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***And***

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INDIAN LAW REPORTS

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**Code of Civil Procedure, 1908-** Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court.

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**Code of Civil Procedure, 1908-** Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court.

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**Code of Civil Procedure, 1908-** Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court.

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**Code of Criminal Procedure, 1973-** Section 438- An FIR was registered against the petitioner for the commission of offence punishable under Section 306 read with Section 34 IPC - prima facie, the name of the applicant was mentioned in the suicide note of the deceased- custodial interrogation of the applicant is necessary keeping in view the gravity- grant of bail would affect the investigation adversely, therefore, application rejected.

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Sections 420 and 120-B IPC read with Section 34 IPC- applicant claimed that matter was settled between the parties- complainant had received amount of Rs. 1,35,000/- on 15.5.2014 and had compromised the matter - accordingly, a prayer was made for quashing the FIR- held, that the offence punishable under Section 120-B IPC is non-compoundable offence- power to quash the FIR should be exercised sparingly and not to stifle the prosecution- offence of criminal conspiracy is against the society and to maintain public peace and tranquility, offence punishable under Section 120-B IPC cannot be allowed to be compounded even if the parties have compromised the same- petition rejected.

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**Constitution of India, 1950-** Article 226- Petitioner was appointed as a clerk on contract basis- she claimed regularization before Administrative Tribunal- Tribunal directed the board to regularize the services of the petitioner as a clerk from the date of completion of 10 years of continuous services and to grant all the consequential benefits- Board regularized her services but did not take into consideration the services rendered by her on contract basis- held, that as per Central Civil Services (Pension) Rules, 1972, if a person engaged by Government on a contract basis for a specific period is appointed to the same or another post without interruption in duty , he may opt to retain the Government contribution or to refund the monetary benefit- Board should behave as model employer and cannot be permitted to exploit the situation by not regularizing the services rendered on contract basis.

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**Constitution of India, 1950-** Article 226- Petitioner was appointed as Constable in S.S.B. in the category of combatized cadre on 20.08.1974- he completed 24 years of regular service in the year 1998 - respondent issued an office memorandum introducing Assured Career Progression Scheme- petitioner was promoted as head constable - petitioner made a

representation which was rejected on the ground that he was not entitled to grant of 2nd financial up-gradation benefits without fulfilling the normal promotion norm of qualifying mandatory pre-promotional course - held, that petitioner was entitled to the benefit of ACP scheme after the completion of 24 years as per Para-15 of the scheme and it was for the respondent to ensure that petitioner undergoes mandatory pre-promotional course- it was not asserted that petitioner had refused to undergo the course - the action of the respondents of not releasing the monetary benefits to the petitioners as per Assured Career Progression Scheme, 1999 is arbitrary and violative of Articles 14 and 16 of the Constitution of India.

Title: Govind Ram Vs. Union of India Page-447

**Constitution of India, 1950-** Article 226- Petitioner was appointed as Medical Officer and he joined his duty on 4.6.1993- subsequently, an advertisement was issued on 31.10.1996 for the post of ex-serviceman scheduled caste- petitioner made a representation for considering him against the said post- his representation was rejected on the ground that rules do not provide for benefit of fixation of pay and seniority when Officer is not recruited against the reserved vacancy of ex-serviceman- held, that instructions of the Government providing that if any ex-serviceman belonging to scheduled caste or scheduled tribe is selected for appointment, his selection can be counted against the overall quota of reservation for scheduled caste or scheduled tribe and that he cannot claim any benefit of being an ex-serviceman shall be applicable when the vacancy is available on the date of recruitment of the candidate but will not apply when no vacancy was available and the petitioner had specifically indicated his preference for being considered against the post of ex-serviceman.

Title: Jai Ram Kaundal Vs. State of H.P. and another Page-450

**Constitution of India, 1950-** Article 226- Petitioner was compulsorily retired – he filed an application before Administrative Tribunal which was transferred to Hon'ble High Court and was allowed- petitioner was permitted to make a representation against the findings of the Inquiry Officer- petitioner made a representation, which was rejected – petitioner claimed that order passed by the Disciplinary Authority rejecting the representation was incorrect- held, that the petitioner was given an opportunity to appear as defence evidence but he had failed to do so- petitioner had signed the statements of the witnesses which means that he was present during the time of recording the statements - he had failed to join the duty despite issuance of notice- employer had legal right to transfer the petitioner- as the petitioner had not joined the place of posting after transfer- therefore, he was rightly held guilty.

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**Constitution of India, 1950-** Article 226- Petitioners were appointed as Junior Engineers in general open category - they belonged to ex-servicemen category and their case was not being considered in the category of ex-serviceman- respondent contended that the case of the petitioners could not be considered against the vacancy of ex-serviceman in view of direction of Hon'ble High Court in ***V.K. Behal vs. State of H.P & ors.*** reported in ***Latest HLJ 2009 (HP) 402*** - Rule 5(1) of the Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non- Technical Services) Rules, 1972 has two parts- first pertains to counting of services for fixation of the pay and second pertains to counting of service for the purpose of seniority- held, that in V.K. Behal case, Court had only considered the case for the seniority and not for fixation of the pay- therefore, respondents were not in position to say that petitioners are not entitled for the benefit of the military service for fixation of the pay.

Title: Avtar Singh Dyal Vs. H.P. State Electricity Board Ltd. Page-535

**Constitution of India, 1950-** Article 226- Petitioners were denied the appointment as JBT on the ground that they had not secured the qualifying marks for appointment- held, that the respondent will consider the case of the petitioner in accordance with law and in case decision goes against them, they will be at liberty to approach the Court again and in case decision is in their favour they would be entitled to seniority from the date of their appointment.

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**Constitution of India, 1950-** Article 226- Respondents admitted that the petitioner was wrongly denied the appointment and the appointment would be offered shortly - in view of this statement, respondents No.1 and 3 directed to offer appointment for petitioner within period of four weeks and to grant seniority from the date of wrongful denial of the appointment.

Title: Vijay Amrit Raj Vs. State of H.P. and others. Page-504

**Constitution of India, 1950-** Article 226- The act of drawing of the election program and the act of dividing the area of operation into zones cannot be termed to be an administrative act- they would be termed as quasi judicial function which are to be performed after hearing parties or making an inquiry- such decision would affect the rights and obligations of the parties.

Title: The Baghal Land Loosers Transport Co-operative Societies Ltd. and others Vs. State of H.P. and others Page-576

**'H'**

**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Copy of jamabandi for the year 1984-85 shows B to be the owner to the extent of 1/3rd share, and in possession as tenant of 2/3rd share- one L is shown

to be the owner of remaining 2/3rd share- held, that entries are not based upon the order of any competent authority, therefore, it is void ab-initio- a person cannot acquire the status of ownership as well as status of tenancy simultaneously.

Title: Bakshi Ram son of Achharu Vs. Mandro Devi widow of Karam Chand Page-568

**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Section 2(10)- Defendant claimed to be a tenant who had become the owner under the provision of H.P. Tenancy and Land Reforms Act- Jamabandi for the year 1987-88 showed the defendant to be a Gair Maurusi Tehat Murtan (tenant under the mortgagee) - held, that tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act.

Title: Hans Raj (died) through LRs. Vs. Bilwamangal and others Page-508

**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Section 2(10)- Defendant claimed to be a tenant who had become the owner under the provision of H.P. Tenancy and Land Reforms Act- Jamabandi for the year 1987-88 showed the defendant to be a Gair Maurusi Tehat Murtan (tenant under the mortgagee) - held, that a tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act.

Title: Partap Chand Vs. Bilwamangal and others Page- 521

**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Section 2(10) - Defendant claimed that tenant of mortgagee was a tenant for all intents and purpose- jamabandi for the year 1987-88 showed the defendant to be a tenant Gair Maurusi Tehat Murtan- held, that tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act.

Title: Pritam Chand (died) through LRs. Vs. Bilwamangal Page-528

**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Section 2(10) - Defendant claimed that tenant of mortgagee was a tenant for all intents and purpose- jamabandi for the year 1987-88 showed the defendant to be a tenant Gair Maurusi Tehat Murtan- held, that tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act.

Title: Madho (died) through LRs. Vs. Bilwamangal Page-515

**Hindu Marriage Act, 1956-** Section13(1)(i)- Husband claimed divorce on the ground of cruelty and desertion – evidence showed that wife was forced to leave her matrimonial home after she gave birth to a female child - no person visited her in the Hospital at the time of delivery- no maintenance was paid to the child and wife-she had to file a petition for

maintenance and the husband, instead of paying maintenance, filed a revision petition- held, that husband had created such an atmosphere that wife could not be expected to live in the matrimonial home- behaviour of the husband towards his wife was cruel and he could not be permitted to take an advantage of his own wrong.

Title: Kulbhushan Sharma Vs. Neeraj Sharma Page-402

**'I'**

**Indian Penal Code, 1860-** Section 34- Common intention means a pre oriented plan – it must exist prior to the commission of the act- no evidence was led to prove that the accused shared common intention hence accused could not be convicted with the aid of Section 34.

Title: Prem Chand Vs. State of H.P. Page-483

**Indian Penal Code, 1860-** Section 302- As per prosecution version, accused had given beating mercilessly to deceased and thereafter, he tried to commit suicide by touching electric wires of transformer - he received severe injuries- he was taken to hospital where he died- PW-1, PW-2 and PW-8 resiled from their testimonies recorded by the police and categorically denied that they had seen the accused giving beating to the deceased- PW-6 had strained relation with the accused which makes it difficult to rely upon his version that deceased had visited his home- medical officer had not found any burn injury on his hand- PW-5 also admitted that it was not possible to touch the wires without using the staircase- held, that the testimonies of eye-witnesses do not prove the prosecution version- no witness from the vicinity had heard any cries- hence, in these circumstances, accused is acquitted.

Title: Bhim Singh Vs. State of H.P. Page-468

**Indian Penal Code, 1860-** Sections 302 and 324 read with Section 34- PW-1 specifically stated that accused was in possession of dagger and had inflicted a dagger blow on the back side of the deceased- when PW-1 tried to rescue the deceased, accused inflicted a dagger blow on his abdomen- his testimony was corroborated by other prosecution witnesses- medical evidence also showed that the deceased had died due to rupture of the descending thoracic aorta- medical evidence also proved incised wound on the abdomen of PW-1- dagger was recovered at the instance of accused- held, that in these circumstances, prosecution version was duly proved.

Title: Prem Chand Vs. State of H.P. Page-483

**Indian Penal Code, 1860-** Section 376- As per prosecution case, accused asked the prosecutrix for Pattals on which she replied that she had only 200 pattals and more pattals would be supplied by her Jethani- accused asked the prosecutrix to accompany him- prosecutrix was raped on the way- prosecutrix admitted that accused knew house of her Jethani- no hue and cry was raised by her- there were contradictions in the testimony of the prosecutrix – no injuries were found on her person-

**Motor Vehicle Act, 1988,** Section 149- It is for the insurer to plead and prove that the deceased was travelling in the vehicle as a gratuitous passenger and the owner has committed willful default but when no evidence was led by the insurer to prove this fact, Insurance Company cannot be absolved of its liability to pay the compensation.

Title: Oriental Insurance Company Ltd. Vs. Indira Devi and others Page-586

**Motor Vehicle Act, 1988-** Section 149- Offending vehicle is Tata Bolero- the gross vehicle weight is 2750 kg - it falls within the definition of light motor vehicle- driver possessed a license to drive light motor vehicle- held, that there was no requirement of having endorsement of PSV and the Tribunal had wrongly granted the right to recovery to the Insurance Company.

Title: Raj Kumar & another Vs. Sukh Dev & others Page-593

**Motor Vehicle Act, 1988-** Section 166- Claimant had filed a petition before Workmen Compensation Commissioner which was dismissed on the ground that deceased was not a workman- held, that the claimants are not debarred from filing the claim petition on the ground that deceased was travelling in the vehicle as owner of the goods.

Title: Oriental Insurance Company Ltd. Vs. Indira Devi and others Page-586

**Motor Vehicle Act, 1988-** Section 166- Deceased was bachelor and a government employee drawing gross salary of Rs. 7604/- - claimants were three in number, therefore, 1/3rd of the amount was to be deducted towards the personal expenses -applying multiplier of 13, claimants are entitled to the sum of Rs.7,80,000/- as loss of earning Rs. 2,000/- under the head 'funeral expenses' and Rs. 2,500/- under the head 'loss of estate'.

Title: The New India Assurance Company Vs. Smt. Ato Devi & others Page-457

**Motor Vehicle Act, 1988-** Sections 149 and 157- Unless and until the transfer is effected in the registration certificate and the other documents, registration certificate continues to be in the name of the owner and the transferee in whose name the vehicle has been transferred cannot be said to be the registered owner.

Title: Vipan Kumar Vs. Naushad Ahmed and another Page-607

**'N'**

**N.D.P.S. Act, 1985-** PW-1 deposed that the bag was sealed with seal impression 'C'- PW-2 deposed that bag was sealed with seal impression 'T' – PW-5 stated that parcel sealed with seal 'E' was handed over to him- NCB forms showed the seal impression 'C'- held, that in view of NCB

form, testimony of PW-2 that seal impression was T and that of PW-5 that seal impression was 'E' were of no consequences.

Title: Hem Raj vs. State of H.P. Page-396

**N.D.P.S. Act, 1985-** Section 20- Accused was found in possession of 5.600 kg of charas-PW-1 deposed that he was asked to call independent witness but could not find any independent witness- PW-2 also deposed that he had sent PW-1 to search for independent witness but PW-1 could not find any independent witness- held, that in these circumstances, prosecution version cannot be doubted due to non-association of independent witnesses.

Title: Sushil Kumar alias Shilu Vs. State of Himachal Pradesh Page-413

**N.D.P.S. Act, 1985-** Section 20- Accused was found in possession of 11 kgs 730 gms of charas- police officials specifically deposed that accused was found at a secluded place, where no witness was available and there was no habitation nearby- testimonies of the police officials were reliable and could not be doubted simply because of non-association of independent witnesses.

Title: Hem Raj Vs. State of H.P. Page-396

**N.D.P.S. Act, 1885-** Section 20- As per prosecution case, accused was found in possession of 4.85 kg. of charas- police officials carrying out the search were posted at different places- according to them, they had stayed in hotel- however, prosecution had not placed on record the registers of hotel located at Sunder Nagar or Karsog, which shows that prosecution version regarding this fact could not be relied upon- further, police officials had arrived in the private vehicle of Head Constable 'L' – in the absence of hotel record the whole version that police had stayed in the hotel and had arrived in the vehicle became doubtful which makes the genesis of the incident suspicious.

Title: Karam Singh Vs. State of H.P. Page-541

**N.D.P. S. Act, 1885-** Section 55- Column No. 1 to 8 of NCB Form were filled up by I.O. – column No. 9 to 12 were filled up by ASI Mohan Lal- however, he was not posted as SHO- therefore, he was not competent to sign the column No. 9 to 12- no Roznamcha was produced to prove that he was discharging duty of SHO or that SHO was absent from the police Station, which leads to an inference that the case property was not brought to the police station and the exercise was completed at a place other than Police Station.

Title: Karam Singh Vs. State of H.P. Page-541

**'S'**

**Specific Relief Act, 1963-** Section 12- Defendant had entered into an agreement to sell the land with the plaintiff in which he had undertaken

to get the consent of his brother for selling his share- held, that share of the defendant was severable and identifiable- therefore, plaintiff is entitled for the execution of the sale deed regarding the share of the defendant. (Para- 13 to 25)

Title: Hari Krishan Karol Vs. Surinder Kumar Page-417

**Specific Relief Act, 1963-** Section 20- plaintiff filed a civil suit seeking specific performance of the agreement- defendant admitted the execution of the agreement and the receipt of the claim- he claimed that he had written letters to the plaintiff to get the sale deed executed but the plaintiff had failed to get the sale deed executed- however, letters were not placed on record- held, that plea of the defendant cannot be accepted.

Title: Hari Krishan Karol Vs. Surinder Kumar Page-417

**Specific Relief Act,1963-** Section 38- Plaintiff claimed to be a co-owner in possession of the suit land to the extent of 1/4th share- he further claimed that revenue entries were wrongly changed and the plaintiff was being dispossessed on the basis of wrong entries- defendants claimed that they were in possession since the time of their ancestors as tenants in the Will without the payment of any rent- they further set up an exchange or arrangement between the predecessor-in-interest of the parties – jamabandi for the year 1953-54 recorded the joint ownership of the parties- subsequent jamabandi shows the suit land to be in possession of G and K and the defendant to be in exclusive possession under them – held, that there was no valid order for change of revenue entries- hence, subsequent entries would have no legal effect.

Title: Banka Ram Vs. Des Raj & others Page-462

**Specific Relief Act, 1963-** Section 38- Plaintiff claimed to be a tenant – she further alleged that the defendant had broken the lock and had removed the articles- defendant was threatening to dispossess the plaintiff forcibly from the premises- hence, injunction was sought- defendant asserted that plaintiff had vacated the shop after six months of the death of her husband and a false suit was filed – held, that evidence of the defendant did not prove the date, month and year when the possession was handed over by the plaintiff to the land owner- even, the name of the land owner to whom the possession was handed over was not mentioned- name of the husband of the plaintiff was recorded in the jamabandi- no efforts were made by the defendant to seek the deletion of his name- therefore, in these circumstances, the version of the defendant that the plaintiff had handed over the possession to the land owner was not acceptable and the version of the plaintiff that she was forcibly dispossessed was to be accepted on the balance of probability.

Title: Suresh Kumar Vs. Sarla Vaidya Page-499

**'W'**

**Wealth Tax Act-** Section 17- Assessee contended that his land was agricultural land and did not fall within the definition of the urban land - there are trees standing on the land and it was not possible to raise any construction without seeking permission from the Competent Authority- held, that as per the definition of the urban land any land classified as agricultural land or the land in which the construction of the building is not possible would not fall within the definition of the urban land- as the land of the assessee is agricultural land and no construction is possible without the permission of Municipal Corporation, it is not liable for the assessment.

Title: Amin Chand Mehta Vs. Commissioner of Wealth Tax Page-442

**Wealth Tax Act-** Section 17- Assessee contended that his land was agricultural land and does not fall within the definition of the urban land - there are trees standing on the land and it was not possible to raise any construction without seeking permission from the Competent Authority- held, that as per the definition of the urban land any land classified as agricultural land or the land in which the construction of the building is not possible would not fall within the definition of the urban land- as the land of the assessee is agricultural land and no construction is possible without the permission of Municipal Corporation, it is not liable for the assessment.

Title: Amin Chand Mehta Vs. Commissioner of Wealth Tax Page-445

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Reserved on 18.9.2014
Decided on 19.9.2014

**Indian Penal Code, 1860-** Section 376- As per prosecution case, accused asked the prosecutrix for Pattals on which she replied that she had only 200 pattals and more pattals would be supplied by her Jethani- accused asked the prosecutrix to accompany him- prosecutrix was raped on the way- prosecutrix admitted that accused knew house of her Jethani- no hue and cry was raised by her- there were contradictions in the testimony of the prosecutrix – no injuries were found on her person- held, that in these circumstances, version of the prosecutrix was not reliable . (Para-16 to 18)

For the appellant : Mr. Ashok Chaudhary, Addl. AG.
For the respondent : Mr. J.R. Poswal, Advocate.

The following judgment of the Court was delivered:

**Rajiv Sharma, Judge**

This appeal is instituted against judgment rendered by learned Sessions Judge, Bilaspur, Himachal Pradesh in Sessions Trial No. 5 of 2004 dated 17.1.2008, whereby respondent-accused (herein after referred to as 'accused' for brevity sake), who was charged and tried for offence under section 376 of the Indian Penal Code, has been acquitted.

2. Case of the Prosecution in a nutshell is that on 20.4.2003 at about 4.30 pm, husband of the prosecutrix had gone to attend a marriage. She was alone with her children. At 10.00 pm, one Shri Rajinder Kumar, resident of Tikkari and accused, who is a Peon in the Veterinary Hospital in Panjgain, came to her house and they told her that they required *Pattals*. She told them that she had only 200 *Pattals* available with her and in case they required more *Pattals*, same could be taken from her *Jethani* Sukh Dei. They asked her to show the house of her *Jethani* Sukh Dei. She agreed. They went towards the house of Sukh Dei. Rajinder Kumar left by saying that he had to go to his house. Thereafter, prosecutrix and accused started moving towards the house of Sukh Dei. They had hardly covered some distance when accused caught her hand. She ran towards jungle. Accused followed her and caught her. Her shirt was torn. He threw her on the ground. She kept crying. Accused opened her *Salwar* and had intercourse with her against her consent/will and thereafter, accused ran away. She went to the house of Kamla Devi and told her about the incident. She also rang up her father, Sukh Ram and told about the incident. Shri Ranjit Singh, Pradhan of the Gram Panchayat was also told about the same. Thereafter, she went to her house and her father also came there. She had suffered bruises on her back and leg. She was also medically examined. Slide was also prepared at that time. Statements of witnesses were recorded. Accused was also subjected to medical examination. Police completed the investigation and thereafter put up challan after completing all the codal formalities. Accused was tried and acquitted by the trial Court i.e. Sessions Judge, Bilaspur, hence, this appeal.

3. Mr. Ashok Chaudhary, Additional Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

4. Mr. J.R. Poswal, Advocate has supported judgment dated 17.1.2008.

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

6. PW-1 Ranjit Singh deposed that he was at his house when he received a telephonic message from prosecutrix, after 9.00 pm. She informed that accused had come to her house and mis-behaved with her.

7. PW-2 and PW-3, are formal witnesses.

8. PW-4 is the prosecutrix. She deposed that about three years ago, on 20.4.2003, at about 10.00 PM, she was sitting with her children at her house. Accused came to her house alongwith one Rajinder Kumar. They asked her for *Pattals*. Rajinder demanded ten thousand *Pattals*. She showed her inability to supply that much quantity. She had only 200 *Pattals* with her. She advised them to have *Pattals* from Sukh Dei, her *Jethani*. Accused requested her to accompany them to the house of Sukh Dei. She showed her inability. However, they repeatedly requested her that she should accompany them to the house of Sukh Dei. They had come to her house on the scooter of Rajinder Kumar. She accompanied them on scooter but on the way, Rajinder alighted from the scooter by telling that he had work at the house of his maternal uncle. She went on scooter with accused. They covered some distance. After that accused stopped the scooter. He caught hold of her from arm and her shirt was torn. Accused forcibly took her to Khadyater, opened her *Salwar* and committed rape upon her. She was crying but her mouth was gagged by him. She rescued from the clutches of the accused and put on her *Salwar* and came back to her house. From there, she straightway came to the house of Kamla Devi. She also informed her *Jethani* and made a telephonic call to the Pradhan i.e. Ranjit Singh She has admitted in her cross-examination that road was adjacent to her house leading to Solag, which is a Pucca road. Her house is situated 40 feet below the road. House of her *Jethani* Kamla Devi is situated adjacent to her house and house of Sukh Dei is about 300 feet by road. Towards upper side of the house of Sukh Dei, there is jungle and house of her *Jethani*, Sukh Dei is also below the road about 50 feet away. House of Gorkhu Ram is situated adjoining to the house of Sukh Dei. She was made to sit on the scooter in front of her house. Rajinder hails from her parental village. He knew the house of Sukh Dei. Rajinder alighted from scooter after 20 feet when all the three of them boarded the scooter. Thereafter, accused took scooter 150 feet from the place where Rajinder alighted. Rajinder alighted near the culvert. Accused stopped the scooter near the house of Sukh Dei. She raised hue and cry. Khadyater is situated on upper side of the road. A path is also leading towards Khadyater. Accused dragged her 150 feet towards Khadyater. Her mouth was gagged throughout. She tried to rescue herself. She pushed accused however, her hands could not reach the face of the accused as such no scratches were caused on the face of the accused. She has not narrated this incident to Rajinder. She has narrated the incident on the same day to the maternal uncle of Rajinder. She has also admitted that her mother-in-law and sister-in-law were also present at her house.

9. PW-5 Sukh Ram deposed that prosecutrix was his daughter. She was married to Chhota Ram. He received a telephonic message from the prosecutrix that two persons, accused and Rajinder Kumar came to her house for taking *Pattals* and when she was going to the house of her *Jethani*, on the way accused committed sexual intercourse with her.

10. PW-6 Mamta Kumari, is the daughter of the prosecutrix. She deposed that on 20.4.2003, at about 10.00 at night, Rajinder and accused came

in the courtyard of her house. They were watching television. Her father had gone to attend a marriage. Mother was present in the house. Rajinder and accused asked the mother for *Pattals*. She told them she had only 200 *Pattals*. She told them that Sukh Dei could supply required quantity of *Pattals*. These persons insisted the prosecutrix to accompany them to the house of Sukh Dei. On the persuasion of Rajinder, mother accompanied them to the house of Sukh Dei. House of Sukh Dei was at 200 yards from their house. When accused visited her house, her younger brother, grandmother and Bua (paternal aunt) were present. Mother came back after half an hour.

11. PW-7 Dr. B. Bhangal has issued MLC Ext. PW7/A. According to the opinion of PW-7, possibility of rape could not be ruled out.

12. PW-8 Ishwar Dass deposed that on 21.4.2003, FIR Ext. PW4/B was lodged by the prosecutrix. Accused was arrested. He moved an application Ext. PW8/B to obtain the MLC. He also prepared site plan vide Ext. PW8/C.

13. PW-9 is a formal witness.

14. PW-10 examined the accused. He issued MLC Ext.PW10/A.

15. PW-11 Rajinder Kumar is a formal witness.

16. According to PW-4 (prosecutrix), accused had come to her house alongwith Rajinder Kumar. Rajinder asked for *Pattals*. She had told them that she had only 200 *Pattals* and more *Pattals* could be supplied by her *Jethani*, Sukh Dei. They insisted her to accompany them to the house of Sukh Dei. She boarded the scooter driven by Rajinder and went towards the house of Sukh Dei. On the way, Rajinder alighted from the scooter. Thereafter, she was driven on scooter by accused for some distance. Thereafter, she was raped. It is apparent that prosecutrix has accompanied accused voluntarily. According to the prosecutrix, Rajinder knew the house of Sukh Dei. If Rajinder knew the House of Sukh Dei, she was not supposed to go with him. House of Kamla Devi was situated near her house. House of Sukh Dei was only 300 feet by road. She could raise hue and cry. Her version that she was dragged to a distance of 150 feet and her mouth was gagged, can not be believed. She was an adult lady and could easily resist the advances of the accused. According to the FIR, after the incident, she went to the house of Kamla Devi, her *Jethani* and narrated the incident to her. However, while appearing as PW-4, she has categorically deposed that she put on her *Salwar* and came to her house. From there she went to the house of Kamla Devi. In the FIR, it is stated that she escaped from the accused and went towards jungle. She was raped in the jungle. However, when she appeared as PW-4, she deposed that accused dragged her to a distance of 150 feet and then committed rape in Khadyater.

