annexures P-8 and P-9, respectively.

3. The said notice and notification have been assailed by the petitioners on the ground that the same are without jurisdiction, arbitrary, illegal, unconstitutional, violative of principles of natural justice, politically motivated and actuated with malice.

4. The respondents-State has filed its reply wherein it is averred:-

(i) That the purpose of the Act is to provide for better administration of Hindu Public Institution and Charitable Endowment and for the protection and preservation of properties pertaining to such institutions and endowments. The underlying object of the applicability of the Act is the interest of people involved in such Public Religious Institutions. The present temple is squarely covered by the definition of Temple and Public Religious Institution and there is enormous element of interest or public involvement, therefore, it cannot be said that the Act is not applicable. There is conscious policy decision taken by the government to add this temple, invoking powers under Section 29 of the Act, in the Schedule attached to the Act to provide for better administration and for the protection and preservation of Shri Raghunath Ji Temple and its properties. There is no question either acquiring or taking over the temple or its properties, therefore, the apprehension of the petitioners is ill-founded and baseless.

(ii) As per the history which is even relied upon by the petitioners themselves that Shri Raghunath Ji is the Chief Deity of entire Kullu District since 1868 and, therefore, can by no stretch of imagination be termed as private temple of the petitioners. Shri Raghunath Ji is Chief Deity amongst more than 298 local Devi-Devtas, who in turn, have their own followings of masses within their respective local boundaries. All such Devi-Devtas mostly participate in Kullu Dussehra accompanied by their respective followers ranging between 200 to 600 each in number.

(iii) Kullu District comprises of four Sub Divisions, five Tehsils consisting of an area of 5503 sq. k.m. and as per 2011 census has population of 4,37,903, out of which Hindu population is 4,15,669. Virtually, all Hindus of Kullu District have deep faith in Shri Raghunath Ji and they are frequent visitors to the Temple

without any restriction except some sacrosanct place like '*Garbh Griha*' where only particular person in a particular manner can enter. The offerings made to the deity by general public are accepted without any reservation in temple. There is uninterrupted participation of all the people in all religious activities and festivals in the temple premises or any other place identified for the occasion where the deity Shri Raghunath Ji is present. Public donations are accepted in temple. After declaration of Kullu Dussehra as 'International Fair', there is international following of Shri Raghunath Ji.

(iv) In view of the international character of celebrating Kullu Dussehra, it requires all kind of arrangements in terms of deployment of Police personnel and Home Guards to maintain Law & Order during Dussehra Festival. Officers/Officials from Police and Administration are deployed for effective execution of Dussehra. Arrangements in themselves show that there is element of huge interest of general public in the temple of Shri Raghunath Ji.

(v) In addition to the aforesaid, there are many more festivals associated with Shri Raghunath Ji and examples of 28 such celebrations and festivals are as under:

1) **Nav Samvatsar**:- In Kulvi culture all traditions of the year starts from Nav Samvatsar i.e. Chaiter Shukal Pratipada (March). This is the first festival of Raghunath Ji. In this, Doorva grass to Raghunath Ji is offered by general public.

2) **Garud Dwitya**:- On the second day of Chaiter Shukal (March) Garud Dwitya ceremony is celebrated. This ceremony happens in the evening in which general public participate.

3) **Pawan Tritya**:- On the third day of Chaiter Shukal (March) Pawan Tritya is celebrated. It is also celebrated in the evening like Garud Dwitya where general public participates.

4) **Vaisakhi**:- On the Skranti of Vaisakh (April) big pooja is held in the Temple of Shri Raghunath Ji and general public offer Bhog of Satu to Shri Raghunath Ji and Prasad is distributed to the worshipers present in the Temple.

5) **Ram Navami**:- On the ninth day of Chaiter Shukal (March) Ram Navami is celebrated at twelve noon. Priest takes fast and then decorate the statue of Lord Raghunath Ji with new clothes, general public participate in the function held in Temple with great zeal and enthusiasm.

6) **Kesar Dol Utsav**:- On third day evening of Ram Navami Kesar Dol Utsav is celebrated in which general public participate and celebrate.

7) **Akshaya Tritya**:- This is celebrated in the evening of Vaisakh Shukal Paksha. This time Jhula is juggled. General public participates.

8) **Van Vihar**:- On twelfth day of Vaisakh Shukal Paksha (April) Van Vihar ceremony is held at garden of Shri Raghunath Ji Temple at 3:00 PM. The Deity sits in the Jhula and general public participate in the festival.

9) **Nrisingh Chaudas**:- On fourteenth day of Vaisakh Shukal Paksha advent of Lord Vishnoo (Nrisingh) as appeared to kill the Hirenyakashyap. This folk drama is held in the Temple of Shri Raghunath Ji. Prohit tells the story of Nrisingh to general public and celebrations are also there.

10) **Bramha Raas**:- This ceremony is also celebrated on Nrising Chaudas at 4:00 PM in the garden near Tulsi flower. This time Shri Raghunath Ji sits

on his traditional seat. Prohit and priest enchants Veda Mantras at this time and general public participate in the function.

11) **Jal Vihar**:- On the Ekadshi of Jestha Shukal Paksha Raghunath takes bath alongwith Sita, Nrisingh, Saligram and Hanuman Ji. After that all these deities are decorated and jiggled in the Jhula on one side of the garden where the holy pond is situated. The water of pond becomes sacred after bath taken by idol of Shri Raghunath Ji and same is sprinkled on general public gathered in the Temple.

12) **Jagannath Dwitya**:- On the second day of Ashad Shukal Paksha the idol of Raghunath is placed on the Kamla Aasan. After that holy Aarti is sung by people present in the Temple. The campus of Temple is believed as a Janak Puri on this day where Shri Ramchandra had his in-laws-house.

13) **Devshayani Ekadashi**:- On the Ekadashi of Aashad Shukal Paksha in the evening the sleeping ceremony of Raghunath Ji is held. Public participates.

14) **Raksha Bandan**:- On Sharavan Purnima big Pooja is held and Yagyopaveet gold beared to Raghunath Ji and Yagyopaveet is also scotted and Rakhi is also offered to Raghunath Ji by general Public of area and devotees.

15) **Janamashatmi**:- Janamashatmi is celebrated with enthusiasm in the mid night of Ashatmi of Krishan Paksha of Bhado and general public participate in the function.

16) **Pahalna:**- On the ninth day of Krishan Paksha of Bhado Pahalna ceremony is also celebrated in the morning which remains continue till next day evening. Public participates.

17) **Sayari Sajja**:- On the first day of Asauj the pooja is held of green crop and fruits. Durva grass of silver is offered to Shri Raghunath Ji by general Public on this day.

18) **Ang Komodhani Ekadashi**:- This ceremony is celebrated on the Ekadashi Shukal Paksha of Bhado month in the evening. The idol of Shri Raghunath put to sleep. Public participates.

19) **Vaman Dwadashi**:- On the twelfth day of Shukal Paksha of Bhado month after big pooja, the pooja of advent of Vaman is celebrated and general public participate in the function.

20) **Basant Panchami**:- On the Panchami of Magh Shukal Paksha Basant Utsab is celebrated. On this day the idol of Shri Raghunath Ji is brought to Dhalpur ground with the tunes of Dhol, Nagara, Karnal, Shehnai etc. There the younger brother of Ram Chandra Ji Bharat meets with Hanuman Ji. A person of Bairagi Community portrays as Hanuman. Raghunath Yatra is held in Dhalpur from Rath ground to place of Raghunath Ji in the middle of the Dhalpur ground. There pooja is held. Gulal is thrown upon the Raghunath Ji and after that sitting on the big rath. Raghunath returns to the Rath ground after that sitting on the palanquin Raghunath returns to Sultanpur to the Temple. This day the songs of Basant are sung by the Vairagies and general public.

21) **Hola Asthak**:- On the Ashatmi of Falgun Shukal Paksha Vairagi people come to the Temple of Shri Raghunath Ji in the evening and sings the holy songs.

22) **Kamalaasan**:- On the tenth day of Falgun Shukal Paksha the seat of kamal is decorated where Raghunath Ji sits. Only Vairagi's can see this seat of Raghunath Ji.

23) **Navratra**:- From the Shukal Patipada of Ashwin month nine days Navratra ceremony are celebrated. On the ninth day Dol of Chaumasa is established. This time Devi Pooja is held.

24. **Dussehra**:- On the tenth day of Ashwin Shukal Paksha Veer Pooja and Ghor (House) Pooja is held in the Temple in the morning. After that Devi Hadimba comes from Manali and is greeted by Raja family. This time the Devi Devtas also come to greet Raghunath Ji. About 3:00 PM Raghunath Ji comes to Dhalpur ground where big rath is already decorated and rath Yatra starts from Rath ground to the camp of Raghunath Ji. All Devi Devtas joins with Raghunath Ji. Dussehra is celebrated for seven days in the Dahalpur Ground with great enthusiasm. Prior to one day of Dussehra, Gold smiths of Kullu District, repair the ornaments, utensils etc. made of gold and silver of Shri Raghunath Ji.

25) **Ram Ras**:- Ram Ras is held on the Pratipada of Kartik Krishan Paksha in the Temple of Raghunath Ji. Many Devi-Devta congratulate Raghunath Ji on reaching Temple on this day.

26) **Dhan Triyodash**:- On the thirteenth day of Kartik Shukal Paksha festival of lights are celebrated. Holy lamps are established which are lighted till Diwali in the evening. Public participate.

27) **Diwali**:- On the Amavasya of Kartik month Diwali is celebrated in the Temple. General public participate.

28) **Ann Koot**:- On the Pratipada of Kartik Shukal Paksha the pooja of new grain is held. Goverdhan mountain is made of rice and Raghunath Ji is seated on this mountain of rice. Cow worship is also held on this day. Aarti is done and food of new rice prepared and served to the public present. People make offerings of new grain to God.

(vi) There have been two major thefts in Shri Raghunath Ji Temple. The first being in January, 2014 when valuables amounting to Rs.23,81,000/- were taken away and FIR No. 28, dated 22.1.2014 was registered at Police Station, Kullu. However, till date the culprits have not been apprehended. The second theft took place in the intervening night of 8th and 9th December, 2014, when Idols of Shri Raghunath Ji alongwith other Idols and valuables were stolen and FIR No. 378, dated 9.12.2014 was registered at Police Station, Kullu.

(vii) After the repeated thefts in the temple, there is resentment among the people of Kullu. As a mark of disappointment even the commercial establishments or private shops remained closed in Kullu. There was huge pressure on the government for tracing the Idols and valuable. The government even announced an award of Rs.10,00,000/- (Rupees ten lacs) for the person giving clue. Many police teams were constituted. Finally, the culprits were apprehended. The theft was result of poor security arrangement of Shri Raghunath Ji Temple and poor condition of building where Idols and valuable were kept as accused made entrance of the temple after climbing on the slate-roofed Temple with the help of the rope. The accused had taken valuable worth Rs.32,00,000/- (Rupees thirty two lacs) approximately besides Idol of Shri Raghunath Ji and other deities, the value of which cannot be estimated in terms of money.

(viii) After the theft several statements in local press were made by the people wherein they urged the State Government to take over the management of Temple and constitute a Trust to look-after the same.

(ix) In addition, the government also received three representations dated 25.5.2015 from Constituency Congress Committee, 23 Kullu (Sardar), on dated 13.5.2015 from Sanskriti Charitable Trust, Kullu signed by as many as 208 persons of Anni Sub Division and on 8.6.2015 one Dinesh Sen, a public representative.

(x) There is no revenue record to show that the petitioners are owners of the land over which Shri Raghunath Ji Temple is existing. In fact, the temple is situated at a distance of approximately 100 meters from the Rupi Palace, which is also located on 'abadi deh' and is in possession of the petitioners. Total 'abadi deh' is about 20 bighas and Temple is on one bigha. Alongwith Temple of Shri Raghunath Ji, many other persons including the petitioners are in possession of 'abadi deh' land. There are about 30-40 families residing there. Therefore, the petitioners by no stretch of imagination can claim exclusive ownership of the land.

(xi) The *Missal Hakiyat* for the year 1868 shows that in fact, the predecessors of the petitioners declared themselves as '*Charibardar'* which meant the first servant of God. The properties of the Deity were managed through the caretaker known as '*Kardar*'. Shri Raghunath Ji is the owner of properties of Temple as well as other landed property. There is no revenue entry specially showing anybody as owner of the land over which the temple is existing except that such land is shown as 'abadi deh'.

(xii) The petitioners are setting up title adverse to title of Deity, who is recognized in law as perpetual minor. Shri Raghunath Ji possesses not only land over which temple is situated within 'abadi deh' at Sultanpur, but also owns landed properties in other part of Kullu District as have been described in paragraphs 9(A) to 9(G) of the reply.

(xiii) As regards the judgment, Annexure P-5, it is averred that the same is not binding on the respondents and general public of District Kullu inasmuch the matter was a judgment in *personam* which binds only the parties to the litigation.

(xiv) In the Missal Hakiar 1868-69 of Phati Kharahal, the family of Raja Jagat Singh is mentioned at Sr. No. 59 as "KHANDAN" and it is described therein that the then owner divided his entire property of Phati into three portions; one portion was donated to Shri Raghunath Ji and he declared him as the servant of God Raghunathji called as '*Chharibardar*', which meant as First Servant of Raghunath Ji. The First Kardar was Isharu s/o Aittu as is evident in Missal Hakiat where entry qua "Bahetmam" has occurred. The office of Kardar is hereditary. Till 22.11.1995, Shri Devi Ram was the Kardar who resigned from the office. Thereafter, Deputy Commissioner, kangra (as Kullu at that time was part of District Kangra) on 30.11.1995 vide mutation No. 993 appointed Shri Durga Singh s/o Shri Megh Singh as Kardar. After the death of Shri Durga Singh on 5.9.1989, his son Shri Surender Singh should have become the hereditary Kardar by operation of law, but revenue records do not show entry to this effect. Shri Surender Singh also expired in the year 1999 whereas again his son respondent No. 3 should have become Kardar by operation of law and there was no occasion for entertaining any application for the appointment of Kardar in the year 1999 when petitioner No. 2 was appointed as Kardar on the recommendation of petitioner No.1 by the Tehsildar. Issue in this regard about review of mutation is still *sub judice* before the Deputy Commissioner.

(xv) On 5.10.1999, petitioner No.2 moved an application requesting respondent No. 2 to declare him as Kardar of Shri Raghunath Ji of area existing in Phati Kiyar, which was marked to the Tehsildar for enquiry. He, in turn, submitted his report on 8.10.1999 to respondent No. 2 vide mutation No. 4063 attested on 15.10.1999. Petitioner No. 2 was ordered to be appointed as Kardar only of Phati Diyar. There is no order of respondent No. 2 appointing the petitioner No. 2 as Kardar of Shri Raghunath Ji Kullu.

(xvi) The petitioners are setting up title adverse to minor deity by claiming themselves to be the owner in possession of the temple whereas it is Shri Raghunath Ji, who is in actual possession of properties of Temple and there is no question of ownership in 'abadi deh'.

(xvii) Nazarana is being paid to all the deities including Shri Raghunath Ji, who participate in Dussehra festival for daily expenses. In addition to that security arrangements, electricity and essential commodities are also being provided to all the deities by the administration including Shri Raghunath Ji since 1968.

(xviii) The experience of the government after inclusion of different temples where interest of public was involved, in Schedule-I of the Act has resulted in better administration of such temples and the income of such temples have gone up tremendously. A large number of persons have benefitted in view of employment provided to them in these temples. There have been provisions for better facilities for pilgrims, security of such temples, construction of shrine, beautification of temples, proper paths, security of devotees, proper lightings etc.

5. Respondent No.3, the first cousin of petitioner No.1, had moved an application seeking his impleadment as a party-respondent and the same was allowed. Thereafter, respondent No.3 filed his reply, wherein he has specifically stated as under:

(i) The petitioner No.1 is only one of the co-sharers of the property in the Rupi palace alongwith Raghunathji Temple. Raghunathji Temple is not the property of petitioner No.1 and is being put to common use of the members of the royal family. The property is jointly owned and possessed by the co-sharers and the petitioner has only 1/16 share in the said property.

(ii) The temple of Raghunathji is separate and not a part of Rupi palace. The public at large visit the said temple as a matter of right as Lord Raghunathji is chief deity of whole Kullu valley.

(iii) The term "*Chhari Bardar*" does not appear to have been used in old records. The meaning of "*Chhari*" is stick, "*Bardar*" is one who lifts the same and, therefore, "*Chhari Bardar*" would mean, who lifts the stick and cannot be equated with the owner of the property. Hence, the claim of petitioner No.1 that the temple of Lord Raghunath is his private property is not correct. With the passage of time, Lord Raghunath has been accepted by the general public as chief deity and devtas and general public pay obeisance to Lord Raghunathji and visit the temple as a matter of right and, therefore, the petitioners cannot claim the temple of Raghunathji as their personal property.

(iv) The grandfather of petitioner, Shri Durga Singh was "*Kardar*" of Lord Raghunathji, who was appointed by the Collector of District Kangra vide order dated 30.11.1955 when previous "*Kardar*" Devi Singh resigned on 22.11.1955. On the basis of such orders, mutation No.963 was attested and sanctioned in the name of Shri Durga Singh, who continued to discharge his duties as "*Kardar*" till his death on 05.09.1989. After the death of Shri Durga Singh, no "*Kardar*" was formally appointed and all the members of royal family used to perform the duties.

(v) In Kullu Valley "*Kardar*" is appointed on hereditary basis by the Collector, hence after the death of Shri Durga Singh, Kanwar Surinder Singh father of respondent inherited "*Kardari*". During 2011, petitioners started claiming exclusive ownership of Rupi palace and temple property compelling the respondent to obtain information under Right to Information Act. The information so received revealed that petitioner No.2 was appointed as "*Kardar*" by the Deputy Commissioner, Kullu, vide order dated 08.10.1999. An application was submitted by petitioner No. 2 on 05.10.1999 for changing the entries of "Kasht" with respect to Khasra Nos. 2039 and 2146 in "phati diar kothi kot kandi" Tehsil and District, Kullu, measuring 3-0 bighas and 5-6 bighas, respectively, which were entered in the name of Lord Raghunathji through "*Kardar*" Shri Durga Singh. On 08.10.1999, the statement of petitioner No.2 was recorded by the Tehsildar, Kullu, wherein he claimed to perform the duties of "*Kardar*" after the death of Shri Durga Singh and petitioner No.1 had certified that petitioner No.2 had been performing the duties of "*Kardar*" and also made recommendations to Deputy Commissioner to appoint petitioner No.2 as "*Kardar*" and that petitioner No.1 has no objection in case petitioner No.2 is appointed as "*Kardar*".

(vi) Thereafter, an order was passed on the same date i.e. 08.10.1999 by the Deputy Commissioner in the office file without passing any separate order. Later vide order dated 11.10.1999, Tehsildar, Kullu directed the change of entries in the revenue records in favour of petitioner No.2. It is claimed that this entire exercise was done by petitioner No.1 with a view to put the property of Lord Raghunath Ji to personal use by exchanging 5-6 bighas of land comprised in Khasra No.2146 with Narain Singh and others as the land of Narain Singh was adjoining to the stone crusher of one of the sons of petitioner No.1 and was causing damage to the land of Narain Singh, who was given this land in exchange so as to facilitate the working of his crusher.

(vii). After the death of Shri Durga Singh, though a proper and fair procedure was required to be followed for appointment of "Kardar" as the replying respondent had also a claim for "Kardar" being the eldest grand son of Shri Durga Singh. However, the petitioners in a hush-hush manner put petitioner No.2 as "Kardar" without putting to notice of replying respondent and other stakeholders of the royal family obviously with a view to facilitate misuse of the property and funds of Lord Raghunathji. The respondent had already staked his claim for appointment of "Kardar" of Lord Raghunathji vide application dated 23.02.2012.

(viii). There are 40 festivals as detailed in Annexure R-3/12, which according to the respondent are celebrated with Lord Raghunathji during the year, out of which 11 are main festivals including "Holika Dehan", "Basant Panchmi" and "Vijaydashmi" which infact is celebrated for 7 days in Dhalpur ground. Besides, "Van Vihar" and "Jal Vihar" are celebrated in the ground outside Raghunathji temple. Other festivals are celebrated in the temple. Besides this, the newly wedded couples of the valley come to pay obeisance to Lord Raghunathji. General public also visits this temple on occasion of birth of a child in their family and other auspicious occasion. Hence, it is clear that the general public has an interest in the temple and, therefore, it is not a private temple. There are some other temples in Rupi Palace, which are not main parts of the main Raghunathji temple, however, they are accessible to all the members of royal family and their invitees only.

(ix). With the passage of time, the nature and character of the temple of Lord Raghunathji has undergone a great change and on account of involvement of the general public and local deities, it cannot be claimed at this distance of time that

it is a private temple. The *"Kardar"* of the temple is appointed by the Deputy Commissioner, which goes to show that it is not a private affair. The grandfather of the replying respondent was appointed as *"Kardar"* by the Deputy Commissioner, Kangra, in the year 1955 and continued as such till his death in the year 1989.

(x). Similarly, on the strength of being "*Chhari Bardar*", petitioner No.1 enters "Garbh Grih" of the temple and that does not lead to the conclusion that he is the owner of the temple. There are many public temples where entries are restricted only to "Pujaris" and public pay obeisance from a particular distance and are not allowed to enter the defined area. Offerings are made by the Devtas of the Kullu Valley from time to time, who in turn, get the funds and gold/silver from general public. For re-construction of temple, for performing Yajnas/Kathas and for organizing other religious activities, funds/gold/silver etc. have been offered to Lord Raghunathji, from time to time, by the general public and also by Devtas of Kullu Valley. Therefore, the petitioners cannot claim to be the owners of such funds, which infact have been offered to Lord Raghunathji by the general public and Devtas of Kullu Valley. In addition thereto, permanent "Dan Patras" are placed in the temple and during Dussehra, "Dan Patras" are installed in Dhalpur maidan (ground) on behalf of Lord Raghunathji and huge funds are collected on account of offerings made by the general public and Devtas of the valley and such funds are required to be utilized in a transparent and fair manner for the management of the affairs of Lord Raghunathji and therefore, the temple cannot be put to private use by anybody.

6. The brother of the petitioner i.e. respondent No.4 moved an application for impleading him as a party, which was allowed and he was impleaded as respondent No.4. However, during the pendency of the petition, he unfortunately died and his legal representatives were then ordered to be brought on record.