17. According to Ext. PW8/C, site plan, house of Gorkhu Ram and Sukh Dei are situated near the place of alleged occurrence. House of Mahender Singh was also at a distance of 100 metres from the place of alleged occurrence. If she had raised hue and cry, persons residing in the houses of Gorkhu Ram, Sukh Dei and Mahender Singh could hear the same.

18. DW-1 Prem Lal has proved relevant extract of register Ex. DW-1/A and DW-1/B. It is clear from these documents that the prosecutrix has visited the dispensary a number of times. Thus, it can not be believed that accused was stranger to her. She was known to the accused. There were no gag injuries on the mouth and lips of the prosecutrix as per cross-examination of PW-7, Dr. B. Bhangal. She has also admitted that if prosecutrix had been gagged, injuries like abrasions etc. were bound to be present on her lips and mouth. Statement of PW-4 does not inspire confidence. She has made various improvements in her statement. Prosecution has not proved the case beyond the reasonable doubt.

19. Learned trial Court has correctly appreciated the entire evidence and there is no occasion for this Court to interfere with the well reasoned judgment of trial Court.

20. Consequently, there is no merit in the appeal and the same is dismissed. Pending applications, if any, are also disposed of. The bail bonds are discharged.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.**

Hem Raj .....Appellant.
Vs.
State of H.P. .....Respondent.

Cr. Appeal No. 212 of 2011.
Reserved on: October 29, 2014.
Decided on: October 30, 2014.

**N.D.P.S. Act, 1985-** Section 20- Accused was found in possession of 11 kgs 730 gms of charas- police officials specifically deposed that accused was found at a secluded place, where no witness was available and there was no habitation nearby- testimonies of the police officials were reliable and could not be doubted simply because of non-association of independent witnesses. (Para-17)

**N.D.P.S. Act, 1985-** PW-1 deposed that the bag was sealed with seal impression 'C'- PW-2 deposed that bag was sealed with seal impression 'T' – PW-5 stated that parcel sealed with seal 'E' was handed over to him- NCB forms showed the seal impression 'C'- held, that in view of NCB form, testimony of PW-2 that seal impression was T and that of PW-5 that seal impression was 'E' were of no consequences. (Para-19)

For the appellant: Mr. Ravi Tanta, Advocate, vice Mr. Ajay Kochhar, Advocate.
For the respondent: Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

**Justice Rajiv Sharma, J.**

This appeal is instituted against the judgment dated 21.5.2011, rendered by the learned Special Judge (II), Kinnaur at Rampur, H.P., in RBT No. 16-AR/3 of 2009/2010, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, was convicted and sentenced to undergo rigorous imprisonment for ten years and a fine of Rs. One lac and in default of payment of fine, he was further ordered to undergo simple imprisonment for two years.

2. The case of the prosecution, in a nut shell, is that on 16.6.2009 at about 5:30 AM, the police party headed by Dy.S.P. (Probationer) Pankaj Sharma (PW-6), was present at *Tuman More* on *Shawad-Ani Road*. They found accused Hem Raj coming from *Shawad* side carrying a rucksack on his back. He was stopped by the police party on suspicion. The place was secluded. Thus, no independent witnesses were available. The accused opted to be searched by the police. Sh. Pankaj Sharma (PW-6) and other witnesses subjected themselves to be searched by the accused but nothing incriminating was found and memo

Ext. PW-1/B was prepared to this effect. PW-6 Pankaj Sharma Dy. S.P. (Probationer) conducted the search of the bag Ext. P-2. It contained charas. It was weighed and found to be 11 kgs 730 gms. The charas alongwith the bag was packed and sealed with seal 'C'. NCB forms in triplicate were filled on the spot. The sample of seal 'C' was also taken separately on Ext. PW-6/B. The case property was taken into possession vide memo Ext. PW-1/C. *'Rukka'* Ext. PW-2/A was sent through Constable Bhoop Singh to the Police Station. FIR Ext. PW-2/B was registered on the basis of the *'rukka'*. The accused was arrested. He was informed about the grounds of arrest vide memo Ext. PW-1/E. The case property alongwith NCB forms were deposited with MHC Anoop Kumar in the *malkhana*. Entry to this effect Ext. PW-7/A, was made in the *malkhana* register. The case property alongwith NCB forms were sent for chemical analysis to FSL, Junga through HHC Roshan Lal. Special report was sent to S.D.P.O., Anni. On receipt of the report of the Chemical Examiner Ext. PW-7/B, challan was put up against the accused after completing all the codal formalities.

3. The prosecution has examined as many as 7 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. His case is of simpliciter denial. The learned Trial Court convicted and sentenced the accused, as stated hereinabove. Hence, the present appeal.

4. Mr. Ravi Tanta, Advocate, appearing vice Mr. Ajay Kochhar, Advocate, for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur, learned Asstt. Advocate General, has supported the judgment of the learned Special Judge(II), Kinnaur at Rampur, H.P. dated 21.5.2011.

5. We have heard learned counsel for the parties and gone through the records of the case meticulously.

6. PW-1, HC Pushap Dev deposed that on 16.6.2009 he alongwith S.I. Gurbachan Singh, ASI Rajinder Kumar, ASI Ludar Singh, Constable Bhoop Singh, Constable Bali Ram and Constable Chet Ram under the supervision of Dy. S.P. (probationer) Pankaj Sharma, left Police Station Anni, at 3:00 AM in official vehicle No. HP-34-0298, towards *Sward* side in connection with *nakabandi*. At about 5:30 AM when they were present at *Tuman More* on *Sward Anni road*, one person wearing black pant and check shirt came from *Sward* side towards *Nagan* side carrying a bag on his back. On seeing the police party, he stopped and got perplexed. On suspicion of possessing some contraband, Dy. S.P. (Probationer) Pankaj Sharma, asked that person about his name and address. He disclosed his name and address. The accused was informed about his right to be searched in the presence of the Magistrate or the Gazetted Officer, orally as well as in writing, to which the accused opted to be searched by the police. Consent memo Ext. PW-1/A was prepared. The place was isolated and there was no habitation nearby and as such it was not possible to associate any independent witness. He alongwith Dy. S.P. (Probationer) Pankaj Sharma and ASI Rajinder Kumar joined as witnesses. He alongwith both the witnesses gave their personal search to the accused and search memo Ext. PW-1/B to this effect was prepared. The rucksack was searched. It contained charas. It weighed 11 kgs 730 gms. The charas was put back into the same polythene envelopes which were put in the same rucksack. The same was packed and wrapped with a piece of cloth and sealed with six seals bearing impression 'C'. NCB forms in triplicate were filled up and after drawing specimen of seal, the seal after its use was handed over to him. The charas recovered from the accused was taken into possession vide seizure memo Ext. PW-1/C. *'Rukka'* was scribed by Dy. S.P. (Probationer) Pankaj Sharma. He sent the same to P.S. Anni, through Constable Bhoop Singh. He denied the suggestion in his cross-examination that on 16.6.2009 at 5:30 AM, bus No. HP-34-8389 in which Malik Kumar was driver and Manohar Lal was conductor, started from bus stand Anni

to Kullu. He denied the suggestion that the bus was stopped by them below Haripur College. He denied the suggestion that Hem Raj accused had boarded the bus at Nagan and he was to go to Kingal. He also denied the suggestion that the accused was issued a ticket from Nagan to Kingal for of Rs. 20/-. He also denied the suggestion that Constable Bhoop Singh boarded the bus and called accused Hem Raj by name and thereafter he made him to get down from the bus and then he was taken to P.S. Anni. He also denied the suggestion that when the accused was taken down, at that time he was not holding any bag. He also denied the suggestion that the accused was falsely implicated. *Tuman More* is situated at a distance of 2 to 2 ½ kms. from Nagan. He denied the suggestion that *Tuman More* is situated at a distance of 1200 meters from Nagan. He also denied the suggestion that 200-300 meters before *Tuman More*, there is a bridge on the '*khud*'. According to him, besides the fish farm, there is a shop of Madan. It was opened late in the morning. He also denied the suggestion that 30 meters above the bridge there are 4 houses of the Brahmins. He denied the suggestion that one person was on duty round the clock at the fish farm. They remained on the spot upto around 11:45 AM. He also denied the suggestion that after every half an hour, one bus and 4-5 other vehicles cross through *Tuman More*. He also denied the suggestion that no independent witnesses from Village Nagan or from near the bridge was associated, because the entire proceedings were conducted by them in the Police Station. He also denied the suggestion that consent memo Ext. PW-1/A was falsely prepared.

7. PW-2 Constable Bhoop Singh, also deposed the manner in which the accused was apprehended, searched and the sealing process was completed on the spot. According to him, ASI Rajinder Kumar and HC Pushap Dev were joined in investigation by the I.O. as witnesses as no independent witnesses were available and the place where the accused person was intercepted was an isolated place. At that time, no person was passing from that place. The charas weighed 11 Kgs. 750 gms. The charas was packed and sealed with seal impression 'T'. NCB forms in triplicate were filled in and specimen of seal was obtained. Thereafter, seal was handed over to HC Pushap Dev. '*Rukka*' Ext. PW-2/A was prepared and handed over to MHC Anup Kumar in the Police Station on the basis of which FIR Ext. PW-2/B was registered. He admitted in his cross-examination that Anni Kullu bus service via Shimla starts from Anni at 5:30 AM. He denied the suggestion that on 16.6.2009 bus No. HP-34-8389 in which Malik Kumar was driver and Manohar Lal was conductor was going from Anni to Kullu via Shimla. He denied the suggestion that the accused Hem Raj boarded the bus for going to Kingal at Nagan. He denied the suggestion that the bus was intercepted below Haripur College. He denied the suggestion that he called accused Hem Raj by name and brought him down from the bus. He denied the suggestion that the accused was brought to the Police Station, Anni. According to him, the distance from Nagan to *Tunam More* would be around 2 or 2 ½ kms. He denied the suggestion that there were four houses of Brahmins situated at a distance of 30-40 meters above the bridge. He also deposed that no attempt was made to join any independent witness from the nearby places. They did not come upto the bridge to find out that some person was present in the shop or in the fish farm.

8. Statements of PW-3 HHC Kashmi Ram and PW-4 ASI Sohan Lal, are formal in nature.

9. PW-5 HHC Roshan Lal deposed that on 17.6.2009 MHC Anoop Kumar handed over one sealed parcel weighing 11.370 kgs. Sealed with seal bearing impression 'E' alongwith NCB forms and specimen of seal vide RC No. 28/09 dated 17.6.2009 for being deposited in FSL, Junga. He deposited the same at FSL, Junga. Till the property remained in his custody, it was not tampered with.

10. PW-6 Pankaj Sharma, deposed that he alongwith other police officials left Police Station Anni in official vehicle No. HP-34-0292 alongwith I.O.

Kit and floodlight in connection with general patrol duty and *Nakabandi* towards Nagan. At about 5.30 pm, when they were present at *Tumon More* on *Shwar-Anni Road*, one person came from *Shwa*r side towards Nagan holding a rucksack on his back. That person was stopped by them. The accused got perplexed. He disclosed his name to the police. He was apprised of his right to be searched in presence of a Magistrate or any Gazetted Officer. The accused opted to be searched by the police vide consent memo Ext. PW-1/A. The place was isolated and no independent witness was available. There was also no habitation nearby. He joined ASI Rajender Kumar and HC Pushap Dev as witnesses. All of them gave their search to the accused person vide search memo Ext. PW-2/B. The Charas was found in the bag. It weighed 11.370 kgs. The charas was put back in the same bag, which was packed and sealed with seal bearing impression 'C'. NCB forms in triplicate, were filled in by him and thereafter, specimen of seal Ext. PW-6/B was drawn and seal was handed over to HC Pushap Dev. The Charas was taken into possession vide seizure memo Ext. PW-1/C. The personal search of the accused person was conducted. The site plan was also prepared. The accused was arrested vide arrest memo PW-1/E. He deposited the case property alongwith NCB forms and specimen of seal with MHC Anup Kumar in the *Malkhana* of the Police Station. The House of Mohar Singh was also raided in the presence of his wife Jiwni Devi. But, nothing incriminating was recovered from his house. Search Memo Ext. PW-6/G was prepared. He denied the suggestion in his cross-examination that the accused boarded the bus at Nagan and he was to go to Kingal on 16.6.2009. He also denied the suggestion that accused Hem Raj had purchased Bus ticket for Rs. 20/- bearing No. 008433. He also denied the suggestion that Constable Bhoop Singh stopped the aforesaid bus at Haripur and called accused Hem Raj out of the bus. He also denied the suggestion that the police personnel after making the accused person to get down from the bus, brought him to Police Station Anni. No attempt was made to join independent witnesses as none was available on the spot or nearby. He denied the suggestion that the documents were prepared in advance.

11. PW-7 HC Anoop Kumar, deposed that on 16.6.2009, Constable Bhoop Singh brought *Rukka* Ext. PW-2/A. He sent the case file to Shri Pankaj Sharma, Dy. S.P. (Probationer). Shri Pankaj Sharma, has deposited the case property comprising of one sealed parcel which was sealed with seal impression 'C' alongwith specimen of seal and NCB forms in triplicate in *Malkhana.* He made entry in the *Malkhana* register at Sr. No. 205, the extract of which is Ext. PW-7/A. He sent the parcel alongwith NCB forms and specimen of seal to FSL Junga through HHC Roshan Lal vide RC No. 28/2009 on 17.6.2009. The copy of RC and receipt is Ext. PW-7/B. The case property remained intact in his custody and it was not tampered with. The report of Chemical Examiner is Ext. PW-7/C.

12. DW-1 Constable Mohar Singh, has proved entry at page No. 241 of the log book of vehicle HP-34-0298 vide memo Ext. DW-1/A.

13. The accused has appeared as DW-2. According to him, he boarded the HRTC Bus No. HP-34-8389 at Nagan at 8.45 AM. When the bus reached below College at Haripur, two police officials present on the road stopped the bus. One of the police official was Head Constable and other was Constable. The police Constable entered the bus and called his name and asked him to get down from the bus. He got down from the bus. The police officials had conversation with the driver of the bus. When he boarded the bus, he was not having any luggage with him. On asking by the police at that time also, he was not possessing any luggage. There were large number of passengers, mainly girls present in the bus. The police vehicle came from *Nula* side and then the police official took him to Police Station Anni. The Police officials showed him the bag and thereafter they obtained his signatures on several documents. The bag did not belong to him. On the next day, he was brought to

Rampur and his brother met him there. He has narrated the entire story to his brother. He has been falsely implicated by the police in this case. He had purchased bus ticket from Kingal vide Ext. DW-2/A. In his cross-examination, he deposed that the bus was full and he was standing in the bus. At the time of his arrest, his personal search was conducted and search memo Ext. PW-1/D was prepared. It was signed by him. He also admitted that the articles recovered from the personal search were entered in the search memo. He denied the suggestion that since he was not possessing any ticket and as such the same was not mentioned in the search memo Ext. PW-1/D. He deposed that the police had returned the ticket to him after perusing the same.

14. DW-3 Malik Kumar, is the driver of bus No. HP-34-8389. According to him, the accused person signaled the bus to stop at Nagan. He told him that the bus was full but the accused persons stated that he wanted to board. He boarded the bus. He was not possessing any baggage at that time. Near Haripur, one of the police officials was of the rank of Head Constable and he did not notice the rank of the other police official. He was not having any star on his uniform. He called the name of accused Hem Raj and made him to get down from the bus. At that time, the accused person did not possess any baggage. In his cross examination, he denied the suggestion that on 16.6.2009, the accused had not boarded the bus at Nagan.

15. DW-4 Manohar Lal is the conductor of the bus. He deposed that Ext. DW-2/A, ticket was from Nagan to Kingal. The date of issue of this ticket was 16th of the month. The police officials stopped the bus at Haripur. The accused was present in the bus. The police officials got the accused to alight from the bus. The accused person was not carrying any baggage when he got down from the bus. The police officials asked them to leave the place and they left towards Luhri side. In his cross-examination he deposed that the bus was 37 seater. At that time about 65 passengers were present in the bus out of which 20-22 passengers were standing. When the accused person boarded the bus at that time, he had no conversation with the driver or with him.

16. Mr. Ravi Tanta, Advocate has vehemently argued that the prosecution has not examined any independent witness during the entire process of seizure and arrest of the accused. PW-1 H.C. Pushap Dev has specifically deposed that the place where the accused was apprehended was isolated and there was no habitation nearby as such it was not possible to associate any independent witness. ASI Rajender Kumar joined them as witness. PW-2 Constable Bhoop Singh also deposed that ASI Rajender Kumar and HC Pushap Dev were joined by the IO as witnesses as no independent witnesses were available as the place where the accused was intercepted was isolated.

17. PW-6 Pankaj Sharma, Dy. S.P. (Probationer) also deposed that the place was isolated. Therefore, no independent witnesses were available and there was no habitation nearby. He joined ASI Rajender Kumar and HC Pushap Dev as witnesses. The statement of PW-1 HC Pushap Dev, PW-2 Constable Bhoop Singh and PW-6 Pankaj Sharma are truthful and natural. The statements of officials witnesses can be relied upon if inspire confidence. The learned trial Court has rightly relied upon the statements of PW-1 HC Pushap Dev, PW-2 Constable Bhoop Singh and PW-6 Pankaj Sharma, Dy. S.P.( Probationer) to the effect that no independent witness was available at the spot. It was 5.30 AM in the morning. The habitation was at a far off place. The shop of one Madan was not opened in the morning as per the statements of PW-1 H.C. Pushap Dev and PW-2 Constable Bhoop Singh. PW-1 HC Pushap Dev has also deposed that efforts were made to join independent witnesses.

18. Mr. Ravi Tanta, Advocate has also argued that there is variance with regard to seal impression. PW-1 HC Pushap Dev has deposed that the contraband was put back in the same polythene bag which was put in the same rucksack, which was packed and wrapped with a piece of cloth and sealed with

6 seals bearing impression 'C'. PW-2 Constable Bhoop Singh has deposed that the Charas was put back into the same bag which was packed and sealed with seal bearing impression 'T'. PW-5 HHC Roshan Lal has deposed that on 17.6.2009, MHC Anoop Kumar handed over one sealed parcel weighing 11.730 kgs sealed with seal bearing impression 'E' alongwith the NCB forms. PW-6 Shri Pankaj Sharma, Dy.S.P. (Probationer) has categorically deposed that charas was taken into possession vide seizure memo Ext. PW-1/C. The charas was put back into the same bag which was packed and sealed with seal bearing impression 'C'. Even, PW-7 HC Anoop Kumar has deposed that Sh. Pankaj Sharma Dy. S.P. (Probationer), has deposited the case property comprising of one sealed parcel which was sealed with seal impression 'C' alongwith specimen of seal and NCB forms in triplicate in *Malkhana.*

19. We have gone through NCB forms, the sample seal is with alphabet 'C'. in Ext. PW-7/C, the FSL has received one sealed cloth parcel bearing 6 seals of impression 'C'. Thus, the statement of PW-2 Bhoop Singh to the effect that seal impression was 'T' and PW-5 Shri Pankaj Sharma, Dy. S.P. (Probationer), contraband was bearing seal impression 'E' is of no consequence.

20. Mr. Ravi Tanta, Advocate has also argued that the accused has been falsely implicated. According to him, his client had infact boarded the HRTC Bus No. HP-34-8389 at Nagan and had purchased ticket to travel to Kingal. He has referred to statement of accused DW-2, accused Hem Raj, DW-3 Malik Kumar and DW-4 Manohar Lal. According to DW-2, he was travelling in the Bus and was asked to get down from the bus by the police officials. He has proved Ext. DW-2/A, ticket. DW-3 Malik Kumar was driver of the bus bearing registration No. HP-34-8389. According to him, the accused signaled him to stop the bus on 16.6.2009. He stopped the bus at Nagan. He told him that the bus was full but the accused person stated that he wanted to go. DW-4 Manohar Lal, in his cross-examination has admitted that when the accused person boarded the bus, he had no conversation either with the driver or with him. The version of DW-2 accused Hem Raj, DW-3 Malik Kumar and DW-4 Manohar Lal does not inspire any confidence. PW-1 HC Pushap Dev denied the suggestion that the bus was stopped by them below Haripur college. He also denied the suggestion that the accused had boarded the bus and he was going to Kingal. He has also denied the suggestion that the accused was brought to the police station and falsely implicated in the case. He also denied the suggestion that the accused was issued ticket from Nagan to Kingal for a fare of Rs.20/-. He also denied the suggestion that the Constable Bhoop Singh boarded the bus and called Hem Raj accused by name and thereafter he made him to get down from the bus and then he was taken to police station Anni. PW-2 Constable Bhoop Singh has also denied the suggestion that accused has boarded the bus for travelling to Kingal at Nagan. He also denied the suggestion that they stopped the said bus below Haripur college. He has also denied that he called the accused by name and brought him down from the bus. PW-1 HC Pushap Dev and PW-2 Constable Bhoop Singh have denied that 30 meters above the bridge, there were four houses of the Brahmins. PW-6 has also denied the suggestion that the accused had purchased bus ticket for Rs.20/- bearing No. 008433. He also denied the suggestion that the bus was stopped by PW-2 Constable Bhoop Singh. He also denied the suggestion that accused was made to got down from the bus. The search of the accused was carried out. There is no entry of ticket in the recovery memo as per Ext. PW-1/B. The charas has been recovered from the exclusive and conscious possession of the accused. The prosecution has followed the prescribed procedure. There is no violation of any mandatory provisions of the Act. The prosecution has proved the case beyond reasonable doubt.

21. Accordingly, there is no occasion for us to interfere with the well reasoned judgment of the trial Court dated 21.5.2011. The appeal is dismissed.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J.**

Kulbhushan Sharma ..... Appellant
Versus
Neeraj Sharma .....Respondent

FAO No. 376/2014
Decided on: 10.11.2014

**Hindu Marriage Act, 1956-** Section13(1)(i)- Husband claimed divorce on the ground of cruelty and desertion – evidence showed that wife was forced to leave her matrimonial home after she gave birth to a female child - no person visited her in the Hospital at the time of delivery- no maintenance was paid to the child and wife-she had to file a petition for maintenance and the husband, instead of paying maintenance, filed a revision petition- held, that husband had created such an atmosphere that wife could not be expected to live in the matrimonial home- behaviour of the husband towards his wife was cruel and he could not be permitted to take an advantage of his own wrong. (Para-12)

**Cases referred:**
Shobha Rani v. Madhukar Reddi AIR 1988 SC 121
Samar Ghosh vs. Jaya Ghosh (2007) 4 SCC 511
Manisha Tyagi vs. Deepak Kumar 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi (2010) 4 SCC 476
Pankaj Mahajan vs. Dimple Alias Kajal (2011) 12 SCC 1
Vishwanath Agrawal vs. Sarla Vishwanath Agrawal (2012) 7 SCC 288
Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176
Lachman Utamchand Kirpalani versus Meena alias Mota, AIR 1964 SC 40
Smt. Rohini Kumari versus Narendra Singh, AIR 1972 SC 459

For the appellant : Mr. Peeyush Verma, Advocate.
For the respondent : None

The following judgment of the Court was delivered:

**Rajiv Sharma, Judge**:

This appeal is instituted against order dated 2.8.2014 passed by learned Addl. District Judge (II) Shimla, Himachal Pradesh in HMA Case No. 19-S/3 of 2014/10.

2. "Key facts" necessary for adjudication of the present appeal are that a divorce petition was filed by the appellant under section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955. Marriage between the parties was solemnized on 27.4.2002 in accordance with Hindu rites and ceremonies. A girl was born on 31.12.2003. Appellant is lecturer. Respondent is working as Professional Assistant (Library) in Indian Institute of Advanced Studies, Boileauganj.

3. According to the appellant, respondent pressed upon him to live separately from his parents. Behaviour of the respondent became harsh and inhuman with the passage of time. She was ignorant and irresponsible. She used to pick up quarrels with the appellant and his family members. She left the matrimonial home in the month of April 2004 alongwith minor child.

Respondent has deserted the appellant and has subjected him to mental distress, agony and cruelty.

4. Petition was contested by the respondent. According to the respondent. According to her, behaviour of the appellant and his family members changed, after the birth of female child. She was harassed for bringing insufficient dowry and chided for not being beautiful. Appellant has moved an application seeking custody of the child. He has not made any efforts to contact her and the child.

5. Appellant filed rejoinder to the reply filed by the respondent. Issues were framed by learned Addl. District Judge on 9.8.2012. Learned Addl. District Judge dismissed the petition on 2.8.2014. Hence, this appeal.

6. I have heard the learned counsel for the appellant and also gone through the order carefully.

7. PW-1 Shri Bharat Ram Sharma has denied that after the birth of the child, respondent went to the house of her parents. He feigned ignorance in his cross-examination that respondent was harassed and forced to leave the matrimonial home as she delivered a female child.

8. PW-2 Shri K.D. Sharma is father of the appellant. He denied that he wanted a male child. He denied that the parents and relatives of his daughter-in-law came to his house and tried to advise the appellant.

9. Appellant has appeared as PW-4. He denied the suggestion that respondent was ousted from matrimonial home as they wanted a male child. He admitted that he did not pay any amount towards the education and other expenses of the child. He also admitted in categorical terms that the child was granted maintenance allowance in proceedings under Section 125 of the Criminal Procedure Code. He had filed revision against order granting maintenance allowance.

10. Respondent has appeared as RW-1. According to her, she was ousted from matrimonial home as she has delivered a female child. Behaviour of the appellant and his family members changed after the birth of the female child on 31.12.2003. She denied the suggestion that appellant was subjected to any mental cruelty by her. Appellant reached hospital at the time of delivery of the child on 31.12.2003 at 6.30 pm. No member from his family came at the time of delivery and her brother dropped her in the house of her in-laws. She went to the house of her in laws on 24.4.2004. Nobody has thereafter taken her.

11. RW-2 Kundan Lal is the father of the respondent. According to him also, behaviour of the family of the appellant changed after the birth of female child.

12. What emerges from the facts enumerated herein above is that marriage the parties was solemnized on 27.4.2002. Female child was born on 31.12.2003. Respondent was forced to leave the matrimonial home. She has given birth to a female child. No member from the family of the appellant has visited her in the hospital at the time of delivery. Respondent's brother dropped her in the in laws' house. Appellant has not paid any amount towards the maintenance of the infant child, rather respondent was forced to file a petition under Section 125 of the Criminal Procedure Code. Maintenance was granted to the child. Appellant instead of complying the orders, filed a revision against the same. He is a lecturer. Circumstances created by the appellant were so hostile that the respondent was forced to leave the matrimonial home. Appellant has miserably failed to prove that she treated him with cruelty. Rather, to the contrary, behaviour of the appellant was cruel towards his wife and child. Appellant has also failed to prove that the respondent has deserted him. Conduct of the appellant was such that the respondent had to leave the matrimonial home. Appellant can not be permitted to take advantage of his own

wrongs. The respondent has not deserted the appellant. Neither the appellant nor his family members have tried to bring the respondent back to her matrimonial home.

13. Their Lordships of the Hon'ble Supreme Court in case **Shobha Rani v. Madhukar Reddi** reported in **AIR 1988 SC 121** have explained the term "cruelty" as under:

> **"4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.**
>
> **5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."**

14. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour, which may be important in dealing with the cases of mental cruelty, as under:

> **"98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept**

**of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.**

**99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.**

**100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.**

**101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.**

**(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.**

**(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.**

**(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.**

**(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.**

**(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.**

**(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger**

**or apprehension must be very grave, substantial and weighty.**

**(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.**

**(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.**

**(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.**

**(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.**

**(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.**

**(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.**

**(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.**

**(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.**

15. Their Lordships of the Hon'ble Supreme Court have held in **Manisha Tyagi vs. Deepak Kumar** reported in **2010(1) Divorce & Matrimonial Cases 451**, as under:

**"24. This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonable be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension**

**that would be harmful or injurious to continue the cohabitation with the other spouse. Therefore, to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce."**

16. Their Lordships of the Hon'ble Supreme Court have held in **Ravi Kumar vs. Julumidevi** reported in (2010) 4 SCC 476, as under:

**"19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it ma be just an attitude or an approach. Silence in some situations may amount to cruelty.**

**20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial case can be of infinite variety – it may be subtle or even brutal and may be by gestures and word. That possible explains why Lord Denning in Sheldon v. Sheldon held that categories of cruelty in matrimonial case are never closed.**

**21. This Court is reminded of what was said by Lord Reid in Gollins v. Gollins about judging cruelty in matrimonial cases. The pertinent observations are (AC p.660)**

> **".. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."**

**22. " About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi at AIR p. 123, para 5 of the report: (SCC p.108, para 5)**

> **"5. It will be necessary to bear in mind that there has been (a) marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court**

**should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties."**

17. Their Lordships of the Hon'ble Supreme Court have held in **Pankaj Mahajan vs. Dimple Alias Kajal** reported in (2011) 12 SCC 1, as under

**"36. From the pleadings and evidence, the following instances of cruelty are specifically pleaded and stated. They are:**

**i. Giving repeated threats to commit suicide and even trying to commit suicide on one occasion by jumping from the terrace.**

**ii. Pushing the appellant from the staircase resulting into fracture of his right forearm.**

**iii. Slapping the appellant and assaulting him. iv. Misbehaving with the colleagues and relatives of the appellant causing humiliation and embarrassment to him.**

**v. Not attending to household chores and not even making food for the appellant, leaving him to fend for himself.**

**vi. Not taking care of the baby.**

**vii. Insulting the parents of the appellant and misbehaving with them.**

**viii. Forcing the appellant to live separately from his parents.**

**ix. Causing nuisance to the landlord's family of the appellant, causing the said landlord to force the appellant to vacate the premises.**

**x. Repeated fits of insanity, abnormal behaviour causing great mental tension to the appellant.**

**xi. Always quarreling with the appellant and abusing him**.

**xii. Always behaving in an abnormal manner and doing weird acts causing great mental cruelty to the appellant.**

18. Their Lordships of the Hon'ble Supreme Court have held in **Vishwanath Agrawal vs. Sarla Vishwanath Agrawal** reported in **(2012) 7 SCC 288** as under:

**"22. The expression 'cruelty' has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.**

**28. In Praveen Mehta v. Inderjit Mehta, AIR 2002 SC 2582 it has been held that mental cruelty is a state of mind and**

**feeling with one of the spouses due to behaviour or behavioural pattern by the other. Mental cruelty cannot be established by direct evidence and it is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment, and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The facts and circumstances are to be assessed emerging from the evidence on record and thereafter, a fair inference has to be drawn whether the petitioner in the divorce petition has been subjected to mental cruelty due to the conduct of the other."**

19. Their Lordships of the Hon'ble Supreme Court in ***Bipinchandra Jaisinghbai Shah*** *versus* ***Prabhavati***, AIR 1957 SC 176 have held that two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Their Lordships have held that desertion is a matter of interference to be drawn from the facts and circumstances of each case. Their Lordships have held as under:

> "What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarized the case-law on the subject in these terms:-
>
> "Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".
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> The legal position has been admirably summarized in paras 453 and 454 at pp. 241. to 243 of Halsbury's Laws of England (3rd Edn.), VoL 12, in the following words:-
>
> "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.
>
> The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".
>
> Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the

other spouse in a state of temporary passion, for example anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances to each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co- exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the (animus deserendi) coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end, and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of Lawson v. Lawson, 1955-1 All E R 341 at p. 342(A), may be referred to :-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..... "

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer

by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

20. Their Lordships of the Hon'ble Supreme Court in ***Lachman Utamchand Kirpalani*** *versus* ***Meena alias Mota***, AIR 1964 SC 40 have held that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. Their Lordships have further held that the burden of proving desertion - the 'factum' as well as the 'animus deserendi' is on the petitioner and he or she has to establish beyond reasonable doubt to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. Their Lordships have held as under:

> "The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal for Bombay where the Court had to consider the provisions of S. 3(1) of the Bombay Hindu Divorce Act, 1947 whose language is in pari materia with that of S. 10(1) of the Act. In the judgment of this Court in Bipin Chandra v. Prabhavati, 1956 SCR 838; ((S) AIR 1957 SC 176) there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.) Vol. 12 was cited with approval :
>
> "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the order without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases." The position was thus further explained by this Court. "If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently the cease cohabitation, it will not amount to desertion. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention of bring cohabitation permanently to an end (animus deserndi). Similarly two elements are essential so far as the deserted spouse is concerned : (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.. . . . . Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi coexist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time." Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled Law that the burden of proving desertion -
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> the "factum" as well as the "animus deserendi" - is on the petitioner; and he or she has to establish beyond reasonable doubt, to the satisfaction of

the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause. As Dunning, L. observed : (Dunn v. Dunn

(1948) 2 All ER 822 at p. 823) :

"The burden he (Counsel for the husband) said was on

her to prove just cause (for living apart). The argument

contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to distinguish between a legal burden of proof laid down by law and a provisional, burden raised by the state of the evidence . . . . . The legal burden throughout this case is on the husband, as petitioner, to prove that this wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal; and, indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the Court has still, at the end of the case, to ask itself: Is the legal burden discharged? Has the husband proved that she deserted him without cause? Take this case. The wife was very deaf, and for that reason could not explain to the Court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: Has that burden been discharged?"

21. Their Lordships of the Hon'ble Supreme Court in ***Smt. Rohini Kumari versus Narendra Singh***, AIR 1972 SC 459 have explained the expression 'desertion' to mean the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage.

"Under Section 10 (1) (a) a decree for judicial separation can be granted on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. According to the Explanation the expression "desertion" with its grammatical variation and cognate expression means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage. The argument raised on behalf of the wife is that the husband had contracted a second marriage on May 17, 1955. The petition for judicial separation was filed on August 8, 1955 under the Act which came into force on May 18, 1955. The burden under the section was on the husband to establish that the wife had deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. In the presence of the Explanation it could not be said on the date on which the petition was filed that the wife had deserted the husband without reasonable cause because the latter had married Countess Rita and that must be regarded as a reasonable cause

for her staying away from him. Our attention has been invited to the statement in Rayden on Divorce, 11th Edn. Page 223 with regard to the elements of desertion According to that statement for the offence of desertion there must be two elements present on the side of the deserting spouse namely, the factum, i.e. physical separation and the animus deserendi i.e. the intention to bring cohabitation permanently to an end. The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting spouse to form his or her intention to bring cohabitation to an end. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of "constructive desertion" is discussed at page 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him."

22. In view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending applications, if any, also stand disposed of. No order as to costs.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.**

Sushil Kumar alias Shilu ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Cr. Appeal No. 255/2011
Reserved on: 5.11.2104
Decided on: 17.11.2014

**N.D.P.S. Act, 1985-** Section 20- Accused was found in possession of 5.600 kg of charas-PW-1 deposed that he was asked to call independent witness but could not find any independent witness- PW-2 also deposed that he had sent PW-1 to search for independent witness but PW-1 could not find any independent witness- held, that in these circumstances, prosecution version cannot be doubted due to non-association of independent witnesses. (Para-14)

For the Appellant: Mr. Avinash Jaryal, Advocate.
For the Respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, Judge.**

This appeal is instituted against a judgment rendered by learned Special Judge, Fast Track Court, Kullu, Himachal Pradesh on 26.5.2011 in

Sessions Trial No. 50 of 2010, whereby appellant/accused (herein after referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein after referred to as 'the Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1.00 Lakh, in default of payment of fine to further undergo simple imprisonment for a period of two years.

2. Case of the prosecution, in a nutshell, is that on 9.4.2010, ASI Sada Nand alongwith ASI Kesar Singh, HC Gopal Chand and Constable Sunil Kumar was going in official vehicle No. HP.34A-9986. The vehicle was being driven by Constable Rup Singh. At about 6.15 pm, when police party reached village Tarakara near a culvert, they saw a person coming down towards road having black coloured backpack(rucksack). On seeing the police, he turned towards hand pump side and ran towards Nullah. He jumped down from that Nullah. Police party, on the basis of suspicion, chased him and nabbed him. Accused person received injuries. He disclosed his name as Sushil Kumar alias Shilu. SI Sada Nand associated ASI Kesar Singh and Constable Sunil Kumar as witnesses. IO told accused that his personal search is required to be taken. He was apprised about his legal right, orally as well as in writing, that he could give his personal search in the presence of a Magistrate or a Gazetted Officer. SI Sada Nand after giving his personal search to the accused conducted the search of the accused. Contraband was recovered from the bag. It was found to be Charas. Charas was weighed and it was found to be 5.600 kg. Charas was again put in the same packet. It was further wrapped with cloth. IO filled up NCB form in triplicate. Seizure memo was prepared. Rukka was sent to the Police Station. FIR was registered on the basis of said Rukka. Accused was taken to the hospital for medical examination. The case property was sent to the FSL Junga for chemical examination. The investigation was completed. Challan was put up and after concluding the trial, accused was convicted and sentenced as noticed herein above.

3. Mr. Avinash Jaryal, Advocate has vehemently argued that the Prosecution has failed to prove its case against the accused.

4. Mr. Ramesh Thakur, Assistant Advocate General has supported judgment dated 26.5.2011.

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

6. PW-1 Constable Sunil Kumar has deposed that he alongwith ASI Kesar Singh, HC Gopal was on patrolling duty at Sangri Baag in official vehicle No. HP.34A.9986. The vehicle was being driven by Constable Rup Singh. When they reached at Tarakara bridge, one person came from upper side of the road having a rucksack of black colour. He ran towards Nullah and jumped from the road. Police chased him. He was nabbed. IO sent him to call for independent witnesses from the locality. IO asked the accused about his identity. IO told the accused that he was suspecting some narcotic substance in his possession. He left the place in search of independent witnesses but could not find any independent witness from the nearby place. He informed the IO that no independent witness was available in the village. IO associated him and Kesar Singh as witnesses. IO asked the accused to whom he wanted to give his personal search. Accused was told by the IO that he could get himself (accused) searched by him or by some Gazetted Officer. Accused told the IO that he wanted to be searched by the police. Consent memo was prepared and it was signed by him alongwith Kesar Singh and the accused. The consent memo is Ext. PW-1/A. ASI Sada Nand gave his personal search to the accused. Thereafter, the search of bag was conducted. The bag was opened, in which one white coloured bag was found which was having words “VEEKAY ENTERPRISES” The bag found inside the main bag was opened on which

VEEKAY ENTERPRISES was written. It was opened and one another polythene bag yellow in colour was found which was wrapped with yellow coloured tape. The tape was removed and small polythene packets were found in which black coloured substance was found. The black coloured substance was tasted and found to be Charas. IO also found other substance which was round. It was also tasted. The contraband was weighed. It was found to be 5.600 kg. Charas was put in the same polythene packet and put in the rucksack. Thereafter, it was sealed in a piece of parcel. Parcel containing bags and Charas was sealed with seven impressions of seal 'A' and second parcel containing weighing machine etc. was sealed with four impressions of seal 'A'. The NCB form I in triplicate was filled by the IO. All the articles were taken into possession vide memo Ext. PW-1/B. Copy of recovery memo was supplied to the accused. Sample seal was taken on a piece of cloth vide Ext. PW-1/C. Photographs of the place were also taken. SHO prepared the file and handed it over to him. He returned back to the place of occurrence and handed over the case file to the IO at the spot. IO informed the accused about the grounds of arrest and arrested him vide memo Ext. PW-1/D. In his cross-examination, he admitted that there remains traffic on the road. Volunteered that there was no vehicle plying at that time. He was not aware that the houses of Jogi Ram and Dot Ram were situated just 10 metres away from National Highway at village Tarakara. He denied that the houses of Toti Devi, Chhabilu, Mohan Lal, Ses Ram and Singhu are situated adjoining to the houses of Jogi and Dot Ram at village Tarakara. He left the spot at 8.30 pm to the Police Station and reached at the Police Station at 9.00 pm. He again started back towards the place of occurrence at about 9.40 pm. He reached the spot at 10.00 pm. IO apprised the accused about the grounds of arrest and arrested him. 7. PW-2 SI Sada Nand deposed that he alongwith ASI Kesar Singh, HC Gopal Singh, Constable Sunil Kumar proceeded on patrol duty towards village Tarakara in official vehicle on 9.4.1010. When they reached at village Tarakara at about 6.15 pm, one person came from hillside. He jumped below the road. He was apprehended. Constable Sunil Kumar was sent to search for independent witnesses. Constable Sunil Kumar came back after about 15 minutes and told the IO that no independent witness was available. He associated ASI Kesar Singh and Constable Sunil Kumar as witnesses. He apprised the accused about his legal right regarding personal search that he could be searched before a Magistrate, Gazetted Officer or the police. Accused gave his consent vide consent memo Ext. PW-1/A. Contraband was recovered from the bag carried by the accused. It was duly sealed with 7 impressions of seal 'A'. It weighed 5.600 kg. A Rukka was sent vide Ext. PW-1/C to the Police Station through Constable Sunil Kumar at 8.30 pm. Constable Sunil Kumar again came back to the place of occurrence at about 10.15 pm. He denied the suggestion in his cross-examination that the houses of Jogi Ram and Dot Ram are situated just 10 yards from the road. He was not aware that the houses of Toti Devi, Chhabilu, Mohan Lal, Ses Ram and Singhu Ram are situated in village Tarakara.

8. PW-3 Constable Rajnish Kumar deposed that on 12.4.2010, MHC Ram Krishan has handed over one parcel sealed with seal impressions 'A' and 'K' alongwith sample seals 'A' and 'K' NCB I form in triplicate, seizure memo and copy of FIR with the directions to deposit the same with FSL Junga vide RC No. 106/10. He deposited the same with FSL Junga on 12.4.2010.

9. PW-4 SI Tej Ram deposed that he received one Rukka through Constable Sunil Kumar vide Ext. PW-2/C. FIR was registered vide Ex. PW-4/B. ASI Sada Nand has produced two parcels, one containing Charas 5.600 kg and another parcel containing bowl etc alongwith NCB I form in triplicate. He resealed the Charas with 7 impressions of seal 'K' and he also resealed second parcel with 4 seal impressions of 'K'. He has taken the impression of seal on a piece of cloth vide Ext. PW-4/C.

10. PW-5 Inspector Mahesh Kumar sent the parcel of Charas to FSL Junga vide forwarding letter Ext. PW-5/A.

11. PW-6 Dr. Sushil has examined the accused on 11.4.2010 at 10.30 pm. He has noticed injuries on his body. He issued MLC Ext. PW-6/A.

12. PW-7 Dr. Ashok Rana has examined the accused and issued MLC Ext. PW-7/A.

13. PW-8 MHC Ram Krishan deposed that he was posted as MHC Police Station Kullu. On 10.4.2010, SHO Tej Ram handed over two parcels alongwith NCB I form in triplicate, sample of seals A and K, photocopies of FIR and seizure memo. Out of these, two parcels, one was sealed with 7 impressions of seal 'A' and resealed with 7 impressions of seal 'K'. Second Pulinda was stated to be containing weighing machine sealed with 4 impressions of seal 'A' and resealed with 4 impressions of seal 'K'. He handed over sealed parcel on 11.4.2010 alongwith NCB Form and FIR to Constable Rajnish Kumar with the direction to deposit the same with FSL Junga.

14. Mr. Avinash Jaryal has vehemently argued that the prosecution has not examined any independent witness. It has come in the statement of PW-1 that the IO told him to call for independent witnesses from the locality. He left the place of occurrence and went to search for independent witnesses. He could not find any independent witness from nearby place. He informed that no one was available in the village. PW-2 Sada Nand also deposed that he sent Sunil Kumar to search for independent witnesses. Constable Sunil Kumar came after 15 minutes and told him that no independent witnesses were available. Mr. Avinash Jaryal has argued that according to PW-1 Sunil Kumar, he left with Rukka to the Police Station at 9.00 pm and came back at 10.00 pm. However, PW-2 deposed that Constable Sunil Kumar took Rukka at 8.30 pm and came back at 10.15 pm. There is variance of only 15 minutes. It is a minor contradiction. PW-1 Sunil Kumar and PW-2 Sada Nand have denied that the houses of Jogi Ram and Dot Ram were situated near the National Highway. It has come in the statement of PW-1 that they were on National Highway but no vehicles were plying at that time.

15. Accused has been apprised of his legal right to be searched before a Magistrate. He has given his consent. There is no procedural lapse in the seizure and sampling undertaken on the spot. Rukka was prepared by PW-2 Sada Nand. It was sent to Police Station through Sunil Kumar, on the basis of which , FIR was registered. PW-1 Sunil Kumar brought back the documents. NCB form was filled in. Contraband was sealed with 7 impressions of seal 'A'. Samples of the seal were obtained on a piece of cloth vide Ext. PW-1/C. PW-4 Tej Ram has deposed that Sada Nand produced two parcels containing Charas weighing 5.600 kg. He resealed the parcel of Charas by affixing 7 seals of seal impression 'K'. The samples have reached FSL Junga intact. The substance was found to be Charas. It has also come in the statements of PW-6 and PW-7 i.e. Dr. Sushil and Dr. Ashok Rana that the accused has received injuries.

16. Accordingly, the prosecution has proved its case against the accused to the hilt. We will not interfere with the well reasoned judgment of the learned trial court.

17. In view of the discussion and analysis made hereinabove, there is no merit in the appeal and the same is dismissed. Pending applications, if any, are also disposed of.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J.**

Hari Krishan Karol .....Appellant.
Versus
Surinder Kumar .....Respondent.

RSA No.455 of 2003
Reserved on 10.11.2014.
Decided on: 18.11.2014.

**Specific Relief Act, 1963-** Section 20- plaintiff filed a civil suit seeking specific performance of the agreement- defendant admitted the execution of the agreement and the receipt of the claim- he claimed that he had written letters to the plaintiff to get the sale deed executed but the plaintiff had failed to get the sale deed executed- however, letters were not placed on record- held, that plea of the defendant cannot be accepted. (Para-13)

**Specific Relief Act, 1963-** Section 12- Defendant had entered into an agreement to sell the land with the plaintiff in which he had undertaken to get the consent of his brother for selling his share- held, that share of the defendant was severable and identifiable- therefore, plaintiff is entitled for the execution of the sale deed regarding the share of the defendant. (Para- 13 to 25)

**Cases referred:**

Kartar Singh vrs. Harjinder Singh & ors., AIR 1990 SC 854

Sardar Singh vs. Smt. Krishna Devi and another, AIR 1995 SC 491

Manzoor Ahmed Magray versus Gulam Hassan Aram and others AIR 2000 SC 191

A. Abdul Rashid Khan (Dead) and others versus P.A.K.A. Shahul Hamid and others., (2000) 10 SCC 636

P.C.Varghese vs. Devaki Amma Balambika Devi and others, AIR 2006 SC 145

Kammana Sambamurthy (deceased by L.Rs) versus Kalipatnapu Atchutamma (deceased by L.R) and others., AIR 2011 SC 103

Harendra Chandra Das and others versus Nanda Lal Roy and others, AIR 1933 Calcutta 98

Dwijendra Kumar Roy and others vrs. Monmohan De AIR 1957 Calcutta 209

Ahammed versus Mammad Kunhi and others, AIR 1987 Kerala 228

Santhos Kumar and others, versus Varghese George and others, AIR 1988 Kerala 277

K. S. Krishnan vs. Kizhakkumbrath Arumugha Tharakar, AIR 1993 Kerala 134

Dhara Singh Vs. Fateh Singh & ors., AIR 2009 Rajasthan 132

For the appellant: Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, Advocate.
For the respondent: Mr. Bhupinder Gupta, Sr. Advocate, with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, J.**

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge (I), Kangra at Dharamshala, H.P., dated 3.7.2003 passed in Civil Appeal No. 65-K/2001.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff, for the convenience sake), filed a suit for specific performance against the appellant-defendant (hereinafter referred to as the defendant). According to the plaintiff, the defendant entered into agreement to sell the whole land comprised in khata No. 104, khatauni No. 165, 166, khasra Nos. 371, 372, 373, 373/1, 373/2, 374, kita-6, area measuring 202 sq. meters, as entered in the *jamabandi* for the year 1990-91, situated in *Mohal* Bohan, *Mauza* Bohan, Tehsil Dehra, District Kangra, H.P. for consideration of Rs. 30,000/-. The defendant had received a sum of Rs. 15,000/- as earnest money. The defendant has agreed to execute the sale deed on or before 10.7.1993. The defendant had undertaken to get the consent of his brother also to sell his share. It was also agreed that in case his brother refused to execute the sale deed in respect of his share, then the defendant would sell his share in the suit land to the plaintiff for Rs. 15,000/- which had already been received by him. The plaintiff was always willing to perform his part of agreement and asked the defendant to transfer his share in the land by a sale deed, but he put off on one pretext or the other. The plaintiff has served two legal notices dated 12.7.1993 and 29.3.1994, asking him to execute the sale deed, however, the defendant has not even cared to reply those notices.

3. The suit was contested by the defendant. The defendant has admitted that the agreement was entered between the plaintiff and the defendant. He also admitted that he had received Rs. 15,000/-. He admitted that the sale deed was to be executed on or before 10.7.1993. According to him, he has posted two letters to the plaintiff on 14.6.1993 and 16.8.1993 in which he had asked the plaintiff to get the sale deed executed. He denied that the possession of the suit land was ever handed over to the plaintiff rather the land remained in the joint possession of defendant and his brother. The issues were framed by the learned Sub Judge Ist Class, Court No. 2, Dehra on 10.3.2000. The learned Sub Judge, decreed the suit of specific performance in favour of the plaintiff vide judgment dated 23.2.2001. The defendant feeling aggrieved by the judgment and decree dated 23.2.2001, preferred appeal before the learned Addl. District Judge(I), Kangra. The learned Addl. District Judge(I), Kangra dismissed the same on 3.7.2003. Hence, this regular second appeal.

4. This regular second appeal was admitted by this Court on 13.7.2004 on the following substantial questions of law:

> "1. Whether the Courts below have mis-interpreted mis-read and mis-construed Agreement for sale exhibit PW-1/A?
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> 2. Whether in view of the specific Agreement between the Seller and Purchaser in Exhibit PW-1/A, that if seller and his brother Shri Krishan Gopal, evade or refuse to execute sale-deed, therefore, respondent shall be entitled to get double of the amount as received by him, therefore, decree for specific performance could not have been passed?"

5. Mr. G.D.Verma, Sr. Advocate, appearing on behalf of the appellant has vehemently argued that the Courts' below have mis-read and mis-construed the agreement for sale Ext. PW-1/A dated 10.7.1993. He also argued that the decree of performance could not have been passed. On the other hand, Mr. Bhupinder Gupta, Sr. Advocate, has supported the judgments and decrees passed by both the Courts' below.

6. I have heard the learned Advocates for the parties and gone through the judgments and records of the case carefully.

7. Since the substantial questions of law are inter-related, hence in order to avoid repetition of evidence, these were taken up together for discussion.

8. It is admitted by both the parties that the agreement was entered into on 8.2.1993. The sale deed was to be executed on or before 10.7.1993. The defendant has admitted that he has received a sum of Rs. 15,000/- from the plaintiff.

9. The plaintiff has appeared as PW-1. According to him, the defendant has agreed to sell the suit land to him. The suit was filed for half share of the defendant in the suit land. The defendant was required to get consent of his brother on or before 10.7.1993 to execute sale deed in his favour. The defendant has not performed his part of the agreement. The plaintiff has served two legal notices upon the defendant. The plaintiff has denied that he has received any letters from the defendant.

10. PW-2 Advocate R.G.Dhiman deposed that he has issued legal notice Ext. PW-2/A on 12.7.1997 on the instructions of the plaintiff. The notice came back undelivered. He handed over the acknowledgement Ext. PW-2/B and envelope Ext. PW-2/C to the plaintiff.

11. PW-3 Gian Chand deposed that he had scribed the document Ext. PW-1/A in favour of Surinder Kumar on the instructions of the defendant. The contents of the same were read over and explained to the parties.

12. DW-1 Hari Krishan has deposed that he alongwith his brother was owner of the suit land. He has apprised the plaintiff of this fact. He has also admitted that he received a sum of Rs. 15,000/- from the plaintiff. He has apprised the plaintiff that he could buy his share. He was not interested to give the land to the plaintiff. When the agreement was signed, he was in dire need of money. Towards the end of his examination-in-chief, he deposed that he was neither interested in giving the land nor to refund the money. In his cross-examination, he admitted that as per Ext. PW-1/A, he was owner of the ½ share of land with his brother. He also admitted that he has signed Ext. PW-1/A after understanding the contents of the same. He also deposed in his cross-examination that he was ready and willing for the execution of the sale deed qua his share. He also admitted that he has never issued any legal notice to the plaintiff.

13. Though, the defendant has taken a specific stand that he has written two letters dated 14.6.1993 and 16.8.1993 for the execution of the sale deed, however, the fact of the matter is that these letters were never placed on record. The plaintiff has served the defendant with legal notice Ext. PW-2/A on 12.7.1993. The same came back undelivered. Mr. G.D.Verma, Sr. Advocate, has also argued that the subject matter of the agreement is composite and is not severable or divisible. Thus, the agreement cannot be enforced. However, the fact of the matter is that the defendant has not pleaded this fact in his written statement. He has drawn the attention of the Court to Section 12 of the Specific Reliefs Act, 1963. In the instant case, the share of the defendant was identifiable and severable. The plaintiff could seek decree for specific performance as per the agreement Ext. PW-1/A to the extent of the share of the defendant. The plaintiff was always ready and willing to perform his part as per the agreement. He has served legal notices upon the defendant. The agreement was to be executed on or before 10.7.1993. The execution of the agreement has been admitted by the defendant. He has also admitted that a sum of Rs. 15,000/- was received by him from the plaintiff as earnest money. It is also evident from the plaint that the plaintiff has only asked for specific performance of the agreement dated 8.2.1993 directing the defendant to execute the sale deed in respect of land measuring 101 sq. meters being half share of land comprised in khata No. 104, khatauni No. 165, 166, khasra Nos. 371, 372, 373, 373/1, 373/2, 374, kita-6, area measuring 202 sq. meters, as entered in the jamabandi for the year 1990-91.