7. Respondent No.4 (since deceased), who was real brother of the petitioner had opposed the petition by filing a reply wherein it is averred that :

(i). He is residing in a specific portion of the palace in his possession and same is being used for his personal residence. There is a common entrance in the shape of main gate (Prawal) to the palace which includes the portion in possession of petitioner No.1, replying respondent, besides other stake holders in the vicinity. It has been specifically denied that the temple of Shri Raghunathji is a part of the palace as alleged. Rather it is stated that Shri Raghunathji is the principal deity of the people of Kullu District and the fact of the matter is that the predecessors of the petitioners and replying respondent had dedicated their rule, over the erstwhile State in the name of Shri Raghunathji. People of Kullu have been worshipping Shri Raghunathji since time immemorial. Indisputably, all local deities have their allegiance to Shri Raghunathji and consequently the tradition of Shri Raghunathji being the principal deity of the area has been accepted as an integral part of cultural ethos of the valley. Therefore, the petitioners' claim of ownership of Raghunathji Temple and other properties is not only incorrect, but is also smeared with malafides.

(ii) There is mass participation of the people in religious rituals and ceremonies related with Shri Raghunathji and the same is not confined to the celebration of Dussehra festival alone. The people in general have access to the temple and various festivals and occasions are celebrated with Shri Raghunathji in the temple and elsewhere throughout the year with mass participation of general public. Therefore, the temple of Shri Raghunathji cannot be claimed to be a private temple by the petitioners. The traditional practice of "*Charibardar"*

cannot be a legal impediment in inclusion of Shri Raghunathji temple in the schedule attached to the Act.

(iii) Shri Raghunathji temple was established with religious object for public purpose and hence the applicabilities of the provisions of the Act have to be judged strictly in accordance with the provisions thereof. There is no malafide on the part of the Government of Himachal Pradesh or any individual in taking the decision to include Shri Raghunathji temple within the ambit of the Act. Lastly, it is denied that the temple is a private temple and, therefore, the provisions of the Act have been rightly applied to the same.

8. The petitioners have filed separate rejoinder to the reply of respondents No.1 and 2 wherein the plea as raised in the writ petition have been reiterated. It has been specifically stated that the temple in question is neither a charitable endowment nor is a public religious institution. It is averred that the action of the government is against the principle of natural justice as the petitioners have not been associated at any point of time and the orders impugned herein have been passed behind their back without affording proper opportunity to them to explain their rights and put up their claims. In such circumstances, the entire action of the respondents smacks malafides and the same is nothing but a politically motivated move to injure the interest of petitioner No.1, who belongs to the political party other than the ruling political party.

9. It has once again been stated that even in the Dussehra ceremonies, there is no mass public participation insofar as Lord Raghunathji is concerned, which is a private affair of petitioner No.1 carried through petitioner No.2 being Kardar. In addition thereto, specific allegations have been levelled against the representationist Sh. Om Prakash Sharma, who has filed representations for creation of the trust and details of such averments are contained in para 3 of the rejoinder.

10. The petitioners have filed rejoinder to the reply of respondent No.3, wherein in the preliminary submissions, it is averred that respondent No.3 is neither owner nor has any right, title or interest as owner of Abadi Phati, Sultanpur and, therefore, cannot be heard in the matter. It is further averred that respondent No.3 had been in various civil and criminal litigation with the petitioner No.1 and his family members and on account of such inimical attitude has approached this Court by concealing true and material facts while seeking his impleadment. On merits, it has been stated that respondent No.3 or his predecessors never owned any land at Sultanpur, Phati Dhalpur and that is why the names of respondent No.3 or his predecessors do not find mention in the revenue record. They in fact have no right, title or interest of any nature either in abadi Phati or temple or the out houses attached to the temple.

11. The petitioners have filed rejoinder to the reply of respondent No.4, wherein it has been averred that respondent No.4 has different motive to oppose the claim of the petitioner. It is denied that the temple of Shri Raghunathji is not part of Rupi Palace. It is also submitted that there are various local deities in respect of villages and phatis of Kullu District and their followers worship their respective deities. It is only during Dussehra festival that all the Devi-Devtas who are invited to Dussehra festival pay their obeisance to Lord Raghunathji. Even during Dussehra festivals the worshipper and villagers who accompany their respective deity or devta perform their respective poojas and other ceremonies. It has been denied that the people in general have access to the temple of Lord Raghunathji as a matter of right and even though, there are various religious festivals that are performed in the temple but participation of general public is not a matter of right in such religious ceremonies or festivals. The birthday of Raja as per tradition is celebrated in the temple with all traditional ceremonies and even the marriage of Raja is performed in the temple and in the marriage of the eldest son of Raja, Lord Narsinghji accompanies the Barat and all the rituals of marriage are performed in his presence. The traditional ceremony of coronation the eldest son of Raja and declaring him to be the successor of Raja as well as Chharibardar (vice regent) are performed traditionally within the temple with all rituals. Even in the daily pooja performed in the temple, the Sankalp is always in the name of

petitioner No.1 and whenever any Yagya or Anusthan, repair or construction takes place in the temple, it is the petitioners who are required to compulsorily to stay within the temple throughout even during night in the rooms which are earmarked for such purpose. Even after any demise of any family members or near relations takes place, the petitioner No.1 is not permitted to mourn the demise and has to perform his duties by staying separately from other family members during the festivals or any Utsav of Lord Raghunathji. Such facts are clearly evident from one instance when the real sister of petitioner No.1 and respondent No.4 namely Rani Kiran Kumari of Mandi expired on very first day of Dussehra festival, petitioner No.1 had to compulsorily stay back and could not mourn the deimise and had attended the funeral which took place on the next day, being the Chharibardar.

12. It is vehemently contended by Mr. Bhupender Gupta, Senior Advocate, assisted by Mr. Neeraj Gupta, counsel for the petitioners that the Lord Raghunathji temple being a private temple and the properties appurtenant thereto being private properties in the ownership and possession of petitioner No.1 are not amenable to the provisions of the Act and, therefore, any action purported to be taken thereunder is without jurisdiction, arbitrary, illegal, unconstitutional and violative of the principles of natural justice and malafide and hence is liable to be quashed. It is further argued that the notification issued under Section 29 of the Act is liable to be quashed as the same has been issued in violation of the principles of natural justice as the petitioners have not at all been associated at any stage and even otherwise the entire action is actuated by the political motivation and thus cannot withstand the judicial scrutiny.

13. On the other hand, learned Advocate General would argue that by way of notification impugned herein, there is no acquisition or taking over of the properties of the petitioners and the same has been issued only for the purpose of administration. The legislature never intended the principles of natural justice or recording of reasons before initiating proceedings under the same, more particularly, while issuing notification under Section 29 of the Act when it is established on record that the public has interest in the temple. The private respondents have towed the line of arguments of the learned Advocate General.

We have heard learned counsel for the parties and have gone through the material placed on record carefully.

14. At the outset, certain salient features of the Act need to be noticed. As per sub section 3 of Section (1) of the Act, it applies to all Hindu and Charitable Endowment mentioned in Schedule-1. "Hindu Public Religious Institution", as per Section 2 (f) of the Amended Act, 2007 reads thus:

> *"(f) "Hindu public religious institution" means a math, temple, smadh, smadhi, dera and endowment attached thereto or a specified endowment, established with a religious object for a public purpose and includes, -*
>
> *(i) All property movable or immovable belonging to or given or endowed for worship in, maintenance or improvement of, additions to, a math, temple, smadh, smadhi or dera for the performance of any service of charity connected therewith:*
>
> *(ii) The idols installed in the math, temple, smadh, smadhi or dera, cloths, ornaments and things, for decoration etc.; and*
>
> *(iii) Religious institution under the direct control of the State Government; but does not include such private religious math, temple, smadh, smadhi or dera, in which the public are not interested:*
>
> *Provided that any offering, whether in kind or in cash, made by any pilgrim or by any other person in any Himachal Pradesh Public Religious Institutions shall be deemed to be the property of such religious institution."*

15. "Temple" defined in Section 2 (l) means *a place, by whatever designation known, used as place of public religious worship, and dedicated to, for the benefit of, or used as of right by, the Hindu community or any section thereof as a place of public religious worship*.

16. Section 29 confers power upon the State Government to amend Schedule-1 and reads thus:

> "**29. Power to amend schedule-I.-**
>
> *(1) The Government may, if it is of opinion that it is expedient or necessary in the public interest so to do, by notification in the Official Gazette, add to, omit from, Schedule-I any Hindu public religious institution and charitable endowment and on any such notification being issued, the Schedule-I shall be deemed to be amended accordingly.*
>
> *(2) Every such notification shall, as soon as possible, after it is issued, be laid before the Legislative Assembly of the State."*

17. There is no dispute that in the case in hand what is sought to be termed to be a Religious Institution within the meaning of Hindu Public Religious Institution in sub section 3 of Section (1) is a temple and it is the claim of the respondents that the same is a temple within the meaning of Section 2 (l), therefore, the respondents No. 1 and 2 would have the right to administer the same.

18. Whereas, learned counsel for the petitioners would contend that the temple in question cannot be termed as a public religious institution and in proof of dedication, user as of right, as a place of public religious worship by the Hindu Community or of any section thereof, the Raghunathji Temple cannot be said to be a temple within the definition of Section 2 (l) of the Act.

19. According to the petitioners, one of the essential requirements as seen from the definition of "temple" is that it should be a place of public religious worship and the Hindu Community or any Section thereof should have used the premises as a place of Public Religious Worship as of right, so as to be called or termed as a public temple. If the essential ingredient, namely, worship by the public as of right is not satisfied, then it becomes a private temple.

20. Therefore, the first and foremost question to be determined is as to whether the Raghunathji Temple is a public temple or a private temple.

21. As early as in 1924, the Hon'ble Privy Council in ***Pujari Lakshmana Goundan and Anr.* v. *Subramania Ayyar and Ors., AIR (1924) PC 44,*** took the view that even in a case where at the initial stage the temple is a private one by reason of the founder holding it out by representing to the Hindu public that the temple was a public temple at which all Hindus have right to worship, then the inference will be that he had dedicated the temple to the public.

22. In ***Babu Bhagwan Din v. Gir Har Swaroop, AIR 1940 PC, 7*** the Hon'ble Privy Counsel while dealing with the grant that was made to one Daryao Gir and his heirs in perpetuity and the evidence showed that the temple and the properties attached thereto had throughout been treated by the members of the family as their private property appropriating to themselves the rents and profits thereof, held that the fact that the grant was made to an individual and his heirs in perpetuity was not reconcilable with the view that the grantor was in effect making a wakf for a Hindu religious purpose.

While distinguishing the case of ***Pujari Lakshmana Goundan's*** the Hon'ble Privy Council observed as follows:

> *'In these circumstances, it is not enough in their Lordships 'opinion' to deprive the family of their private property to show that Hindus willing to worship have never been turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual mela. Worshippers are naturally welcome at a temple because of the offerings they bring*

and the repute they give to the idol; they do not have to be turned away on pain of forfeiture of the temple property as having become property belonging to a public trust.

Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as, a public temple, must be considered in their historical setting in such a case as the present; and dedication to the public is not to be readily A inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away; and as worship generally implies offerings of some kind it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity. Thus, in 61 I A 405, the Board expressed itself as being shown to act on the mere fact of the public having been freely admitted to a temple. The value of public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right. Their Lordships do not consider that the case before them is in general outline the same as the case of the Madras temple 29 C W N 112, in which it was held that the founder who had enlarged the house in which the idol had been installed by him, constructed circular roads for processions, built a rest house in the village for worshippers, and so forth, had held out and represented to the Hindu public that it was a public temple.'

23. In ***Deoki Nandan* v. *Murlidhar, 1956 SCR 756: (AIR 1957 SC 133)*,** is a leading judgment on the subject by a Bench of four Hon'ble Judges of the Hon'ble Supreme Court. Therein the facts found were that one Sheo Ghulam, a pious childless Hindu, constructed Thakurdwara of Sri Radhakrishnaji in Balasia village of District Sitapur. He was in management of the temple till his death. He executed a 'Will' bequeathing all his properties to the temple and made provisions for its proper management. The question arose whether the temple was dedicated to the public and whether the temple was a public or private temple. The Hon'ble Supreme Court laid down that the issue whether the religious endowment is a public or a private is a mixed question of law and facts, the decision of which must be taken on the application of the legal concepts of public and private endowment to the facts found. It was held that the distinction between a private or a public endowment is that whereas in the former the beneficiaries are specific individuals, in the latter they are the general public or a class thereof. It was further held that an idol is a juristic person capable of holding properties. The properties endowed for the temple vest in it, but the idol has no beneficial interest in the endowment. The true beneficiaries are its worshipers. On facts it was found that the temple was a public temple and it was held that the true test whether a temple is a private or a public temple, depends on whether the public at large or a section thereof has an unrestricted right of worship and it was observed:

'When once it is understood that the true beneficiaries of religious endowments are not the idols but the worshippers, and that the purpose of the endowment is the maintenance of that worship for the benefit of worshippers, the question whether an endowment is private or public presents no difficulty. The cardinal point to be decided is whether it was the intention of the founder that specified individuals are to have the right of worship at the shrine, or the general public or any 'specified portion thereof.

The learned Judge distinguished the decision of the Privy Council in Babu Bhagwan Din v. Gir Har Saroop, (supra) on the ground that properties in that case were granted not in favour of an idol or temple but in favour of the founder who was maintaining the temple and to his heirs in perpetuity, and said:

'But, in the present case, the endowment was in favour of the idol itself, and the point for decision is whether it was private or public endowment. And in such

circumstances, proof of user by the public without interference would be cogent evidence that the dedication was in favour of the public.'

It was also observed while distinguishing the Privy Council decision in Babu Bhagwan Din's case that it was unusual for rulers to make grant to a family idol. In Deoki Nandan's case the Court referred to several factors as an indicia of the temple being a public one viz the fact that the idol is installed not within the precincts of residential quarters but in a separate building constructed for that purpose on a vacant site, the installation of the idols within the temple precincts, the performance of pooja by an archaka appointed from time to time for the purpose, the construction of the temple by public contribution, user of the temple by the public without interference, etc.'

24. In ***Ram Saroop Dasji* v. *S. P. Sahi, Special Officer-in-Charge of the Hindu Religious Trusts, (1959)Suppl (2) SCR 583: (AIR 1959 SC 951),*** another Constitution Bench of the Hon'ble Supreme Court reiterated the distinction between the public and private trust. In the former the beneficial interest is vested in an uncertain and fluctuating body of persons, either the public at large or some considerable portion of it, answering a particular description. In the latter, the beneficiaries are definite and ascertained individuals or who within a time can be definitely ascertained. The facts that the uncertain and fluctuating body of persons is a section of the public following a particular religious faith or is only a sect of persons of a certain religious persuasion would not make any difference on the matter and would not make the trust a private trust. It was held that Sri Thakur Laxmi Narainji was a public trust within the meaning of S.2(e) of the Bihar Hindu Religious Trusts Act, 1950

25. In ***Narayan Bhagwantrao Gosavi Balajiwale* v. *Gopal Vinayhak Gosavi, (1960) 1 SCR 773:(AIR 1960 SC 100)*** a Bench of three Hon'ble Judges of the Hon'ble Supreme Court held that the long user by the public as of right and grant of land and cash by the rulers, taken along with other relevant facts were consistent only with the public nature of the endowment. It was held that Sri Balaji Venkatesh at Nasik and its Sansthan constituted charitable and religious trusts within the meaning of the Charitable and Religious Trusts Act, 1920. In that context this Court also considered the question of burden of proof and held that it would mean of two things, namely, (1) that a party has to prove an allegation before it is entitled to a judgment in its favour; and (2) that the one or the other of the two contending parties has to introduce evidence on a contested issue. The question of onus is material only where the party on which it is placed would eventually lose if it failed to discharge the same. Where issues are, however, joined, evidence is led and such evidence can be weighed in order to determine the issues, the question of burden becomes academic.

26. In ***The Poohari Fakir Sadavarthy of Bondilipuram vs. The Commissioner, Hindu Religious and. Charitable Endowments, AIR 1963 SC 510***, a Bench of Hon'ble three Judges of the Hon'ble Supreme Court, laid down the following tests to find out whether a particular temple is a private or a public one:-

'That an institution would be a public temple within the Hindu Religious Endowments Act, 1926, if two conditions are satisfied; firstly, that it was a place of public religious worship and secondly, that it was dedicated to, or was for the benefit of, or was used as of right p by the Hindu Community, or any section thereof, as a place of religious worship.When there be good evidence about the temple being a private one, the mere fact that a number of people worship at the temple, is not sufficient to come to the conclusion that the temple must be a public temple to which those people go as a matter of right as it is not usual for the owner of the temple to disallow visitors to the temple even if it be a private one.'

27. In ***Tilkayat Shri Govindalalji Maharaj* v. *State of Rajasthan, (1964) 1 SCR 561: (AIR 1963 SC 1638)*** the Constitution Bench of the Hon'ble Supreme Court held, on construction of evidence, that Nathdwara temple of Udaipur is a public temple with management of the trustee of the property belonging to the temple.

28. In ***Goswami Shri Mahalaxmi Vahuji* v. *Rannchhoddas Kalidas and Ors., [1970] 2 SCR 275*** , the Hon'ble Supreme Court, after considering the earlier decisions on this aspect, held as follows:-

> *'Though most of the present day Hindu public temples have been found as public temples, there are instances of private temples becoming public temples in course of time. Some of the private temples have acquired great deal of religious reputation either because of the eminence of its founder or because of other circumstances. They have attracted large number of devotees. Gradually in course of time they have become public temples. Public temples are generally built or raised by the public and the deity installed to enable the members of the public or a section thereof to offer worship. In such a case the temple would clearly be a public temple. If a temple is proved to have originated as a public temple, nothing more is necessary to be proved to show that it is a public temple but if a temple is proved to have originated as a private temple or its origin is unknown or lost in antiquity then there must be proof to show that it is being used as a public temple. In such cases the true character of the particular temple is decided on the basis of various circumstances. In those cases the courts have to address themselves to various questions such as:-*
>
> > *(1) Is the temple built in such imposing manner that it may prima facie appear to be a public temple?*
> >
> > *(2) Are the members of the public entitled to worship in that temple as of right?*
> >
> > *(3) Are the temple expenses met from the contributions made by the public?*
> >
> > *(4) Whether the sevas end utsavas conducted in the temple are those usually conducted in public temples?*
> >
> > *(5) Have the management as well as the devotees been treating that temple as a public temple? Though the appearance of a temple is a relevant circumstance, it is by no means a decisive one. The architecture of temples differs from place to place. The circumstance that the public or a section thereof have been regularly worshipping in the temple as a matter of course and they can take part in the festivals and ceremonies conducted in that temple apparently as a matter of right is a strong piece of evidence to establish the public character of the temple. If votive offerings are being made by the public in the usual course and if the expenses of the temple are met by public contribution, it is safe to presume that the temple in question is a public temple. In brief the origin of the temple, the manner in which its affairs are managed, the nature and extent of gifts received by it, rights exercised by the devotees in regard to worship therein, the consciousness of the manager and the consciousness of the devotees themselves as to the public character of the temple are factors that go to establish whether a temple is a public temple or a private temple. In Lakshmana v. Subramania, the Judicial Committee was dealing with a temple which was initially a private temple. The Mahant of this temple opened it on certain days in each week to the Hindu public free to worship in the greater part of the temple, and on payment 'of fees in one part only. The income thus received by the Mahant was utilised by him primarily to meet the expenses of the temple and the balance went to support the Mahant and his family. The Privy Council held that the conduct of the Mahant showed that the had held out and represented to the Hindu public that the temple was a public temple at which all Hindus might worship and the inference was, therefore, that he had dedicated it to the public. In Mundancheri Koman v. Achutan Nair, the Judicial Committee again*

> *observed that the decision of the case would depend on the inferences to be derived from the evidence as to the way in which the temple endowments had been dealt with and from the evidence as to the public user of the temples. Their Lordships were satisfied that the documentary evidence in the case conclusively showed that the properties standing in the name of the temples belonged to the temples and that the position of the manager of the temples was that of a trustee. Their Lordships further, added that if it had been shown that F the temples had originally been private temples they would have been slow to hold that the admission of the public in later times possibly owing to altered conditions would affect the private character of the trusts. In Deoki Nandan v. Murlidar, this Court observed that the issue whether a religious endowment is a public or a private one is a mixed question of law and fact, the decision of which must depend on the application of legal concepts of a public and private endowment to the facts found. Therein it was further observed that the distinction between a public and private endowment is that whereas in the former the beneficiaries, which means the worshippers are specific individuals and in the later the general public or class thereof. In that case the plaintiff sought to establish the true scope of the dedication from the user of the temple by the public. In Narayan Bhagwant Rao Gosavi Balajiwale v. Gopal. Vinayak Gosavi and Ors., this Court held that the vastness of the temple, the mode of its construction, the long user of the public as of right, grant of land and cash by the Rulers taken along with other relevant factors in that case were consistent only with the public nature of the temple."*

29. In ***Bihar State Board of Religious Trust* v. *Palat Lall and Ann, [1971] 2 SCR 650***, the Hon'ble Supreme Court, inter alia, observed that the fact that the worshippers from the public were admitted to the temple was not a decisive fact, because worshippers would not be turned away as they brought in offerings, and the popularity of the idol among the public was not indicative of the fact that the dedication of the properties was for public.

30. In ***Bihar State Board Religious Trust, Patna* v. *Mahant Sri Biseshwar Das, [1971] 3 SCR 680,*** the Hon'ble Supreme Court held that the evidence that Sadhus and other persons visiting the temple were given food and shelter was not by itself indicative of the temple being a public temple or its properties being subject to a public trust; that the mere fact of the public having been freely admitted to the temple cannot mean that courts should readily infer there from dedication to the public; that the value of such public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right; that the fact that idols were installed permanently on a pedestal and the temple was constructed on grounds separate from the residential quarters of the mahant could not lead to inference of dedication to the public.

31. In ***T.D. Gopalan* v. *The Commissioner of Hindu Religious and Charitable Endowments, Madras, [1973] 1 SCR 584: (AIR 1972 SC 1716),*** the facts were that the Mandapam was constructed on their own land. The Garbha Griha in front of the mandapam, stone idols called Dwarabalakas on either side and implements necessary for offering puja in the mandapam existed. The Commissioner declared it to be a public temple but in the suit the trial Court declared it to be a private temple. On appeal, the High Court reversed the decree of the trial Court and held that the temple was a public temple on the ground that members of the public had been worshipping at the shrine without let or hindrance, and that the temple was being run by contributions and by benefactions obtained from members of the public. The Hon'ble Supreme Court considered the nature of the temple, place of worship attaching importance to the origin of the temple, the management thereof by the members of the family and absence of any endowed property etc., declared it to be private temple and confirmed the decree of the trial Court. While considering those facts, the Hon'ble Supreme Court held that the origin of the temple, the manner

in which its affairs were managed, the nature and extent of the gifts received by it, the rights exercised by devotees in regard to worship therein, the consciousness of the Manager or devotees themselves as to the public character of the temple are facts which go to establish whether a temple is public or private. In the absence of Dwajasthamba or Nagara bell or Hundial in the temple were considered to be factors to declare the temple to be a private temple and it was observed as under:

> *'Moreover, if the origin of the temple had been proved to be private then according to the law laid down by the Privy Council itself in Babu Bhagwan Din's case dedication to the public was not to be readily inferred. Such an inference, if made, from the fact of user by the public was hazardous since it should not, in general, be consonant with Hindu sentiment or practice that worshippers should be turned away; and, as worship generally implied offerings of some kind, it was not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity. It was further emphasised by their Lordships that the value of public user as evidence of dedication depends on the circumstances which give strength to the inference that the user was as of right. In Goswami Shri Mahalaxmi Vahuji v. Rannchoddas Kalidas and Ors., it was pointed out that the appearance though a relevant circumstance was by no means decisive. The circumstance that the public or a section thereof had been regularly worshipping in the temple as a matter of course and they could take part in the festivals and ceremonies conducted in that temple apparently as a matter of right was a strong piece of evidence to establish its public character. If votive offerings were being made by the public and the expenses were being met by public contribution, it would be A safe to presume that the temple was public. In short the origin of the temple the manner in which its affairs were managed the nature and extent of the gifts received by it, rights exercised by devotees in regard to worship therein, the consciousness of the manager and the consciousness of the devotees themselves as to the public character of the temple were factors that went to establish whether a temple was public or private.'*

32. In ***Dhaneshwarbuwa Guru Purshottambuwa* v. *Charity Commissioner, (1976) 3 SCR 518: (AIR 1976 SC 871),*** while reiterating the well-settled distinction between private trust or public trust, the Hon'ble Supreme Court emphasised that the deity installed in the temple was intended by the founder to be continually worshiped by an indeterminate multitude of the Hindu public without any hindrance or restriction in the matter of worship by the public extending over a long period. Receipt of the Royal grant, gifts of the land by members of the public, absence of any evidence in the long history of the Sansthan to warrant that it had any appearance of, or that it was ever treated as, a private property are some of the features to lead to an inescapable conclusion that Shri Vithal Rukhamai Sansthan was to be public trust within the meaning of S. 2(13) of the Act.

33. In ***Bala Shankar Maha Shanker Bhattjee and others vs. Charity Commissioner, Gujarat State 1995 Supp (1) SCC 48,*** the Hon'ble Supreme Court after placing reliance on the earlier judgments, some of which have been noticed above, laid down the following principles to determine a private or public temple:

> *"19. A place in order to be a temple, must be a place for public religious worship used as such place and must be either dedicated to the community at large or any section thereof as a place of public religious worship. The distinction between a private temple and public temple is now well settled. In the case of former the beneficiaries are specific individuals; in the latter they are indeterminate or fluctuating general public or a class thereof. Burden of proof would mean that a party has to prove an allegation before he is entitled to a judgment in his favour. The one or the other of the contending parties has to introduce evidence on a contested issue. The question of onus is material only where the party on which it*

is placed would eventually lose if he failed to discharge the same. Where, however, parties joined the issue, led evidence, such evidence can be weighed in order to determine the issue. The question of burden becomes academic.

20. An idol is a juristic person capable of holding property. The property endowed to it vests in it but the idol has no beneficial interest in the endowment. The beneficiaries are the worshippers. Dedication may be made orally or can be inferred from the conduct or from a given set of facts and circumstances. There need not be a document to evidence dedication to the public. The consciousness of the manager of the temple or the devotees as to the public character of the temple; gift of properties by the public or grant by the ruler or Government; and long use by the public as of right to worship in the temple are relevant facts drawing a presumption strongly in favour of the view that the temple is a public temple. The true character of the temple may be decided by taking into consideration diverse circumstances. Though the management of a temple by the members of the family for a long time, is a factor in favour of the view that the temple is a private temple, it is not conclusive. It requires to be considered in the light of other facts or circumstances. Internal management of the temple is a mode of orderly discipline or the devotees are allowed to enter into the temple to worship at particular time or after some duration or after the headman leaves the temple are not conclusive. The nature of the temple and its location are also relevant facts. The right of the public to worship in the temple is a matter of inference.

21. Dedication to the public may be proved by evidence or circumstances obtainable in given facts and circumstances. In given set of facts, it is not possible to prove actual dedication which may be inferred on the proved facts that place of public religious worship has been used as of right by the general public or a section thereof as such place without let or hindrance. In a public debuttar or endowment, the dedication is for the use or benefit of the public. But in a private endowment when property is set apart for the worship of the family idol, the public are not interested. The mere fact that the management has been in the hands of the members of the family itself is not a circumstance to conclude that the temple is a private trust. In a given case management by the members of the family may give rise to an inference that the temple is impressed with the character of a private temple and assumes importance in the absence of an express dedication through a document. As stated earlier, consciousness of the manager or the devotees in the user by the public must be as of right. If the general public have always made use of the temple for the public worship and devotion in the same way as they do in other temples, it is a strong circumstance in favour of the conclusiveness of public temple. The origin of the temple, when lost in antiquity, it is difficult to prove dedication to public worship. It must be inferred only from the proved facts and circumstances of a given case. No set of general principles could be laid."

34. The Hon'ble Supreme Court in ***Smt. Marua Dei vs. Muralidhar Nanda, 1999 AIR (SC) 329,*** was dealing with the proceedings which were initiated under Section 41 of the Orissa Hindu Religious Endowments Act, 1951 for a declaration that the temple in question is neither a public temple nor a math as defined in the Act and that it was a private spiritual institution for the worship by the applicants family members only. The Additional Assistant Commissioner of Endowments held that the institution was neither a public temple nor a math but is a private institution of the applicants. The appellate authority dismissed the appeal. In an appeal filed before the High Court, the institution was held to be a public temple. The judgment of the High Court was affirmed by the Hon'ble Supreme Court and the principles as laid in ***Bala Shankar's*** case (supra) were reiterated.

35. In ***Teki Venkata Ratnam and others vs. Dy. Commissioner, Endowments and others,* (2001) 7 SCC 106**, the Hon'ble Supreme Court reiterated that a private temple can also in due course of time become a public temple and it was observed:

> *"9. The second submission based on the decision of the District Court made in O.P. No. 1 of 1940 declaring the temple as private, as rightly held by the High Court, has no merit or force. It must be remembered that a private temple in course of time depending on various factors and developments may gradually acquire the nature of a public temple. The Division Bench of the High Court in this regard relied on the decision of this Court in Goswami Shri Mahalaxmi v. Shah Ranchhoddas (AIR 1970 SC 2025), para 15 of the said judgment reads :-*
>
> > *"Though most of the present day Hindu public temples have been founded as public temples, there are instances of private temples becoming public temples in course of time. Some of the private temples have acquired great deal of religious reputation either because of the eminence of its founder or because of other circumstances. They have attracted large number of devotees. Gradually in course of time they have become public temples. . . . ."*

36. In ***S. Pitchai Ganapathy and others vs. Commissioner, Hindu Religious and Charitable Endowments Department and others, (2001) 8 SCC 460,*** the Hon'ble Supreme Court held that a party seeking declaration that the temple is a private one must rebut presumption that temple whose origins are unknown is a public temple.

37. In ***Kuldip Chand and another vs. Advocate General to Government of H.P. and others, (2003) 5 SCC 46,*** the Hon'ble Supreme Court has laid down the guidelines to determine whether the endowment is a public or private in nature in the following manner:

> *"40. Undoubtedly, bequests for construction of a Dharamsala will be for a charitable purpose. It is not necessary that the properties must be dedicated to any particular deity but what is essential is complete dedication for a charitable purpose. Such dedication may be made to an object both religious and of public utility."*

38. Similarly, in ***State of W.B. and others versus Sri Sri Lakshmi Janardan Thakur and others, (2006) 7 SCC 490,*** the Hon'ble Supreme Court have culled out the following factors to determine whether the trust is private or public:

> *"15. In order to ascertain whether a trust is a private, following factors are relevant:*
>
> > *(1) If the beneficiaries are ascertained individuals;*
> >
> > *(2) If the grantor has been made in favour of an individual and not in favour of a deity;*
> >
> > *(3) The temple is situated within the campus of the residence of the donor;*
> >
> > *(4) If the revenue records or entries suggest the land being in possession of an individual and not in the deity. On the other hand an inference can be drawn that the temple along with the properties attached to it is a public trust:*
> >
> > > *(1) If the public visit the temple as of right*
> > >
> > > *(2) If the endowment is the name of the deity.*
> > >
> > > *(3) The beneficiaries are the public.*
> > >
> > > *(4) If the management is made through the agency of the public or the accounts of the temple are being scrutinized by the public."*

39. In ***Parasamaya Kolerinatha Madam, Tirunelveli* vs. *P. Natesa Achari (dead) through LRs and others (2011) 13 SCC 431,*** while setting out the two necessary ingredients for a structure or place to be described as a temple under the Act, observed as under:

> *"12. The distinction between maths and temples, stated in several judicial pronouncement has found statutory recognition in the aforesaid definitions. There are two necessary ingredients for a structure or place to be described as a temple under the Act. First is its use as a place of public religious worship. Second is dedication of the structure or place to, or for the benefit of, or use as of right by, the Hindu community or a section thereof, as a place of public religious worship. The mere fact that members of the public are allowed to worship at a place, will not make it a public temple. The Hindu sentiments and the tenets of Hinduism do not normally exclude worshippers from a place of worship, even when it is private or part of a Math. Therefore, the crucial test is not whether the members of the public are permitted to worship, but whether the worship by the members of the public is as of right by the Hindu community or any section thereof, or whether a place has been dedicated a place of public religious worship. [See : the decision of the Privy Council in Koman Nair v. Achuthan Nair ILR (1935) 58 Mad 91, the decisions of the Madras High Court in Madras Hindu Religious Endowments Board vs.V.N. Deivanai Ammal (1953) 2 MLJ 688; Bodendraswami Mutt vs. Board of Commissioners for Hindu Religious Endowments (1955) 1 MLJ 60, and The Commissioner, Hindu Religious & Charitable Endowment (Admn.) Department vs. Tirukoilur Adhinam Tirupappuliyur Srimath Gnaniar Madalayam (2003) 1 MLJ 726]."*

40. Thereafter earlier judgments rendered in ***Goswami Shri Mahalaxmi Vahuji vs. Ranchhoddas Kalidas (1969) 2 SCC 853, T.D. Gopalan vs. Commr. of Hindu Religious and Charitable Endowments (1972) 2 SCC 329*** and ***Radhakanta Deb. Vs. Commr. of Hindu Religious Endowments (1981) 2 SCC 226*** were relied upon and it was observed as under:

> *"16. Therefore, the fact that there are some idols installed in a Math and members of the public offer worship to such idol will not make it a place of public religious worship, that is, a temple, if the other ingredients of a math exist or if it is established to be a premises belonging to a math and used by the math for its purposes. If the property in its origin was a math property, it cannot be treated as a temple merely because the math had installed idols and permitted worship by the members of the community and the premises is used for rendering charitable and religious services. The Division Bench has proceeded on the erroneous impression that existence of an idol in a math property, when worshipped by the members of the community, would convert the math property into a temple."*

41. In ***Sree Panimoola Devi Temple and others vs. Bhuvanachandran Pillai and others (2015) 12 SCC 698***, the Hon'ble Supreme Court negated the contentions of the appellant therein that temple which is initially a private temple had acquired the status of a public temple with passage of time due to the visits of large number of persons and offerings made by the general public, including their participation in the religious rites. The judgment rendered by the Hon'ble Privy Council in ***Babu Bhagwan Din*** case (supra) was relied upon and it was observed as under:

> *"5. The case of the plaintiffs all along and also in the counter-affidavit filed before this Court has been that the temple was initially a private temple, but the same acquired the status of a public temple with passage of time due to the visits of large number of persons and offerings made by the general public, including their participation in the religious rites performed therein. Even if we are to accept the aforesaid position, the said fact by itself would not be sufficient to enable a determination in favour of the plaintiffs.*

6. In this regard, following observation of the Privy Counsel in Babu Bhagwan Din, AIR 1940 PC 7 may be extracted with profit:

> *"…..In these circumstances it is not enough, in their Lordships' opinion, to deprive the family of their private property to show that Hindus willing to worship have never been turned away or even that the deity has acquired considerable popularity among Hindus of the locality or among persons resorting to the annual mela. Worshippers are naturally welcome at a temple because of the offerings they bring and the repute they give to the idol : they do not have to be turned away on pain of forfeiture, of the temple property as having become property belonging to a public trust. Facts and circumstances, in order to be accepted as sufficient proof of dedication of a temple as a public temple, must be considered in their historical setting in such a case as the present ; and dedication to the public is not to be readily inferred when it is known that the temple property was acquired by grant to an individual or family. Such an inference if made from the fact of user by the public is hazardous, since it would not in general be consonant with Hindu sentiments or practice that worshippers should be turned away ; and as worship generally implies offerings of some kind it is not to be expected that the managers of a private temple should in all circumstances desire to discourage popularity."*
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> *7. Reliance has been placed by the learned counsel for the respondent-plaintiffs on a decision of this Court in Bala Shankar Maha Shanker Bhatjee vs. State of Gujarat 1995 Supp (1) SCC 485 to contend that worship by thegeneral public for long and offerings made by the public would give a private temple a status of a public temple.*
>
> *8. A reading of the opinion of this Court in Bala Shankar, makes it clear that the worship by the members of the public and offerings made was one of the several circumstances considered relevant by this Court for determination of the question, namely, whether the temple in question – Kalika Mataji Temple – is a public temple. There were several other relevant aspects that were taken into account by the Court to answer the said question, namely, cash allowance paid from the State treasury to maintain the deity from time to time; fixed grants given by the Rulers i.e. Scindia and British Rulers; the Temple and its properties being shown in government records as belonging to Mataji and the respondents being shown as Pujaris. The reliance placed on Bala Shankar, therefore, is of no consequence."*

42. From a conspectus of law as laid down in the aforesaid judgments, it is abundantly clear that the question whether the temple is a public or private one cannot be decided on any straightjacket formula and would depend on various factors wherein the Court will have to examine atleast some of these aspects:

(i) Historical origin of the temple;

(ii) Manner in which the affairs of the temple have been managed;

(iii) Whether the temple expenses are met from the contribution made by the public;

(iv) Whether the devotees offer worship as a matter of right;

(v) Dedication of the temple for the benefit of the public;

(vi) Whether devotees have been treating the temple as a public temple;

(vii) Location of the temple etc.etc.

43. It would be noticed that in all the judgments referred to hereinabove that the proceedings therein emanated from civil suits wherein the parties had led evidence and had also cross-examined witnesses and it is on the basis of the pleadings and evidence so led that adjudication was made. However, in the present case, the parties have only relied upon the petition, replies and rejoinders, on the basis of which the questions of complex nature as we are faced with the instant petition cannot be answered without affording either of the parties a chance of cross-examination.

44. Even otherwise, the aforesaid question is only one out of the multiple complex questions that are required to be adjudicated and same can only be adjudicated on the basis of the evidence. Some of the other questions that arise for adjudication are enumerated below:-

(i) What is the status of petitioner No.1 vis-à-vis Shri Raghunathji Temple, particularly, after his ancestor Raja Jagat Singh abdicated his throne to the will of Shri Raghunathji and became its Chharibardar i.e. Vice Regent?

(ii) What is the mode of appointment of Kardar of the temple? Is it by the Chharibardar as alleged by the petitioners or by the State?

(iii) Whether the petitioners are claiming any adverse interest to that of the idol of Raghunathji by claiming himself to be the owner in possession of the temple, whereas it is Shri Raghunathji, who is in actual possession of the temple?

(iv) Whether the meaning assigned to word 'Chharibardar' by the petitioners is correct?

(v) What is the effect of the land and the temple situated thereupon being classified as Abadi Deh?

(vi) What is the effect of revenue records which only show Shri Raghunathji to be in possession of the property, whereas the petitioner No.1 is shown as Manager thereof?

45. In view of the firm stand taken by the petitioners on the one hand and the respondents on the other hand tangled and intricate dispute of facts going to the very core of the issue, is manifest herein. It is well settled that the writ Court is loathe to enter the thicket of disputed facts.

46. In ***Sohan Lal vs. Union of India and another AIR 1957 SC 529***, a Constitution Bench of the Hon'ble Supreme Court while dealing with a writ wherein rival claims of title to the property had been raised held that civil suit is a proper remedy rather than approaching the Court under Article 226 of the Constitution of India for exercising the prerogative of issuing writs. It is apt to reproduce paragraphs 5 and 6 of the judgment as under:

> "5. *We do not propose to enquire into the merits of the rival claims of title to the property in dispute set up by the appellant and Jagan Nath. If we were to do so, we would be entering into a field of investigation which is more appropriate for a Civil Court in a properly constituted suit to do rather than for a Court the prerogative of issuing writs. There are questions of fact and law which is in dispute requiring determination before the respective claims of the parties to this appeal can be decided. Before the property in dispute can be restored to Jagan Nath it will be necessary to declare that he had title in that property and was entitled to recover possession of it. This would in effect amount to passing a decree in his favour. In the circumstances to be mentioned hereafter, it is a matter for serious consideration whether in proceedings under Art. 226 of the Constitution such a declaration ought to be made and restoration of the property to Jagan Nath be ordered.*
>
> *6. Jagan Nath had entered into a transaction with the Union of India upto a certain stage with respect to the property in dispute, but no letter of allotment had been issued him. Indeed, he had been informed, when certain facts became*

known, that the property in question could not be allotted to him as he was a displaced person who had been allotted land in East Punjab. As between Jagan Nath and the Union of India it will be necessary to decide what rights were acquired by the former in the property upto the stage when the latter informed Jagan Nath that the property would not be allotted to him. Another question for decision will be whether Jagan Nath was allowed to enter into possession of the property because it was allotted to him or under a misapprehension as the Union of India was misled by the contents of his application. The case of the Union of India is that under the scheme Jagan Nath was not eligible for allotment of a house in West Patel Nagar, as it was subsequently discovered that he had been allotted, previous to his application, agricultural land in the District of Hissar. Being satisfied that Jagan Nath was not eligible for allotment, the Union of India refused to allot to him the tenement No. 35, West Patel Nagar and allotment of that house was made to the appellant who was found to be eligible in every way. The appellant was accordingly given possession of the property after Jagan Nath's eviction. The appellant had complied with all the conditions imposed by the Union of India and a letter of allotment was actually issued to him and he entered into possession of the property in dispute under the authority of the Union of India. Did the appellant thereby acquire a legal right to hold the property as against Jagan Nath? In our opinion, all these questions should be decided in a properly constituted suit in a Civil Court rather than in proceedings under Art. 226 of the Constitution."

47. A constitution Bench of the Hon'ble Supreme Court in **Thansingh *vs. Superintendent of Taxes, Dhubri and others AIR 1964 SC 1419*** explained the nature of jurisdiction exercised by the High Court under Article 226 and it was held:

"7….. *"The jurisdiction of the High Court under Art. 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restric- tions which are expressly provided in the Article. But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy which, without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed."*

48. In ***New Satgram Engineering Workers and another vs. Union of India and others AIR 1981 SC 124,*** three Hon'ble Judges Bench of the Hon'ble Supreme Court held that whether a workshop or director's bungalow was a mine or not a mine was to be decided in a civil suit being a civil dispute and not in a petition under Article 226 of the Constitution and held as under:

"23. The question whether the engineering unit was 'situate in, or adjacent to', the New Satgram Coal Mine and was 'substantially' used for purposes of the mine as well as the question whether the Technical Director's Bungalow and the Guest House were 'solely' used for the residence of officers and staff of the mine and, therefore, fall within the definition of 'mine' as contained in Section 2 (h) of the Nationalisation Act, cannot obviously be decided in proceedings under Article 226 of the Constitution. The proper remedy is by way of a suit, as rightly observed by the High Court.

49. In ***Ghan Shyam Das Gupta and another vs. Anant Kumar Sinha and others AIR 1991 SC 2251*** the Hon'ble Supreme Court held that the remedy under Article 226 was not intended to supercede the modes of obtaining the relief before a civil Court or to deny defences legitimately open in such actions and it was only in exceptional cases where provisions are rendered incapable of giving relief to an aggrieved party that a writ would be maintainable. It is apt to reproduce paras 7 and 8 of the judgment, which read thus:

> " 7. *It has been contended, and in our view correctly, that if the claim of the writ petitioners of being in pos- session of the premises as tenants in their own right is rejected and they are held to have been inducted by Prabhas Kumar Sinha or his father Dr. K.C. Sinha, they are liable to be evicted in execution of the present decree. It was, therefore, necessary to adjudicate upon the dispute between the parties and record a finding on the character of possession of the writ petitioners, before proceeding to consider whether the decree is executable or not against them, and having not done so, the High Court has seriously erred in law in allowing the writ petition by the impugned judgment. The decision on the disputed issue was dependent on the consideration of the evidence to be led by the parties, and while exercising the writ jurisdiction the High Court was not expected to go into that question. In the circumstances, the Court ought to have refused to dispose of the writ petition on merits, leaving the writ petitioners to avail of the remedy before the civil court. The error in the judgment as pointed out earlier was the consequence of the initial mistake in entertaining the petition.*
>
> *8. The principle as to when the High Court should exercise its special jurisdiction under Article 226 and when to refuse to do so on the ground of availability of an alternative remedy has been settled by a long line of cases. The remedy provided under Article 226 is not intended to supersede the modes of obtaining relief before a civil court or to deny defences legitimately open in such actions. As was observed in State of Andhra Pradesh v. Chitra Venkata Rao [1976] 1 SCR 521 the jurisdiction to issue a writ of certiorari is supervisory in nature and is not meant for correcting errors like an appellate court. In Thansingh Nathmal and Ors. v.A. Mazid: [1964] 6 SCR 654 a case dealing with liability to pay sales tax, the appellants without following the statutory remedy under the Sales Tax Act, moved the High Court under Article 226 on the ground that the Act was ultra vires. The challenge was rejected. Another contention, namely, that the finding of the Commissioner that the goods were actually within the State at the time of the contract was based on no evidence and was purely specu- lative, was also raised. This ground also failed before the High Court and the writ petition was dismissed. Approving the decision, this Court observed that if the appellants had persued the statutory remedy under the Act and the question had been referred to the High Court, the Court could have appropriately advised the Commissioner, but not having done so the High Court could not be asked to assume the role of an appellate court over the decision of the Commissioner either on a question of fact or even of law. Again when a learned Single Judge of the High Court and on appeal a Division Bench proceeded to examine the correctness of an order in relation to grant of a permit to ply a vehicle under the Motor Vehi- cles Act, it was observed by this Court in M. Naina Mohammed v. K.A. Natarajan & Ors., [1976] 1 SCR 102, that the power under Article 226 is supervisory in nature and the Judges at both the tiers had unwittingly slipped into the subtle but, fatal, error of exercising a kind of appellate review. So far the question of executability of a decree is concerned, the Civil Procedure Code contains elaborate and exhaustive provisions for dealing with it in all its aspects. The numerous rules of order XXI of the Code take care of differ- ent situations, providing effective remedies not only to judgment-debtors and decree-holders but also to claimant objectors as the case may be. In an exceptional case, where provisions are rendered incapable of giving relief to an aggrieved party*

in adequate measure and appropriate time, the answer is a regular suit in the civil court. The remedy under the Civil Procedure Code is of superior judicial quality than what is generally available under other stat- utes, and the Judge being entrusted exclusively with admin- istration of justice, is expected to do better. It will be, therefore, difficult to find a case where interference in writ jurisdiction for granting relief to a judgment-debtor or a claimant objector can be justified. The rules 97 to 106 of order XXI envisage questions as in the present appeal to be determined on the basis of evidence to be led by the parties and after the 1976 Amendment, the decision has been made appealable like a decree. The High Court, in the present case, therefore, ought not to have embarked upon a decision of the writ petition on merits, and should have refused to exercise its special jurisdiction on the ground of alternative remedy before the civil court."