14. In the case of ***Kartar Singh vrs. Harjinder Singh & ors.,*** reported in ***AIR 1990 SC 854,*** their lordships of the Hon'ble Supreme Court have held that when the vendor entered into a written agreement with the appellant for himself and on behalf of his sister for sale of all properties and the sister refused to sell property coming to her share, in a suit of specific performance of agreement, a decree was granted in respect of half share of suit property. It was held as follows:

> "4. We are afraid that the very foundation of the. reasoning of the Division Bench of the High Court is defective. It was never disputed that the respondent and his sister had each half share in the suit properties. Hence a mere failure to mention in the agreement that they had such share in the property would not entitle one to come to the conclusion that they did not have that share. When the property is owned jointly, unless it is shown to the contrary, it has to be held that each one of the joint owners owns a moiety of the property. In the present case, there is neither a pleading nor a contention that the respondent and his sister did not own the property in equal shares. Secondly, the agreement of sale clearly mentions that respondent was entering into the agreement both on behalf of himself and his sister, and that he was, under the agreement, selling the whole of his share and also the whole of the share of his sister in the property. Further in the agreement itself he had stated that he was responsible to get the sale-deed executed by his sister and that he would pursuade her to do so. This being the case, the properties agreed to be sold were clearly distinguishable by the shares of the respective vendors. In the circumstances when the absentee vendor, for some reason or the other, refused to accept the agreement, there is no reason why the agreement should not be enforced against the vendor who had signed it and whose property is identifiable by his specific share.
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> 5. We are, therefore, of the view that this is not a case which is covered by S. 12 of the Act. It is clear from S. 12 that it relates to the specific performance of a part of a contract. The present is not a case of the performance of a part of the contract but of the whole of the contract so far as the contracting party, namely, the respondent is concerned. Under the agreement, he had contracted to sale whole of his property. The two contracts, viz. for the sale of his share and of his sister's share were separate and were severable from each other although they were incorporated in one agreement. In fact, there was no contract between the appellant and the respondent's sister and the only valid contract was with respondent in respect of his share in the property."

15. Their lordships of the Hon'ble Supreme Court in the case of ***Sardar Singh versus Smt. Krishna Devi and another***, reported in ***AIR 1995 SC 491,*** have held that when the property was capable of division, justice demanded partial enforcement of contract instead of refusing specific performance in its entirety. Their lordships have held as under:

> "15. In view of the finding that the appellant had half share in the property contracted to be sold by Kartar Lal, his brother, the agreement of sale does not bind the appellant. The decree for specific performance as against Kartar Lal became final. Admittedly the respondent and her husband are neighbours. The appellant and his brother being co-parceners or co-owners and the appellant after getting the tenant ejected both the brothers started living in the house. As a prudent purchaser Joginder Nath ought to have made enquiries whether Kartar Lal had exclusive title to the property. Evidence of mutation of names in the Municipal Register establishes that the property was mutated in the joint names of the appellant and Kartar Lal and was in joint possession and enjoyment. The Courts below, therefore, have,

committed manifest error of law in exercising their discretion directing specific performance of the contract for the entire property. The house being divisible and the appellant being not a consenting party to the contract, equity and justice demand partial enforcement of the contract, instead of refusing specific performance in its entirety, which would meet the ends of justice. Accordingly we hold that Joginder Nath having contracted to purchase the property, it must be referable only in respect of half the right, title and interest held by Kartar Lal, his vendor. The The first respondent being successor in interest, becomes entitled to the enforcement of the contract of the half share by specific performance. The decree of the trial Court is confirmed only to the extend of half share in the aforestated property. The appeal is accordingly allowed and the decree of the High Court is set aside and that of the trial Court is modified to the above extent. The parties are directed to bear their own costs throughout."

16. In the case of ***Manzoor Ahmed Magray versus Gulam Hassan Aram and others*** reported in ***AIR 2000 SC 191,*** their lordships of the Hon'ble Supreme Court have held that when the defendant entered into agreement to sell land jointly purchased by him alongwith brother and son who were minors at relevant time and each having one third share, the decree for specific relief with regard to 1/3rd or 2/3rd share owned by defendant and his son for which he could execute sale deed was not barred. Their lordships of the Hon'ble Supreme Court have held as under:

"15. Further, in the present case, defendant No. 1 Mohd. Yousuf Magray entered into an agreement to sell the land purchased by him in 1968-69 in three names, namely, himself, his brother (Ghulam Rasool at the relevant time - minor) and his minor son (Manzoor Ahmad Magray). Clause 2 of the agreement stipulated that Mohd. Yousuf would be bound to include and join his brother Ghulam Rasool for the execution and completion of the sale deed in respect of the said land. The learned single Judge by judgment and decree dated 16th November, 1981 granted relief for specific performance of the contract only for 1/3rd share of Mohd. Yousuf (defendant No. 1). Against that judgment the plaintiff as well as defendant No. 1 filed appeals. The Division Bench dismissed the appeal filed by Mohd. Yousuf. It allowed the appeal of the plaintiff qua the share of minor son of defendant No. 1 by holding that land was purchased by Mohd. Yousuf in the name of his son and in fact, it was owned by him. The Division Bench, however, dismissed the claim for specific performance in respect of 1/3rd share of Ghulam Rasool. Against that part of the decree, plaintiff has not preferred any appeal.

16. As stated above, Section 15 of the J. and K. Act makes it abundantly clear that where a party to a contract is unable to perform the whole of his part of it, the Court may at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform. Hence, there is no bar for passing the decree for specific relief with regard to 1/3rd or 2/3rd share owned by the contracting party for which he can execute the sale deed. For the share of Ghulam Rasool (brother of defendant No. 1) admittedly, no decree is passed by the High Court. Dealing with the similar contention where agreement was for sale of property belonging to brother and sister each having half share the Court in Kartar Singh v. Harjinder Singh, (1990) 3 SCC 517 : (AIR 1990 SC 854) held that when the absentee vendor, for some reason or the other refused to accept the agreement, there is no reason why the agreement should not be enforced against the vendor who had signed and his property is identifiable by specific share. The Court further held that such case is not covered by Section 12 of the Specific Relief Act, 1963 which relates to specific performance of a part of

a contract. Such type of case would be the case where specific performance of the whole of the contract so far as contracting party is concerned. Further, whenever a share in the property is sold the vendee has right to apply for the partition of the property and get the share demarcated. Hence there would not be any difficulty in granting specific performance of the contract to the extent to which it is binding between the parties.

Re : (e) Suit land cannot be alienated or transferred"

17. In the case of ***A. Abdul Rashid Khan (Dead) and others versus P.A.K.A. Shahul Hamid and others.,*** reported in ***(2000) 10 SCC 636,*** their lordships of the Hon'ble Supreme Court have held that the joint owner of property agreeing to sell such property is bound to execute sale deed, if other co-sharer does not join, the vendor joint-owner is bound at least to the extent of his share and the agreement to sell would be specifically enforceable. Their lordships have held as under:

"14. Thus we have no hesitation to hold, even where any property is held jointly, and once any party to the contract has agreed to sell such joint property agreement, then, even if other co-sharer has not joined at least to the extent of his share, he is bound to execute, the sale deed. However, in the absence of other co-sharer there could not be any decree of any specified part of the property to be partitioned and possession given. The decree could only be to the extent of transferring the share of the Appellants in such property to other such contracting party. In the present case, it is not in dispute that the Appellants have 5/6"' share in the property. So, the Plaintiffs suit for specific performance to the extent of this 5/6"' share was rightly decreed by the High Court which requires no interference."

18. In the case of ***P.C.Varghese versus Devaki Amma Balambika Devi and others,*** reported in ***AIR 2006 SC 145,*** their lordships of the Hon'ble Supreme Court have held that the decree for specific performance of contract regarding vendors excluding share of minor can be passed and it was composite contract. Their lordships have held as under:

"19. We fail to understand as to how the agreement for sale can be said to be a contingent contract, as was submitted by Mr. Reddy. The agreement nowhere states that in the event the permission to sell the minor's share is not obtained within the period specified therein, the same shall become invalid or otherwise unenforceable in law. The application for grant of permission to sell the minor's share, as noticed hereinbefore, was rejected only during the pendency of the suit.

34. The submission of Mr. Reddy to the effect that the learned Trial Judge committed a serious error in granting a decree for partition along with a decree for specific performance of contract need not detain us long as in view of Section 22(1)(a) of the Act a decree for partition and separate possession of the property can be granted in addition to a decree for specific performance of contract. As in this case, the Appellant herein in view of amended prayer 'C' relinquished his claim in respect of the property belonging to the minor - Respondent No. 4, he also prayed for a decree for partition and such a prayer having been allowed, no exception thereto can be taken. In any event, the said question has not been raised by the Respondents before the High Court at all. Section 22 enacts a rule of pleading that in order to avoid multiplicity of proceedings, the plaintiff may claim a decree for possession and/ or partition in a suit for specific performance. Even though strictly speaking, the right to possession accrues only when a suit for specific performance is decreed, indisputably such a decree for possession and/ or partition is prayed for in anticipation of the grant of prayer for specific

performance of contract. [See Babu Lal Vs. M/s. Hazari Lal Kishori Lal and Others (1982) 1 SCC 525]

38. For the reasons aforementioned,, the impugned judgment cannot be sustained, which is set aside accordingly. The Appeal is allowed. No costs."

19. Similarly, their lordships of the Hon'ble Supreme Court in the case of ***Kammana Sambamurthy (deceased by L.Rs) versus Kalipatnapu Atchutamma (deceased by L.R) and others.,*** reported in ***AIR 2011 SC 103,*** have held as under:

"21. Section 12 prohibits specific performance of a part of a contract except in the circumstances under sub-sections (2), (3) and (4). The circumstances mentioned in these sub-sections are exhaustive. Is Section 12 attracted in the facts and circumstances of the present case? We do not think so. The present case is not a case of the performance of a part of the contract but the whole of the contract insofar as the vendor is concerned since he had agreed to sell the property in its entirety but it later turned out that vendor had only half share in the property and his wife held the remaining half. The agreement is binding on the vendor as it is without being fractured. As regards him, there is neither segregation or separation of contract nor creation of a new contract. In Kartar Singh v. Harjinder Singh & Ors. (1990) 3 SCC 517, this Court was concerned with a case where vendor--brother and a sister had each half share in the suit properties. The agreement for the sale was executed by the brother concerning the suit properties in which the sister had half share. The sister was not executant to the agreement; rather she refused to accept the agreement. The question for consideration before this Court was whether agreement could be enforced against the vendor--brother to the extent of his half share. This Court considered Section 12 and held as under :

"5. We are, therefore, of the view that this is not a case which is covered by Section 12 of the Act. It is clear from Section 12 that it relates to the specific performance of a part of a contract. The present is not a case of the performance of a part of the contract but of the whole of the contract so far as the contracting party, namely, the respondent is concerned. Under the agreement, he had contracted to sell whole of his property. The two contracts, viz. for the sale of his share and of his sister's share were separate and were severable from each other although they were incorporated in one agreement. In fact, there was no contract between the appellant and the respondent's sister and the only valid contract was with respondent in respect of his share in the property.

6. As regards the difficulty pointed out by the High Court, namely, that the decree of specific performance cannot be granted since the property will have to be partitioned, we are of the view that this is not a legal difficulty. Whenever a share in the property is sold the vendee has a right to apply for the partition of the property and get the share demarcated. We also do not see any difficulty in granting specific performance merely because the properties are scattered at different places. There is no law that the properties to be sold must be situated at one place. As regards the apportionment of consideration, since admittedly the appellant and respondent's sister each have half share in the properties, the consideration can easily be reduced by 50 per cent which is what the first appellate court has rightly done."

24.. In view of the above decisions of this Court and the facts and circumstances which have already been noticed by us, in our opinion, there is no impediment for enforcement of the agreement against the vendor to the extent of his half share in the property. However, Mr. A.T.M. Sampath, learned counsel for the vendor's wife placed great reliance upon HPA International v. Bhagwandas Fateh Chand Daswani & Ors. (2004) 6 SCC 537 and, particularly, the following paragraphs of the report.

> "67. If the vendee intended to seek conveyance separately of the life interest of the vendor, the earliest opportunity for him was when he had received notice dated 11-9-1979 sent through the lawyer by the vendor cancelling the contract. Assuming that at that time he could not opt for lesser relief as the suit for sanction was pending, he could have, in any case, opted for conveyance of life interest of the vendor soon after he came to know of the negotiations for sale with Bob Daswani, which took place in the presence of one of the partners of the plaintiff vendee. Even after deriving the knowledge of the execution of the sale deed dated 29-12-1979 Ext. D-1, the option to obtain lesser relief of transfer of life interest was not exercised. It was exercised as late as on 25-11-1986 by filing an affidavit and at the time when pleadings of the parties were completed and the joint trial in the two suits had already commenced. During long pendency of the suits between 1979 to 1986, the parties interested in the property changed their positions. The vendor by executing a registered sale deed in favour of the subsequent vendee got his public dues paid to relieve the pressure on the property and obtained market price of the property. After obtaining possession of the property pursuant to the sale deed, the subsequent vendee has raised construction and inducted tenants. Accepting the legal stand based on Sections 90, 91 and 92 of the Indian Trusts Act that the subsequent vendee, being a purchaser with knowledge of prior agreement, is holding the property as a trustee for the benefit of the prior vendee, the vendor, who changed his position by effecting a subsequent sale cannot be compelled to convey his life interest when such lesser relief was not claimed at the earliest opportunity and the terms of the contract did not contemplate transfer of life interest alone."
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> 98. The above argument has no merit and the aforesaid decision is hardly of any help to the vendee. This is not a case where the vendor had only right of spes successionis and after execution of agreement of sale, he subsequently acquired full interest in the property to be held bound by Section 43 of the Transfer of Property Act. In the case before us, the reversioners were not parties to the agreement of sale. When in the suit for sanction to transfer their interest they were made parties and were noticed, they expressly objected to the proposed transfer. No principle of estoppel or provisions of Section 43 of the Transfer of Property Act can, therefore, operate against them. So far as the subsequent vendee is concerned, in the course of suit, he was pushed to a position in which he could not take a stand that he had no knowledge of the prior agreement with the vendee but he has separately purchased life interest from the vendor and obtained separate release deeds, on payment of consideration, from the reversioners. The reversioners being not parties to the sale agreement, Ext. P-1 entered into with the vendee, the latter could not enforce the contract, Ext. P-1 against the former."

It is sufficient to say that the agreement of sale and the facts which their Lordships had to consider in the case of HPA International4 were in many respects different from the agreement in the present case. In that case vide agreement of sale (Exhibit P1) therein, full interest in the property, i.e. life interest of the vendor and spes successionis of reversioners with sanction of the court was agreed to be sold. The reversioners were not parties to the sale agreement that was entered with the vendee therein. The parties were conscious that the vendor had only life interest in the property and he could not convey more than his own interest. The court found that vendee entered into a speculative deal for obtaining full interest in the property depending upon the sanction to be granted by the court. In the backdrop of these facts, this Court observed in paragraphs 68, 69 and 70 of the report thus:

> "68. On duly appreciating the evidence on record, construing specific terms of the contract and considering the conduct of the parties, we have arrived at the conclusion that the rescission of the contract, due to non-grant of sanction by the Court within two years after execution of the contract and filing of the suit for sanction, was not an act of breach of contract on the part of the vendor to justify grant of relief of specific performance of the contract to the prior vendee.
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> 69. We are also of the view that the plaintiff vendee, by his own act in the pending suits, was responsible for rendering the suit for sanction as infructuous. He was guilty of lapse in not seeking conveyance of life interest of the vendor at the earliest opportunity when notice of rescission of the contract was received by him and later when he derived the knowledge of execution of registered sale deed in favour of the subsequent vendee. The option was exercised conditionally in the midst of the joint trial of the two suits.
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> 70. There was one integrated and indivisible contract by the vendor to convey full interest in the property i.e. his own life interest and the interest of the reversioners with sanction of the Court. As the Court had not granted the sanction, the contract could not be specifically enforced. The lesser relief of transfer of life interest was not claimed within a reasonable time after the vendor had intimated that the contract, as agreed for full interest, was not possible of performance. We find that neither equity nor law is in favour of the plaintiff vendee."

The Court further observed in paragraph 100 of the report as follows:

> "100. In the case before us, we have not found that the vendor was guilty of rendering the suit for sanction infructuous. It did terminate the contract pending the suit for sanction but never withdrew that suit. The vendee himself prosecuted it and rendered it infructuous by his own filing of an affidavit giving up his claim for the interest of reversioners. In such a situation where the vendor was not in any manner guilty of not obtaining the sanction and the clause of the contract requiring the Court's sanction for conveyance of full interest, being for the benefit of both the parties, the contract had been rendered unenforceable with the dismissal of the sanction suit."

HPA International, thus, have no considerable bearing on the case in hand."

20. In the case of ***Harendra Chandra Das and others versus Nanda Lal Roy and others,*** reported in ***AIR 1933 Calcutta 98,*** the Division Bench has held that contract, whether divisible, is a question of fact.

21. In the case of ***Dwijendra Kumar Roy and others vrs. Monmohan De*** reported in ***AIR 1957 Calcutta 209,*** the learned Single Judge has held that contract must be specifically enforced as a whole and the exceptions to this general rule are to be found in Sections 14 to 16 of the Act. Sections 14 to 17 of the Act taken together are both positive and negative in their form and they constitute a complete code within the terms of which relief by way of specific performance of part of a contract will have to be brought. In this case defendants No. 1 to 4 have entered into a contract to settle certain lands belonging to them with the plaintiff at a rental of Rs. 70 per annum on receipt of a *salami* of Rs. 700. In a suit for specific performance it was found that the contract was not binding on the minor defendant No. 2 in respect of his ¼ share in the suit lands. The learned Single Judge has held that neither Section 14 nor Section 16 was applicable to the case but the plaintiff was entitled to a decree for specific performance in regard to ¾ share of the adult contracting defendants without any abatement in the stipulated *salami* and rent in respect of the *sixteen annas* share, provided he was prepared to relinquish his claim to further performance and compensation as required by the proviso to S. 15. It has been held as follows:

> "8. The relevant law of partial enforcement is to be found in Sections 14 to 17 of the Specific Relief Act. Section 17 of the Act provides that "the Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections". The general rule thus is that a contract must be specifically enforced as a whole and the exceptions to this general rule are to be found in Sections 14 to 16 of the Act. The Judicial Committee in , has authoritatively laid down that the four Sections 14 to 17 of the Act taken together "are both positive and negative in their form" and "they constitute a complete Code within the terms of which" relief by way of specific performance of part of a contract will have to be brought. My present enquiry is thus of a limited character, namely, whether the plaintiff has succeeded in making out a case under any of the said three Sections 14 to 16.
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> 9. On the facts found, the suit contract was made in favour of the plaintiff by defendants Nos. 3 and 4 and defendant No. 1 acting on behalf of himself and his minor brother defendant No. 2, and the contract, so far as this defendant No. 2 is concerned, is unenforceable in law. In the face of the decision in L.P.A. Nos. 8 and 9 of 1952 (Cal) (B), cited by the appellants, it is difficult to apply Section 16 to such a case when, under almost similar circumstances, this Court (Das and Sen, JJ.) refused to hold that the disputed contract was divisible in the sense that its enforceable and unenforceable parts stood on "separate and independent'' footings within the meaning of the Section. I must, therefore, leave aside Section 16 and turn to the other two Sections 14 and 15. Of these, again, Section 14 requires that the unenforceable part should bear only a small proportion to the whole in value which obviously refers to or connotes negligible or insignificant or immaterial deficiency, implying substantial compliance with the whole contract. The present case is certainly not one of substantial compliance, as contemplated in Section 14 and, accordingly, that section also must be left out of account. I am thus left with Section 15 which applies where inter alia substantial compliance is not possible and the latter part of the section which is in the nature of a proviso provides that in such a rase the defaulting party may be made "to perform so much of his part of the contract as he can perform provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the

deficiency or for the loss or damage sustained by him through the default of the defendant."

This section has often been applied to cases like the present and specific performance of the enforceable part of the contract has been decreed if the plaintiff relinquished his claim to the remainder as required by the statutory proviso, quoted above. For instance, it is enough to refer to Dinanath Sarma v. Gour Nath Sarma ; Purna Chandra Mukherjee v. Gopendra Krishna AIR 1926 Cal 744 (D); Panchananda Kundu v. Rajani Kanta Pal ; Rai Promatha Nath Mittra v. Gostha Behari Sen . Reference may also be made to Shama Charan Kotal v. Kumed Dasi 27 Cal LJ 611: (AIR 1918 Cal 889) (G); Srinath Bhattacharya v. Jatindra Mohan Chatterji, 30 Cal WN 263: (AIR 1926 Cal 445) (H); Mahendra Nath Srimani v. Kailash Nath Das ; Nripendra Ch. Sarkar v. Ekherali Joardar and Baluswami Aiyar v. Lakshmana Aiyar, ILR 44 Mad 605: (AIR 1921 Mad 172) (FB) (K), which appear to proceed on the same principle and the correctness of the position has been accepted and applied in the L.P.A. Nos. 8 and 9 of 1952 (Cal) (B), particularly relied on by the appellants, where the decision of the Privy Council in , has been exhaustively reviewed, examined and explained. Harendra Chandra Das v. Nanda Lal Roy is even wider but, in view of the fact that the plaintiff is content to have the lesser relief under Section 15 (Proviso), it is unnecessary to consider the applicability of that case to the facts before us. I would, accordingly, hold that the plaintiff-respondent is entitled to a decree for specific performance in regard to the three-fourths share of the adult contracting defendants Nos. 1 and 3 and 4 without any abatement in the stipulated selami and rent in respect of the sixteen annas share. That is what the Courts below have given him and the plaintiff has definitely accepted it and thus waived or relinquished all his claim in respect of the remaining one-fourth as required by the proviso in Section 15. Even if the necessary relinquishment be not inferable from the above circumstance, the plaintiff-respondent is in no worse position, as his learned Counsel has categorically and unequivocally stated before me that his client is prepared to relinquish his claim to further performance and compensation, as required by the proviso in Section 15. This is clearly sufficient, as relinquishment for purposes of the said section can be made at any stage of the litigation (Vide the Kalyanpur Lime Wows Ltd. v. The State of Bihar, (M), approving Waryam Singh v. Gopi Chand, ILR 11 Lah 69: (AIR 1930 Lah 34) (N), and as, in my opinion, there is nothing on the present record to justify withhold ing of specific performance, in the exercise of my discretion, I am bound to affirm the decisions of the two Courts below. This appeal must, therefore, fail."

22. In the case of ***Ahammed versus Mammad Kunhi and others,*** reported in ***AIR 1987 Kerala 228,*** the learned Single Judge has held that where an agent was authorized by power of attorney to sell half right over property and on basis of that power he entered into an agreement with purchaser plaintiff to sell the entire property, the authorized portion was separable from the unauthorized portion in a claim by plaintiff under S. 22 of Specific Relief Act for enforcement of agreement for sale and only that extent of agreement was enforceable over which alone the agent had the authority.

"5. Both the trial court and the appellate court found the agreement to be valid to the extent of 1/2 right over the suit property. At the same time, basing on Sections 227 and 228 of the Contract Act, the trial court and the appellate court found that the agreement entered into by the 1st defendant beyond his authority is not separable from the portion for which he had the authority. On this ground the agreement was found to be not enforceable. What Section 227 of the Contract Act says is that when an agent does more than he is authorised to do, and when the part

of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal. What Section 228 says is that when an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction. I do not think that the courts below were right in the finding that the authorised portion is not separable from the unauthorised portion. What was authorised under Ext.B6 was only sale or agreement for sale of 1/2 of the property. But what was agreed was sale of the full right. Section 12 of the Specific Relief Act authorises specific performance of a part of contract in certain specified cases even though the general provision is that specific performance of part of a contract shall not be directed. Under Section 22 of the Specific Relief Act, notwithstanding anything to the contrary contained in the Code of Civil Procedure, any person suing for specific performance of a contract for the transfer of immovable property may, in appropriate cases, ask for partition and separate possession of the property in addition to such performance. Therefore, it cannot be said that the unauthorised portion of Ext.A 1 is inseparable from the authorised portion and hence for that reason the agreement is not enforceable to any extent. Even though what was claimed in the plaint was specific performance of the entire agreement, it is seen that at the time of arguments plaintiff restricted his claim to enforcement of the agreement to 1/2 of the property over which atone the 1st defendant had authority. I disagree with the courts below in this respect and find that the authorised portion was separable from the unauthorised portion."

23. In the case of ***Santhos Kumar and others, versus Varghese George and others,*** reported in ***AIR 1988 Kerala 277,*** the Division Bench has held that where no permission of Court under Section 8 of the Hindu Minority and Guardianship Act, 1956 was obtained, the agreement to sell property in favour of the plaintiff was executed by the natural guardian on behalf of himself and minors was not binding on the minors. The plaintiff could be granted decree for part performance against the guardian.

"7. Section 8 of the Hindu Minority and Guardianship Act enumerates the powers of a natural guardian. Section 8(1) reads :

"The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate, but the guardian can in no case bind the minor by a personal covenant".

Section 8(2) of the Act prohibits the natural guardian from mortgaging, charging or transferring the minor's property without permission of the Court. Section 8(3) stipulates that any disposal of immovable property by a natural guardian, in contravention of Sub-section (1) or Sub-section (2), is voidable at the instance of the minor or any person claiming under him. Section 8(4) mandates the court not to grant permission to the natural guardian to do any of the acts mentioned in Sub-section (2) except in case of necessity or for an evident advantage to the minor. Thus it is manfestly clear that under Section 8 of the Act, property of the minor can be alienated, mortgaged or leased or gifted only for his evident advantage or necessity and the court's permission is a condition precedent. Any transaction by a natural guardian of the immovable property of the minors without permission of the court will not have any legal force and would not be binding on the minors.