50. In ***Smt. Parvatibai Subhanrao Nalawade vs. Anwarali Hasanali Makani and others, AIR 1992 SC 1780,*** the Hon'ble three Judges Bench of the Hon'ble Supreme Court observed as under:

"10.......Before closing this judgment, we would, like to emphasise that in cases relating to immoveable properties which are governed by the ordinary civil law the High Court should not exercise its special jurisdiction under the Constitution unless the circumstances are exceptional. *This aspect has been discussed by this Court earlier on several occasions."*

51. In ***State of Rajasthan vs. Bhawani Singh, AIR 1992 SC 1018*** the Hon'ble Supreme Court while considering the jurisdiction as well as disputed question of title in the title and cannot go into disputed question appurtenant to title of the property and it was observed:

"7. Having heard the counsel for the parties, we are of the opinion that the writ petition was misconceived insofar as it asked for, in effect; a declaration of writ petitioner's title to the said plot. It is evidence from the facts stated hereinabove that the title of the writ petitioner is very much in dispute. Disputed question relating to title cannot be satisfactorily gone into or adjudicated in a writ petition."

52. In ***Mohan Pandey and another vs. Smt. Usha Rani Rajgaria and others AIR 1993 SC 1225*** the Hon'ble Supreme Court considered the question whether the jurisdiction of the High Court under Article 226 of the Constitution could be invoked for enforcement of a private right to immoveable property claimed by and against a private individual. The Hon'ble Supreme Court observed as under:

" 6......*There is no doubt that the dispute is between two private persons with respect to an immovable property. Further, a suit covering either directly a portion of the house-property which is in dispute in the present case or in any event some other parts of the same property is already pending in the civil court. The respondent justifies the step of her moving the High Court with a writ petition on the ground of some complaint made by the appellants and the action by the police taken thereon. We do not agree that on account of this development, the respondent was entitled to maintain a writ petition before the High Court. It has repeatedly been held by this court as also by various High Courts that a regular suit is the appropriate remedy for settlement of disputes relating to property rights between private persons and that the remedy under Article 226 of the constitution shall not be available except where violation of some statutory duty on the part of a statutory authority is alleged. And in such a case, the court will issue appropriate direction to the authority concerned. If the grievance of the respondent is against the initiation of criminal proceedings, and the orders passed and steps taken thereon, she must avail of the remedy under the general law constitutional jurisdiction to be used for deciding disputes, for which remedies, under the general law, civil or criminal, are available. It is not intended to replace the ordinary remedies by way of a suit or application available to a litigant. The jurisdiction is*

> *special and extra-ordinary and should not be exercised casually or lightly. We, therefore, hold that the High Court was in error in issuing the impugned direction against the appellants…"*

53. It is thus well settled that the principle of law that a regular suit is the appropriate remedy for settlement of disputes relating to property rights between private parties. The remedy under Article 226 of the Constitution is not available except where violation of some statutory duty on the part of the statutory authority is alleged and in such a case, the court will issue appropriate direction to the authorities concerned. The High Court cannot allow the constitutional jurisdiction to be used for deciding disputes for which remedies lie under the general law, civil or criminal are available. It is not intended to replace the oridinary remedies by way of a suit or application available to a litigant. The jurisdiction is special and extraordinary should not be exercised casually or lightly. The writ petition is filed in public law remedy. The High Court while exercising a power of judicial review is concerned with illegality, irrationality and procedural in propriety of an order passed by the State or a statutory authority etc. Remedy under Article 226 of the Constitution cannot be invoked for resolution of a private law dispute as contra-distinguished from a dispute involving public law character. It is also well settled that a writ remedy is not available for resolution of a property or title dispute.

54. The following principles emerge from the aforesaid decisions:

(i) Writ Petition is a public law remedy and cannot be invoked for resolution of private law disputes. Therefore, a writ petition is not maintainable for resolution of a property dispute or for declaration of title.

(ii) Where there is an alternative effective and effacious remedy available under law the High Court wil not exercise its jurisdiction under Article 226. But, rule of such exclusion is a rule of discretion and where the matter involves enforcement of fundamental right or failure to follow principles of natural justice discretion may be exercised to entertain petition under Article 226.

(iii) A Writ Petition is not intended to replace ordinary remedies by way of suit or application. Where an alternative remedy was available, a petitioner cannot allow that remedy to be time barred or allow it to be dismissed and then apply under Article 226 contending that he has no other remedy.

(iv) A writ petition is not an appropriate remedy where the matter requires determination of disputed questions of fact involving elaborate examination of evidence. But, where fundamental rights are infringed, writ petition may, in appropriate cases, be entertained, even if the matter involves determination of disputed questions of fact.

55. It is contended by Mr. Bhupender Gupta, learned Senior Counsel for the petitioners that the petitioners are not seeking declaration of title, however, in our considered opinion, while praying for a writ of certiorari to quash the impugnd orders, they are, in effect, seeking declaration of title to the properties of Mandir Shri Raghunathji. At the same time, petitioner No.1 is seeking declaration to the properties of Shri Raghunathji as being his private properties to the exclusion not only against the general public but also to the exclusion of respondent No.4, who is none other than the real brother of petitioner No.1 and even respondent No.3, who is first cousin of petitioner No.1 and respondent No.4. No doubt, the petitioners are also seeking quashing of the impugned orders, but those orders can only be quashed in case this Court on the basis of the material is in a position to come to a definite conclusion that the property is a private temple as is alleged by the petitioners and not public temple as contested by the respondents. It is only then and then alone that this Court would proceed to issue a writ of certriorari to quash the impugned orders.

56. At this stage, learned counsel for the petitioners would then contend that there is already an adjudication in their favour by the District Judge, Hoshiarpur in case titled Nanak Chand and others vs. Damodar Dass wherein it has been categorically found that the temple was built by the ancestors of Damodar Dass and as it was damaged in the earthquake of 1905, it was rebuilt by Damodar Dass at his own expenses about seven years back, as admitted by Nanak Chand petitioner himself. The Kardar of this idol was appointed by Rai Bhagwant Singh who admitted that the idol in this temple is the private property of the family of Damodar Dass. This idol is also not mentioned in the village Wajib-ul-arz which deals with public trusts.

57. In addition to the above, learned counsel for the petitioner would contend that even in the inquiry conducted by the Single Man Inquiry Commission of Hon'ble Mr. Justice D.B. Lal, Judge of this Court and it was found after a detailed inquiry that the temple was the private property of Raja and Government had no right to interfere with the same.

58. On the other hand, the learned Advocate General would contend that the decision rendered by the learned District Judge, Hoshiarpur is in '*rem'* because it was a case between the two private individuals wherein the Government was not a party.

59. Similar issue came up before a Division Bench of this Court in ***Mahant Bal Dass vs. State of Himachal Pradesh and another 1988 (1) Sim. L.C. 226*** wherein not only the vires of the Act were challenged but even the action of the respondents-State including temple within Schedule-1 was assailed. In addition thereto, the reliance like in the instant case was also placed therein upon the judgment rendered by the District Judge, Hoshiarpur in an earlier litigation which was between the two private individuals. Indisputably therein also, the petitioner had claimed that he was entitled to own, use and manage as he likes to the exclusion of the general public, the temple in question and the properties appertaining thereto, whereas the State had claimed that the trust was established and dedicated for a public purpose of a charitable or religious nature of which the petitioner is merely a Mohtmim (Manager) in his capacity as the Gaddi Nashin Mahant for the time being.

60. This Court after carefully analyzing the pleadings held that such disputed questions of title were apparently incapable of being decided without evidence being led and without an adjudication of rights based on such evidence. It was further held that a just and proper determination of the controversy, was not possible without affording to the parties an opportunity to establish their respective case by leading documentary and oral evidence, which can be tested by cross-examination and appreciated in light of all the relevant considerations.

61. It was further held that even though the name of the temple i.e. Mandir Damtal had been included in Schedule-I of the Act and because there was a legislative determination, however, such determination was neither final nor conclusive and the parties were entitled to challenge such notification in the Court of law on the ground that it does not fall within the cover of the definition of charitable endowment or Hindu Public Religious Institution. It is apposite to reproduce the relevant observations which read thus:

> *"17. The petition is resisted by the Respondents, inter alia, on the ground that the Gaddi Nashn Mahant is only a Mohtmim (Manager) and not the owner of the temple and its properties. The settlement of 1868 and the entries in the revenue records as a statement made by the Petitioner himself on July 24, 1978, is relied upon in support of this plea. The Respondents contend that the decision rendered by the district judge Hoshiarpur and kangra District in rem because it was a case between two private individuals and the Government was not a party. Besides, in the said Judgment itself it is recorded that the then Mahant had admitted in the plaint that the large property attached to the Thakurdwara was for religious and charitable purposes. The Muaffis were to continue till the existence of Thakurdwara subject to the condition of good behaviour of the incumbent(s). The assertion of the Petitioner that the temple as well as the property attached thereto are his private properties and that the temple is not a public religious institution is emphatically*

denied. It is also asserted that a Mohtmira (Manager) cannot claim to be the owner of the property of the temple and that the owner is the temple itself. According to the Respondents, the inclusion of the name of the Mandir Damtal in Schedule-I of the Act was done after proper survey and such inclusion is neither ultra vires the Act nor violative of the Petitioner's fundamental rights.

18. Against the background of the aforesaid controversy in the pending suit and the present writ petition, it is manifest that a question directly and substantially in issue, broadly stated, is whether Mandir Damtal and the properties appertaining thereto are the private property of the Petitioner which he is entitled to own, use and manage as he likes to the exclusion of the general public, as alleged by him, or whether the said Mandir and the properties appertaining thereto constitute a trust established and dedicated for a public purpose of a charitable or religious nature of which the Petitioner is merely a Mohtmim (Manager) in his capacity as the Gaddi-Nashin Mahant for the time being, as alleged by the State/Advocate-General. Such a seriously disputed question of title, in our considered opinion, is apparently incapable of being decided without evidence being led and without an adjudication of rights based on such evidence. A just and proper determination of the controversy, in our judgment, is not possible without affording to the parties an opportunity to establish their respective case by leading documentary and oral evidence, which can be tested by cross-examination and appreciated in light of all the relevant considerations.

19. It is true that by the inclusion of the name of Mandir Damtal in Schedule I of the Act, there is a legislative determination, as it were, that the said temple is a charitable endowment and/or a Hindu Public Religious Institution and/or a place of public religious worship dedicated to or for the benefit or use as of right by the Hindu community or any section thereof, as the case may be. However, such a legislative judgment is neither final nor conclusive. This proposition is incontrovertible.

20. In Panipat Woollen and General Mills Co. Ltd. and Anr. v. Union of India and Ors., 1986 4 SCC 368, a similar question arose for consideration. The Sick Textile Undertakings (Taking Over of Management) Act, 1972, provides in Section 4(1) that on or before the appointed day, the management of the sick textile undertakings specified in the First Schedule shall vest in the Central Government. The expression "sick textile undertaking" is duly defined in the said Act. One of the submissions in support of the challenge to the constitutionality of the said Act was that the Legislature having itself decided the question whether an undertaking is a sick textile undertaking or not, without giving any opportunity to the owner of such undertaking to make a representation, had damaged the basic structure of the Constitution. The submission was repelled in the following words:

> *By including certain textile undertakings as sick textile undertakings in the First Schedule to the Takeover Act, the legislature has not made any judicial or quasi-judicial determination, nor has the legislature given any judgment, as contended on behalf of the Petitioners, although such inclusion is sometimes loosely expressed as 'legislative judgment'. In Section 2(d), the legislature has laid down the criteria for a sick undertaking. The sick textile undertakings have been specified in First Schedule on the basis of the tests laid down in Section 2(d). In including the sick textile undertakings in the First Schedule, the legislature has not acted arbitrarily, for, it has also laid down the criteria or tests for such inclusion. If any undertaking which has been so specified in the First Schedule does not satisfy the tests under Section 2(d) of the Takeover Act, the owner of it is entitled to challenge such inclusion or takeover in a Court*

> *of law although such challenge has to be founded on a strong ground. Thus, there is no finality or conclusiveness in the legislative determination of a undertaking as a sick textile undertaking. Such determination is neither judicial nor quasi-judicial. Therefore, the question of damaging or altering the basic structure of the Constitution, namely, separation of powers among the Legislature, the Executive and the Judiciary, does not at all arise.*

21. In the present case also, for the self-same reasons, the mere inclusion of specification of the name of Mandir Damtal in Schedule I of the Act, which purports to specify Hindu Public Religious Institutions or Charitable Endowment, does not attach any finality or conclusiveness to the legislative determination accordingly made. The Petitioner is entitled to challenge such inclusion in a court of law (including in a writ petition under Article 226 of the Constitution) on the ground, inter alia, that the temple does not fall within the coverage of the definition of the expression "Charitable endowment" or "Hindu public religious institution" given in Section 2(a) and 2(f) respectively of the Act. There cannot be any dispute on that point and he has in fact done so in this writ petition. The real question, as earlier pointed out, however, is whether having regard to the nature and character of questions raised and required to be determined in the writ nation the Petitioner should, in the exercise of our judicial discretion and in the interest of justice, be relegated to the remedy of canvassing those points in the pending suit, since they require evidence to be led to adjudicate upon a disputed question of title which is already issue the said it Having given an anxious consideration to the matter from all the relevant angles we think we should do so on the facts and in the circumstances of the case. Needless to add that having considered all the rival pleas we are not satisfied also that the matter in controversy is capable of being resolved purely on legal points or issues. We say no more lest any of the parties be prejudiced.

22. There are other reasons also which justify the relegation of the Petitioner to the pending suit for the determination of the controversy. The Advocate-General, who has instituted the is not a party in the present petition. It is difficult to appreciate how the controversy as to the tide herein raised can be determined in his absence since any decision on the issue will have a direct impact on the suit. One of the pleas advanced in the is that the suit under Section 92 of the Code of Civil Procedure not competent and not maintainable at all. A plea of that nature can properly be raised only in the suit itself and not in a collateral feeding and it cannot be decided by any other Court in the absence of the Plaintiff. Besides, a petition under Article 226 cannot be used and is not intended to be used as a medium or means to obtain declaratory orders or declaratory reliefs so as to make them a foundation for defeating claims which are pending adjudication in a previously instituted suit in a court of competent jurisdiction, especially when the grant of such reliefs involves the decision of the controversial issues pending adjudication in such a suit. The fact that the suit is pending on the original side of this High Court itself is not a factor which to our mind con solve these problems, even if both are heard together, apart from the other difficulties involved in the process.

23. Shri D.R. Gupta urged that the suit is not a remedy at all for the adjudication of the dispute in view of the fact teat by virtue of the legislative determination purported to have been made as aforesaid on account of the inclusion of the temple in Schedule-I of the Act, the Petitioner will not be able to urge that the said temple and the not properties attached thereto are his private property and that they do constitute a trust created for a public purpose of charitable or religious nature. The contention has been advanced merely to be rejected. In the first place it has already been pointed out above that such a

legislative determination or judgment so-called is not final and conclusive and that it is subject to challenge in a court of law. In the next place, there is no reason why the question as to the validity of the inclusion of the name of the temple in Schedule I and the purported legislative determination that it is a Hindu Public religious institution or charitable endowment, as the case may be cannot be challenged in the pending suit by seeking an amendment in the written statement and why the learned single Judge cannot determine the controversy by going into all the factual and legal aspects on the basis of evidence including the question of title. Be it stated that the learned Advocate-General was specifically asked by the Court as to whether he would oppose any application for amendment of the written statement incorporating the pleas raised in the present petition, if and when moved by the Petitioner in the pending suit. He expressly stated that such an application, if and when presented, will not be opposed by him.

62. The aforesaid judgment squarely applies to the facts of the instant case and we otherwise see no reason to take a different view.

63. Even otherwise, it is more than settled that the High Court in exercise of its writ jurisdiction under Article 226 should not interfere with the matters, which are in the realm of private laws and it can otherwise be taken to be well settled that where there is disputed questions of fact, which require evidence before the same can be established, then as a matter of practice, the Court would not entertain such writ petition.

64. It is equally settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the Court to issue writ, but ordinarily that would be a good ground for refusing to exercise the discretion under Article 226.

65. This petition involves seriously disputed questions of fact and even otherwise the rival claims of the parties are such, which can only be investigated and determined on the basis of evidence, which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs.

66. For the foregoing reasons, after having given an anxious consideration to the issue under examination, the writ petition is rejected without entering into the merits of the dispute and subject to the rights of the parties to be regulated in accordance with law. It goes without saying that in the event of the suit being filed within a period of 30 days, the State shall not be entitled to raise either the question of limitation or the question of non-service of statutory notice under Section 80 CPC and the Court shall proceed to determine the lis and also consider any prayer made for interim relief strictly in accordance with law without being influenced by anything stated/observed hereinabove. It is made clear that none of the aforesaid observation shall be taken to be an expression of opinion on the merits much less operate as resjudicata. It further goes without saying that even though by virtue of legislative determination, Shri Raghunathji Temple has been included in the Schedule-1 of the Act. However, it is made clear that such a legislative determination or judgment so called is not final or conclusive and will be subject to challenge in a court of law as has already been held by this Court in ***Mahant Bal Dass*** *case (supra).*

67. In light of the aforesaid observations, the petition is disposed of, leaving the parties to bear their own costs. Pending application (s) if any, also stands disposed of. Interim order dated 1.8.2016 is vacated.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Mohan Meakin Ltd. ....Petitioner.
Versus
The State of Himachal Pradesh and others ....Respondents.

CWP No.251 of 1999 along with CWP No.590 of 1999.
Judgment reserved on: 14.07.2017.
Date of decision : 31st August, 2017.

Constitution of India, 1950- Article 226- Petitioner is carrying on business of manufacture and sale of Indian made foreign liquor – petitioner imported some quantity of malt spirit from different places after getting permit from Collector Excise, Himachal Pradesh – subsequently, payment of permit/transport fee was imposed – the fee was demanded – the petitioner claimed that he had paid the applicable fee and filed writ petitions – the petitions were dismissed – the matter was taken to Hon'ble Supreme Court, which set aside the order of Hon'ble High Court and remanded the matter for a fresh decision – held that the Court has earlier held that the State was demanding the fee and not the tax – the contention that there has to be a quid pro quo before the fee can be imposed was rejected – the notification was issued in exercise of the powers vested in the State- the Hon'ble Supreme Court had found that the fee would not be payable on denatured spirit, rectified spirit or perfumed spirit and the transport shall not include the transport of foreign spirit or country spirit- it was also held that the State had not produced any material to justify the levy of fee – it was specifically held that the malt spirit of over proof strength cannot be subject matter of any regulation or control of the State- the State Government cannot claim to have power to legislate on alcohol of malt spirit of over proof strength merely on the ground that it can be made potable after dilution – the State Government is competent to levy fee for ensuring that industrial alcohol is not surreptitiously converted into potable alcohol and the State is not deprived of the revenue on the sale of such potable alcohol- there is a distinction between the tax and the fee – tax is levied as part of common burden while fee is for payment of specific benefit or privilege- the fee has to be determined on the basis of quid pro quo – the State has not produced any material to show that it was running any additional cost for ensuring that the malt spirit of over proof strength is not surreptitiously converted into potable liquor to deprive the State of the revenue on the sale of alcohol- no supplementary affidavit was filed to establish these facts – the petitioner is paying the salary of the Excise Staff posted by the government in the petitioner's units at Kasauli and Solan – the petition allowed – notification quashed and notices demanding the payment of fee from the petitioner set aside. (Para-19 to 64)

Cases referred:

Mohan Meakin Limited versus State of Himachal Pradesh and others (2009) 3 SCC 157
Synthetics and Chemicals Ltd. and others vs. State of U.P. and others (1990) 1 SCC 109
New Swadeshi Sugar Mills Ltd. and another vs. State of Bihar and others (1983) PLJR 105
State of Bihar and others vs. New Swadeshi Sugar Mills Ltd. and another (2003) 11 SCC 478
Bihar Distillery and another vs. Union of India and others (1997) 2 SCC 727
Deccan Sugar & Abkari Company Limited vs. Commissioner of Excise A.P. (1998) 3 SCC 272
Deccan Sugar and Abkari Company Limited vs. Commissioner of Excise A.P. (2004) 1 SCC 243
State of U.P. and others vs. Vam Organic Chemicals Ltd. and others (2004) 1 SCC 225
Indian Mica Micanite Industries vs. The State of Bihar and others (1971) 2 SCC 236
Ranger Breweries Ltd. vs. State of H.P. and others 2010 (3) Shim. L.C. 98
Mohan Meakin Limited vs. State of Himachal Pradesh and others (2009) 3 SCC 157
Jindal Stainless and another vs. State of Haryana and others AIR 2016 SC 5617
Automobile Transport (Rajasthan) Ltd. etc. vs. State of Rajasthan and others AIR 1962 SC 1406

Jindal Stainless Ltd. (2) and another vs. State of Haryana and others (2006) 7 SCC 241
Jindal Stainless and another vs. State of Haryana and others AIR 2016 SC 5617
State of Tamil Nadu and another vs. TVL. South Indian Sugar Mills Association and others (2015) 13 SCC 748
State of Himachal Pradesh and others vs. M/s Shivalik Agro Poly Products and others AIR 2004 SC 4393

For the Petitioner(s)	:	Mr.K.D.Sood, Senior Advocate with Mr.Dhananjay Sharma, Advocate.
For the Respondents	:	Mr.Shrawan Dogra, Advocate General with Mr.V.S.Chauhan, Additional Advocate General, Mr.Puneet Rajta, Deputy Advocate General, Mr.J.S.Guleria, Assistant Advocate General and Mr.R.N.Sharma, Advocate, for the respondents-State. None for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The instant writ petitions were dismissed by this Court vide judgment dated 27.06.2007, however, the said judgment was assailed before the Hon'ble Supreme Court and set aside vide order dated 18.12.2008 with the following directions:-

> *"We, therefore, are of the opinion that the impugned judgment cannot be sustained. It is set aside accordingly and the matter is remitted to the High Court for consideration of the Writ Petition filed by the appellant afresh. The parties shall be at liberty to file additional affidavits/evidence before the High Court, if they so desire.*
>
> *The appeals are allowed. The respondents shall bear the costs of the appellant. Counsel's fee assessed at Rs.50,000/-."*

2. The learned counsel for the petitioner(s) would argue that the issue involved in the lis already stands adjudicated by the Hon'ble Supreme Court and these cases have been remanded only with a view to afford the State an opportunity to place on record additional documents so as to enable it to prove its claim with regard to "quid pro quo". Whereas, the learned Advocate General would argue that in terms of the mandate of the Hon'ble Supreme Court, these writ petitions have been remanded to this Court for consideration afresh.

3. The parties at ad idem that insofar as the earlier judgment passed by this Court on 27.06.2007 is concerned, the contentions as borne out from the pleadings have been correctly recorded. Therefore, taking assistance from the said judgment, the rival contentions of the parties can be stated thus:-

4. Briefly stated the facts of CWP No. 251 of 1999 are that the petitioner is a company incorporated under the Companies Act having its registered office in Solan Brewery and is carrying on the business of manufacture and sale of Indian Made Foreign Liquors, (I.M.F.S.) and beers etc. It was alleged that the petitioner company is having a Distillery at Kasauli in Solan District holding a licence in Form D-2. It was further alleged that for blending of Malt Spirit produced at Kasauli Distillery, petitioner imported some quantities of Malt Spirit of over proof strength from its own Distillery at Mohan Nagar in Uttar Pradesh, after getting import permits from the Collector Excise, Himachal Pradesh. The petitioner also transported some quantities of Malt Spirit of over proof strength from M/s Rangar Breweries Ltd., Mehatpur, Distt. Una as well as some quantities of spirit from its Distillery at Mohan Nagar, Distt. Ghaziabad to Solan Brewery during the year 1997-98 and 1998-99.

5. It was further alleged that prior to 1.4.1996 there was no provision which required payment of permit/transport fee on transportation of I.M.F.S., country spirit, beer etc. It was alleged that it was for the first time that permit/transport fee was levied as per announcement for excise auctions for the year 1996-97 dated 12.3.1996. It was alleged that as per the letter issued by the Excise & Taxation Commissioner, Himachal Pradesh, a permit fee at the rate of Rs.2.50 per bulk litres on denatured spirit, Rs.2.00 per proof litre and Rs.1.00 per proof litre on foreign spirit and country liquor respectively was leviable. It was alleged that the permit fee was payable at the time of grant of permission and transport of liquor. A notification was issued in view of the above letter of Excise & Taxation Commissioner Shimla vide which the rates mentioned above were payable by a person who makes an application for the grant of permission to import and/or transport of the foreign liquor or country liquor or both. It was alleged that this fee was inserted by Notification dated 23.3.1996 but no permit/transport fee was charged by excise authorities at the time of issuing import permits for import of Malt Spirit from Mohan Meakin Limited, Mohan Nagar (U.P.) and accordingly vide letter dated 28.10.1997, the then Excise & Taxation Officer had asked the petitioner to deposit a sum of Rs.8,21,992/- on account of the permit fee on the spirit imported by the petitioner during the year 1996-97. This was followed by other memos and the petitioner was finally asked to deposit sum of Rs.17,68,346/- upto 6.2.1999, failing which this amount will be declared as an arrear of land revenue and will be recoverable as such.

6. The petitioner further alleged that it had paid to the Government of H.P. per unit licence fee for the manufacture of Indian Made Foreign liquor/spirit under the Distillery licence for different period as detailed in para-11 of the petition. The petitioner also pleaded that it has paid export duty at the rate of Rs.1.00 per proof litre on Indian Made Foreign Spirit and at the rate of Rs.0.50 per B.L. on beer with alcoholic content at 5% with alcoholic content exceeding 5% as well as at the rate of Rs.0.75 per B.L. The petitioner also paid the import fee at the rate of Rs.6/- per P.L. on spirit imported by it. The notifications issued by the Assistant Excise & Taxation Commissioner, Solan, were alleged to be illegal, without jurisdiction and contrary to the Punjab Excise Act and the rules framed thereunder and the provisions of constitution of India and were alleged to be liable to be set aside. Hence, the present petition filed by the petitioner.

7. On similar allegations CWP No. 590 of 1999 was filed. The facts of the case are given as under:

8. The petitioner alleged that it is a company having its registered office at Solan Brewery in Himachal Pradesh and the company has been carrying on the business of manufacture and sale of Indian Made Foreign Spirit (hereinafter referred to as IMFS), It was alleged that the petitioner company has been granted permission to manufacture IMFS and beer and the excise licence was granted by the State Government. It was alleged that till 1983 the State Government was charging Rs.1000/- per annum as fee for distillery licence and Rs.500/- per annum for brewery licence under the Excise Act. The same was raised to Rs.75,000/- per annum for distillery licence and Rs.10,000/- per annum for brewery licence in 1993. Thereafter, the State resorted to imposition of licence fee on per bottle basis and accordingly, the distillery licence fees which was only Rs.1000/- per annum in 1983 became around Rs. 12 Lacs in 1996-97 and the brewery licence has arisen from Rs.500/- per annum to over Rs.8 Lacs per annum in 1996-97. It was alleged that this fee was being sought to be charged in addition to the excise duty and various other levies which are being paid by the petitioner to the State Exchequer. The petitioner has challenged the imposition of licence fee as without an authority of law being unconstitutional, arbitrary and ultra vires the Constitution. It was alleged that the fee is not in the nature of fee but is in the nature of tax which is ultra vires the provisions of Constitution. It was alleged that the levy has no quid pro quo. The licence was issued in favour of the petitioner D-2 for distillery unit at Kasauli including the spirit bottling section of Solan Brewery as well as B-1 licence for Brewery at Solan was for the period upto 31.3.1999. The distillery licence renewal fee which was raised to Rs.75,000/- per annum in 1993 was fixed at Rs.2/- per unit of 750 mls. (one bottle) of IMFS subject to minimum of Rs.75,000/-. Similarly, the Brewery licence renewal

fee was fixed at Rs.1/- per bottle unit of 650 mls, subject to a minimum of Rs.10,000/- per annum and these were enhanced as per notifications marked as Annexures P-8 and P-9.

9. The petitioner made a representation to the State Government and the licence fee was reduced vide notification dated 31.5.1994 From Rs.2/- per unit to Rs.0.25 per unit and that of Beer was reduced from Rs.1/- per bottle to Rs.10000/- per annum. The petitioner made another representation but of no avail. It was alleged that in 1997, the licence fee for IMFS was further raised from Rs.0.50 per unit to Rs.0.75 per unit of 750 mls. It was further raised to Rs. 0.90 per unit of 750 mls vide notifications (Annexures P-16 and P-16/A). The petitioner company had alleged that during the year 1996-97 and 1997-98 it had paid per unit licence fee as under:

Year	In respect of Distillery Licence in Form D-2.	In respect of Brewery Licence in Form B-1.
1996-97	Rs.11,60,888/-	Rs. 8,30,488/-
1997-98	Rs.10,26,842/-	Rs. 4,03,244/-

10. The petitioner company had also allegedly paid amount as manufacture and export duty/fee on export of IMFS and Beer during the period from 1.4.1996 to 31.3.1997 and 1.4.1997 to 31.3.1998 as under:

Year	On export of Indian Made Foreign Liquor.	On export of Beer.
1996-97	Rs. 12,25,000/-	Rs. 16,00,000/-
1997-98	Rs. 7,22,263.50/-	Rs. 5,75,835/-

11. The petitioner also alleged that it was also paying licence fees on license in Form L-1 and L-1A attached to Distillery and Brewery amounting to Rs. 60,000 and Rs. 1,60,000/-.

12. Thus it was pleaded that the impugned levies are detrimental to the petitioner as well as to the public at large as well as State of H.P. which levy is arbitrary and unconstitutional, hence the writ petition filed challenging the levy of the fees raised by the State Government vide impugned notifications.

13. In reply filed by the respondents to the writ petition they have pleaded that the petitioner has been granted the Distillery licence on its request and subject to the conditions as stipulated in the said licence which was to manufacture various types of spirit. It was pleaded that the first condition of the licence was that the licensee shall observe the provisions of the Punjab Excise Act, 1 of 1914 and all rules made thereunder applicable to manufacture, issue and sale of spirit. The licence was granted for a period of one year which was in the nature of a contract subject to fulfillment of the conditions and strict observance of the rules governing the licence. It was pleaded that the Government is the exclusive owner of the privilege to trade in liquor and the notification is duly covered by Entry No. 8 of List II of the Seventh Schedule. Therefore, the permit was essentially regulatory in nature. It was pleaded that the objective of the permit is to regulate transport including import as well under Entry No. 8. Thus, the fee was leviable by the State in respect of services performed by it for the benefit of the individual, whereas a tax was payable for the common benefits conferred by the Government on all tax payers. It was pleaded that the amount of fee is based upon the expenses incurred by the State in rendering the services. It was pleaded that the Excise and Taxation Department regulates the production, manufacture, transport etc. 'intoxicating liquors' irrespective of whether those are meant for human consumption or otherwise and maintains not only a large establishment for regulation of these activities and observe compliance of the terms of the permit for the import and transport of liquors and, therefore, levy of fee was constitutional. Thus, it was pleaded that the levy of fee envisaged under the provisions of Rule 7.2A of the Punjab Liquor Permit and Pass Rules, 1932 is applied to the State of H.P. which is in accordance with the law and the petitioner

was liable to pay this amount with effect from 1.4.1996 as per the rate of fee amended from time to time. The fee was payable on making of an application for the grant of permission to import and/or transport of the foreign liquor or country spirit or both. It was pleaded that the fee is neither a tax nor duty so as to attract the provisions of Entry 42 of List I of Seventh Schedule to the "Constitution of India. The fee was leviable on import of liquor and was charged on every permit to import/transport the liquor whether inter-state or intrastate for the services. Thus, it was pleaded that the notification issued by the Excise Department cannot be said to be illegal and against the constitution and as such, there is no merit in the writ petition.

14. In reply to CWP No. 590 of 1999, it was pleaded by the respondents that the licence was granted in favour of the petitioner on the condition that the licensee shall observe the provisions of the Punjab Excise Act and rules made thereunder as applicable to manufacture, issue and sale of spirit. It was also submitted that the Punjab Distillery Rules, 1932, as applied to the State of Himachal Pradesh were framed under the Punjab Excise Act, 1914, which provide for the grant of licence in Form D-2 for the manufacturing of intoxicating liquors. Likewise the Punjab Brewery Rules provide for the grant of licence in Form B-1 for the manufacturing of Beer. It was pleaded that under Entries 8 and 51 of List II read with Entry 84 of List I of the Seventh Schedule to the Constitution, the State Legislature has the exclusive privilege to legislate on 'intoxicating liquors' or alcoholic liquor for human consumption. Therefore, the State has the exclusive power to make law with respect to manufacture and production of intoxicating liquors. The Government was the exclusive owner of the privilege to trade in liquor. The citizens do not have any fundamental right to trade or carry on the business in the properties or rights belonging to the Government. The licences granted to the petitioner are in the nature of parting with the exclusive right of the State for a price or consideration and that too on its request. The petitioner as such using the right of the State is obliged to pay the price or consideration in lieu of that. The licences are granted for a period of one year which can be renewed by the Government on request and the petitioner has nowhere been put under compulsion to obtain the licence every year. Since the petitioner has been continuing with the licence after getting it renewed every year, he is estopped to challenge the impugned licence fee being arbitrary, exorbitant and illegal and more so when the burden of the fee is bound to pass on to the consumers.

15. Both the aforesaid petitions came to be dismissed by this Court vide judgment dated 27.06.2007, however, the matter was assailed by the petitioner(s) before the Hon'ble Supreme Court and the judgment passed by this Court was ordered to be set aside by the Hon'ble Supreme Court in its decision reported in ***Mohan Meakin Limited*** *versus* ***State of Himachal Pradesh and others (2009) 3 SCC 157*** (for short "***Mohan Meakin's case***") and the matter was remanded to this Court for consideration of the writ petitions afresh.

16. It is vehemently argued by Shri K.D.Sood, Senior Advocate, assisted by Shri Dhananjay Sharma, Advocate, for the petitioner(s) that these writ petitions have been remanded only for affording an opportunity to place on record material so as to justify the fee as the same is based upon the principle of "quid pro quo".

17. On the other hand, the learned Advocate General would argue that in terms of the operative portion of the judgment, the Hon'ble Supreme Court has not decided the case on merits and has simply remanded the case for decision afresh.

18. We have heard the learned counsel for the parties and gone through the material placed on record.

19. In order to appreciate the rival contentions of the parties, it would be necessary to first advert to the earlier decision of the Court to gather as to what was actually decided therein.

20. After reproducing the pleadings, it appears that the petitioner(s) raised a query as to whether the amount being claimed by respondent No.2 was in the shape of tax leviable by the Central Government under the provisions of Entry 42 of List I of the Seventh Schedule of the Constitution of India or was it in the nature of fees leviable by the State Government under the

powers vested in it under Entries 8 and 66 of List II of the Seventh Schedule. This position had been conceded by the State Government in its reply wherein it was admitted that the amount being levied or claimed was not a "tax" but a "fee" and as such falls under List II of the Seventh Schedule and under Item No.8, the State Government was competent to levy the fees. The only question thereafter considered by this Court was whether this fees could be levied under the powers vested in the State Government or not.

21. After hearing the respective arguments, this Court while adjudicating CWP No.590 of 1999 concluded as follows:-

> *"It is clear from the above discussion that the fees are mainly chargeable for the services being rendered by the State Government and though in the earlier decisions it was held that for the charging of levy of any fees, the element of quid pro quo was a sine-qua-non but as per the later decisions it is not necessary and no material is required to be placed on record and the amount being spent extra for the services rendered by the State Government can be presumed only. In the present case, the*
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> *State has been burdened with extra work of regulating of import of spirit in the State, due to the import of the same by the petitioners from outside the State. This necessarily involves the maintaining of stationery for issuing of export permits, maintaining a record for issuing a licence as well as keeping a surveillance that the import of the spirit was being made in accordance with the permit issued by the State Government which requires necessarily deployment of special staff for the extra work done by the State Government in lieu of the extra services taken by the petitioners. Coming to the impugned notifications I have already mentioned above that the levy was being made at the rate of Rs.2.50, Rs.2.00 and Rs.1.00 per proof litre on foreign spirit or denatured spirit which by any stretch of imagination cannot be said to be excessive. There is not such substance in the plea raised by the petitioners that the petitioners were paying salary of the staff kept at the Brewery, Solan such the same was in pursuance of the contract awarded in favour of the petitioners, but the necessity to maintain additional staff arose because of the import licence taken by the petitioners for importing spirit from outside the State and as such, the State was competent to levy the fees without rendering the necessary particulars of the charges being incurred extra for issuance of the licence or for maintaining a proper check that the spirit was being imported in accordance with the licence or not."*

22. On the basis of the aforesaid reasoning, CWP No.251 of 1999 was disposed of and the claim of the petitioner that before levying of the fee, the expenditure likely to be incurred or to be incurred was "quid pro quo" before such a levy could be imposed was rejected by reiterating that this fee could be levied by the State Government under its powers and there was no condition of quid pro quo in view of the latest law of the Hon'ble Apex Court and, therefore, the impugned notifications issued under the provisions of the Punjab Excise Act and Rules framed thereunder were within the legislative competence of the State and, therefore, could not be held ultra vires of the Constitution.

23. As regards CWP No.590 of 1999, this Court came to the conclusion that once the State Government had the power to issue notification, then the petitioner could take no exception to the same, more particularly, when it was a contract between the parties under which the petitioner was liable to pay the fee as imposed by the State Government during the subsistence of the contract. Therefore, once the licence fee was enhanced in exercise of the powers vested in the State Government under the Constitution and under the provisions of the Punjab Excise Act and Rules there under, the licence fee could have been enhanced by the State Government since the petitioner(s) had no right to deal in the trade of liquor. In addition to that, the Court also observed that the burden of fees was to pass to the consumers and was not affecting any

fundamental right of the petitioner(s) to indulge in any trade or business. As such, the challenge made to the impugned notifications was not liable to be quashed in any manner whatsoever.

24. Before adverting to the respective contentions of the parties, we may make note of certain provisions which are relevant for the decision of the instant cases.

25. Article 245 of the Constitution, which is in Part XI of the Constitution, pertaining to relations between the Union and the State, contemplates the extent to which laws can be made by the Parliament or the Legislatures of the States. The provision contemplates that subject to the provisions of the Constitution, Parliament is empowered to make law for the whole or any part of the territory of India and the Legislature of a State for whole or any part of the State.

26. Article 246 of the Constitution contemplates that notwithstanding anything contained in Clauses (2) and (3) of Article 246, Parliament has exclusive power to make laws with respect to any of the matters enumerated in List-I in the Seventh Schedule, i.e. the Union List. Clause (2) of this Article contemplates that both the Parliament, subject to Clause (3), and the State Legislature, subject to Clause (1), will have power to make laws with respect to matters enumerated in List III, i.e. the Concurrent List, and thereafter, Clause (3) speaks about power of the State to make laws on matters enumerated in List -II, i.e. the State List.

27. Finally, Article 254 of the Constitution makes a provision to deal with the laws which are inconsistent and are made by the Parliament and the State. Clause (1) of Article 254 contemplates that if any provision of a law made by a Legislature of a State is repugnant to any provision of a law made by the Parliament, which Parliament is competent to enact or any provision of the existing law with respect to matters enumerated in the Concurrent List, then, subject to provisions of Clause (2), the law made by the Parliament, whether passed before or after the law made by the Legislature of the State shall prevail. Clause (2) contemplates that when a law made by the State Legislature with respect to a matter enumerated in the Concurrent List contains any provision repugnant to any provision or of any law earlier made by the Parliament and law made by the State has received the assent of the President, the law made by the State shall prevail, otherwise, the law made by the Union shall prevail.

28. As far as various entries in Schedule VII with which we are concerned, they read as under:

"Relevant Entries of List I

7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.

52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

84. Duties of excise on tobacco and other goods manufactured or produced in India except-

(a) alcoholic liquors for human consumption.

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

Relevant Entries of List II

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

51.(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

66. Fees in respect of any of the matters in this List, but not including fees taken in any court."

29. The learned Advocate General has invited our attention to para-8 of the judgment in ***Mohan Meakin's case*** to canvass that the issue involved in this case was not considered by the Hon'ble Supreme Court while remanding the case since the arguments therein were confined to "industrial alcohol" and "rectified spirit" and did not relate to "malt spirit of overproof strength" which otherwise is the subject-matter of the instant lis.

30. We have considered the said contentions and find the same to be highly misplaced, apart from being based on a complete misreading of the judgment in ***Mohan Meakin's case*** (supra), more particularly, para-8 which reads thus:-

> "8. *Mr. Anoop G. Chaudhary and Mr. Rakesh Dwivedi, learned senior counsel appearing on behalf of the appellant, would submit:*
>
> > *(i) Transportation of industrial alcohol and/ or rectified spirit being not within the legislative competence of the State, it cannot exercise any control thereover.*
> >
> > *(ii) The High Court committed a serious error as it proceeded on the premise that there does not exist any distinction between import of potable liquor and that of Malt Spirit of over proof strength.*
> >
> > *(iii) The element of quid pro quo being inherent in the levy of fee and as no material was produced by the State to justify its demand, the impugned judgment cannot be sustained."*

31. It is, thus, evidently clear that one of the questions before the Hon'ble Supreme Court was with respect to whether this Court had committed a serious mistake as it proceeded on the premise that there does not exist any distinction between import of "potable liquor" and that of "malt spirit of over proof strength". The Hon'ble Supreme Court after taking note of the various provisions of the Constitution of India and further taking into consideration that the Punjab Excise Act was a pre-constitutional statute and was thus proceeded to observe in para-16 as under:-

> *"16. The appellant herein contends that it had imported malt spirit of overproof strength and the application for grant of permit vis-à-vis levy of fee pertained only thereto. It has furthermore been contended that the malt spirit imported by it being rectified spirit, it is not potable as per ISI specifications. It is not bought and sold in the market as potable liquor. It is used as a raw material for blending to manufacture IMFL. Contention of the appellant, therefore, is that it is not an excisable article within the meaning of the provisions of Section 3(6) of the Act."*

32. The Hon'ble Supreme Court thereafter examined the various provisions of the Act and the Rules framed there under like Punjab Liquor Permit and Pass Rules, 1932, Excise Barriers' Rules, 1939 and held that the State alone had the exclusive authority to grant licences and the petitioner being a licensee was bound to abide by the terms and conditions of the licence as also the rules framed in this behalf. It was further held that the State possessed the right to have complete control over all aspects of intoxicants viz. manufacture, collection, sale and consumption etc. and also had the exclusive right to manufacture and sell liquor and to transfer the said right with a view to raise revenue. That apart, it was held that the right to fix the amount of consideration for grant of said privilege for manufacturing or vending liquor was also beyond any doubt or dispute.