8. In the case in hand there is not leading or evidence at all that the 1st defendant as natural guardian entered into the agreement to alienate the property belonging to the minors with permission obtained from the Court under Section 8 of the Act. As there is no evidence that the agreement was entered into by the 1st defendant' for the manifest advantage of the minors and with the permission of the Court their right will not be adversely affected. Defendants 3 to 6 are perfectly entitled to, avoid the agreement entered into by the 1st defendant in favour of the plaintiff without permission of the Court, Even if it is held that the transaction was beneficial to the minors and to their manifest advantage, still it cannot improve the position, as the Court's prior permission was not obtained. As permission of the Court was not taken by the guardian for the sale of the property the minor defendants can very well avoid the agreement.

9. It has next to be considered whether the plaintiff can obtain decree for specific performance of the agreement so far as the property belonging to defendants 1 and 2 is concerned. Section 12(1) of the Specific Relief Act, 1963 postulates that except in cases falling in Sub-sections (2) to (4), the Court shall not direct specific performance of a part of contract so far as they can be performed, and for compensation so far as it is not possible to perform them. Sub-section (2) deals with the case, when the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money. In such animation the court may direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency.

In the case in hand defendants 1 and 2 are in a position to convey substantially what the plaintiff has contracted to get. Out of the total extent of 94 cents, the extent of property belonging to the minors is only 18 cents. With respect to the property belonging to defendants 1 and 2 they cannot raise any controversy so far as the plaint claim is concerned. As defendants 1 and 2 are in a position to convey substantially what the plaintiff as a purchaser had contracted to get, the court can definitely decree the suit for specific performance as against their property. As it is found that defendants 1 and 2 have no title with regard to 18 cents of property belonging to the minor defendants and as they did not obtain sanction of the Court as provided under Section 8 of the Hindu Minority and Guardianship Act specific performance cannot be granted with regard to that item of property. In such a case the Court has to see whether the part of the contract which cannot be performed bears only a small proportion to the whole in value. Where it is found that the promisor had no title in regard to one item out of several, he had agreed to convey, the court has to see whether the part of the contract which cannot be performed bears only a small proportion to the whole in value and admits of compensation in money, or that such part does not bear only a small proportion to the whole in value or does not admit of compensation in money. In a case where the part of the contract which cannot be performed is the conveyance of ah item which is only a small portion of the whole in value and admits of compensation in money, the provisions of Section 12(2) of the Specific Relief Act became applicable. In Rutherford v. Acton Admas, AIR 1915 PC 113 it is stated as follows :

> "if a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy".

> Defendants 1 and 2 cannot perform the whole of the agreement and they can perform only that part of the agreement which relates to their own property. As the property belonging to the minor defendants is only a small proportion to the whole of the agreement, it has to be held that specific performance of so much of the contract as can be performed can be granted in favour of the plaintiff."

24. In the case of ***K. S. Krishnan versus Kizhakkumbrath Arumugha Tharakar,*** reported in ***AIR 1993 Kerala 134,*** the learned Single Judge has held that the agreement can be enforced against one of the co-owners in respect of his share. It has been held as follows:

> "18. The law being what has been stated above there cannot be any difficulty in enforcing a contract against one of the co-sharers who had jointly contracted to convey a property. If any of them is unable to convey his portion there is no legal bar in getting specific performance of the remaining portion against the other co-sharers. Each of the co-sharers is entitled to possession and enjoyment of the whole property along with others. He has an equal right to the possession of every part and parcel of the property. It may be that their interests are unequal but still they have got unity of possession and each of the co-sharers can transfer his share and the transferee becomes a co-sharer along with others. Section 44 of the Transfer of Property Act says that the transferee acquires as to such share or interest the transferor' right to joint possession or other common or part enjoyment of the property. The transferee can also enforce partition of his rights but subject to the conditions and liabilities affecting at the date of the transfer. Thus in a case where several co-sharers had contracted to convey a joint property belonging to them the contract can be enforced against one of them if the others are unable to convey their shares."

25. In the case of ***Dhara Singh versus Fateh Singh & ors.,*** reported in ***AIR 2009 Rajasthan 132,*** the learned Single Judge has held that the purchaser would be entitled to get partition by stepping into shoes of his vendor and decree of specific performance cannot be denied to plaintiff purchaser. It has been held as follows:

> "15. Therefore, merely because the land in question was owned jointly by joint owners, it does not prevent sale by joint owners to the extent of their share and purchaser would become entitled to get partition of such land owned in joint names by stepping into shoes of their vendors. Since this position of law is clear enough, the decree for specific performance could not have been refused by the learned trial Court while deciding issue No. 8 against the plaintiff which appears to have been wrongly decided by the learned trial Court against the plaintiff-appellant and contrary to the judgment of Apex Court in the case of P.C. Varghese (AIR 2006 SC 145) (supra).
>
> 16. It is true that the relief of specific performance is a discretionary relief and it is not necessary for the trial Court to always decree specific performance of contract and the plaintiff can be compensated in the form of compensation in monetary terms. However, the said discretion has to be fairly used and in accordance with law. The fact that the plaintiff was put in physical possession at the time of agreement dated 9.2.1985 itself and paid major portion of the consideration under agreement in the year 1985 itself, entirely tilts the balance in favour of the plaintiff and in these circumstances, he was entitled to secure the specific performance of the agreement in question itself and mere compensation at double the amount paid by the plaintiff cannot adequately compensate the plaintiff who is in possession of 9 bighas of agricultural land since 1985 and is doing agricultural operations thereon since then. This Court also does

not find any reason to upset the findings of the learned Trial Court on issues decided in favour of the plaintiff.

17. The legal impediment in securing such transfer by proving that he is bonafide resident of Rajasthan, is also no longer available to the defendants in view of aforesaid notification dated 22.4.1991 cited by the learned counsel for the plaintiff-appellant. The judgments relied upon by the learned counsel for the respondents-defendants are mostly under the circumstances where the plaintiff was not in possession of the suit property and after long number of years, the Court did not consider it appropriate to award the specific performance of the contract in question, in view of high escalation of the price of the land. Here the situation is different. Under the agreement in question, the plaintiff is in physical possession of the land in question since 1985 and for long number of years he is carrying on his agricultural operations on the land in question, therefore, now denying him specific performance and allowing him only compensation in monetary terms cannot be considered to be justified. As far as question of any compensation to the defendants is concerned, that too is not found to be justified because it is only the rights of parties at the time of entering into the agreement, which will be decided in the litigation and merely because this Court now finds that the decree of specific ought to have been granted in favour of the plaintiff, it cannot be said that the defendants would be entitled to any sort of difference on account of escalation of price or compensation to settle the equities. The defendants had agreed to sell said 9 bighas of land for consideration of Rs. 74,250/- and the plaintiff had already paid consideration to the extent of Rs. 66,450/-. This was according to the then prevailing market rate and the plaintiff is admittedly in possession of the land in question since then. Therefore, now awarding any extra-compensation in the form of consideration in favour of the defendants are now expected to do is only to execute the sale-deed in performance of the agreement which they entered into on 9.2.1985 followed by agreement dated 15.2.1985, whereby with some additional payment, the bar of any time limit was agreed to be removed by the parties. However, on the unpaid sum of consideration of Rs. 7, 800/- the defendants would be entitled to get interest @ 9% per annum."

26. Accordingly, the Courts below have correctly appreciated Ext. PW-1/A and the substantial questions of law are answered accordingly. It is held that the agreement could be specifically enforced against the share of defendant.

27. Consequently, the appeal is dismissed.

**********

**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J.**

Santosh Kumar and another. ...Petitioners.
Versus
Vijay Ram and others ...Respondents

CMPMO No. 82 of 2014
Reserved on: 10.11.2014
Decided on: 18.11.2014

**Code of Civil Procedure, 1908-** Order 6 Rule 17- Plaintiff filed an application seeking amendment to the effect that defendants were not entitled to compensation and for seeking to restrain the defendants from spending the award amount- held, that the award was passed on 12.6.2013- plaintiff was not a party before Land Acquisition Collector

and did not know about the proceeding- therefore, plaintiff had filed the application after exercise of due diligence – amendment was necessary for adjudicating the controversy between the parties- amendment was allowed subject to payment of cost of Rs.1,000/-. (Para-7 to 10)

**Land Acquisition Act, 1894 -** Section 31- Claim of the person entitled to share in compensation if not adjudicated upon in land acquisition proceedings is not barred before the Civil Court. (Para-13 to 19)

**Cases referred**

Shri Deo Sansthan Chinchwad and others vs. Chintaman Dharnidhar Deo and another, AIR 1962 Bombay 214

Jog Raj and another v. Banarsi Dass and another, AIR 1978 Punjab and Haryana 189

Karnail Singh v. Jagir Singh, AIR 1984 Punjab and Haryana 294

Hira Singh (deceased by LRs v. Smt. Sahini and others, AIR 1987 Delhi 168

Shantibala alias Shantilata Dei vs. Krushna Chandra Samantaray and others, AIR 2004 Orissa 9

Kempoji Rao v. Special Land Acquisition and Estate Officer, AIR 2008 Karnataka 54

Sampath Kumar vs. Ayyakannu and another, (2002) 7 SCC 559

Rajesh Kumar Aggarwal and others vs. K.K. Modi and others, (2006) 4 SCC 385

For the Petitioners : Mr. Neeraj Gupta, Advocate.
For the Respondents : Mr. B.S. Chauhan, Advocate for respondent No.1.
Respondents No.2 to 4, 6 and 7 already ex parte.

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, Judge.**

This petition is instituted against the order dated 5.12.2013 rendered by Civil Judge (Senior Division), Kinnaur District at Reckong Peo.

2. "Key facts" necessary for the adjudication of this petition are that plaintiff-respondent (hereinafter referred to as the "plaintiff" for convenience sake) has filed a suit for declaration against the petitioners-defendants (hereinafter referred to as the "defendants" for convenience sake). The suit was contested by the contesting defendants by filing written statement. According to the defendants, a "will" was executed by deceased Amber Sukh on 19.2.1994 in their favour. They have become absolute owner on the basis of same. Mutation was attested in their favour on 1.9.1994.

3. Plaintiff filed an application under order 6 rule 17 of the Code of Civil Procedure seeking amendment of the plaint by inserting new paras in the plaint. According to the averments contained in the application, State Government has acquired land for construction of the border road. Award No.03/12 was passed on 12.6.2012 by the Land Acquisition Collector, Sub Division Kalpa at Reckong Peo. A sum of Rs. 83,63,739/- has been awarded in favour of the defendants. The payment was duly deposited in the bank. Plaintiff sought to raise the plea that defendants were not entitled to amount of compensation and the decree for permanent prohibitory injunction was also sought seeking to restrain defendants from spending the award amount. Application was contested by the defendants. Learned trial court allowed the application on 5.12.2013. Hence, the present petition.

4. Mr. Neeraj Gupta learned counsel for the defendants has vehemently argued that plaintiff has the remedy under section 31 of the Land Acquisition Act, 1894 (herein after referred to as ' Act' for brevity sake).

5. Mr. B.S. Chauhan, learned counsel appearing on behalf of plaintiff has strenuously argued that defendants have rightly availed the remedy by filing a suit. According to him, amendment in the plaint would avoid multiplicity of litigation.

6. I have heard the learned counsel for the parties and have perused the impugned order dated 5.12.2013 carefully.

7. What emerges from the facts enumerated hereinabove is that plaintiff has instituted a suit against the defendants. Case of the defendants precisely is that they have become absolute owner on the basis of "will" executed by Amber Sukh on 19.2.1994. The mutation was also attested in their favour. However, fact of the matter is that land was acquired by the State Government for the construction of border road. Award was passed on 12.6.2012. A sum of Rs. 83,63,739/- has been awarded in favour of the defendants. Plaintiff wanted to amend para 5 of the plaint by adding the following lines:

> **"In fact, the mother of defendants No.1 and 2 was earlier married to one Sh. Vidyapur of Village Jangi and after the death of Vidyapur she was remarried with Sh. Kirpa Ram father of defendants No.1 and 2 at village Rarang, District Kinnaur and was residing there."**

8. He also wanted to amend para 6 of the plaint by adding the followings word:

> **"alienation and also restraining from spending the awarded amount of Rs. 83,63,739/- in any manner whatsoever and in case they are not restrained from spending the awarded amount, then in that event the very purpose of filing of the present suit would be defeated."**

9. He further wanted to amend para V of the prayer clause by adding the following words:

> **"alienating and spending the awarded amount in any manner by issuance of permanent prohibitory injunction and substituted the word "Mandate" by adding the words "Permanent prohibitory injunction."**

10. The underlined principle to allow amendments to the pleading is definitely to avoid multiplicity of litigation. In the instant case, plaintiff has exercised due diligence while preferring an application for amendment of the plaint. The award has been made after the suit was instituted on 13.9.2009. The award No.03/12 was rendered on 12.6.2013. The amendment was necessary for the adjudication of the real controversy involved between the parties. The awarded amount has already been disbursed to the defendants. The plaintiff was not party before the Land Acquisition Collector. He did not know about the proceedings pending before the Land Acquisition Officer. The application cannot be termed to be filed belatedly. Defendants have also been duly compensated by awarding costs of ` 1,000/-.

11. There is no merit in the contention of Mr. Neeraj Gupta that plaintiff could take recourse under section 31 of the Act.

12. Section 31 of the Act reads as under:

> **"31. Payment of compensation or deposit of same in Court.**

**(1) On making an award under section 11, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award, and shall pay it to them unless prevented by some one or more of the contingencies mentioned in the next sub-section.**

**(2) If they shall not consent to receive it, or if there be no person competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted:**

**Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount:**

**Provided also that no person who has Received the amount otherwise than under protest shall be entitled to make any application under section 18:**

**Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto.**

**(3) Notwithstanding anything in this section, the Collector may, with the sanction of [1][appropriate Government] instead of awarding a money compensation in respect of any land, make any arrangement with a person having a limited interest in such land, either by the grant of other lands in exchange, the remission of land revenue on other lands held under the same title, or in such other way as may be equitable having regard to the interests of the parties concerned.**

**(4) Nothing in the last foregoing sub-section shall be construed to interfere with or limit the power of the Collector to enter into any arrangement with any person interested in the land and competent to contract in respect thereof."**

13. Division Bench of Bombay High Court in ***Shri Deo Sansthan Chinchwad and others*** vs. ***Chintaman Dharnidhar Deo and another***, AIR 1962 Bombay 214 has held that claim of person entitled to share in compensation if not adjudicated upon in land acquisition proceedings, separate suit by such person to recovery his share from person who has received compensation is competent. The Division Bench has held as under:

**"(12) As against Mr. Jahagirdar's contention, it was urged by Mr. Chitale, learned advocate appearing on behalf of the respondents, that the suit would be competent because apportionment proceedings are entirely separate proceedings and would require a separate notice to person interested in the compensation money. In this connection, he relied on the decision of the Calcutta High Court in Hurmitian Bibi v.padma Lochun Das, ILR 12 Cal 33, where it was held that the apportionment of the compensation under Section 39 of Act X of 1870 is intended to be proceeding distinct from that of settling the amount of compensation under the previous provisions of the Act, and any dispute as to the apportionment is only decided as between those persons who are actually before the Court. A separate notice, therefore, of the apportionment proceedings is requisite to bind any person by those**

**proceedings, and where such a noticee has not been served, any party interested, although served with the notice of the proceedings for setting the amount of the compensation, cannot be considered a party to the proceedings for apportioning it, and is not barred, by the decision of the latter proceedings, from bringing a suit under the proviso to Section 40, to recover a share of the money so apportioned. We do not think it is necessary to deide whether a separate notice of the apportionment proceedings would be required because admittedly in the present case there have been no apportionment proceedings. Mr. Chitale further contended that even assuming that plaitiff No. 1 had notice of the acquisition proceedings in his capacity as a chief trustee, a separate notice should have been given to him since it must have been known to the Revenue authorities that he had an interest in a private capacity in the village vasul to the extent of Rs. 417-4-0. We do not think it is necessary to decide this question either for the purpose of the present appeal. Mr. Chitale has also invited our attention to the Privy Council decision in Ramchandra Rao v. Ramchandra Rao, 24 Bom LR 963: (AIR 1922 PC 80), where it was held that the Land Acquisition Act of 1894 contemplated two separate and distinct forms of procedure, one for fixing the amount of compensation described as the award, and the other, for determining in case of dispute the relative rights of the persons entitled to the compensation money. Any dispute as to relative rights of persons entitled to receive compensation money is settled by litigation in the ordinary way. It was further held in that case that the decision of a competent Court even in proceedings under the Land Acquisition Act would operate as res judicata and the same question cannot be reopened in a subsequent litigation between the same parties. That case, it is true, is also distinguishable on facts. In the present case, the question of apportionment of the compensation amount appears tohave been altogether lost sight of by the Land Acquisition authorities despite entries in the Record of Rights. When the plaintiffs applied to the Collector for their share in the compensation money, the amount had been already paid to the Sansthan and the Collector does not appear to have acted under any of the provisions of the Land Acquisition Act. He merely asked the plaintiffs to apply to the Sansthan for their share in the compensation amount and, in case of refusal, to file a suit to recover the same. Mr. Chitale contends that in these circumstances, in view of the third proviso to Section 31(2) of the Land Acquisition Act, the suit filed by the plaintiffs would be maintainable. In our judgment, there is considerable force in this argument. Under the thrid proviso to Section 31(2) of the Act, nothing contained in sub-section (2) shall affect the liability of any person who may receive the whole or any part of any compensation awarded under the Act, to pay the same to the person lawfully entitled thereto. Unless, therefore, the claim of such a person, who is lawfully entitled to a share in the compensation money, is already adjudicated upon under the provisions of the Land Acquisition Act or such person having had notice to such proceedings, appears therein and fails to assert and prosecute his claim to a share in accordance with the provisions of that Act, he would be entitled to file a suit to recover his share from the person who may have received the whole or any part of the compensation amount awarded under the Act. We must, therefore, reject Mr. Jagirdar's contention that the suit is not maintainable as plaintiffs did not get their claim adjudicated upon under the provisions of the Land Acquisition Act."**

14. Learned Single Judge of Punjab and Haryana High Court in ***Jog Raj and another*** v. ***Banarsi Dass and another***, AIR 1978 Punjab and Haryana 189 has held that where there is a dispute regarding the apportionment of the amount of compensation and the Collector makes payment to one of the claimants, the other claimant can recover his share of the amount of compensation from the claimant who has been paid the amount by filing a civil suit. Learned Single Judge has held as under:

> **"7. Mr. G. C. Mittal, in support of his contention, referred to Hemanta Kumar Banerjee v. Satish Chandra Banerjee, AIR 1941 Cal 635, wherein it was observed that last proviso to S. 31(2) contemplates civil suit. It does not create right to get refund but merely recognises right existing independently of the section. He also referred to Shri Deo Sansthan Chinchwad v. Chintaman Dharnidhar Deo. AIR 1962 Bom 214, wherein similar observations were made. There cannot be any dispute that a suit is maintainable for recovery under proviso to S. 31(2). But it is not the only remedy. I am of the view that both the remedies for recovery of such amounts are open and it is for the party concerned to choose either of them.**
>
> **13. On the merits, I have also examined the matter, I have already held above that two courses were open to the tenants--firstly they could file an application before the Additional District Judge for making payment to the landlord out of the enhanced amount after taking into consideration the amount already paid by the Collector and to pay the balance to them and secondly to file a suit for recovery of their share out of the amount paid by the Collector to the landlord. They adopted the first course to which they were entitled to. For the aforesaid reasons, I do not find any fault with the judgment of the Additional District Judge and confirm the same."**

15. The Division Bench of Punjab and Haryana High Court in ***Karnail Singh v. Jagir Singh***, AIR 1984 Punjab and Haryana 294 has held that the suit for recovery for compensation amount is maintainable. The Division Bench has held as under:

> **"7. SECTION 31 has been interpreted by the Supreme Court So Dr. G. H. Grant v. State of Bihar AIR 1966 SC 237. J. C. Shah, J., speaking for the majority observed as follows (at p. 244):--**
>
> **"In, determining, the, court, of,, amount of compensation: which may be offered, he has, it is true, to apportion the, amount-of compensation between the persons known or believed to. be interested in the land, of whom. or of whose claims, he has information. whether or not they have appeared before him,. But the scheme, of. apportionment by the Collector. does trot finally. determine the rights of the Persons interested in. the. amount of compensation: the. award. is only conclusive. between the Collector and the persons interested. and not among the persons interested. The Collector has no power. to finally adjudicate, upon the title to compensation:. that dispute,. has to he decided other in. a reference 1 under SC GB '18. or. under SECTION 30-or in a "separate suit. Payment at compensation. therefore. '"under SECTION. 31 to. the, person declared by the away' ' to be entitled thereto discharges the State of 1", liability. to pay compensation (subject to any modification by the Court leaving. it open-to the. claimant to compensation to under 29 state: his., right in g reference.. under. SECTION 30 or by a separate suit.,,."**

**From the above observations, it. is clear that the award i final so far as the Collector. and the persons in interested. are concerned,. but it, is. not, so., among the persons. contested 1 the land. The Persons. 1 interested can get. their dispute solved together by asking the Collector to make i. referred Under SECTION. 18, pee, of this. Act or by-a separate.. suit. The same view had been expressed earlier in Hemanta Kumar Banerjee y Satish Chanda Banerjee,' AIR'. 1941 Cal 635. Hitkarini Sabha v., Jabalpftr Corporation, AIR 1958 Madh Pra 339, and Shri Deo Sansthan Chinchwad V. Chintaman Phamidhar 1 AIR 1962 BQM 214.)eo, Similar mat r came Up before me were. while sitting. in single Bench. in Jog. Rai v. Benars Dass., (1978) 80 Pun LR @258., AIR 1978 Punj & Har 189). 1 also took same view and held, that a suit. is.for re maintainable covers of an amount under proviso to SECTION 31(2) of the Act."**

16. Learned Single Judge of Delhi High Court in ***Hira Singh (deceased by LRs*** v. ***Smt. Sahini and others***, AIR 1987 Delhi 168 has held that suit seeking recovery of compensation from person who received it is maintainable. Learned Single Judge has held as under:

**"10. There is no dispute to the fact that Khasra No. 932 was acquired by the Government vide award No. 1691 dt. Mar. 23, 1964 announced on Mar. 31, 1964, Khasra No. 932 was placed in Block 'B' and compensation thereof was assessed at Rs.1,500/- per bigha. At the time of the announcement of the award, Shri Fateh Singh was the recorded owner/ person interested. No application has been made for apportionment of compensation by any person under S. 18 of the said Act. It is not the case of the appellant that Surat Singh had received any notice of apportionment of compensation. The consensus of judicial opinion is that where a claim of a person entitled to compensation is not adjudicated upon in the land acquisition proceedings, separate suit by such person to recover his share from person who had actually received compensation is competent. Reference may be made to the decision of the Privy Council in TB Ramchandra Rao v. ANS Ramchandra Rao. AIR 1922 PC 80. It was held that Land Acquisition Act contemplated two separate and distinct forms of procedure, one for fixing the amount of compensation described in the award, and the other, for determining in case of dispute the relative rights of persons entitled to receive compensation money. Any dispute as to the relative rights of persons entitled to receive compensation money may be settled by litigation in the ordinary way. This is the effect of the third proviso to S. 31 (2) of the Act. The claim of Surat Singh has not been determined or adjudicated upon under the provisions of the Land Acquisition Act. He is entitled to file a suit to recover his share from the person who has actually received the amount of compensation awarded under the Act. I, therefore, find no merit in the second submission of the counsel for the appellant."**

17. Learned Single Judge of Orissa High Court in ***Shantibala alias Shantilata Dei*** vs***. Krushna Chandra Samantaray and others***, AIR 2004 Orissa 9 has held that decree for recovery can be passed against person wrongfully receiving compensation and against State jointly and severally. Learned Single Judge has held as under:

**13. The third proviso from the above quoted provision of law provides that a person if receives compensation amount though legally not entitled to the same, then he is liable to pay the same to the person who is lawfully entitled to the same. The said provision ipso facto does not disentitles the looser of the land or forbids him**

**to claim the relief of recovery of compensation amount jointly and severally from the State as well as the person who has received it wrongly. On the other hand, while adjudicating a dispute of the present nature Court should take into consideration all relevant facts and evidence and circumstances leading to payment by the Land Acquisition Officer to a wrong person and to decide if the circumstance available on record are sufficient to exonerate the State or to pass a decree for recovery jointly and severally.**

**14. In the above context, this Court finds no relevancy of the ratio in the case of Secretary of State for India, AIR 1924 Mad 521 (Supra) and Shri Deo Sansthan, Chinchwad, AIR 1962 Bom 214 (supra). In the case of State v. Smt. Sugandhi, AIR 1980 Madh Pra 19 (supra), learned Judges of the Division Bench of Madhya Pradesh High Court have judiciously consider such a contention and have stated that (Para 25 of AIR) :--**

**"As to the fourth point, normally the State is not a necessary or a proper party to a suit for recovery of compensation alleged to have been paid to a wrong person. Having paid the amount after the award was made, to a person who came forward to claim it, the State should normally stand absolved from the liability. The person who ought to have received the compensation for reason of his better title has his remedy against the person to whom the money has been wrongly paid. Third proviso to Section 31(2) of the Land Acquisition Act saves such a right to the person lawfully entitled to compensation, to claim the same from the person to whom the amount has been wrongly paid. There are, however, authorities for the proposition that where the Collector has shown negligence in paying to a wrong person (such negligence as would be actionable), the Collector should be asked to pay again. It is not right, the authorities say, that the Government should throw on a party whose property it has compulsorily acquired, the risk and burden of recovering the compensation from someone to whom the Government has wrongly paid it. (See K.N.K.R.M.K. Chattyat Firm v. Secy. of State, AIR 1933 Rang 176, Deputy Collector, Cocanada v. Maharaja of Pittapur, (1926) ILR 49 Mad 519 : AIR 1926 Mad 492 (1)."**

**However, in that reported case learned Judge did not find want of bona fide in the conduct of the Land Acquisition Officer and therefore declined to pass a decree jointly and severally.**

**15. From the foregoing discussions this Court finds that law does not prohibits grant of a decree jointly and severally. Evidence on record i.e. Ext. 4 and oral evidence adduced from the side of the plaintiff goes to show that the Land Acquisition Collector did not act bona fide while hastily made payment of half of the compensation amount to defendant No. 1 notwithstanding a protest raised from plaintiff's side disputing to such rights of defendant No. 1. Defendant No. 4 has not been able to prove on record that such payment was made to defendant No. 1 after due enquiry or in the absence of any protest or resistance from any quarter. Thus the evidence on record does not protect the defendant No. 4 against a decree.**

**16. The trial Court has also committed another mistake by granting a decree of the claimed amount in favour of the plaintiff. Fact remains that plaintiff is entitled to the proportionate compensation to the extent she lost from the purchased lands and if that comes within the half share of her vender. It is also stated at the Bar that**

**plaintiff has also received compensation for acquisition of remaining portion from the disputed plot. There is no clear and cogent evidence available on record in that respect. Therefore, while passing a decree for recovery of the compensation amount by the plaintiff jointly and severally from the defendant to Nos. 1 and 4, it is ordered that plaintiff is entitled to recover such amount proportionate to the extent of land lost by her from out of that Ac. 0.210 decimals. If the loss of the land sustained by the plaintiff is for more than 50% of the land acquired under that Notification then also her claim shall remain confined only to 50% of the compensation amount determined under the concerned acquisition proceeding inasmuch as she has not claimed for any further compensation for loss of such land. If the loss of the land by her is for any lessor area then decree shall be passed proportionately for a lesser amount. While modifying the judgment and decree of the trial Court accordingly the trial Court is directed to determine that aspect to pass a decree for a certain amount.**

**17. It appears from Ext. 4 i.e., the Award passed in Land Acquisition Case No. 51 of 1969 that the Land Acquisition Collector had been directed to determine the above aspect for payment of proportionate compensation to the plaintiff. There is nothing on record to indicate that the Land Acquisition Collector undertook any follow up action to comply with such direction in that Award. There has been a gap of about three decades and as yet plaintiff is to get the compensation amount which is her legitimate due. Statutory interest in such a case is inadequate relief against the financial loss and damage due to non-availability of such money at her disposal. Therefore, it will be appropriate for the defendant No. 4 to get the proportionate compensation determined, if not already done, expeditiously and if possible to make payment of the same as per that Award (Ext. 4). Unless the defendant No. 4 shall attend to that job sincerely, then the trial Court while determining the amount of compensation which the plaintiff is entitle to recover shall also allow appropriate amount towards damage as against the defendants jointly and severally.**

**In the result, the appeal is allowed and the decree of the Court below stands modified in the following manner :--**

**(a) Plaintiff is entitle to a money decree jointly and severally against defendant Nos. 1 and 4 for the compensation amount which shall be proportionate to the land lost by her under the concerned Notification but in any case such amount shall not exceed the amount of compensation claimed in the suit.**

**(b) It will be appropriate and desirable for the defendant No. 4 to verify and determine the amount of such compensation which plaintiff should get and if possible to pay the same expeditiously and in the interest of equity and justice.**

**(c) Notwithstanding the proceeding direction to defendant No. 4 the trial Court shall take further evidence, if any, adduced by the parties or any of them to determine the amount for which the decree shall be passed and at that stage looking to the conduct of the defendant No. 4 trial Court shall determine if any amount shall be awarded towards damage and if so, the quantum thereof. For that limited purpose the case be regarded as remanded.**

**(d) Hearing-fee is assessed at contested scale and the defendants/respondents 1 and 4 jointly and severally bear the cost all throughout.**

18. Learned Single Judge of Karnataka in ***Kempoji Rao v. Special Land Acquisition and Estate Officer***, AIR 2008 Karnataka 54 has held that if payment is made to a person other than actual owner, owner is required to proceed and claim reimbursement from recipient. Learned Single Judge has held as under:

> **"11. That apart, payment under section 31 of the Act even as indicated in the provision is not conclusive if a person entitled for payment has not received compensation but some other person has claimed it as original petition and the entitlement of the proper person to receive or claim reimbursement from the recipient is kept open under the very provision and that cannot be achieved in a proceeding of this nature but has to be independently."**

19. In the instant also, the plaintiff has an independent right to recover the amount from the defendants by seeking amendment of the plaint. The award has been made after the filing of the suit. It would avoid multiplicity of litigation. The relief sought for by the plaintiff could not be decided under section 31 of the Act. It is required to be independently determined in a properly instituted suit. The basic structure of the suit has not been changed. No prejudice has caused to the defendants. The trial court was bound to take into consideration subsequent developments, i.e. award made by the Land Acquisition Officer, in order to shorten the litigation.