33. It was specifically held in para 24 of the judgment in ***Mohan Meakin's case*** (supra) that the State has to make distinction between a "malt spirit of overproof strength" and "potable liquor". Entries 8, 51 and 66 of List II of the Seventh Schedule of the Constitution confer jurisdiction upon the State only to exercise its legislative control in respect of matters which are covered thereby. However, "industrial alcohol" or "spirit" having regard to Entry 52 of List I of the

Seventh Schedule of the Constitution cannot be the subject matter of any regulation or control of the State, it being not "alcoholic liquor for human consumption" and placed reliance upon the judgment of the Hon'ble Supreme Court of Hon'ble Seven Judge in ***Synthetics and Chemicals Ltd. and others*** *vs.* ***State of U.P. and others (1990) 1 SCC 109***. It is apt to reproduce para-24 of the judgment which reads thus:-

> "*24. The State has to make distinction between a Malt Spirit of over proof strength and potable liquor. Entries 8, 51 and 66 of List II of the Seventh Schedule of the Constitution of India confer jurisdiction upon the State only to exercise its legislative control in respect of matters which are covered thereby. Industrial alcohol or spirit having regard to Entry 52 of List I of the Seventh Schedule of the Constitution of India cannot be subject matter of any regulation or control by the State; it being not alcoholic liquor for human consumption. The question is well-settled in view of the decision of a Seven-Judge Bench of this Court in Synthetics and Chemicals Ltd. and Others v. State of U.P. and Others [(1990) 1 SCC 109] wherein it was categorically held: (SCC pp. 143-44, paras 53-54)*
>
> > *"53. It was further submitted by the State that the State has exclusive right to deal in liquor. This power according to the counsel for the State, is reserved by and/or derived under Articles 19(6) and 19(6)(ii) of the Constitution. For parting with that right a charge is levied. It was emphasised that in a series of decisions some of which have been referred to hereinbefore, it has been ruled that the charge is neither a fee nor a tax and termed it as privilege. The levy is on the manufacture, possession of alcohol. The rate of levy differs on its use, according to the State of U.P. The impost is also stipulated under the trading powers of the State under Article 298 and it was contended that the petitioners and/or appellants were bound by the terms of their licence. It was submitted that the Parliament has no power to legislate on industrial alcohol, since industrial alcohol was also alcoholic liquor for human consumption. Entry 84 in List I expressly excludes alcoholic liquor for human consumption; and due to express exclusion of alcoholic liquor for human consumption from List I, the residuary Entry 97 in List I will not operate as against its own legislative interest. These submissions have been made on the assumption that industrial liquor or ethyl alcohol is for human consumption. It is important to emphasise that the expression of a constitution must be understood in its common and normal sense. Industrial alcohol as it is, is incapable of being consumed by a normal human being. The expression `consumption' must also be understood in the sense of direct physical intake by human beings in this context. It is true that utilisation in some form or the other is consumption for the benefit of human beings if industrial alcohol is utilised for production of rubber, tyres used. The utilisation of those tyres in the vehicle of man cannot in the context in which the expression has been used in the Constitution, be understood to mean that the alcohol has been for human consumption.*
> >
> > *54. We have no doubt that the framers of the Constitution when they used the expression `alcoholic liquor for human consumption' they meant at that time and still the expression means that liquor which as it is is consumable in the sense capable of being taken by human beings as such as beverage of drinks. Hence, the expression under Entry 84, List I must be understood in that light. We were taken through various dictionary and other meanings and also invited to the process of manufacture of alcohol in order to induce us to accept the position that denatured spirit can also be by appropriate cultivation or application or admixture with water or with others, be transformed into `alcoholic liquor for human consumption' and*

> *as such transformation would not entail any process of manufacture as such. There will not be any organic or fundamental change in this transformation, we were told. We are, however, unable to enter into this examination. Constitutional provisions specially dealing with the delimitation of powers in a federal polity must be understood in a broad commonsense point of view as understood by common people for whom the Constitution is made. In terminology, as understood by the framers of the Constitution, and also as viewed at the relevant time of its interpretation, it is not possible to proceed otherwise; alcoholic or intoxicating liquors must be understood as these are, not what these are capable of or able to become. It is also not possible to accept the submission that vend fee in U.P. is a pre-Constitution imposition and would not be subject to Article 245 of the Constitution. The present extent of imposition of vend fee is not a pre-Constitution imposition, as we noticed from the change of rate from time to time." (emphasis in original).*

34. After making the aforesaid observations, it was observed that the doctrine of *res extra commercium* as applied by this Court in respect of "potable alcohol" would have no application to "industrial alcohol" which is produced in an industry controlled and regulated in terms of Entry 52 of List I of the Seventh Schedule of the Constitution of India.

35. After making the aforesaid pertinent observations, the Hon'ble Supreme Court thereafter proceeded to observe that if manufacture and transport of "industrial alcohol" and/or "malt spirit of overproof strength" is not *res extra commercium* in view of the binding decision in ***Synthetics and Chemicals Ltd.'s case*** (supra), it would be axiomatic that the provisions of Article 301 of the Constitution of India could be made applicable in view of the exclusive legislative competence of the Parliament having regard to Entry 42 of List I of the Seventh Schedule of the Constitution of India and the State's power to impose compensatory tax and/or fee would be limited as envisaged by Article 304(b) of the Constitution of India. The Hon'ble Supreme Court specifically observed that the State has not been able to make any distinction between import and export of "spirit" and "potable liquor".

36. After referring to the representations of the petitioner and referring to the counter affidavit filed by the State, the Hon'ble Supreme Court proceeded to observe that even the State asserts its right to regulate the business of liquor including overproof spirit in terms of the provisions of the Act and the Rules framed there under. However, in terms of the Rules, the fee specified therein would not be payable on denatured spirit, rectified spirit or perfumed spirit and the transport shall not include the transport of foreign spirit or country spirit in the course of export inter-State or across the custom frontier of India. The levy, therefore, ex facie could not have been imposed on rectified spirit. It was further held that the jurisdiction of the State to impose such a levy would be limited. After making a detailed reference to what is "fee" and "tax" and difference between the same, the Hon'ble Supreme Court thereafter in para 40 of the judgment in ***Mohan Meakin's case*** (supra) observed that the respondent-State in fact had not produced any material whatsoever before this Court to justify the levy of fee.

37. Notably, not only the appeals filed by the petitioner(s) herein were allowed but even the respondents were ordered to bear the costs of the appellants assessed at Rs.50,000/-. Thus, the contention raised by the learned Advocate General that there was no adjudication by the Hon'ble Supreme Court is without any merit and contrary to what has been decided by the Hon'ble Supreme Court as it is beyond a pale of doubt that the Hon'ble Supreme Court has categorically held that malt spirit of overproof strength having regard to Entry 52 of List I of the Seventh Schedule of the Constitution of India cannot be the subject matter of any regulation or control of the State "*it being not alcoholic liquor for human consumption*"

38. A contention is thereafter raised by the learned Advocate General that malt spirit of overproof strength by subsequent dilution becomes potable and fit for human consumption and, therefore, liable for fee. However, the said contention has been raised simply to be rejected.

Not only the issue stands answered by the judgment in ***Mohan Meakin's case***, but earlier to that a similar issue came up for consideration before the Patna High Court in ***New Swadeshi Sugar Mills Ltd. and another*** *vs.* ***State of Bihar and others (1983) PLJR 105*** wherein it was contended that rectified spirit did not constitute an excisable item under the Bihar Excise Act as the rectified spirit by its subsequent dilution became potable and fit for human consumption and, therefore, liable for duty.

39. The aforesaid judgment came to be assailed before the Hon'ble Supreme Court in ***State of Bihar and others*** *vs.* ***New Swadeshi Sugar Mills Ltd. and another (2003) 11 SCC 478*** wherein it was held as under:-

> *"1.We find that the conclusion of the High Court that no duty can be levied by the appellant State on rectified spirit, having regard to the provisions of the Constitution, has been upheld by this Court in the case of Synthetics and Chemicals Ltd. v. State of U.P. (1990) 1 SCC 109. It has been held there that the provisions of various State Acts which purport to levy a tax or charge upon industrial alcohol, also called rectified spirit and alcohol used and usable for industrial purposes, are unconstitutional.*
>
> *2. Having regard to the fact that the provision in the State Act imposing the levy is unconstitutional, it is unnecessary to go into the appellant' argument based on a rule made in exercise of the rule-making power in the State Act. The rule concerned relates to duty to be paid on rectified spirit which is transported, a prescribed quantity being allowed to be deducted by way of leakage or evaporation. In the notice issued to the respondents it was such duty which was claimed in the sum of Rs.8,62,678. Duty itself not being leviable, that claim must also be held to be invalid.*
>
> *3. The appeal is, accordingly, dismissed. There shall be no order as to costs."*

40. A different view at variance with above, however, came to be taken by a Bench of two Hon'ble Judge of the Hon'ble Supreme Court in ***Bihar Distillery and another*** *vs.* ***Union of India and others (1997) 2 SCC 727***. The petitioners therein had questioned the legislative competence of the State Government to deal with rectified spirit unfit for human consumption in view of the promulgation of IDR Act contending that industrial alcohol was the exclusive prerogative of the Parliament to legislate. Summing up the consideration the Hon'ble Supreme Court in para 23 of its report held as follows:-

> *"23. We are of the respectful and considered opinion that the decision in Synthetics did not deal with the aspects which are arising for consideration herein and that it was mainly concerned with industrial alcohol, i.e., denatured rectified spirit. While holding that rectified spirit is industrial alcohol, it recognised at the same time that it can be utilised for obtaining country liquor [by diluting it] or for manufacturing I.M.F.Ls. When to decision says that rectified spirit with 95% alcohol content v/v is "toxic", what it meant was that if taken as it is, it is harmful and injurious t health. By saying "toxic" it did not mean that it cannot be utilised for potable purposes either by diluting it or by blending it with other items. The undeniable fact is that rectified spirit is both industrial alcohol as well as a liquor which can be converted into country liquor just by adding water. It is also the basis substance from which I.M.F.Ls. are made. [Denatured rectified spirit, of course, is wholly and exclusively industrial alcohol.] This basic factual premise, which is not and cannot be denied by any one before us***, raises certain aspects for consideration herein which were not raised or considered in Synthetics. Take a case where two industries `A' and*
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> > *--------------***If rectified spirit is toxic and unfit for human consumption, why is it necessary to denature it, asks the learned Additional Advocate General for the State of Uttar Pradesh. Denaturing is meant precisely for*

> *making what is meant for human consumption unfit for human consumption, he says.*

`B' come forward with proposals to manufacture rectified spirit; `A' says that it proposes to manufacture rectified spirit and then denature it immediately and sell it as industrial alcohol while `B' says that it will manufacture rectified spirit and utilise it entirely for obtaining country liquor [arrack or by whatever other name, it may be called] or for manufacturing I.M.F.Ls. from out of it or to supply it to others for the said purpose. According to Synthetics, `A' is under the exclusive control of the Union and the only powers of the State are those as are enumerated in Para 86 quoted above. But what about `B'? The rectified spirit manufactured by it is avowedly meant only for potable purposes. Can it yet be called "industrial alcohol"? Can it still be said that the State concerned has no power or authority to control and regulate industry `B' and that the Union alone will control and regulate it until the potable liquors are manufactured? The Union is certainly not interested in or concerned with manufacture or process of manufacture of country liquor or I.M.F.Ls. Does this situation not leave a large enough room for abuse and misuse of rectified spirit? It should be remembered that according to many States before us, bulk of the rectified spirit produced in their respective States is meant for and is utilised for obtaining or manufacturing potable liquors. Can it be said even in such a situation that the State should fold its hands and wait and watch till the potable stage is reached. Yet another and additional circumstance is this: it is not brought to our notice that any notified orders have been issued under Section 18-G of the I.D.R. Act regulating the sale, disposal or use of rectified spirit for the purpose of obtaining or manufacturing potable liquors which means that by virtue of Entry 33 of List-III, the States do have the power to legislate on this field - field not occupied by any law made by the Union. It is these and many other situations which have to be taken into consideration and provided for in the interests of law, public health, public revenue and also in the interests of proper delineation of the spheres of the Union and the States. The line of demarcation can and should be drawn at the stage of clearance/removal of the rectified spirit. Where the removal/clearance is for industrial purposes [other than the manufacture of potable liquor], the levy of duties of excise and all other control shall be of the Union but where the removal/clearance is for obtaining or manufacturing potable liquors, the levy of duties of excise and all other control shall be that of the States. This calls for a joint control and supervision of the process of manufacture of rectified spirit and its use and disposal. We proceed to elaborate:

> *(1) So far as industries engaged in manufacturing rectified spirit meant exclusively for supply to industries [industries other than those engaged in obtaining or manufacture of potable liquors], whether after denaturing it or without denaturing it, are concerned, they shall be under the total and exclusive control of the Union and be governed by the I.D.R. Act and the rules and regulations made thereunder. In other words, where the entire rectified spirit is supplied for such industrial purposes, or to the extent it is so supplied, as the case may be, the levy of excise duties and all other control including establishment of distillery shall be that of the Union. The power of the States in the case of such an industry is only to see and ensure that rectified spirit, whether in the course of its manufacture or after its manufacture, it not diverted or misused for potable purposes. They can make necessary regulations requiring the industry to submit periodical statements of raw material and the finished product [rectified spirit] and are entitled to verify their correctness. For this purpose, the States will also be entitled t post their staff in the distilleries and levy reasonable regulatory fees to defray the cost of such staff, as held by this Court in*

Shri Bileshwar Khand Udyog Khedut Sahakari Mandali Ltd. v. State of Gujarat & Anr. [1992 (1) S.C.R. 391] and Gujchem Distillers India Ltd. v. State of Gujarat & Anr. [1992 (1) S.C.R. 675].

(2). So far as industries engaged in the manufacture of rectified spirit exclusively for the purpose of obtaining or manufacturing potable liquors - or supplying the same to the State government or its nominees for the said purpose - are concerned, they shall be under the total and exclusive control of the States in all respects and at all stages including the establishment of the distillery. In other words, where the entire rectified spirit produced is supplied for potable purposes - or to the extent it is so supplied, as the case may be - the levy of excise duties and all other control shall be that of the States. According to the State governments, most of the distilleries fall under this category.

(3) So far as industries engaged in the manufacture of rectified spirit, both for the purpose of (a) supplying it to industries [other than industries engaged in obtaining or manufacturing potable liquors/intoxicating liquors] and (b) for obtaining or manufacturing or supplying it to Governments/persons for obtaining or manufacturing potable liquors are concerned, the following is the position: the power to permit the establishment and regulation of the functioning of the distillery is concerned, it shall be the exclusive domain of the Union. But so far as the levy of excise duties is concerned, the duties on rectified spirit removed/cleared for supply to industries [other than industries engaged in obtaining or manufacturing potable liquors], shall be levied by the Union while the duties of excise on rectified spirit cleared/removed for the purposes of obtaining or manufacturing potable liquors shall be levied by the concerned State government. The disposal, i.e., clearance and removal of rectified spirit in the case of such an industry shall be under the joint control of the Union and the concerned State to ensure evasion of excise duties on rectified spirit removed/cleared from the distillery. It is obvious that in respect of these industries too, the power of the States to take necessary steps to ensure against the misuse or diversion of rectified spirit meant for industrial purposes [supply to industries other than those engaged in obtaining or manufacturing potable liquors] to potable purposes, both during and after the manufacture of rectified spirit, continues unaffected. Any rectified spirit supplied, diverted or utilised for potable purposes, i.e., for obtaining or manufacturing potable liquors shall be supplied to and/or utilised, as the case may be, in accordance with the concerned State Excise enactment and the rules and regulations made thereunder. If the State is so advised, it is equally competent to prohibit the use, diversion or supply of rectified spirit for potable purposes.

(4) It is advisable - nay, necessary - that the Union government makes necessary rules/regulations under the I.D.R. Act directing that no rectified spirit shall be supplied to industries except after denaturing it save those few industries [other than those industries which are engaged in obtaining or manufacturing potable liquors] where denatured spirit cannot be used for manufacturing purposes.

(6) So far as rectified spirit meant for being supplied to or utilised for potable purposes is concerned, it shall be under the exclusive control of the States from the moment it is cleared/removed for that purpose from the distillery - apart from other powers referred to above.

(7) The power to permit the establishment of any industry engaged in the manufacture of potable liquors including I.M.F.Ls., beer, country liquor and

> *other intoxicating drinks is exclusively vested in the States. The power to prohibit and/or regulate the manufacture, production, sale, transport or consumption of such intoxication liquors is equally that of the States, as held in McDowell."*

41. This judgment, however, came to be doubted in ***Deccan Sugar & Abkari Company Limited*** *vs.* ***Commissioner of Excise A.P. (1998) 3 SCC 272*** in view of the Constitution Bench judgment in ***Synthetics & Chemicals Ltd.*** (supra) and the matter was referred to a larger Bench.

42. A three Judge Bench of the Hon'ble Supreme Court in ***Deccan Sugar and Abkari Company Limited*** *vs.* ***Commissioner of Excise A.P. (2004) 1 SCC 243*** held in para-2 as follows:-

> *"2. It is settled by the decision of this Court in* ***Synthetics and Chemicals Ltd. v. State of U.P. (1990) 1 SCC 109*** *that the State Legislature has no jurisdiction to levy any excise duty on rectified spirit. The State can levy excise duty only on potable liquor fit for human consumption and as rectified spirit does not fall under that category the State Legislature cannot impose any excise duty. The decision in* ***Synthetics and Chemicals Ltd. v. State of U.P. (1990) 1 SCC 109*** *has been followed in* ***State of U.P. v. Modi Distillery (1995) 5 SCC 753*** *where certain wastage of ethy1 alcohol was sought to be taxed. This Court following the decision in Synthetics and Chemicals Ltd came to the conclusion that this cannot be done."*

43. In ***State of U.P. and others*** *vs.* ***Vam Organic Chemicals Ltd. and others (2004) 1 SCC 225****,* the Hon'ble Supreme Court after taking note of the earlier judgments held that the State cannot legislate in respect of industrial alcohol despite the fact that such industrial alcohol has the potential to be used to manufacture alcoholic liquor. It was also noticed that the State Government could only charge regulatory fee for the purpose of payment of salary for the staff and to see that no non-potable alcohol was converted into potable alcohol. The burden of showing a broad co-relation between the fee charged and administrative expenses for imposing a regulatory fee was upon the State Government. It is apt to reproduce paras 43 and 44 which read thus:-

> *"43. Considering the various authorities cited, we are of the view that the State Government is competent to levy fee for the purpose of ensuring that industrial alcohol is not surreptitiously converted into potable alcohol so that the State is deprived of revenue on the sale of such potable alcohol and the public is protected from consuming such illicit liquor. But this power stops with the denaturation of the industrial alcohol. Denatured spirit has been held in Vam Organics I, to be outside the seisin of the State Legislature. Assuming that denatured spirit may by whatever process be renatured. (a proposition which is seriously disputed by the respondents) and then converted into potable liquor this would not give the State the power to regulate it. Even according to the demarcation of the filed of legislative competence as envisaged in Bihar Distillery industrial alcohol for industrial purposes falls within the exclusive control of the Union and according to Bihar Distillery "denatured spirit, of course, is wholly and exclusively industrial alcohol". (SCC p. 742, para 23)*
>
> *44. Besides, the fee is required to be justified with reference to the cost of such regulation. The industry is already paying a fee under Rule 2 for such regulation. Indeed the justification for levying the fee under Rule 3(a) is the identical justification given by the State for levying the fee under Rule 2. Presumably, a full complement of Excise Officers and staff are appointed by the State in the Excise Department to carry out their duties under the Act to oversee, control and keep duty on the various kinds of intoxicants under the Act. Having regard to the decision in Vam Organics I, we must also assume that apart from the normal*

strength, additional officers and staff were appointed to regulate the denaturation of the industrial alcohol. There is nothing to show that there has been any deployment of any additional staff to over-see the possibility of renaturation of the denatured spirit."

44. A reference to the Hon'ble seven Judge Bench decision in ***Synthetics & Chemicals Ltd.'s case*** was made by the Hon'ble Supreme Court, however, it would be pertinent to refer to certain other questions as have been decided in the aforesaid decision.

"53. It was further submitted by the State that the State has exclusive right to deal in liquor. This power according to the counsel for the State, is reserved by and/or derived under Articles 19(6) and 19(6)(ii) of the Constitution. For parting with that right a charge is levied. It was emphasised that in a series of decisions some of which have been referred to hereinbefore, it has been ruled that the charge is neither a fee nor a tax and termed it as privilege. The levy is on the manufacture, possession of alcohol. The rate of levy differs on its use, according to the State of U.P. The impost is also stipulated under the trading powers of the State under Article 298 and it was contended that the petitioners and/or appellants were bound by the terms of their licence. It was submitted that the Parliament has no power to legislate on industrial alcohol, since industrial alcohol was also alcoholic liquor for human consumption. Entry 84 in List I expressly excludes alcoholic liquor for human consumption; and due to express exclusion of alcoholic liquor for human consumption from List I, the residuary Entry 97 in List I will not operate as against its own legislative interest. These submissions have been made on the assumption that industrial liquor or ethyl alcohol is for human consumption. It is important to emphasise that the expression of a constitution must be understood in its common and normal sense. Industrial alcohol as it is, is incapable of being consumed by a normal human being. The expression `consumption' must also be understood in the sense of direct physical intake by human beings in this context. It is true that utilisation in some form or the other is consumption for the benefit of human beings if industrial alcohol is utilised for production of rubber, tyres used. The utilisation of those tyres in the vehicle of man cannot in the context in which the expression has been used in the Constitution, be understood to mean that the alcohol has been for human consumption.

54. We have no doubt that the framers of the Constitution when they used the expression `alcoholic liquor for human consumption' they meant at that time and still the expression means that liquor which as it is is consumable in the sense capable of being taken by human beings as such as beverage of drinks. Hence, the expression under Entry 84, List I must be understood in that light. We were taken through various dictionary and other meanings and also invited to the process of manufacture of alcohol in order to induce us to accept the position that denatured spirit can also be by appropriate cultivation or application or admixture with water or with others, be transformed into `alcoholic liquor for human consumption' and as such transformation would not entail any process of manufacture as such. There will not be any organic or fundamental change in this transformation, we were told. We are, however, unable to enter into this examination. Constitutional provisions specially dealing with the delimitation of powers in a federal polity must be understood in a broad commonsense point of view as understood by common people for whom the Constitution is made. In terminology, as understood by the framers of the Constitution, and also as viewed at the relevant time of its interpretation, it is not possible to proceed otherwise; alcoholic or intoxicating liquors must be understood as these are, not what these are capable of or able to become. It is also not possible to accept the submission that vend fee in U.P. is a pre-Constitution imposition and would not be subject to Article 245 of the

Constitution. The present extent of imposition of vend fee is not a pre-Constitution imposition, as we noticed from the change of rate from time to time."