20. Their Lordships of the Hon'ble Supreme Court in ***Sampath Kumar vs. Ayyakannu and another***, (2002) 7 SCC 559 have held that only such amendments as are directed towards putting forth and seeking determination of the real questions in controversy between the parties should be permitted to be made. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In the latter case the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No straitjacket formula can be laid down. Their Lordships have held as under:

> **"9. Order 6 rule 17 of the CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amended. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No strait-jacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment."**

21. Their Lordships of the Hon'ble Supreme Court in ***Rajesh Kumar Aggarwal and others*** vs. ***K.K. Modi and others***, (2006) 4 SCC 385 have held that the object of order 6 rule 17 of the Code of Civil Procedure is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause

injustice or prejudice to the other side. The court always should amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide. The amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice. The court should also take notice of subsequent events in order to shorten the litigation to preserve and safeguard the rights of both the parties and to subserve the ends of justice. Their Lordships have held as under:

> **"15. The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.**
>
> **16. Order VI Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.**
>
> **17. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.**
>
> **18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary has expressed certain opinion and entered into a discussion on merits of the amendment. In cases like this, the Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to sub-serve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court.**
>
> **19. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case.**
>
> **20. We shall now consider the proposed amendment and to see whether it introduces a totally different, new and inconsistent case as observed by the Hon'ble Judges of the Division Bench and as to whether the application does not appear to have been made in good faith. We have already noticed the prayer in the plaint and the application for amendment. In our view, the amendment sought was**

**necessary for the purpose of determining the real controversy between the parties as the beneficiaries of the Trust. It was alleged that respondent No.1 is not only in exclusive possession of 57,942 shares of GPI and the dividend received on the said shares but has also been and is still exercising voting rights with regard to these shares and that he has used the Trust to strengthen his control over GPI. Therefore, the proposed amendment was sought in the interest of the beneficiaries and to sell the shares and proceeds invested in Government bonds and or securities. A reading of the entire plaint and the prayer made thereunder and the proposed amendment would go to show that there was no question of any inconsistency with the case originally made out in the plaint. The Court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting malafide. There are a plethora of precedents pertaining to the grant or refusal of permission for amendment of pleadings. The various decisions rendered by this Court and the proposition laid down therein are widely known. This Court has consistently held that the amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice. The amendments sought for by the appellants has become necessary in view of the facts that the appellants being the beneficiaries of the Trust are not deriving any benefit from the creation of the Trust since 1991-92 and that if the shares are sold and then invested in Government bonds/securities the investment would yield a minimum return of 10-12%. It was alleged by the appellants that respondent No.1 is opposing the sale in view of the fact that if the said shares are sold after the suit is decreed in favour of the appellants, he will be the loser and, therefore, it is solely on account of the attitude on the part of respondent No.1 that the appellants have constrained to seek relief against the same."**

22. In the instant case also the cause of action has arisen during the pendency of the suit and the proposed amendment has rightly been allowed by the trial court.

23. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the petition and the same is dismissed. Pending application(s), if any, also stands disposed of. No costs.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.**

Amin Chand Mehta .....Appellant.

Versus

Commissioner of Wealth Tax .....Respondent.

WTA No. 01 of 2009.
Reserved on: 31.10.14
Decided on: 19.11.2014.

**Wealth Tax Act-** Section 17- Assessee contended that his land was agricultural land and did not fall within the definition of the urban land - there are trees standing on the land and it was not possible to raise any construction without seeking permission from the Competent Authority- held, that as per the definition of the urban land any land classified as

agricultural land or the land in which the construction of the building is not possible would not fall within the definition of the urban land- as the land of the assessee is agricultural land and no construction is possible without the permission of Municipal Corporation, it is not liable for the assessment. (Para- 6 to 9)

**Case referred:**
Commissioner of Wealth Tax versus D.C.M. Ltd., reported in (2007) 290 ITR 615 (Delhi)

For the appellant: Mr. Vishal Mohan, Advocate.
For the respondent: Mr. Diwan S. Negi, Advocate, vice Ms. Vandana Kuthiala, Advocate.

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, J.**

This appeal is instituted by the appellant-assessee against the order rendered by the learned Income Tax Appellate Tribunal in WTA Nos. 49 to 54/Chd/2008 dated 30.1.2009.

2. The appeal was admitted on the following substantial questions of law:

> "1. Whether the ld. Tribunal is right in law in holding that agricultural land within the municipality are subjectable to Wealth Tax being a part of the assets as defined under Section 2 (ea) of the Wealth Tax Act?
>
> 2. Whether in law the ld. Tribunal is right in holding that land covered by trees on which construction for the time being is not possible well within the definition of assets for the levy of Wealth Tax Act even though construction was not possible on the valuation date?
>
> 3. Whether land on which construction is not possible, being covered by trees possesses market value that too similar to that of the lands on which construction is possible?"

3. Key facts, necessary for the adjudication of this appeal are that the notice was issued to the appellant under Section 17 of the Wealth Tax Act, 1957. He filed reply/return to the same. The assessment order was passed by the Wealth Tax Officer against the appellant on 27.12.2006. He preferred appeal against the order dated 27.12.2006 before the Commissioner of Wealth Tax (Appeals), Shimla. The Commissioner of Wealth Tax (Appeals), Shimla, dismissed the same on 22.9.2008. The appellant challenged the order dated 22.9.2008 before the Income Tax Appellate Tribunal, Chandigarh Bench 'B'. The Income Tax Appellate Tribunal, Chandigarh Bench 'B', dismissed the same on 30.1.2009. Hence, this present appeal.

4. Mr. Vishal Mohan, Advocate, for the appellant has vehemently argued that the impugned land is agriculture land and does not fall within the definition of "urban land". In other words, his submission is that it was beyond the purview of Wealth Tax. He also argued that the trees are standing on the land, thus the construction was not possible without seeking permission from the statutory authorities. He has also relied upon the demarcation report carried out by the Assistant Collector, Shimla (Urban) on 14.3.2008, whereby the land was found to be covered by trees. He lastly contended that the land on which the trees are standing cannot be used for construction purpose without seeking permission of the competent authority. On the other hand, learned counsel for

the department has supported the orders passed by the learned authorities below.

5. We have gone through the orders passed by the Wealth Tax Officer dated 27.12.2006, Commissioner of Wealth Tax (Appeals) dated 22.9.2008 and Income Tax Appellate Tribunal, Chandigarh Bench, dated 30.1.2009. The appellant has also placed on record the copy of the *jamabandi* in respect of the agricultural/non-agricultural land owned by the appellant.

6. Mr. Vishal Mohan, Advocate, for the appellant has drawn the attention of this Court to the amendment carried out in Section 2 (ea)(b) retrospectively w.e.f 1.4.1993, as per the Finance Act, 2013. It reads as under:

> "2 (ea)(b). "urban land" means land situate-
>
> (i) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the valuation date; or
>
> (ii) in any area within such distance, not being more than eight kilometers from the local limits of any municipality or cantonment board referred to in sub-clause (i), as the Central Government may, having regard to the extent of, and scope for, urbanization of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette,
>
> but does not include land classified as agricultural land in the records of the Government and used for agricultural purposes or land on which construction of a building is not permissible under any law for the time being in force in the area in which such land is situated or the land occupied by any building which has been constructed with the approval of the appropriate authority or any unused land held by the assessee for industrial purposes for a period of two years from the date of its acquisition by him or any land held by the assessee as stock-in-trade for a period of ten years from the date of its acquisition by him."

7. It is evident from the amendment carried out retrospectively that the land classified as agricultural land in the records of the government and used for agriculture purposes or land on which construction of building is not permissible under any law for the time being in force, in the area in which the land is situated, would not fall within the ambit of expression "urban area". The land of the assessee is agricultural land though situated in the municipal limits of M.C. Shimla. No construction is permissible in the forest land without the permission of the Municipal Corporation Building Bye-laws and Town and Country Planning Act.

8. In the case of ***Commissioner of Wealth Tax versus D.C.M. Ltd.,*** reported in ***(2007) 290 ITR 615 (Delhi),*** the Hon'ble Division Bench has held that once the land or any building thereupon making it a combination of land and building is not urban land, then it could not be an asset as defined under Section 2(ea) of the Act. Their lordships also held that the "urban land" would not include land, on which construction of a building is not permissible under any law for the time being in force in the area whether the land is situated or land occupied by any building. The intention of the legislature appears to be that the land which falls within this exception would have to be excluded from the abmit and scope of the expression "urban land".

9. Thus, the land owned and possessed by the appellant-assessee would not fall within abmit of the Section 2(ea)(b) and the learned Authorities

were also not right in coming to the conclusion that the construction was possible on the lands covered by the trees. The land on which the trees are standing cannot be treated at par for the purpose of market value with the land on which the construction is possible. The land on which the trees are standing, construction is not possible without seeking permission from the competent authorities and thus the market value of this land would be lower. The substantial questions of law are answered accordingly.

10. Consequently, the appeal is allowed. Order dated 30.1.2009, rendered by the learned Income Tax Appellate Tribunal, Chandigarh, is set aside. The proceedings initiated against the appellant are dropped.

**********

**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.**

Amin Chand Mehta .....Appellant.

Versus

Commissioner of Wealth Tax .....Respondent.

WTA No. 02 of 2009.
Reserved on: 04.11.14
Decided on: 19.11.2014.

**Wealth Tax Act-** Section 17- Assessee contended that his land was agricultural land and does not fall within the definition of the urban land - there are trees standing on the land and it was not possible to raise any construction without seeking permission from the Competent Authority- held, that as per the definition of the urban land any land classified as agricultural land or the land in which the construction of the building is not possible would not fall within the definition of the urban land- as the land of the assessee is agricultural land and no construction is possible without the permission of Municipal Corporation, it is not liable for the assessment. (Para- 6 to 9)

**Case referred:**
Commissioner of Wealth Tax versus D.C.M. Ltd., reported in (2007) 290 ITR 615 (Delhi)

For the appellant: Mr. Vishal Mohan, Advocate.
For the respondent: Mr. Vinay Kuthiala, Sr. Advocate, with Mr. Diwan Singh Negi, Advocate.

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, J.**

This appeal is instituted by the appellant-assessee against the order rendered by the learned Income Tax Appellate Tribunal in WTA Nos. 49 to 54/Chd/2008 dated 30.1.2009.

2. The appeal was admitted on the following substantial questions of law:

> "1. Whether the ld. Tribunal is right in law in holding that agricultural land within the municipality are subjectable to Wealth Tax being a part of the assets as defined under Section 2 (ea) of the Wealth Tax Act?

2. Whether in law the ld. Tribunal is right in holding that land covered by trees on which construction for the time being is not possible well within the definition of assets for the levy of Wealth Tax Act even though construction was not possible on the valuation date?

3. Whether land on which construction is not possible, being covered by trees possesses market value that too similar to that of the lands on which construction is possible?"

3. Key facts, necessary for the adjudication of this appeal are that the notice was issued to the appellant under Section 17 of the Wealth Tax Act, 1957. He filed reply/return to the same. The assessment order was passed by the Wealth Tax Officer against the appellant on 14.8.2007. He preferred appeal against the order dated 14.8.2007 before the Commissioner of Wealth Tax (Appeals), Shimla. The Commissioner of Wealth Tax (Appeals), Shimla, dismissed the same on 22.9.2008. The appellant challenged the order dated 22.9.2008 before the Income Tax Appellate Tribunal, Chandigarh Bench 'B'. The Income Tax Appellate Tribunal, Chandigarh Bench 'B', dismissed the same on 30.1.2009. Hence, this present appeal.

4. Mr. Vishal Mohan, Advocate, for the appellant has vehemently argued that the impugned land is agriculture land and does not fall within the definition of "urban land". In other words, his submission is that it was beyond the purview of Wealth Tax. He also argued that the trees are standing on the land, thus the construction was not possible without seeking permission from the statutory authorities. He has also relied upon the demarcation report carried out by the Assistant Collector, Shimla (Urban) on 14.3.2008, whereby the land was found to be covered by trees. He lastly contended that the land on which the trees are standing cannot be used for construction purpose without seeking permission of the competent authority. On the other hand, learned counsel for the department has supported the orders passed by the learned authorities below.

5. We have gone through the orders passed by the Wealth Tax Officer dated 14.8.2007, Commissioner of Wealth Tax (Appeals) dated 22.9.2008 and Income Tax Appellate Tribunal, Chandigarh Bench, dated 30.1.2009. The appellant has also placed on record the copy of the *jamabandi* in respect of the agricultural/non-agricultural land owned by the appellant.

6. Mr. Vishal Mohan, Advocate, for the appellant has drawn the attention of this Court to the amendment carried out in Section 2 (ea)(b) retrospectively w.e.f 1.4.1993, as per the Finance Act, 2013. It reads as under:

"2 (ea)(b). "urban land" means land situate-

(i) in any area which is comprised within the jurisdiction of a municipality (whether known as a municipality, municipal corporation, notified area committee, town area committee, town committee, or by any other name) or a cantonment board and which has a population of not less than ten thousand according to the last preceding census of which the relevant figures have been published before the valuation date; or

(ii) in any area within such distance, not being more than eight kilometers from the local limits of any municipality or cantonment board referred to in sub-clause (i), as the Central Government may, having regard to the extent of, and scope for, urbanization of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette,

but does not include land classified as agricultural land in the records of the Government and used for agricultural purposes or land on which construction of a building is not permissible under any law for the time

being in force in the area in which such land is situated or the land occupied by any building which has been constructed with the approval of the appropriate authority or any unused land held by the assessee for industrial purposes for a period of two years from the date of its acquisition by him or any land held by the assessee as stock-in-trade for a period of ten years from the date of its acquisition by him."

7. It is evident from the amendment carried out retrospectively that the land classified as agricultural land in the records of the government and used for agriculture purposes or land on which construction of building is not permissible under any law for the time being in force, in the area in which the land is situated, would not fall within the ambit of expression "urban area". The land of the assessee is agricultural land though situated in the municipal limits of M.C. Shimla. No construction is permissible in the forest land without the permission of the Municipal Corporation Building Bye-laws and Town and Country Planning Act.

8. In the case of ***Commissioner of Wealth Tax versus D.C.M. Ltd.,*** reported in ***(2007) 290 ITR 615 (Delhi),*** the Hon'ble Division Bench has held that once the land or any building thereupon making it a combination of land and building is not urban land, then it could not be an asset as defined under Section 2(ea) of the Act. Their lordships also held that the "urban land" would not include land, on which construction of a building is not permissible under any law for the time being in force in the area whether the land is situated or land occupied by any building. The intention of the legislature appears to be that the land which falls within this exception would have to be excluded from the abmit and scope of the expression "urban land".

9. Thus, the land owned and possessed by the appellant-assessee would not fall within abmit of the Section 2(ea)(b) and the learned Authorities were also not right in coming to the conclusion that the construction was possible on the lands covered by the trees. The land on which the trees are standing cannot be treated at par for the purpose of market value with the land on which the construction is possible. The land on which the trees are standing, construction is not possible without seeking permission from the competent authorities and thus the market value of this land would be lower. The substantial questions of law are answered accordingly.

10. Consequently, the appeal is allowed. Order dated 30.1.2009, rendered by the learned Income Tax Appellate Tribunal, Chandigarh, is set aside. The proceedings initiated against the appellant are dropped.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.**

CWP No. 8272 of 2014
alongwith CWP No.8376 of 2014
Decided on: 21.11.2014

**1. CWP No.8272 of 2014**

Govind Ram. ...Petitioner.

Versus

Union of India. ...Respondent.

**2. CWP No. 8376 of 2014**

Pratap Singh. ...Petitioner.

Versus

Union of India. ...Respondent.

**Constitution of India, 1950-** Article 226- Petitioner was appointed as Constable in S.S.B. in the category of combatized cadre on 20.08.1974- he completed 24 years of regular service in the year 1998 - respondent issued an office memorandum introducing Assured Career Progression Scheme- petitioner was promoted as head constable - petitioner made a representation which was rejected on the ground that he was not entitled to grant of 2nd financial up-gradation benefits without fulfilling the normal promotion norm of qualifying mandatory pre-promotional course - held, that petitioner was entitled to the benefit of ACP scheme after the completion of 24 years as per Para-15 of the scheme and it was for the respondent to ensure that petitioner undergoes mandatory pre-promotional course- it was not asserted that petitioner had refused to undergo the course - the action of the respondents of not releasing the monetary benefits to the petitioners as per Assured Career Progression Scheme, 1999 is arbitrary and violative of Articles 14 and 16 of the Constitution of India. (Para-3 to 6)

For the Petitioner: Mr. Vaibhav Tanwar, Advocate.
For the Respondent: Mr. Ashok Sharma, A.S.G.I.

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, Judge** (oral)**.**

Since common questions of law and facts are involved in both the petitions, the same are taken up together and are being disposed of by a common judgment. However, facts of CWP No. 8272/2014 have been taken into consideration for clarity sake.

2. Petitioner was appointed in S.S.B. as Constable in the category of combatized cadre on 20.8.1974. Petitioner completed 24 years of regular service in the year 1998. Respondent issued office memorandum dated 9.8.1999 whereby Assured Career Progression Scheme was introduced. Conditions of grant of Assured Career Profession Scheme are annexed as Annexure P-1. Para 15 of the same reads as under:

> **"15. Subject to condition No.4 above, in cases where the employees have already completed 24 years of regular service, with or without a promotion, the second financial upgradation under the scheme shall be granted directly. Further, in order to rationalize unequal level of stagnation, benefit of surplus regular service (not taken into account for the first upgradation under the scheme) shall be given at the subsequent stage (second) of financial upgradation under the ACP Scheme as a one time measure. In other words, in respect of employees who have already rendered more than 12 years but less than 24 years of regular service, while the first financial upgradation shall be granted immediately, the surplus regular service beyond the first 12 years shall also be counted towards the next 12 years, of regular service required for grant of the second financial upgradation and, consequently, they shall be considered for the second financial upgradation also as and when they complete 24 years of regular service, without waiting for completion of 12 more years of regular service after the first financial upgradation already granted under the Scheme."**

3. Petitioner was promoted as Head Constable in the year 2001. He superannuated in the year 2009. The Ministry of Finance, Government of India

vide order dated 23.8.2012 agreed to the proposal of the Ministry of Home Affairs, Government of India for implementation of the Delhi High Court orders for the grant of benefit of Assured Career Progression Scheme. Similarly, Ministry of Home Affairs issued office order dated 27.8.2012 stating that the Ministry of Finance has agreed to implement the orders of the Delhi High Court for the grant of benefit of Assured Career Progression Scheme. In furtherance of office orders dated 23.8.2012 and 27.8.2012, respondent No.3, i.e. Director General (SSB) sent a copy of office orders 23.8.2012 and 27.8.2012 to all the concerned including the Commandants of all the Battalions for information and necessary compliance. Respondent No.3 on 3.5.2013 requested all the concerns including the Commandants of all the Battalions to confirm grant of financial upgradation under Assured Career Progression Scheme to the post of Sub Inspector to all the eligible Constables/Head Constables including retired personnel in accordance with the original Assured Career Progression Scheme of the year 1999. Representation was made by the petitioner. Representation was rejected by the respondents on 16.9.2014 only on the ground that as per instructions, petitioner was not entitled to grant of 2nd financial up-gradation benefits w.e.f. 9.8.1999 without fulfilling the normal promotion norms/qualifying mandatory pre-promotional course in accordance with original ACP Scheme and MHA letter dated 19.6.2001. Memorandum dated 16.9.2014 is contrary to the scheme. Petitioner was entitled to benefit of ACP scheme immediately after the completion of 24 years as per para 15, as quoted hereinabove. It was for the respondents to ensure to make the petitioner to undergo mandatory pre-promotional course. It is not the case of the respondents that the petitioner was sent to undergo mandatory pre-promotional course and he has refused to undergo the same. According to the scheme, the financial upgradation under the ACP Scheme was purely personal to the employee and has no relevance to his seniority position. It merely contemplates placement on personal basis in the higher pay scale and was to be treated actual/functional promotion of the employees concerned. Petitioner has earned only one promotion throughout his career when he was promoted as Head Constable in the year 2001. The condition, if any, imposed in the ACP scheme would be deemed to have been waived.

4. Ministry of Finance and Ministry of Home Affairs have observed to scrupulously implement the judgment subject to verification of number of years put in by the petitioners in regular services. Respondent No.3 has also issued instructions to all the concerned including Commandants of all the Battalions to grant the benefits of the ACP scheme.

5. The memorandum dated 16.9.2014 is against the judgment of the Delhi High Court rendered in Writ Petition (Civil) No. 2987/2014 dated 26.5.2014 titled as ***Bachitter Singh*** Vs. ***Union of India and others***. The operative portion of the judgment reads as under:

> **"In view of the aforesaid statement made by counsel for the respondents and keeping in view the fact that the issue is covered by a number of decisions of this court, we grant the prayer made by the writ petitioners for grant of benefits under the Scheme(s) subject to the verification of the number of years put in by the writ petitioners in regular service. The benefits shall be granted to the petitioners expeditiously but not later than three months from today."**

6. Case of the petitioner is squarely covered by office orders dated 23.8.2012 and 27.8.2012 issued by the Ministry of Finance and Ministry of Home Affairs. Necessary directions have been issued by respondent No.3 to implement the scheme qua the petitioners and similarly situate persons as per original Assured Career Progression Scheme of the year 1999. Petitioner in CWP No. 8272/2014 has superannuated on 1.8.2009 and petitioner in CWP No. 8376/2014 has superannuated on 31.7.2008. Respondents were expected to

redress the grievance of the petitioners of their own. They were fully eligible for the grant of benefit under Assured Career Progression Scheme after the completion of requisite number of years of service. The action of the respondents not to release the monetary benefits to the petitioners as per Assured Career Progression Scheme, 1999 is arbitrary and thus violative of Articles 14 and 16 of the Constitution of India.

7. Accordingly, in view of the analysis and discussion made hereinabove, the writ petitions are allowed. Respondents are directed to grant to the petitioners pay scale of Rs. 5500-175-9000 from 1999 and thereafter fix their pay in the pay scale of Rs. 7300-34800 plus Grade Pay of Rs. 4200/- with effect from 1.1.2006. Respondents are also directed to release the arrears of salary since 1999 till the date of retirement of the petitioners alongwith interest @ 9% per annum within a period of eight weeks from today. Pension of the petitioners shall also be worked out accordingly. Pending application(s), if any, also stands disposed of. No costs.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J.**

Jai Ram Kaundal. ...Petitioner.

Versus

State of H.P. and another. ...Respondents.