(emphasis supplied)

45. Entry 8 in List II deals with intoxicating liquor, however, the question would be whether this entry pertaining to intoxicating liquor is confined to potable liquor or includes all liquors. The answer to this question can be found in ***Indian Mica Micanite Industries*** *vs.* ***The State of Bihar and others (1971) 2 SCC 236*** wherein it was held that the expression of a Constitution must be understood in its common and normal sense, industrial alcohol is incapable of being consumed by normal human being and the argument that the expression "consumption" would include non-potable alcohol unfit for human consumption or otherwise was rejected and it was held that the expression "consumption" appearing in various entries and parts of the Constitution must be understood in the sense of direct physical intake by human beings, in this regard and it was held that the word "consumption" means that it is with reference to the alcohol, which is only fit for human consumption.

46. The Hon'ble Supreme Court after holding that the pith and substance of the Legislature has to be looked into proceeded to interpret the expression "intoxicating liquor" in paras 74 to 77 in the following manner:-

"74. It has to be borne in mind that by common standards ethyl alcohol (which has 95%) is an industrial alcohol and is not fit for human consumption. The petitioner and the appellants were manufacturing ethyl alcohol (95%) (also known as rectified spirit) which is an industrial alcohol. ISI specification has divided ethyl alcohol (as known in the trade) into several kinds of alcohol. Beverage and industrial alcohols are clearly and differently treated. Rectified spirit for Industrial purposes is defined as "spirit purified by distillation having a strength not less than 95% of volume by ethyl alcohol". Dictionaries and technical books would show that rectified spirit (95%) is an industrial alcohol and is not potable as such. It appears, therefore, that industrial alcohol which is ethyl alcohol (95%) by itself is not only non-potable but is highly toxic. The range of spirit of potable alcohol is from country spirit to whisky and the Ethyl Alcohol content varies between 19 to about 43 per cent. These standards are according to the ISI specifications. In other words, ethyl alcohol (95%) is not alcoholic liquor for human consumption but can be used as raw material input after processing and substantial dilution in the production of Whisky, Gin, Country Liquor, etc. In many decisions, it was held that rectified spirit is not alcohol fit for human consumption. Reference may be made in this connection to Delhi Cloth and General Mills Co. Ltd. v. The Excise Commissioner, U.P. Allahabad and Anr. Special Appeal No. 177 of 1970, decided on 29th March, 1973. In this connection, it is important to bear in mind the actual provision of entry 8 of list II. Entry 8 of list II cannot support a tax. The above entry contains the words "intoxicating liquor". The meaning of the expression "intoxicating liquor" has been tightly interpreted by the Bombay High Court in the Balsara's case (supra). The decision of the Bombay High Court is reported in AIR 1951 Bombay 210, at p. 214. In that light, perhaps, the observations of Fazal Ali, J. in Balsara's case (supra) requires consideration. It appears that in the light of the new experience and development, it is necessary to state that "intoxicating liquor" must mean liquor which is consumable by human being as it is and as such when the word "liquor" was used by Fazal Aft, J., they did not have the awareness of full use of alcohol as industrial alcohol. It is true that alcohol was used for industrial purposes then also, but the full potentiality of that user was not then comprehended or understood. With the passage of time, meanings do not change but new experiences give new colour to the meaning. In Har Shankar's case (supra), a bench of five judges have surveyed the previous authorities. That case dealt with the auction of the right to sell potable liquor. The position laid down in that case was that the State had the exclusive privilege or right of manufacturing and selling liquor and it had the power

to hold public auctions for granting the right or privilege to sell liquor and that traditionally intoxicating liquors were the subject matters of State monopoly and that there was no fundamental right in a citizen to carry on trade or business in liquor. All the authorities from Cooverji Barucha's case (1954) SCR 673 to Har Shankar's case (supra) dealt with the problems or disputes arising in connection with the sale, auction, licensing or use of potable liquor.

75. Only in two cases the question of industrial alcohol had come up for consideration before this Court. One is the present decision which is under challenge and the other is the decision in Indian Mica & Micanite Industries's case (supra). In the latter case, in spite of the earlier judgments including Bharucha's case, denatured spirit required for the manufacture of micanite was not regarded as being within the exclusive privilege of the State. It appears that in that decision at p. 321 of the report, it was specifically held that the power of taxation with regard to alcoholic liquor not fit for human consumption, was within the legislative competence of central legislature. The impost by the State was held to be justifiable only if it was a fee thereby impliedly and clearly denying any consideration or price for any privilege. For the first time, in the Synthetics & Chemicals Ltd. 's case (supra), the concept of exclusive privilege was introduced into the area of industrial alcohol not fit for human consumption.

76.Balsara's case (supra) deal with the question of reasonable restriction on medicinal and toilet preparations. In fact, it can safely be said that it impliedly and sub-silentio clearly held that medicinal and toilet preparations would not fall within the exclusive privilege of the State. If they did there was no question of striking down of section 12 (c) & (d) and section 13(b) of the Bombay Prohibition Act, 1949 as unreasonable under Article 19(1)(f) of the Constitution because total prohibition of the same would be permissible. In K.K. Narula's case (1967) 3 SCR 50, it was held that there was right to do business even in potable liquor. It is not necessary to say whether it is good law or not. But this must be held that the reasoning therein would apply with greater force to industrial alcohol.

77. Article 47 of the Constitution imposes upon the State the duty to endeavour to bring about prohibition of the consumption except for medicinal purpose of intoxicating drinks and products which are injurious to health. If the meaning of the expression "intoxicating liquor" is taken in the wide sense adopted in Balsara's case, it would lead to an anomalous result. Does Article 47 oblige the State to prohibit .even such industries as are licensed under the IDR Act but which manufacture industrial alcohol? This was never intended by the above judgments or the Constitution. It appears to us that the decision in the Synthetics & Chemicals Ltd. 's case (supra) was not correct on this aspect."

47. The legal position was summed up in paras 85, 86 and 88 which read thus:

"85. After 1956 amendment to the IDR Act bringing alcohol industries (under fermentation industries) as item 26 of the First Schedule to IDR Act the control of this industry has vested exclusively in the Union. Thereafter, licences to manufacture both potable and non potable alcohol is vested in the Central Government. Distilleries are manufacturing alcohol under the Central Licences under IDR Act. No privilege for manufacture even ii one existed, has been transferred to the distilleries by the State. The State cannot itself manufacture industrial alcohol without the permission of the Central Government. The States cannot claim to pass a right which these do not possess. Nor can the States claim exclusive right to produce and manufacture industrial alcohol which are manufactured under the grant of licence from the Central Government. Industrial alcohol cannot upon coming into existence under such grant be amenable to States' claim of exclusive possession of privilege. The State can neither rely on entry 8 of

list I1 nor entry 33 of list III as a basis for such a claim. The State cannot claim that under entry 33 of list III, it can regulate industrial alcohol as a product of the scheduled industry, because the Union, under section 18G of the IDR Act, has evinced clear intention to occupy the whole field. Even otherwise sections like section 24A and 24B of the U.P. Act do not constitute any regulation in respect of the industrial alcohol as product of the scheduled industry- On the contrary, these purport to deal with the so-called transfer of privilege regarding manufacturing and sale. This power, admittedly, has been exercised by the State purporting to act under entry 8 of list II and not under entry 33 of list III.

86.The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol:

> *(a) It may pass any legislation in the nature of prohibition of potable liquor referable to entry 6o of list II and regulating powers.*
>
> *(b) It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.*
>
> *(c) The state may charge excise duty on potable alcohol and sales tax under entry 52 of list II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the state on industrial alcohol.*
>
> *(d) However, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. See in this connection, the observations of India Mica's case (supra).*

88. On an analysis of the aforesaid decisions and practice, we are clearly of the opinion that in respect of industrial alcohol the States are not authorised to impose the impost they have purported to do. In that view of the matter, the contentions of the petitioners must succeed and such impositions and imposts must go as being invalid in law so far as industrial alcohol is concerned. We make it clear that this will not affect any impost so far as potable alcohol as commonly understood is concerned. It will also not affect any imposition of levy on industrial alcohol fee where there are circumstances to establish that there was quid pro quo for the fee sought to be imposed. This will not affect any regulating measure as such."

48. It is, thus, evidently clear that the State Government cannot claim to have power to legislate on alcohol of "malt spirit of overproof strength" merely on the ground that the same can be made potable after dilution. The State at best can only lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable liquor.

49. Even otherwise, the issue insofar as this Court is concerned is no longer *res integra* in view of a Division Bench judgment of this Court in ***Ranger Breweries Ltd.*** *vs.* ***State of H.P. and others 2010 (3) Shim. L.C. 98*** wherein the question posed before the Court was whether the State is justified in levying the duty/duties on the wastage of spirit in the process of re-distillation. While answering the question, it was held that pre-constitutional levy of duty, as proposed, is permissible only if the same is duly prescribed. However, since the duty came to be prescribed under the Rules, for the first time, only in the year 1999 and re-distillation for the purpose of manufacturing liquor admittedly was prior to 1999 and, therefore, there could be no levy of duty on wastage of re-distillation process. The contention of the petitioner was that any duty is permissible only on alcoholic liquor fit for human consumption, whereas, the spirit admittedly that was being supplied to the distillery for the purpose of distillation was not alcoholic liquor fit for human consumption and the duty that was proposed to be levied was on spirit not fit for human consumption. This Court held that excise duty was permissible by the

State only on alcoholic liquor fit for human consumption and it shall be apt to reproduce the following observations:-

> *"4. We do not think that there can be any formidable resistance on this argument advanced by the petitioner, in view of the well settled position that excise duty is permissible by the State only on alcoholic liquor fit for human consumption. The Supreme Court has dealt with these aspects in quite a few decisions. In* ***Mohan Meakins Ltd. Versus Excise & Taxation Commissioner, H.P. & others, reported in (1997) 2 SCC, 193,*** *it has been held that :*
>
> > *"6. It is, thus, clear that the range of potable alcohol varies between country spirit to whiskey and the ethyl alcohol. The alcoholic strength of each excisable article and its percentage varies as per the ISI specifications but intoxicating liquor necessarily means only that liquor which was consumable by human beings as it was. The State of levying excise duty upon alcoholic liquor arises when excisable article is brought to the stage of human consumption with the requisite alcoholic strength thereof. It is only the final produce which is relevant.*
> >
> > *7. Thus, the final product of the beer is relevant excisable article excigible to duty under Section 31 of the Act when it passes through fine filter press and received in the bottling tank. The question is at what stage the duty is liable to be paid? Section 23 specifically envisages that until the payment of duty is made or bond is executed in that behalf as per the procedure and acceptance by the Financial Commissioner, the finished product, namely, the beer in this case, shall not be removed from the place at which finished product was stored either in a warehouse within factory premises or precinct or permitted place of usage. Under these circumstances, the point at which excise duty is exigible to duty is the time when the finished product, i.e., beer was received in bottling tank or the finished product is removed from the place of storage or warehouse etc.*
>
> *5. In* ***Bihar Distillery and another versus Union of India and others,*** *reported in* ***(1997) 2 SCC,727,*** *it has been held at paragraph 23 and to extent relevant, the same is as follows:*
>
> > *"23.........where the removal/clearance is for industrial purposes (other than the manufacture of potable liquor), the levy of duties of excise and all other control shall be of the Union but where the removal/clearance is for obtaining or manufacturing potable liquors, the levy of duties of excise and all other control shall be that of the State............."*
> >
> > *(6) So far as rectified spirit meant for being supplied to or utilised for potable purposes is concerned, it shall be under the exclusive control of the State from the moment it is cleared/removed for that purpose from the distillery-apart from other powers referred to above."*
>
> *6. In* ***Deccan Sugar & Abkari Co. Ltd. Versus Commissioner of Excise, A.P, (2004) 1 SCC 243,*** *it has been held that:*
>
> > *"2. It is settled by the decision of this Court in Synthetics and Chemicals Ltd. vs. State of U.P. that the State Legislature has no jurisdiction to levy any excise duty on rectified spirit. The State can levy excise duty only on potable liquor fit for human consumption and as rectified spirit does not fall under that category the State Legislature cannot impose any excise duty. The decision in Synthetics and Chemicals Ltd. v. State of U.P. has been followed in State of U.P. v. Modi Distillery where certain wastage of ethyl alcohol was sought to be taxed. This Court following the decision in Synthetics and Chemicals Ltd came to the conclusion that this cannot be done."*

7. As already stated above, the State has no case that the duty that was charged on the petitioner is on liquor, that is fit for human consumption. Duty is charged on spirit which is not a potable liquor. The learned Additional Advocate General contends that even if excise duty is not leviable, duty on spirit is leviable under the Punjab Excise Act, 1914. No doubt, being a pre-constitutional levy, in case there was enabling provision for such levy on spirit, it is permissible in view of the Article 277 of the Constitution of India, which reads as follows:

> *"**Savings**.- Any taxes, duties, cesses or fees which immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament of law."*

19. Even otherwise, it only pertains to the rate of duty and the duty is leviable only if it is prescribed under the Rules. The Rules regarding levy of duty for wastage element was prescribed for the first time only in 1999. Even otherwise also, the fiscal orders will not apply since there is no process of removal of spirit from distillery in the process of re-distillation.

20. The Excise and Taxation Commissioner has proposed to levy the duty on the entire wastage since no wastage element had been prescribed during re-distillation, in the case of the petitioner, prior to 1999. The same view has been affirmed by the Appellate Authority, namely Financial Commissioner. As we have already held above, the pre-constitutional levy of duty, as proposed, is permissible only if the same is duly prescribed. That was prescribed under the Rules only in the year 1999. In the case of the petitioner herein, the re-distillation admittedly is prior to 1999 and, therefore, there can be no levy of duty on the wastage during the re-distillation process. Hence, the writ petitions are allowed and the impugned orders are quashed. We find that the petitioner had deposited the amounts under protest, pursuant to interim order, passed by this court. As we have held that duty, as above, is impermissible under law, the amounts, deposited by the petitioner, shall be refunded forthwith."

50. In view of the aforesaid discussion, we are of the considered view that having regard to Entry No.52 of List I of Seventh Schedule of the Constitution, the malt spirit of overproof strength cannot be the subject matter of any regulation or control of the State as it is not "alcoholic liquor for human consumption". However, the State Government is competent to levy fee for the purpose of ensuring that industrial alcohol is not surreptitiously converted into potable alcohol, so that the State is deprived of the revenue on the sale of such potable alcohol and the public is protected from consuming such illicit liquor.

51. Therefore, the next question which is posed for consideration of this Court is whether the impugned levy of "fees" on "malt spirit of overproof strength" which even though has been held to be within the legislative competence of the State, passes the test of "quid pro quo" as it is for this precise reason that the Hon'ble Supreme Court has remanded the case to this Court. This would be clearly evident from a perusal of paras 40 to 42 of its judgment in ***Mohan Meakin Limited*** *vs.* ***State of Himachal Pradesh and others (2009) 3 SCC 157*** which read thus:-

"40. In this case, the State in fact has not produced any material whatsoever before the High Court.

41. In CIT v. Distillers Co. Ltd. (2007) 5 SCC 353, this Court held that even for the purpose of levy of excise duty, the same must have a direct relationship with the manufacture of arrack.

42. We, therefore, are of the opinion that the impugned judgment cannot be sustained. It is set aside accordingly and the matter is remitted to the High Court for consideration of the writ petition filed by the appellant afresh. The parties shall be at liberty to file additional affidavits/evidence before the High Court, if they so desire."

52. At this stage, it is vehemently argued by the learned Advocate General that the element of compensatory tax based upon the principle of "quid pro quo" is no longer valid in view of the decision of Hon'ble nine Judge Bench of the Hon'ble Supreme Court in ***Jindal Stainless and another*** *vs.* ***State of Haryana and others AIR 2016 SC 5617***.

53. We are unable to agree with this submission for the simple reason that in ***Jindal Stainless case*** (supra), the Hon'ble Supreme Court was dealing with the question of "compensatory tax" vis-à-vis Article 301 of the Constitution.

54. The concept of compensatory tax is not there in the Constitution, but was judicially evolved in ***Automobile Transport (Rajasthan) Ltd. etc.*** *vs.* ***State of Rajasthan and others AIR 1962 SC 1406*** and has been over-ruled in ***Jindal Stainless's case***. The concept of compensatory tax was judicially crafted as an exception to Article 301 of the Constitution.

55. There is a difference between "tax fee" and "compensatory tax" as has been held by the Hon'ble Supreme Court in ***Mohan Meakin's case*** (supra) in the following manner:-

> *"34. As regards imposition of fee, it was opined :(Vam Organic case[4], SCC p. 241, para 44)*
>
> > *"44. Besides, the fee is required to be justified with reference to the cost of such regulation. The industry is already paying a fee under Rule 2 for such regulation. Indeed, the justification for levying the fee under Rule 3(a) is the identical justification given by the State for levying the fee under Rule 2. Presumably, a full complement of excise officers and staff are appointed by the State in the Excise Department to carry out their duties under the Act to oversee, control and keep duty on the various kinds of intoxicants under the Act. Having regard to the decision in Vam Organics-I[5] we must also assume that apart from the normal strength, additional officers and staff were appointed to regulate the denaturation of the industrial alcohol. There is nothing to show that there has been any deployment of any additional staff to oversee the possibility of renaturation of the denatured spirit."*
>
> *35. The question as regards "aspects of power to levy fee vis-a-vis tax" came up for consideration before this Court in Jindal Stainless Ltd. (2) v. State of Haryana (2006) 7 SCC 241 wherein this Court held: (SCC p. 266, paras 38-39)*
>
> > *"38. In the generic sense, tax, toll, subsidies, etc. are manifestations of the exercise of the taxing power. The primary purpose of a taxing statute is the collection of revenue. On the other hand, regulation extends to administrative acts which produces regulative effects on trade and commerce. The difficulty arises because taxation is also used as a measure of regulation. There is a working test to decide whether the law impugned is the result of the exercise of regulatory power or whether it is the product of the exercise of the taxing power. If the impugned law seeks to control the conditions under which an activity like trade is to take place then such law is regulatory. Payment for regulation is different from payment for revenue. If the impugned taxing or non-taxing law chooses an activity, say, movement of trade and commerce as the criterion of its operation and if the effect of the operation of such a law is to impede the activity, then the law is a restriction under Article 301. However, if the law enacted is to enforce discipline or conduct under which the trade has to*

perform or if the payment is for regulation of conditions or incidents of trade or manufacture then the levy is regulatory. This is the way of reconciling the concept of compensatory tax with the scheme of Articles 301, 302 and 304. For example, for installation of pipeline carrying gas from Gujarat to Rajasthan, which passes through M.P., a fee charged to provide security to the pipeline will come in the category of manifestation of regulatory power. However, a tax levied on sale or purchase of gas which flows from that very pipe is a manifestation of exercise of the taxing power. This example indicates the difference between taxing and regulatory powers (see Essays in Taxation by Seligman).

Difference between 'a tax', 'a fee' and 'a Compensatory Tax'

Parameters of Compensatory Tax

39. As stated above, in order to lay down the parameters of a compensatory tax, we must know the concept of taxing power."

It was observed: (Jindal Stainless case [7], SCC p. 268, para 43)

"43. In the context of Article 301, therefore, compensatory tax is a compulsory contribution levied broadly in proportion to the special benefits derived to defray the costs of regulation or to meet the outlay incurred for some special advantage to trade, commerce and intercourse. It may incidentally bring in net revenue to the Government but that circumstance is not an essential ingredient of compensatory tax."

56. Undoubtedly, ***Jindal Stainless Ltd. (2) and another*** *vs.* ***State of Haryana and others (2006) 7 SCC 241*** has been over-ruled by a larger Bench of nine Judge in ***Jindal Stainless and another*** *vs.* ***State of Haryana and others AIR 2016 SC 5617*** (supra) with regard to "compensatory tax", but the distinction between "tax" and "fee" has been maintained and is otherwise legally well accepted. Tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege.

57. The distinction between "tax" and "fee" has been lucidly explained by the Hon'ble Supreme Court in its recent judgment reported in ***State of Tamil Nadu and another*** *vs.* ***TVL. South Indian Sugar Mills Association and others (2015) 13 SCC 748***, wherein it was held as under:-

"7. Over the years, the inflexibility with which the principle of quid pro quo was to be applied, which may have been sired from a pedantic perusal of Synthetics and Chemicals Ltd.[2], has been clarified and crystallized by this Court. We shall reproduce these paragraphs from B.S.E. Brokers' Forum, Bombay and Others v. Securities and Exchange Board of India and others, (2001) 3 SCC 482 to enable their fruitful consideration: (SCC pp.501 & 503-04, paras 30 & 38)

30. This Court in the case of Sreenivasa General Traders v. State of A.P. (1983) 4 SCC 353 has taken the view that the distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. This Court said that in determining whether a levy is a fee or not emphasis must be on whether its primary and essential purpose is to render specific services to a specified area or class. In that process if it is found that the State ultimately stood to benefit indirectly from such levy, the same is of no consequence. It also held that there is no generic difference between a tax and a fee and both are compulsory exactions of money by public authorities. This was on the basis of the fact that the compulsion lies in the fact that the payment is enforceable by law against a person in spite of his unwillingness or want of consent. It also

held that a levy does not cease to be a fee merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have a direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. It also held that the element of quid pro quo in the strict sense is not always a sine qua non for a fee, and all that is necessary is that there should be a reasonable relationship between the levy of fee and the services rendered. That judgment also held that the earlier judgment of this Court in Kewal Krishan Puri v. State of Punjab (1980) 1 SCC 416 is only an obiter.

* * *.

38. As noticed in City Corpn. of Calicut vs.Thachambalath Sadasivan (1985) 2 SCC 112 the traditional concept of quid pro quo in a fee has undergone considerable transformation. From a conspectus of the ratio of the above judgments, we find that so far as the regulatory fee is concerned, the service to be rendered is not a condition precedent and the same does not lose the character of a fee provided the fee so charged is not excessive. It is also not necessary that the services to be rendered by the collecting authority should be confined to the contributories alone. As held in Sirsilk Ltd. vs. Textiles Committee 1989 Supp. (1) SCC 168 if the levy is for the benefit of the entire industry, there is sufficient quid pro quo between the levy recovered and services rendered to the industry as a whole. If we apply the test as laid down by this Court in the abovesaid judgments to the facts of the case in hand, it can be seen that the statute under Section 11 of the Act requires the Board to undertake various activities to regulate the business of the securities market which requires constant and continuing supervision including investigation and instituting legal proceedings against the offending traders, wherever necessary. Such activities are clearly regulatory activities and the Board is empowered under Section 11(2)(k) to charge the required fee for the said purpose, and once it is held that the fee levied is also regulatory in nature then the requirement of quid pro quo recedes to the background and the same need not be confined to the contributories alone."