CWP No. 2624 of 2010
Reserved on: 19.11.2014
Decided on: 21.11. 2014

**Constitution of India, 1950-** Article 226- Petitioner was appointed as Medical Officer and he joined his duty on 4.6.1993- subsequently, an advertisement was issued on 31.10.1996 for the post of ex-serviceman scheduled caste- petitioner made a representation for considering him against the said post- his representation was rejected on the ground that rules do not provide for benefit of fixation of pay and seniority when Officer is not recruited against the reserved vacancy of ex-serviceman- held, that instructions of the Government providing that if any ex-serviceman belonging to scheduled caste or scheduled tribe is selected for appointment, his selection can be counted against the overall quota of reservation for scheduled caste or scheduled tribe and that he cannot claim any benefit of being an ex-serviceman shall be applicable when the vacancy is available on the date of recruitment of the candidate but will not apply when no vacancy was available and the petitioner had specifically indicated his preference for being considered against the post of ex-serviceman. (Para- 2 to 4)

For the Petitioner: Mr. Sanjeev Bhushan, Advocate.
For the Respondents: Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, Judge.**

Petitioner was appointed as Medical Officer (Dental) vide office order dated 31.5.1993. He joined his duties on 4.6.1993. One post of ex-serviceman scheduled caste was advertised vide advertisement No.5/96 dated 31.10.1996. Petitioner made a representation through proper channel to consider him against the vacancy of scheduled caste ex-serviceman. He has

also stated in the representation that he has given the option to be considered against the reserved vacancy of ex-serviceman as and when available. Case of the petitioner was rejected vide office order dated 6.10.2008 on the basis of instructions dated 21.7.1982. According to the letter dated 6.10.2008, rules do not provide to give benefit of fixation of pay and seniority when the officer is not recruited against the reserved vacancy of ex-serviceman. The same stand has been reiterated by the respondents in the reply.

2. However, fact of the matter is that petitioner was appointed on 31.5.1993 when the post of scheduled caste ex-serviceman was not available. It is in these circumstances he applied against scheduled caste category and appointed as Medical Officer (Dental) on 31.5.1993. The post of scheduled caste ex-serviceman has only become available on 31.10.1996. Case of the petitioner was required to be considered against this post, particularly when he had given option to be considered against the post of scheduled caste ex-serviceman as and when available. Petitioner had no option but to seek appointment against the scheduled caste post since the post of scheduled caste ex-serviceman was not available in the year 1993 when he was appointed as a Medical Officer (Dental). The instructions issued on 21.7.1982 clarifying that if any ex-serviceman belonging to scheduled caste or scheduled tribe is selected for an appointment, out of the vacancies reserved for being filled by ex-serviceman, his selection would be counted against the overall quota of reservation that shall be provided to scheduled caste or scheduled tribe as the case may be and once a person has been considered against scheduled caste or scheduled tribe quota, he cannot claim any benefit of being an ex-serviceman on a later date. These instructions would apply only when the ex-serviceman belonging to scheduled caste or scheduled tribe is selected for appointment out of vacancies reserved for being filled by ex-serviceman. In the instant case, the post of ex-serviceman was not available in the year 1993. It has become available only on 31.10.1996. Once the petitioner has given his option, he should have been considered against the post of ex-serviceman and conferred with all the rights upon him as per rules.

3. The employer has to take reasonable common sense view of the matter. Petitioner is an ex-serviceman. He joined the post, which was available immediately after his retirement from army. He could not wait till availability of the post of ex-serviceman scheduled caste being advertised. It is in these circumstances, he got himself appointed against the post of scheduled caste category and simultaneously gave his option to be considered against the post of ex-serviceman as and when available. Respondents have misconstrued instructions dated 21.7.1982 to deny the benefit of pay fixation and seniority to the petitioner.

4. The benefits which were available as per instructions dated 19.2.1975 to the demobilized armed personnel when recruited to non-reserved post and vacancy becoming available in near future even if occurs subsequently, the same would be applicable to the petitioner also. The personnel appointed against ex-serviceman category are entitled to pay fixation and seniority. The rules have been framed to give benefits to the ex-servicemen. The underlined principle to give reservation to the ex-servicemen is to attract the youth to join Indian Army and to appreciate the services they have rendered to the Nation. These provisions being special provisions are to mitigate the hardship being faced by the incumbents to seek employment, after their retirement at the young age, have to be construed liberally.

5. Accordingly, in view of the analysis made hereinabove, the petition is allowed. Annexures P-3 and P-4 are quashed and set aside. Petitioner would be deemed to have been appointed against the post of ex-serviceman scheduled caste advertised on 31.10.1996 for all intents and purposes. His pay shall be fixed in accordance with Armed Forces Personal Reservation of Vacancy in H.P. Non-Technical Service Rules, 1985 within a period of six weeks from

today. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.**

Neeraja Marwaha. ...Petitioner.

Versus

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

CWP No. 6044 of 2014
Decided on: 21.11.2014

**Constitution of India, 1950-** Article 226- Gratuity of the petitioner was withheld on the ground that decision from the Court was awaited but record shows that case was disposed of- held, that gratuity is a property and not a bounty - State being a welfare state could not be oblivious to the decision of the case- State directed to release the amount with interest @ 8% per annum. (Para- 3 to 5)

**Case referred:**
State of Jharkhand and others vs. Jitendra Kumar Srivastava and another, (2013) 12 SCC 210

For the Petitioner: Ms. Ranjana Parmar, Advocate.
For the Respondents: Mr. Shrawan Dogra, A.G. with Mr. M.A. Khan, Addl. A.G. with Mr. P.M. Negi, Dy. A.G.

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, Judge** (oral)**.**

Petitioner was promoted to the post of Junior Assistant vide office order dated 7.6.2000. The promotion orders were withdrawn by the respondents on 17.3.2003. Petitioner challenged order dated 17.3.2003 by way of original application. It was transferred to this Court and assigned CWP (T) No.9658 of 2008. It was decided on 22.3.2010. Respondents preferred an appeal against the judgment dated 22.3.2010. The same was disposed of by a Division Bench of this Court on 24.4.2012. Fact of the matter is that the judgment rendered in ***Ram Lal Sharma and others*** vs. ***State of H.P. and another*** stood implemented, as per statement of the learned Additional Advocate General recorded in LPA No. 484 of 2012 decided on 26.11.2013. Case of the petitioner was required to be looked into on the analogy of Ram Lal Sharma's case.

2. Petitioner has sought voluntary retirement on 31.5.2013. The gratuity of the petitioner was sanctioned. However, the Chief Medical Officer sent a communication to the Director of Health Services bringing to his notice that decision of the Tribunal was still awaited. The Chief Medical Officer thereafter vide office order dated 6.6.2014 withheld a sum of Rs. 1,06,238/- only on the ground that original application was pending decision. The contents of letter dated 6.6.2014 were factually incorrect. The original application filed by the petitioner, which was transferred to this Court and converted as CWP (T) No.9658 of 2008 stood decided on 22.3.2010. The LPA No.712 of 2011 preferred against order dated 22.3.2010 was decided by a Division Bench of this Court and on the basis of the statement of learned Additional Advocate General

recorded in LPA No. 484 of 2012, the petitioner would be entitled to similar treatment, which was accorded to Ram Lal Sharma.

3. Respondent being a welfare State could not be oblivious to the developments which have taken place from 22.3.2010 till LPAs No. 712/2011 and 484 of 2012 decided on 24.4.2012 and 26.11.2013. The gratuity is a property and not a bounty.

4. Their Lordships of the Hon'ble Supreme Court in ***State of Jharkhand and others vs. Jitendra Kumar Srivastava and another***, (2013) 12 SCC 210 have held that it is an accepted position that gratuity and pension are not bounties. An employee earns these benefits by dint of his long, continuous, faithful and unblemished service. It is thus a hard earned benefit which accrues to an employee and is in the nature of "property". Their Lordships have held as under:

> **"8. It is an accepted position that gratuity and pension are not the bounties. An employee earns these benefits by dint of his long, continuous, faithful and un-blemished service. Conceptually it is so lucidly described in D.S. Nakara and Ors. Vs. Union of India; (1983) 1 SCC 305 by Justice D.A. Desai, who spoke for the Bench, in his inimitable style, in the following words:**
>
> > **"18. The approach of the respondents raises a vital and none too easy of answer, question as to why pension is paid. And why was it required to be liberalised? Is the employer, which expression will include even the State, bound to pay pension? Is there any obligation on the employer to provide for the erstwhile employee even after the contract of employment has come to an end and the employee has ceased to render service?**
> >
> > **19. What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date? We need seek answer to these and incidental questions so as to render just justice between parties to this petition.**
> >
> > **20. The antiquated notion of pension being a bounty a gratituous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar and Ors.[1971] Su. S.C.R. 634 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied maters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab and Anr. V. Iqbal Singh (1976) IILLJ 377SC".**
>
> **It is thus hard earned benefit which accrues to an employee and is in the nature of "property". This right to property cannot be**

**taken away without the due process of law as per the provisions of Article 300 A of the Constitution of India.**

**9. Having explained the legal position, let us first discuss the rules relating to release of Pension.**

**14. Right to receive pension was recognized as right to property by the Constitution Bench Judgment of this Court in Deokinandan Prasad vs. State of Bihar; (1971) 2 SCC 330, as is apparent from the following discussion:**

> **"27. The last question to be considered, is, whether the right to receive pension by a Government servant is property, so as to attract Articles 19(1)(f) and 31(1) of the Constitution. This question falls to be decided in order to consider whether the writ petition is maintainable under Article 32. To this aspect, we have already adverted to earlier and we now proceed to consider the same.**
>
> **28. According to the petitioner the right to receive pension is property and the respondents by an executive order dated June 12, 1968 have wrongfully withheld his pension. That order affects his fundamental rights under Articles 19(1)(f) and 31(1) of the Constitution. The respondents, as we have already indicated, do not dispute the right of the petitioner to get pension, but for the order passed on August 5, 1966. There is only a bald averment in the counter- affidavit that no question of any fundamental right arises for consideration. Mr. Jha, learned counsel for the respondents, was not prepared to take up the position that the right to receive pension cannot be considered to be property under any circumstances. According to him, in this case, no order has been passed by the State granting pension. We understood the learned counsel to urge that if the State had passed an order granting pension and later on resiles from that order, the latter order may be considered to affect the petitioner's right regarding property so as to attract Articles 19(1)(f) and 31(1) of the Constitution.**
>
> **29. We are not inclined to accept the contention of the learned counsel for the respondents. By a reference to the material provisions in the Pension Rules, we have already indicated that the grant of pension does not depend upon an order being passed by the authorities to that effect. It may be that for the purposes of quantifying the amount having regard to the period of service and other allied matters, it may be necessary for the authorities to pass an order to that effect, but the right to receive pension flows to an officer not because of the said order but by virtue of the Rules. The Rules, we have already pointed out, clearly recognise the right of persons like the petitioner to receive pension under the circumstances mentioned therein.**
>
> **30. The question whether the pension granted to a public servant is property attracting Article 31(1) came up for consideration before the Punjab High Court in Bhagwant Singh v. Union of India A.I.R. 1962 Pun 503. It was held that such a right constitutes "property" and any interference will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive**

**pension. This decision was given by a learned Single Judge. This decision was taken up in Letters Patent Appeal by the Union of India. The Letters Patent Bench in its decision in Union of India v. Bhagwant Singh I.L.R. 1965 Pun 1 approved the decision of the learned Single Judge. The Letters Patent Bench held that the pension granted to a public servant on his retirement is "property" within the meaning of Article 31(1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as "property" cannot possibly undergo such mutation at the whim of a particular person or authority.**

**31. The matter again came up before a Full Bench of the Punjab and Haryana High Court in K.R. Erry v. The State of Punjab I.L.R. 1967 P & H 278. The High Court had to consider the nature of the right of an officer to get pension. The majority quoted with approval the principles laid down in the two earlier decisions of the same High Court, referred to above, and held that the pension is not to be treated as a bounty payable on the sweet will and pleasure of the Government and that the right to superannuation pension including its amount is a valuable right vesting in a Government servant It was further held by the majority that even though an opportunity had already been afforded to the officer on an earlier occasion for showing cause against the imposition of penalty for lapse or misconduct on his part and he has been found guilty, nevertheless, when a cut is sought to be imposed in the quantum of pension payable to an officer on the basis of misconduct already proved against him, a further opportunity to show cause in that regard must be given to the officer. This view regarding the giving of further opportunity was expressed by the learned Judges on the basis of the relevant Punjab Civil Service Rules. But the learned Chief Justice in his dissenting judgment was not prepared to agree with the majority that under such circumstances a further opportunity should be given to an officer when a reduction in the amount of pension payable is made by the State. It is not necessary for us in the case on hand, to consider the question whether before taking action by way of reducing or denying the pension on the basis of disciplinary action already taken, a further notice to show cause should be given to an officer. That question does not arise for consideration before us. Nor are we concerned with the further question regarding the procedure, if any, to be adopted by the authorities before reducing or withholding the pension for the first time after the retirement of an officer. Hence we express no opinion regarding the views expressed by the majority and the minority Judges in the above Punjab High Court decision, on this aspect. But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant.**

**32. This Court in State of Madhya Pradesh v. Ranojirao Shinde and Anr. MANU/SC/0030/1968 : [1968]3SCR489 had to consider the question whether a "cash grant" is "property"**

**within the meaning of that expression in Articles 19(1)(f) and 31(1) of the Constitution. This Court held that it was property, observing "it is obvious that a right to sum of money is property".**

**33. Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by Sub-article (5) of Article 19. Therefore, it follows that the order dated June 12, 1968 denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1)of the Constitution, and as such the writ petition under Article 32 is maintainable. It may be that under the Pension Act (Act 23 of 1871) there is a bar against a civil court entertaining any suit relating to the matters mentioned therein. That does not stand in the way of a Writ of Mandamus being issued to the State to properly consider the claim of the petitioner for payment of pension according to law".**

**15. In State of West Bengal Vs. Haresh C. Banerjee and Ors. (2006) 7 SCC 651, this Court recognized that even when, after the repeal of Article 19(1)(f) and Article 31 (1) of the Constitution vide Constitution (Forty-Fourth Amendment) Act, 1978 w.e.f. 20th June, 1979, the right to property was no longer remained a fundamental right, it was still a Constitutional right, as provided in Article 300A of the Constitution. Right to receive pension was treated as right to property. Otherwise, challenge in that case was to the vires of Rule 10(1) of the West Bengal Services (Death-cum-- Retirement Benefit) Rules, 1971 which conferred the right upon the Governor to withhold or withdraw a pension or any part thereof under certain circumstances and the said challenge was repelled by this Court.**

**16. Fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognized as a right in "property". Article 300 A of the Constitution of India reads as under:**

**"300A Persons not to be deprived of property save by authority of law. - No person shall be deprived of his property save by authority of law."**

**Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the Constitutional mandate enshrined in Article 300A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced."**

5. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. Annexure P-8 to the effect whereby a sum of Rs.1,06,238/-has been withheld, is quashed and set aside. The respondents are directed to release a sum of Rs.1,06,238/- to the petitioner within a period of six weeks from today with interest @ 8% per annum. Pending application(s), if any, also stands disposed of. No cost.

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**BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.**

FAO No. 430 of 2010
a/w FAO No. 76 of 2011
Decided on: 21.11.2014

**FAO No. 430 of 2010**

The New India Assurance Company ...Appellant.

Versus

Smt. Ato Devi & others ...Respondents.

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**FAO No. 76 of 2011**

Smt. Ato Devi & others ...Appellants.

Versus

Bobby Bus Service & others ...Respondents.

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**Motor Vehicle Act, 1988-** Section 149- Insurer pleaded that the driver of the vehicle did not have effective and valid driving licence- Driving licence disclosed that it was issued by Registration and Licencing Authority, Nadaun- no evidence was led to prove that the licence was not valid, therefore, the plea of the insurer that licence was not valid is not acceptable. (Para-12 to 13)

**Motor Vehicle Act, 1988-** Section 166- Deceased was bachelor and a government employee drawing gross salary of Rs. 7604/- - claimants were three in number, therefore, 1/3rd of the amount was to be deducted towards the personal expenses -applying multiplier of 13, claimants are entitled to the sum of Rs.7,80,000/- as loss of earning Rs. 2,000/- under the head 'funeral expenses' and Rs. 2,500/- under the head 'loss of estate'. (Para-14 to 17)

**Cases referred:**

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121

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

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**FAO No. 430 of 2010**

For the appellant: Mr. B.M. Chauhan, Advocate.

For the respondents: Mr. Naresh Kaul, Advocate, for respondents No. 1 to 3.
Mr. Pushpinder Jaswal, Advocate, for respondents No. 4 and 5.

.....

**FAO No. 76 of 2011**

For the appellants: Mr. Naresh Kaul, Advocate.

For the respondents: Mr. Pushpinder Jaswal, Advocate, for respondents No. 1 and 3.
Mr. B.M. Chauhan, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

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**Mansoor Ahmad Mir, Chief Justice** *(Oral)*

Both these appeals are outcome of award, dated 1st June, 2010, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 32 of 2008, titled as Smt. Ato Devi and others versus Bobby Bus Service and others, whereby compensation to the tune of Rs. 6,29,950/- with interest @ 12% per annum

from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (hereinafter referred to as "the impugned award"), thus, I deem it proper to dispose of both these appeals by this common judgment.

2. The insurer has questioned the impugned award by the medium of FAO No. 430 of 2010 on the ground that the Tribunal has fallen in error in saddling it with liability and the amount awarded in excessive.

3. The claimants have called in question the impugned award by the medium of FAO No. 76 of 2011 on the ground of adequacy of the compensation.

**Brief facts:**

4. The claimants, being the victims of the motor vehicular accident, invoked the jurisdiction of the Tribunal in terms of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") for grant of compensation on the grounds taken in the memo of claim petition.

5. The case, as presented by the claimants in the claim petition, was that deceased-Shiv Charan, who was 22 years of age, while going towards Hamirpur, met with an accident on 26th January, 2008, at place Mandir Bil Bani Mod near Rit Bhatha, P.S. Nadaun, which was caused by the driver, namely Shri Vipin Singh, who was driving bus, bearing registration No.HP-55B-6701, rashly and negligently. He was taken to Primary Health Center, Nadaun, wherefrom was shifted to PGI Chandigarh and succumbed to injuries on 29th January, 2008, at 2.45 a.m. The claimants had sought compensation to the tune of Rs. 25,00,000/-, as per the break-ups given in the claim petition.

6. The owner-insured, the driver and the insurer contested the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal on 16th March, 2009:

> *"1. Whether deceased Shiv Charan died due to rash and negligent driving of vehicle No. HP-55B-6701 by respondent No. 3 Vipin Singh as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, if so, to what amount and from whom? OPP*
>
> *3. Whether the petition is not maintainable as alleged? OPR*
>
> *4. Whether the petition is bad for non joinder of necessary parties? OPR-2*
>
> *5. Whether the petitioner Nos. 2 and 3 were not dependent upon the deceased as alleged? OPR-2*
>
> *6. Whether the vehicle in question was being used in contravention of its authorized use, if so, to what effect? OPR-2*
>
> *7. Whether driver of the vehicle in question was not holding a valid and effective driving licence as alleged? OPR-2*
>
> *8. Relief."*

8. The claimants have examined Constable Janak Raj as PW-2, Shri Amar Nath as PW-3, Shri Yogender Singh as PW-4 and one of the claimants, Smt. Ato Devi, has herself stepped into the witness box as PW-1. The respondents in the claim petition have not examined any witness except the driver, Shri Vipin Singh, has stepped into the witness box as RW-1.

**Issues No. 1 and 3 to 6:**

9. The claimants have proved by leading evidence, oral as well as documentary, that the driver, namely Shri Vipin Singh, had driven the offending

vehicle rashly and negligently and FIR No. 18 of 2008, Ext. PW-2/A, was lodged at Police Station Nadaun, District Hamirpur.

10. The findings returned by the Tribunal on issues No. 1 and 3 to 6 are not in dispute for the reason that the claimants have questioned the impugned award on the ground of adequacy of compensation and the insurer has questioned the same on the grounds that the owner-insured has committed willful breach as the driver of the offending vehicle was not having valid and effective driving licence at the relevant point of time and the amount awarded is excessive. However, I have gone through the claim petition and the record. Issues No. 1 and 3 to 6 have rightly been decided by the Tribunal in favour of the claimants and against the respondents, are, accordingly, upheld.

11. Before I deal with issue No. 2, I deem it proper to determine issue No. 7.

**Issue No. 7:**

12. The Tribunal has discussed the evidence and held that the driver was having the valid and effective driving licence. The driving licence is on the record as Ext. R-2, which do disclose that it was issued by the Registration and Licensing Authority, Nadaun, District Hamirpur, and was valid at the time of accident. The insurer has not led any evidence to discharge the onus to prove the issue.

13. There is no record on the file, not to speak of proof, to show that the driver of the offending vehicle was not having a valid and effective driving licence. Perusal of the copy of the driving licence, Ext. R-2, discloses that the driver was having a valid and effective driving licence. Thus, the Tribunal has rightly decided issue No. 7 against the insurer and saddled it with liability, is accordingly upheld.

**Issue No. 2:**

14. Admittedly, the deceased was a Government employee, was drawing gross salary of Rs. 7604/-, in terms of the Last Pay Certificate, Ext. PA. The claimants are three in number and the deceased was bachelor. Applying the ratio laid down by the Apex Court in **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** one-third was to be deducted for the reason that the claimants, i.e. mother has lost her budding son, who was the only source of hope and help in her old age, was dependent upon him and the brother & sister have lost their brother in budding age, was source of their hope and help and were deprived of love and affection of their brother.

15. Thus, the Tribunal has rightly deducted one-third, but has fallen in error in holding that the claimants have lost source of income to the tune of Rs.3,333/- per month. It can be safely held that the claimants have lost source of income to the tune of Rs. 5,000/- per month after deducting one-third. Hence, the claimants have lost source of income to the tune of Rs.60,000/- (Rs. 5,000/- x 12) per annum.

16. Keeping in view the age of the deceased and the claimants, the Tribunal has rightly applied multiplier of '13', which is appropriate multiplier.

17. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.7,80,000/- (Rs. 60,000/- x 13). The mother is also held entitled to Rs. 2,000/- under the head 'funeral expenses' and Rs. 2,500/- under the head 'loss of estate'.

18. It appears that the Tribunal has fallen in error in awarding interest @ 12% per annum, which is at higher side in view of the law laid down by the Apex Court read with the rates of the Reserve Bank of India. Accordingly, it is held that the claimants are entitled to interest @ 7.5% per annum from the date of filing of the claim petition till its realization. The impugned award is modified accordingly.

19. Having glance of the above discussion, both the appeals are disposed of and the impugned award is modified, as indicated hereinabove.

20. The insurer is directed to deposit the enhanced awarded amount before the Registry within twelve weeks. On deposition of the same, the Registry is directed to release the awarded amount in favour of the claimants, out of which, 50% of the amount be released in favour of claimant No. 1 and the remaining 50% in favour of claimants No. 2 and 3 in equal shares after proper identification.

21. Send down the record after placing copy of the judgment on Tribunal's file.

22. A copy of this judgment be also placed on the file of FAO No. 76 of 2011.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.**

Veena Devi. ...Petitioner.

Vs.

Himachal Pradesh State Electricity Board Ltd. & anr. ...Respondents.

CWP No. 5400 of 2014
Reserved on: 20.11.2014
Decided on: 21.11.2014

**Constitution of India, 1950-** Article 226- Petitioner was appointed as a clerk on contract basis- she claimed regularization before Administrative Tribunal- Tribunal directed the board to regularize the services of the petitioner as a clerk from the date of completion of 10 years of continuous services and to grant all the consequential benefits- Board regularized her services but did not take into consideration the services rendered by her on contract basis- held, that as per Central Civil Services (Pension) Rules, 1972, if a person engaged by Government on a contract basis for a specific period is appointed to the same or another post without interruption in duty , he may opt to retain the Government contribution or to refund the monetary benefit- Board should behave as model employer and cannot be permitted to exploit the situation by not regularizing the services rendered on contract basis. (Para-6)

For the Petitioner: Mr. Adarsh K. Vashista, Advocate.
For the Respondents: Ms. Sharmila Patial, Advocate.

The following judgment of the Court was delivered:

**Justice Rajiv Sharma, Judge.**

Petitioner was appointed as a Clerk in the respondent-Board on contract basis on 16.11.1988. Petitioner had been working continuously with

effect from 16.11.1988. She was legitimately expecting that her services would be regularized by the respondents taking into consideration her interrupted services with effect from 16.11.1988. Petitioner approached erstwhile Himachal Pradesh Administrative Tribunal by way of O.A(D) No. 414/1998 seeking regularization. The Tribunal was pleased to direct the respondent-Board to regularize the services of the petitioner as a Clerk/Typist from the day she completed ten years of continuous service on contract basis and grant all the consequential benefits, i.e. annual increments alongwith interest @ 10%. Order dated 29.6.2001 was assailed by the Board before this Court by way of CWP No.1134/2001. It was disposed of by this Court on 4.8.2008. The matter was ordered to be placed before the Board of Directors of the Board, who on its own was permitted to consider the case of the petitioner for regularization of service as a special case. In sequel to the judgment rendered by this Court, the Board regularized the services of the petitioner vide letter dated 21.3.2009. The Board though has regularized the services of the petitioner vide letter dated 21.3.2009, however, the services rendered by the petitioner with effect from 16.11.1988 on contract basis have not been taken into consideration towards qualifying service for pension.

2. Rule 17 of the Central Civil Services (Pension) Rules, 1972 reads as under:

> 17. Counting of service on contract –
>
> "(1) A person who is initially engaged by the Government on a contract for a specified period and is subsequently appointed to the same or another post in a substantive capacity in a pensionable establishment without interruption of duty, may opt either:-
>
> | | |
> |---|---|
> | (a) | to retain the Government contribution in the Contributory Provident Fund with interest thereon including any other compensation for that service ; or |
> | (b) | to agree to refund to the Government the monetary benefits referred to in Clause (a) or to forgo the same if they have not been paid to him and count in lieu thereof the service for which the aforesaid monetary benefits may have been payable. |
>
> (2) The option under sub-rule (1) shall be communicated to the Head of Office under intimation to the Accounts Officer within a period of three months from the date of issue of the order of permanent transfer to pensionable service, or if the Government servant is on leave on that day, within three months of his return from leave, whichever is later.
>
> (3) If no communication is received by the Head of Office within the period referred to in sub-rule (2), the Government servant shall be deemed to have opted for the retention of the monetary benefits payable or paid to him on account of service rendered on contract."

3. It is clear from the plain language employed in rule 17 of the Central Civil Services (Pension) Rules, 1972 that if a person is initially engaged by the Government on contract for a specified period and is subsequently appointed to the same or another post in a sustentative capacity in a pensionable establishment without interruption of duty, he may opt either to retain the Government contribution in the Contributory Provident Fund with interest thereon including any other compensation for that service or to agree to refund to the Government the monetary benefit referred to in clause or to forgo the same if they have not been paid to him and count in lieu thereof the service for which the aforesaid monetary benefits may have been payable.

4. Mr. Adarsh Vashista submitted at the Bar that the deductions were made from the salary of the petitioner towards contributory fund and his client is ready and willing to refund the same and in lieu thereof to count the services rendered on contract basis as qualifying service for pensionary benefits.