58. As regards "fee" in the instant case, the same has to be determined on the basis of "quid pro quo" as the State's power to impose or levy is limited to (i) the regulation of non-potable alcohol for the limited purpose of preventing its use as alcoholic liquor (ii) the charging of fee based on "quid pro quo" (Refer: ***Vam Organic Case*** (supra).

59. Reverting to the facts, it would be noticed that despite the orders passed by the Hon'ble Supreme Court, the State has not produced any tangible material to show that it was incurring any additional costs for the purpose of ensuring that the so called malt spirit of over proof strength is not surreptitiously converted into potable liquor so as to deprive the State of the revenue on the sale of alcohol and, at the same time, the public is protected from consuming such illicit liquor.

60. We are conscious of the fact that the traditional view with regard to concept of fee of "quid pro quo" has undergone a sea change and now it is no longer regarded necessary that (i) some specific service must be rendered to the particular individual or individuals from whom a fee is realized and what has to be seen is whether there is a broad and general co-relation between the totality of fee on the one hand, and the totality of the expenses of services on the other, (ii) there need not be an exact or mathematical correlation between the amount realized as a "fee" and the value of the service rendered. A particular correlation between the two is sufficient to sustain the levy. (Refer: ***State of Himachal Pradesh and others*** *vs.* ***M/s Shivalik Agro Poly Products and others AIR 2004 SC 4393).***

61. It would be noticed that in compliance to the judgment dated 18.12.2008 passed by the Hon'ble Supreme Court, the respondents did file a supplementary affidavit and the averments as are necessary for the purpose of these petitions are contained in paragraphs 12 and 13 of this affidavit which read thus:-

"12. That the State Government is having the following distilleries, breweries and bottling plants manufacturing liquor in the State and selling the same, and the Government has employed full-time staff as shown against each:-

Sr.No.	***District***	***Manufacturing Unit***	***Staff employed***	
	Solan		***ETI***	***Peon/ Beldar***
1.	*-do-*	*M/s Mohan Meakin Ltd.Solan Brewery*	*3*	*0*
2.	*-do-*	*M/s Kasauli Distillery, Kasauli*	*1*	*1*
3.	*-do-*	*M/s Himalayan Gold Brewery Ltd. Kripalpur, BBN Baddi*	*1*	*0*
4.	*-do-*	*United Spirits Ltd., Baddi*	*1*	*1*
5.	*-do-*	*M/s Patiala Distillers & Manufactures Ltd. Baddi, Distt. Solan*	*2* *0*	
6.	*-do-*	*M/s K.M.Distillery Pvt. Ltd., Parwanoo, District Solan*	*1*	*1*
7.	*-do-*	*M/s H.P.GIC Parwanoo District Solan*	*1*	*0*
8.	*-do-*	*M/s Kala Amb Distillery and Brewery V. Bhangla Tehsil Nalagarh, District Solan*	*1*	*0*
9.	*-do-*	*M/s Sabacchus Distillery Pvt. Ltd., Nalagarh, District Solan*	*1*	*0*
	Sirmaur			
10.	*-do-*	*Carlsberg India Pvt. Ltd.,Tokion, Paonta Sahib.*	*2*	*1*
11.	*-do-*	*M/s Tiloksons Brewery & Distillery Kala Amb, District Sirmaur (Beldar)*	*1*	*1(Beldar)*
12.	*-do-*	*M/s Yamuna Beverages Pvt. Ltd. 14 Nariwala, Paonta Sahib, District Sirmaor.*	*2*	*1(Beldar)*
13.	*-do-*	*M/s Hill View Distillery & Bottling Plant, Shambhuwala, District Sirmour*	*1*	*1(Beldar)*
14.	*-do-*	*M/s Himgiri Beverages Meerpur Kotla, Kala-Amb,Distt. Sirmour*	*1*	*0*
	Una			
15.	*-do-*	*M/s H.P.GIC Ltd., Mehatpur, District Una, H.P.*	*2*	*0*

16.	*-do-*	*M/s Rangar Breweries Ltd., Mehatpur District Una, H.P.*	*2*	*2*
	Hamirpur			
17.	*-do-*	*M/s Him Queen Distillers & Bottlers Kunani, Distt. Hamirpur*	*1*	*1*
	Kangra			
18.	*-do-*	*M/s Bindal Associates, Tehsil Indora*	*1*	*1*
19.	*-do-*	*M/s V.R.V. Foods Ltd. Sansarpur Terrace, Distt. Kangra*	*1*	*1*
	Mandi			
20.	*-do-*	*M/s Goverdhan Bottling Plant Pvt. Ltd., Galu, District Mandi*	*1*	*1*
21.	*-do-*	*M/s Basandari Bottlers Pvt. Ltd., Industrial Area, Ner Chowk(Ratti), Distt. Mandi*	*1*	*1*

13. That exclusively on the staff posted within the distillers (which strength is by all standards deficient and highly inadequate), breweries and bottling plants/bonded warehouses , the State Government is incurring annual expenditure of Rs.1,53,45,564. If the expenses of the staff posed in the Districts, Collector (Excise) offices and the Financial Commissioner (Excise) Office are also calculated, these expenses are bound to be around Rs.9/10 crores annually, for multifarious aspects of supervision required under the aforesaid provisions of the Act and the rules framed there under, which is absolutely indispensable for effective excise control and supervision."

62. The petitioner has filed a counter-affidavit wherein it has been specifically averred that the excise staff has been posted by the Government in the petitioner's Units at Kasauli and Solan, but their salaries are being paid by the petitioner and besides the salary, the petitioner is also providing to the entire staff posted in the Brewery and Distillery at Solan and Kasauli free furnished accommodation with free water, electricity and free telephone in their office. The salaries and other expenses incurred on the staff posted in various distilleries are also paid by the concerned distilleries. It is also pointed out that the services being provided and the expenses being incurred by the State are wholly disproportionate to the fees and taxes which are being collected from the various manufacturing units. Infact, the State is thriving on the levy of excise duties and license fees which is collected from various distilleries, breweries, bottling plants and bounded warehouses in the State. It is specifically stated that even the State is collecting huge amount as fee, but it is rendering little or no services except harassment to the parties. The co-relation between the services rendered and the license fee levied and collected has not been justified by placing any material on record. Noticeably, the respondents have not cared to rebut these averments.

63. Thus, from a conspectus of the aforesaid discussion, it is clearly evident that the State Government has not undertaken any supervisory activity which will constitute "quid pro quo" for the imposition of the import fee. The respondents have further failed to co-relate the amount of fee levied with the expenses incurred by the Government in rendering the services. There is total absence of any co-relation between the expenses incurred by the respondents and the amount raised by them.

64. In view of the aforesaid discussion, both the petitions are allowed. The notifications issued by the respondents dated 23.03.1996, 31.03.1997 and 30.03.1998 are

quashed and set aside and consequently notices dated 27.01.1999 and 10.02.1999 demanding the payment of permit fee on import/transport of "overproof strength spirit" which form the subject-matter of CWP No.251 of 1999 are quashed and set aside. Similarly, the demand notices which form the subject-matter of CWP No.590 of 1999 are quashed and set aside and respondents are directed to refund the licence fee to the petitioner(s) charged in terms of those notifications. All pending application(s) stand disposed of.

65. Registry is directed to place a copy of this judgment on the file of CWP No.590 of 1999.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, ACJ AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

M/s Anand Auto Care Pvt. Ltd. …Petitioner

Versus

State of H.P. and others …Respondents.

CWP No.1015 of 2017

Date of Decision: August 31, 2017

Constitution of India, 1950- Article 226- A lease was granted in favour of respondent No. 4 in industrial area, Shoghi- lessee established a flour mill, which was run for sometime – the lessee had availed certain credit facilities from State Bank of India- lessee committed default - his assets and liability were taken over by the Bank- Bank transferred the lease hold rights to the petitioner – petitioner was required to pay a sum of Rs. 59,74,033/- and also to liquidate the liabilities of HPSEB, Department of Excise and Taxation and Department of Industries- the amount payable to the Bank was deposited and the liabilities were liquidated- no objection certificate was issued – however, the steps were not taken for executing the lease deed and handing over the possession – State contended that liabilities of other Government Departments are pending- held that names of the departments whose liabilities were to be satisfied were mentioned in the letter – it was never stated during the negotiations that liabilities of some other department were also to be satisfied – hence, direction issued to hand over the possession and execute the lease deed – further direction issued to deposit the amount due and admissible within four months from the date of adjudication in view of the undertaking. (Para-9 to 18)

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

For the Respondents : Mr. Mr. Anoop Rattan, Mr. Romesh Verma, Additional Advocates General and Mr. J.K. Verma, Deputy Advocate General, for respondents-State.
Mr. Arvind Sharma, counsel for respondent No.3.
Mr. Chandranarayana Singh, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

<u>Sanjay Karol, ACJ</u>

Petitioner approached this Court, inter alia, praying for the following relief:

> "That a writ in the nature of mandamus be issued directing the respondents No.1 & 2 to execute a formal lease deed in favour of the petitioner with respect to Plot No.4, Industrial Area, Shoghi, Tehsil and District Shimla immediately and after the lease deed is executed, the amount which petitioner is prepared deposited in this Hon'ble court may be directed to be released in favour

of respondent No.3 and respondent No.3 be directed to hand over the possession of the Plot to the petitioner."

2. Certain facts are not in dispute. M/s Techno Impex Electronic, a proprietorship concern of Shri Rupinder Ahuja (respondent No.4), was an allottee of Industrial Plot No.4 at Industrial Area, Shoghi, State of H.P. The ownership, undisputedly, is that of the State of Himachal Pradesh (Department of Industries) and status of the allottee was that of a lessee, in relation to which Lease Deed dated 28.10.1994 was executed.

3. On the said industrial plot, the lessee established a flour mill, which he was able to run for a particular duration. The lessee had availed certain credit facilities, i.e. advances by way of loan from the State Bank of India (respondent No.3). On account of serious defaults by him, in the repayment of the loan, his assets and liabilities were taken over by the Bank.

4. In order to liquidate part of the liability, a decision was taken by the lessor and the Bank to transfer the leasehold rights, that of the lessee, in Plot No.4, Industrial Area Shoghi, in favour of the present writ petitioner, namely M/s Anand Auto Care Private Limited. Communication dated 23.3.2017 (Annexure P-4), in this regard, is reproduced as under:

"................

"This is with reference to your office letter No.SARB/2015-16/372 dated 3.1.2017 and meeting held in this regard on 27.2.2017 at 11 AM under the Chairmanship of Director of Industries, H.P.

In this regard it is submitted that the Director of Industries vide letter No.Ind Dev. F(13) Plots/SML-754/91-X dated 22.3.2017 has agreed in principle to consider the transfer of lease hold rights of Plot No.4 from M/s Techno Impex Electronic to M/s Anand Auto Care Pvt Ltd. He has further directed the undersigned to process the case as per provisions of lease deed & Incentive Rules inn force for according formal approval to transfer of lease hold rights of Plot No.4 from M/s Techno Impex Electronic to M/s Anand Auto Care Pvt. Ltd.

In view of above, SBI, M/s Techno Impex Electronic and M/s Anand Auto Care Pvt. Ltd. are requested to submit the following documents:

I. A joint request letters from Sh. Surinder Seth (original allottee of Plot No.4) and Sh. Rupinder Ahuja addressed to the undersigned for transfer of lease hold rights of this plot from M/s Techno Impex Electronic to M/s Anand Auto Care Pvt. Ltd. in accordance with the Memorandum of Understanding executed on 20.12.2016 between Sh. Rupinder Ahuja and Sh. Vishal Anand/ S/o Sh. Satish Anand Director M/s Anand Auto Care Pvt. Ltd. or any other MOU/Agreement to Sell if any executed thereafter.

II. Affidavit/legal undertaking from M/s Anand Autocare Pvt. Ltd. to pay the present and past liabilities of M/s Techno Impex Electronic and M/s Swaran Flour Mill in respect of all Govt. departments/undertakings like Department of Excise and Taxation, HPSEB Ltd. Industrial Area Development Agency (IADA), Shoghi etc. and amount settled between State Bank of India and M/s Techno Impex Electronic/Swaran Flour Mill or M/s Anand Auto Care Pvt. Ltd.

III. Affidavit/legal undertaking by M/s Anand Auto Care Pvt. Ltd. to pay un-earned increase in premium payable to IADA Shoghi and outstanding premium if any to Industries Department before execution of supplementary lease deed.

IV. The supplementary lease deed would be executed with M/s Anand Auto Care Pvt. Ltd. after receipt of formal approval for the transfer of lease hold rights of plot No.4 from M/s Techno Impex Electronic to M/s Anand Auto Care Pvt. Ltd. and submission of No due Certificate from SBI, present and past liabilities of M/s Techno Impex Electronic and M/s Swaran Flour Mill in respect of all Govt.

departments/undertakings like Department of Excise and taxation, HPSEB Ltd., Industrial Area Development Agency (IADA), Shoghi etc.

V. Possession of the qua property would be handed over by SBI to M/s Anand Auto Care Pvt. Ltd. after execution of supplementary lease deed with M/s Anand Auto Care Pvt. Ltd.

…………………." (Emphasis supplied)

5. Thus, an arrangement was worked out between the lessor and the Bank, whereby petitioner was required to pay a sum of Rs.59,74,033/- and also liquidate liabilities of (a) Himachal Pradesh State Electricity Board (HPSEB), (b) Department of Excise and Taxation, Himachal Pradesh, (c) Department of Industries, Himachal Pradesh.

6. It is not in dispute that the amount payable to the bank was deposited, pursuant to orders passed by this Court on 21.6.2017.

7. It is not in dispute that insofar as all liabilities are concerned, they stand liquidated and the amounts deposited by the writ petitioner. In fact, pursuant thereto, Bank issued a No Objection Certificate for transfer of leasehold rights in favour of the writ petitioner and the lessor also granted permission, in terms of communication dated 1.5.2017 (Annexure P-8), which reads as under:

"………

This is with reference to the Assistant General Manager, S.B.I letter No.SARB/2017-18/07 dated 06/04/201, letter dated 5/4/2017 of M/s Anand Auto Care Pvt. Ltd., joint undertaking dated 28/3/2017 given by Sh. Surinder Seth and Sh. Rupinder Ahuja both partner of M/s Techno Impex Electronics, on the subject referred to above.

In this regard it is submitted that the Director of Industries vide letter No.Ind. Dev. F(13) Plots/SML-754/91-X, dated 29/4/2017 has accorded approval for the transfer of lease hold rights of Plots No.4, I.A., Shoghi from M/s Techno Impex Electronics to M/s Anand Autocare Pvt. Ltd subject to fulfillment condition contain in this letter dated 29/4/2017 (copy enclosed).

M/s Techno Impex Electronic and M/s Anand Autocare Pvt. Ltd are requested submit the following within the 15 days of issuance of this letter positively:-

1. Bank draft of Rs.8,94,001/- (Eight lacs ninety four thousand and one only) in favour of Chairman, IADA, Shoghi towards unearned increase in premium as per the provision made under rule 6.13(a)(iii) of Incentives Rules-2004 as amended upto 12/3/2015 {Rs.2,10,776 as unearned increase already deposited by Sh. Rupender Ahuja stand adjusted against the applicable unearned incease as per the provision made under rule 6.13(a)(iii) of Incentives Rules-2004, which works out as Rs.11,04,745/-}.

2. Maintenance charges of Rs.30164/- and water charges of Rs.20881/- (Total Rs.51,045/-) in the shape of bank draft in the name of Chairman, IADA, Shoghi.

3. No dues certificate from SBI against the loan raised by M/s Techno Impex Electronics power by M/s Swaran Flour Mills.

4. No dues certificate from the Department of Excise and Taxation regarding VAT and CST if any in respect of M/s Techno Impex Electronics or M/s Swaran Flour Mills.

5. No dues certificate from HPSEB, ltd, in respect of liabilities if any of M/s Techno Impex Electronics or M/s Swaran Flour Mills.

After the receipt of aforesaid dues and certificates the supplementary lease deed would be executed for the remaining period of lease deed. The SBI will handover physical possession of the plot of M/s Swaran Flour Mills.

M/s Anand Autocare Pvt. Ltd will utilize this plot for setting up of Automobile Showroom/Service Station and will start the unit within a period of one year failing which the proceedings will be initiated for the cancellation and resumption of plot as per the provisions of lease deed/supplementary lease deed to be executed with M/s Anand Autocare Pvt. Ltd.

…………………"

8. However, despite the petitioner having fulfilled all the conditions, so stipulated (reproduced supra), and there being no objection on the part of the Bank, the lessor did not take steps for executing formal Lease Deed and handover possession of the plot in question, forcing the writ petitioner to file the instant petition.

9. While justifying the action for not executing the Lease Deed, Mr. Anoop Rattan, learned Additional Advocate General, invites our attention to communication dated 29.4.2017, that of Director of Industries, copy whereof is taken on record. Relevant portion thereof is extracted as under:

"That the present lessee of plot or the Industrial Enterprise in whose favour the permission for transfer of lease hold rights of plot No.4 is being accorded, will pay to the lessor i.e. Department of Industries, the differential cost as per the provisions made under Rule 6.13(a)(iii) of Rules Regarding Grant of Incentives Concessions and Facilities to Industrial units in H.P.-2004 as amended upto 12/03/2015 and other outstanding dues, including 58.00 lacs as Bank loan, past and present liabilities of Govt. Departments like Excise and Taxation Department, HPSEB and IADA Shoghi due for payment before the execution of supplementary lease deed of plot." (Emphasis supplied)

10. Taking clue from the words "Govt. Departments like Excise and Taxation Department, HPSEB and IADA Shoghi", it is contended that dues and liabilities that of the 'Department of Food, Civil Supplies & Consumer Affairs' are also to be read into the words "liabilities of Govt. Departments", so referred to in communication dated 29.4.2017.

11. Language of the letter is unambiguously clear. It specifies Departments and that being Excise and Taxation Department, HPSEB and IADA, but word "like" cannot be read to include any other liability, more so which is not statutory in nature. Liability that of the Department of Food, Civil Supplies & Consumer Affairs is contractual and not statutory. It is totally unrelatable to the leasehold rights.

12. There is yet another reason for us to reject the contention of the State. Communication dated 29.4.2017, is that of the Director of Industries, and not of the Department of Food, Civil Supplies & Consumer Affairs. Not only that, we find that subsequent to the said communication dated 29.4.2017, the General Manager, District Industries Centre, Shimla, while referring to said communication, itself clarified to all, including the writ petitioner, Bank as also the lessee, that permission for transfer of leasehold rights stands accorded, subject to the petitioner or the lessee depositing the dues that of IADA, Bank, the Excise and Taxation Department, that too relating to VAT/CST and HPSEB.

13. It is a matter of record that even pursuant to the negotiations, which the writ petitioner had had with the Department of Industries, Director of Food, Civil Supplies & Consumer Affairs, did not raise any objection. In fact, such objection came to be raised, for the first time, only during the pendency of the present petition. As such, we do not find action of respondents No.1 and 2, in withholding execution of the Lease Deed and handing over possession of the plot in question, in favour of writ petitioner, more so, in terms of Annexure P-8, to be tenable.

14. Hence, we direct respondents No.1 and 2 to forthwith handover possession of the plot and execute the Lease Deed in favour of the writ petitioner. Mr. G.C. Gupta, learned Senior Advocate, states that all steps for execution of the Lease Deed shall be taken by the petitioner within a period of one week.

15. However, the matter cannot be allowed to rest here. There is yet another issue, which we find, in public interest, needs to be resolved and that being the outstanding dues payable by the lessee, i.e. M/s Techno Impex Electronic/Swaran Flour Mills (respondent No.4) to the Department of Food, Civil Supplies & Consumer Affairs. In this regard, we find from affidavit dated 19.8.2017, that of the Director, Department of Food, Civil Supplies & Consumer Affairs, who was impleaded as a party during the course of the proceedings, that on account of certain contractual obligations, i.e. supply of wheat for processing, more than Rs.1,82,09,991/- was due and payable by the lessee, in relation to which, Office Order dated 1.7.2013, was passed. Assailing the same, lessee filed a statutory appeal, which was dismissed on 7.4.2014. As on 22.7.2015, a sum of Rs.2,36,72,923/- was recoverable from M/s Swaran Flour Mills, another proprietorship firm of Shri Rupinder Ahuja, Proprietor of M/s Techno Impex Electronic (respondent No.4).

16. To a specific query, as to how this amount would be cleared, Shri Rupinder Ahuja has filed two affidavits dated 30.8.2017 and 31.8.2017, stating that subject to his exhausting all remedies for adjudication of liability, civil in nature, he would pay the amount, eventually adjudicated by the authorities, within a period of four months from the date of such final adjudication. It stands clarified that there is a statutory provision for assailing the order passed by the Appellate Authority, which he (proprietorship concern) undertakes to take recourse, positively within a period of four weeks from today. Mr. Anoop Rattan, learned Additional Advocate General, states that any such proceedings initiated by the lessee, shall be considered and decided, on merits, without insisting on the issue of limitation. We clarify that thereafter the only remedy available with the lessee would be to approach the constitutional Court, under Article 226/227 of the Constitution of India and not by way of Civil Suit.

17. Undertaking of Shri Rupinder Ahuja, to the effect that with final adjudication of his liability, civil in nature, he shall deposit the entire amount, which may be adjudicated to be due and admissible, within a period of four months thereafter, is accepted and taken on record. He has been explained the consequences of breach of undertaking, including initiation of proceedings of contempt.

18. Insofar as proceedings, criminal in nature, so initiated against Shri Rupinder Ahuja (his concern), we commend to the State to reconsider withdrawing the same, in view of the undertaking so furnished. The fact that the FIR came to be registered during the pendency of the present writ petition, we are hopeful that the State shall take a favourable view. For these proceedings, liberty also reserved to the lessee to take recourse to such remedies as may be available to him, if so required and advised.

Petition stands disposed of in the aforesaid terms, so also pending application(s), if any.

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