5. The Board is a State within the meaning of Article 12 of the Constitution of India. The Board, on its own, should have counted the services with effect from 16.11.1988 to 21.3.2009 towards qualifying service instead of compelling the petitioner to approach this Court for the redressal of her grievance. The services rendered by the petitioner with effect from 16.11.1988 to 21.3.2009 cannot be obliterated. The Board is a pensionable establishment. Petitioner has already made a representation, but the same was not decided.

6. The Board should show sensitivity while dealing with the matters pertaining to pensionary/retiral benefits. The Board must act as model employer. The action of respondents not to count the qualifying services with effect from 16.11.1988 to 21.3.2009 would also amount to unfair labour practice. The Board cannot be permitted to exploit the situation by not regularizing the services of the incumbents rendered on contract basis for years together and thereafter not counting the services rendered on contract basis for the purpose of pensionary/retiral benefits after the regularisation.

7. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is allowed. Respondents are directed to count the services of the petitioner rendered on contract basis as Clerk/Typist with effect from 16.11.1988 to 21.3.2009 for the purpose of qualifying service for pensionary benefits. The Petitioner is directed to refund the contributory fund made by the Board within a period of eight weeks from today. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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

Banka Ram ...Appellant/defendant.
Vs.
Des Raj & others ...Respondents/Plaintiffs.

RSA No. 440 of 2003.
Reserved on: 19th November, 2014.
Decided on: 24th November, 2014.

**Specific Relief Act,1963-** Section 38- Plaintiff claimed to be a co-owner in possession of the suit land to the extent of 1/4th share- he further claimed that revenue entries were wrongly changed and the plaintiff was being dispossessed on the basis of wrong entries- defendants claimed that they were in possession since the time of their ancestors as tenants in the Will without the payment of any rent- they further set up an exchange or arrangement between the predecessor-in-interest of the parties – jamabandi for the year 1953-54 recorded the joint ownership of the parties- subsequent jamabandi shows the suit land to be in possession of G and K and the defendant to be in exclusive possession under them – held, that there was no valid order for change of revenue entries- hence, subsequent entries would have no legal effect. (Para-8)

For the Appellant: Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.

For the Respondents: Mr. K.D. Sood, Senior Advocate with Rajneesh K. Lall, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge**

This appeal is directed against the impugned judgment and decree, rendered on 02.09.2003 by the learned District Judge, Hamirpur, H.P., in Civil Appeal No. 32 of 1997, whereby, the learned District Judge allowed the appeal preferred by the plaintiff/respondent and reversed the findings of the learned trail Court rendered on 17.09.1997 in Civil Suit No. 239 of 1992.

2. Briefly stated the facts of the case are that the original plaintiff Kangru Ram filed the suit against the defendants Milkhi Ram and Prabhi for declaration and permanent prohibitory injunction. It has been averred that the suit land comprised in khata No.40, Khatauni No. 63, khasra Nos. 416, 419, 420, 570, 648, kita 5 measuring 15 kanals, 4 marlas, situated in Tika Jhatwar, Maouza Ugialta, Tehsil and District Hamirpur, H.P. The plaintiff had claimed himself as co-owner in possession of the suit land to the extent of ¼ share. The suit land has been pleaded to be in joint co-onwership and possession of the parties as no partition has taken place in accordance with law and the revenue entries in the column of possession in favour of the defendants as tenant at will are wrong and illegal and thereby the same are not binding on the plaintiff. It has been further pleaded that the revenue entries have been wrongly changed in connivance with the revenue officials by the defendants and that the defendants have threatened to dispossess the plaintiff forcibly on the basis of wrong entries with respect to the possession. It has been further pleaded that during consolidation operation over the suit land in March, 1992, he filed an application before the Consolidation Officer which was dismissed on 15.6.1992. The plaintiff has also pleaded in alternative that in case during pendency of the defendants dispossessed the plaintiff from the suit land, a decree of possession be also passed. Hence the suit.

3. The defendants/appellant contested the suit and filed the written statement wherein the defendants have claimed exclusive possession over the suit land since the time of their ancestors in the capacity of tenants at will without any rent as the defendants have given Shamlat land in village Dugli to the plaintiff to the extent of 5/26 share which comes to 1 kanal 15 marlas and in addition to it, abadi in Tika Dabrera to the extent of 1/64 shares which comes to 10 marlas and thereby have pleaded the entry of possession in their favour to be legal and correct which was incorporated during the life time of Gopala, the predecessor-in-interest of the parties. The defendants have also pleaded the separate possession of the parties to their respective share since their ancestors. The defendants have pleaded the exchange or arrangement between the processor-in-interest of the parties and in alternative of no such exchange or arrangement having been proved then the defendants have claimed the complete ouster of the plaintiff from the suit land and thereby claiming adverse possession to the interest of the plaintiff.

4. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is joint owner in possession of the suit land, as alleged? .....OPP
2. Whether the plaintiff is entitled to the relief of injunction as prayed for? .....OPP

3. Whether the suit land to the extent of the share of plaintiff is also in the ownership and possession of defendants by way of exchange as alleged? ….OPD

4. Whether the defendants being in possession have become owners of the suit land by way of adverse possession?……OPD

5. Relief.

5. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff(s)/respondent(s). In appeal, preferred against the judgment and decree of the learned trial Court by the plaintiff(s)/respondent(s) before the learned first Appellate Court, the learned first Appellate Court allowed the appeal and reversed the findings recorded by the learned trial Court.

6. Now the defendant/appellant has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 19.12.2003, this Court, admitted the appeal instituted by the defendant/appellant against the judgment and decree rendered by the learned first Appellate Court on the hereinafter extracted substantial questions of law:-

1. Whether the Lower Appellate Court has taken wrong view of law in holding the findings on issue No.3, which was returned against the defendants-appellants have attained finality, as the defendants did not challenge the same in appeal, especially when the suit filed by the plaintiff-respondent was dismissed?

2. Whether the Courts below have misunderstood the controversy by misreading the plea raised by the defendants in the written statement regarding complete ouster of the plaintiff-respondent from the joint property? Have not both the courts below applied wrong principles of law in erroneously negativing the case put forth by the defendants/-1ppellant, by holding that the adverse possession is not proved?

3. Whether the Lower Appellate Court has ignored the revenue entries which have the presumption of truth by taking wrong view of law that the basis of exchange was not proved, by ignoring the admission of the plaintiff-respondent accepting the exclusive possession of the defendants-appellant over the suit land?

**Substantial questions of Law No.1 to 3.**

7. The jamabandi qua the suit land pertaining to the year 1953-54 comprised in Ex.DB reflects the factum of the suit land being recorded in the joint ownership of the parties at contest. However, it is recorded in possession of one Gopala and Kangaru, in their capacity as co-owners. The suit land is located in Tika Jhatwar. The parties at contest also jointly owned the property located at Tikka Dugli. The subsequent jamabandis qua the suit land comprised in Exts.DC, DD, DE, DF, DG, DH and Exts. P-2 to P-5 and Ex. D-1, however, contrary to the reflection in the jamabandi for the year 1953-54 comprised in Ex.DB, wherein though the suit land is recorded in the joint ownership of the parties at contest and Gopala and Kangaru are displayed to be in possession thereof, reflect the defendants to be in exclusive possession thereof being tenants under Gopala and Kangaru. Besides, in the column of rent in the jambandis aforesaid a communication exists of the possession of the defendants qua the suit land having accrued on account of exchange thereof inter se them and the plaintiff with the land at Tikka Dugli.

8. The bedrock of the controversy hinges upon the factum of the legality of the entries comprised in the jamabandis aforesaid with reflections therein of the defendant being tenants in possession of the suit land under Gopala and Kangaru and such possession has come to be acquired by them in pursuance to an exchange having been effected inter se the plaintiff and the defendants, inasmuch as, the plaintiff having in pursuance thereto acquired possession of the land in Tikka Dugli, whereas, the defendants having acquired possession of the suit land located in Tikka Jhatwar. However, the efficacy of the entries aforesaid lacks both legal vigour and tenacity. The reason for concluding as aptly done by the learned first Appellate Court is of no probative and tenacious proof having erupted comprised in the rendition of a valid order by the authority/competent revenue officer in pursuance where to the entries aforesaid were recorded in the jamabandis aforesaid. In the absence of evidence comprised in the display by the apposite records existing before this Court of the entries comprised in the jamabandis aforesaid with reflection therein of the defendants having acquired possession of the suit property in pursuance to an exchange having been effected inter se them and the plaintiff for constituting them to be garnering an aura of sanctity, rather renders the entries to have been incorporated without any legal authorization and, as such, construable to be nonest and void as aptly done by the learned first Appellate Court. Even otherwise, there being omission of adduction of cogent evidence comprised in the adduction into evidence of the exchange deed purportedly executed/entered inter se the parties at contest, whereunder the plaintiff acquired the possession of the land situated at Tika Dugli and the defendants acquired possession of the suit land situated at Tika Jhatwar, renders the contention as raised by the defendants/appellant of theirs having acquired possession of the suit land situated in Tikka Jhatwar in pursuance thereto, to be legally frail and of little probative worth. Naturally, then the aforesaid entries with portrayal therein in the jamabandis aforesaid are to be concluded to be arbitrarily recorded and of no significance in whittling or jeopardizing the rights of the plaintiff in the suit property with his being recorded as co-owner alongwith the defendants in the jamabandi for the year 1953-54 which precedes the subsequent jamabandis with untenable and erroneous reflections therein of the defendants being in possession thereof in pursuance to an exchange inter se the parties encompassing the suit land and the land at Tika Dugli. Consequently, the entries in the jamabandis subsequent to the jamabandi for the year 1953-54, for reiteration when not having been proved to be preceded by a valid order of an authorized revenue officer, gain no leverage. Moreover, the reflection of the defendants/appellant as tenants qua the suit land under the plaintiff, too erodes the efficacy of the entries in the jamabandis comprised in Ex.DC onwards especially when too in the respective columns of ownership thereof, the suit land has been reflected to be in joint ownership of the parties at contest, yet with the defendants having been recorded to be in exclusive possession thereon in the capacity as tenants, is in dire detraction to and antithetical to the principle of the joint/co-ownership which embodies, hence, the rule of community of title and unity of possession inhering in all co-khatedars or co-owners, as the parties at contest are reflected in the jamabandis subsequent to the jambandi for the year 1953-54. For amplification when the parties at contest in the jamabandis succeeding to the jamabandi for the year 1953-54 are also recorded as joint owners of the suit land, the effect and the import of the said entries is of theirs inhering in the joint owners, who are the parties at contest, a right to claim community of title and unity of possession qua each inch of property recorded in their joint ownership, it is enigmatic in what manner with, hence, the mutually contradictory status reflected therein to be embodied in the defendants, hence, as such, theirs sequeling affliction to the rule of joint ownership vesting a title as co-owner even in the defendants as also untenably diluting their rights as co-owners in the joint suit property, then came to be recorded. Therefore, the defendant cannot claim or assert the status as untenably reflected in the jamabandis succeeding to the jambandi for the year 1953-54 of theirs being

tenants upon the suit land and that too under the plaintiff, who too like them is recorded as co-owner in the suit property. In other words, the reflection of the defendants/appellant as tenants in exclusive possession of the suit property in the jamabandis succeeding to the jamabandi for the year 1953-54, though at the same time marking an amplifying reflection therein of theirs being recorded as joint owners of the suit land alongwith the plaintiff, is a reflection which does not appeal to the embodied sacrosanct legal canon of joint ownership and its inhering in all joint owners inclusive of the defendants/appellant equivalent and compatible rights as such over the suit land. Consequently, the entries marking the fact of the defendants/appellant being in possession of the suit property as tenant in pursuance to an exchange effected inter se them and the plaintiff, inasmuch as in pursuance thereto while they having abdicated their possession in favour of the plaintiff in Tikka Dugli and having acquired possession of the suit land from the plaintiff at Tikka Jhatwar, more so, when the factum of such exchange for the reasons aforesaid and for the further reason when there is no attestation of mutation in pursuance to the exchange purportedly entered into inter se the parties at contest nor consequent reflections in the apposite jambandis, are of no significance, rather render the plea of the defendants of theirs having acquired possession of the suit property from the plaintiff in pursuance thereto to be an unacceptable and frail submission. Further more, it ought not to be omitted to be also bespoken that the exchange even if it had been entered or effected inter se the parties at contest then the jamabandis subsequent to Ex.DB which is the jamabandi for the year 1953-54, would have portrayed deletion of the name of the plaintiff from the column of ownership and a manifest corresponding reflection in the remarks column of the jamabandi or in its column of ownership of the defendants/appellant having acquired the suit land by way of exchange and theirs having become exclusive owner thereof in pursuance thereto. However, the above reflections are omitted to be communicated in jamabandis subsequent to the jamabandi for the year 1953-54, as such omission of aforesaid reflections also reinforcingly, hence, appears to spur an inference that there was no exchange entered into inter se the parties at contest nor also it has to be obviously concluded that the entries reflecting the defendants to have acquired the possession as tenant of the suit property in pursuance thereto have no legal validity or sinew.

9. The learned counsel for the defendants/appellant has argued that with there being a plea in the written statement, of the defendants being in possession of the suit property in complete ouster of the plaintiff is a plea compatible to the plea of theirs having acquired title to the suit land by adverse possession. However, assuming that the plea of complete ouster of the plaintiff/respondent from the suit land at the instance of the defendants/appellant is comprised in the written statement of the defendants/appellant, inasmuch as theirs being in possession of the suit land in complete ouster of the plaintiff, who even did not participate in the mesne profits and having never objected to their exclusive possession over the suit land, is equivalent to a communication of plea of acquisition of title to the suit land by adverse possession. Nonetheless, though the factum of pleading of complete ouster of the plaintiff/respondent by the defendants/appellant does exist in the written statement of the defendants/appellant, yet the said plea has been ambiguously pleaded, inasmuch as it does not take within its fold, of such complete ouster of the plaintiff from the suit land, though equivalent to an assertion by the defendants of theirs having acquired title to the suit land by adverse possession, the legally enshrined germane fact as to when such overt act marking the inception or commencement of possession of the defendants/appellant with an animus possidendi, arose with precision with exactitude in time. In the face of imprecise averments in the written statement of the defendant qua the commencement of their possession over the suit land with an animus possidendi, renders the said plea to be construable to be

nebulously or loosely phrased constituting it to be not, hence, comprising the raising of an appositely communicated contention at the instance of the defendants/appellant of theirs having acquired title to the suit land by prescription, inasmuch as theirs having by their overt acts commencing with an animus possidendi erupting at a precisely communicated time gained possession of the suit land and continuously thereafter with a hostile animus towards the defendants, retained it. Non existence of precise communications qua the commencement with exactitude in time of adverse possession by the defendants qua the suit land comprised in the commission of overt acts by the defendants/appellant with an animus possidendi, portrays, hence, that the plea has been loosely phrased and does not, hence, also embody the necessary ingredients for its constituting a tenable plea of the defendants/appellant, of theirs having acquired title to the suit property by adverse possession. Therefore, the evidence, if any as exists on record comprised in the admissions of the plaintiffs in their respective testimonies or of the defendants qua the exclusive possession of the defendant over the suit land, does not give succor to the said plea, inasmuch as it being beyond pleadings, rather possession, if any, of the defendants/appellant over the suit land, even if exclusive, yet given the fact that for the reasons attributed hereinabove, the jamabandi for the year 1953-54 comprised in Ex.DB has been alone construed to be tenable and its manifesting the fact of the parties at contest being recorded therein to be in joint ownership, naturally the legal incident thereof is of theirs enjoying compatible and equal right with each other qua every inch of the suit land, as such, possession, if any, even if exclusive of the defendants/appellant over the suit land is to be construed to be possession on behalf of the plaintiff/respondent as well. Such possession does not, when the entries subsequent to Ex. DB have been construed to be arbitrary and nonest, as such, imputing no right in the defendants as tenants over the suit property, obviously, then when the entries in Ex.DB prevail, constitute possession donning the mantle of or vesting a right either as tenants or as prescriptive owners in the defendants. As such, the sacrosanct conclusion is that the parties enjoy rights common/joint with each other and have joint interest over the suit land especially when the entries existing in Ex.DB remain un-eroded by the subsequent entries in the subsequent jamabandis which latter entries have been concluded to be while not having been preceded by any valid order of an authorized officer to be nonest.

10. Even though, the learned counsel for the defendants/appellant has contended that the learned first Appellate Court has affirmed the findings recorded by the learned trial Court qua the factum of no cogent evidence and convincing proof erupting qua the factum of the suit land having been acquired by the defendants/appellant in pursuance to an exchange having been effectuated or entered inter se them, as such, besides when while affirming, such findings, the learned first Appellate Court had concluded that it necessitates affirmation on the score of the defendants/appellant not having assailed it before the learned first Appellate Court, hence, imbuing it with finality, which manner of affirmation by the learned trial Court has been contended to be untenbale. Assuming that there may be purported untenability foisted to the factum of affirmation afforded by the learned first Appellate Court to the aforesaid findings recorded by the learned trial Court, nonetheless, the effect thereof fades in the face of the learned first appellate Court having dwelt ad nauseam and exhaustively qua the validity and sustainability of such findings, by an advertence to the compatible proof thereto, in sequel to which exercise it concluded the exchange as set up by the defendants/appellant to foist tenability to the entries in the jamabandis subsequent to the one recorded in Ex.DB, acquire no tenability or legality. Consequently, when the entire issue has been thrashed out at ad nauseam by the learned first Appellate, it estops the learned counsel appearing for the appellant/defendant to contend that the effect thereof has been dealt with in a slip shod and cryptic manner, besides

without application of mind by the learned trial Court rather the said fact when has been dealt with in a thorough as well as in an elaborative manner and besides on a circumspect analysis of the evidence on record, hence, the contention of the learned counsel appearing for the appellant is rejected. Consequently, the findings of the learned first Appellate Court are based upon a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication. Accordingly, the substantial questions of law No. 1 to 3 are answered against the defendants/appellant and in favour of the plaintiff/respondent.

11. The result of the above discussion is that the appeal preferred by the defendants/appellant is dismissed and the judgment and decree rendered by the learned first Appellate Court is affirmed and maintained. Record of the learned Courts below be sent back forthwith. All pending applications, if any, are also disposed of. No costs.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.**

Bhim Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 358 of 2011.
Reserved on: November 21, 2014.
Decided on: November 24, 2014.

**Indian Penal Code, 1860-** Section 302- As per prosecution version, accused had given beating mercilessly to deceased and thereafter, he tried to commit suicide by touching electric wires of transformer - he received severe injuries- he was taken to hospital where he died- PW-1, PW-2 and PW-8 resiled from their testimonies recorded by the police and categorically denied that they had seen the accused giving beating to the deceased- PW-6 had strained relation with the accused which makes it difficult to rely upon his version that deceased had visited his home- medical officer had not found any burn injury on his hand- PW-5 also admitted that it was not possible to touch the wires without using the staircase- held, that the testimonies of eye-witnesses do not prove the prosecution version- no witness from the vicinity had heard any cries- hence, in these circumstances, accused is acquitted. (Para- 29 to 31 and 35 to 37)

**Code of Criminal Procedure, 1973-** Section 161- Extra judicial confession- As per prosecution case, accused stated before PW-3 and PW-6 that "*Aaj mene ise dil se mara hai*"- they had not disclosed this fact to the police - held, that in these circumstances, extra judicial confession could not be relied upon. (Para-32)

For the petitioner: Mr. Adarsh Sharma, Advocate, vice counsel.
For the respondent: Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, J.**

This appeal is instituted against the judgment dated 7.10.2010, rendered by the learned Addl. Sessions Judge, Mandi, Camp at Karsog, in

Sessions Trial No. 4 of 2009, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offences under Sections 302 & 309 IPC. He was sentenced to undergo imprisonment for life (rigorous) and to pay a fine in the sum of Rs. 5,000/- for the commission of offence under Section 302 IPC and in default of payment of fine, he was ordered to suffer simple imprisonment for six months. He was also sentenced to undergo simple imprisonment for one year for the commission of offence under Section 309 IPC.

2. The case of the prosecution, in a nut shell, is that the complainant Banti Devi is resident of village Khumaro. Accused is her son. About 9 years back, accused married Kaushalya Devi without the consent of his parents. Accused has two daughters and one son. Elder daughter Neha (deceased) was seven or eight years old. She was studying in the second class. About three months prior to the incident accused had beaten his wife and children. His wife Kaushalya Devi went to her parental house alongwith the younger daughter. Accused used to administer beatings to his wife and children.

3. On 20.6.2009, Neha alongwith her brother Dinesh came to the house of Smt. Banti Devi during evening time. The accused was living separately from his parents. Neha and Dinesh took meals and slept in the room of the complainant. Accused was working as labourer. During night at about 2:30 AM, accused knocked at the door of the house of the complainant and pushed the door to open it. The complainant was sitting inside her room as she was not able to sleep due to toothache. The light of the room was on. The accused asked her about his children. She and her husband told him that both Neha and Dinesh were sleeping. She also asked accused to go to kitchen in order to take dinner. Neha and Dinesh were sleeping in the room of the complainant alongwith Kala (daughter of the complainant). The accused dragged Neha from her hairs and started beating her. Neha cried and the complainant tried to save Neha. Accused gave kick blows on the shoulder of the complainant. Accused also slapped her. The accused threatened to kill them. She alongwith her husband, Neha and Kala started raising alarm but nobody came on the spot. Accused continued beating Neha. He threatened that in case somebody would come forward to save Neha, he would kill them and resultantly, all of them were frightened. The accused removed Phati (wooden piece) from the table and started beating Neha mercilessly. Phati was also having a nail. Neha sustained injuries on her forehead, arms, legs back and stomach. She started bleeding profusely. The complainant alongwith Kushal Chand and Bindu went to the house of Yuv Raj, Vice President of the Panchayat. When they were returning back to her house, she heard explosion at electricity transformer. When they reached near the transformer, accused was lying on the spot and his clothes and stomach was burnt. She was told by her family members that accused went towards transformer when Neha fell unconscious. When complainant alongwith other persons reached at her house, she found that Neha was demanding water. She was also vomiting. She was brought to Civil Hospital Karsog. She died there at 6:30 AM. Neha died due to beatings administered by accused with the aid of hands and Phati.

4. On 21.6.2009, a telephonic message was received from Civil Hospital, Karsog at PS Karsog that one girl admitted in the hospital has died having sustained injuries. This information was recorded in the *rojnamcha*. SI Vijay Sen directed HC Tek Chand to go to hospital. At about 8:00 AM, HC Tek Chand informed SI Vijay Sen on telephone that the girl had died. S.I. Vijay Sen went to hospital and statement of complainant Banti Devi was recorded under Section 154 Cr.P.C by SI Vijay Sen. FIR was registered at PS Karsog. MLC certificate of Neha was obtained. Her post mortem report was also received. The inquest report was prepared. Viscera of the deceased was handed over to the police by the MO Civil Hospital, Karsog for the purpose of examination. The

accused was also medically examined. The blood stained Kurta and Paijama were also taken into possession. The blood stained pieces of plastic mattress, burnt inner and shirt of the accused were also taken into possession by SI Vijay Sen. The pieces of Phati and one stick were also taken into possession. The table was also taken into possession by the police. Reports were received from FSL, Junga. The investigation was completed and thereafter challan was put up after completing all the codal formalities.

5. The prosecution has examined as many as 22 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C. He has denied the case of the prosecution. The learned Trial Court convicted and sentenced the accused, as stated hereinabove. Hence, the present appeal.

6. Mr. Adarsh Sharma, Advocate, appearing for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur, learned Asstt. Advocate General, has supported the judgment of the learned Addl. Sessions Judge, Mandi, Camp at Karsog, dated 7.10.2010.

7. We have heard learned counsel for the parties and gone through the records of the case carefully.

8. PW-1 Banti Devi is the mother of the accused. According to her, the marriage between accused and Kaushalya Devi was solemnized about 12 years back. He married Kaushalya Devi without their consent. Three children were born out of this wedlock. The name of the eldest daughter was Neha. She was seven years old at the time of her death. She was studying in 2nd class at that time. About one year back, quarrel took place between Kaushalya and the accused. Both of them had consumed liquor. Accused and Kaushalya were living in separate houses. She was living in separate house. The distance between their house was about 200 ft. Kaushalya had left the house and went to the house of her parents. Neha and Dinesh remained in the house of the accused. Accused used to administer beatings to his children under the influence of liquor. On 20.6.2009, Neha and Dinesh came to her house. The accused was working as labourer under NREGA scheme. When Neha and Dinesh came to her house, they did not take meals. Both of them slept with her at night. Her husband slept in the separate room. She was having toothache on that day. At about 1:30 AM, accused Bhim Singh came to her house. He was under the influence of liquor. He asked her about his family. Her husband woke up and told the accused that his children were sleeping. At that time, she was sitting on the cot. The light was on. She was not able to sleep during night due to toothache. Her husband told accused that he should go to kitchen if he want to take food. The accused did not take meals. The accused asked the children to leave her house. Her husband also asked the accused to leave the house if he did not want to take meals. The accused stated that he would take the children to his house. She caught Neha. She told accused that she would not permit Neha to be taken out of her house during night. The accused pushed her. She raised alarm. Her husband Amar Singh came to the room. The accused had also pushed her husband. She asked children to raise alarm. Neha and Dinesh started raising cries. Accused threatened to kill her. There was wooden table inside the room. Accused removed one Phati from the table. He hit on her leg with that Phati. She left the room in order to save herself. She went to the house of Prem Lata, Panch in the Village. Accused did not beat Neha in her presence. She was declared hostile and cross-examined by the learned Public Prosecutor. She denied the suggestion that the accused had inflicted injuries on the person of Neha with the aid of Phati having been removed by him from the wooden table. She admitted that there was iron nail in the Phati. She denied that Neha was bleeding from her head, forehead, arms, legs, back and stomach. She denied that accused continued administering beatings to Neha despite the fact that she was bleeding profusely. She admitted that she went to the house of Up-Pradhan Yuv Raj alongwith Kushal and Bindu.

She had gone to the house of Yuv Raj to bring him to the spot. She admitted that when she was returning back to her house alongwith Yuvraj, Kushal and Bindu they heard explosion of electricity transformer. She admitted that due to explosion, supply of electricity to the village was disrupted. She admitted that accused was lying near the transformer. She did not remember that her family member had told her that when Neha became unconscious, accused had fled from the room. She admitted that Neha was also vomiting at that time. She admitted that Neha was brought to Civil Hospital, Karsog. She admitted that Neha had died at about 6:30 AM in the hospital. She also denied that Neha died due to administering of severe beatings by accused with Phati. The police visited the spot. The police photographed the spot. The police took into possession blood stained Kurta and Pajama of her husband Amar Singh and burnt shirt and inner of accused and pieces of plastic mattresses stained with blood vide memo Ext. PA. The police also took into possession eight wooden pieces of 'kial' and one stick of 'fagra' (firewood tree) stained with blood, vide memo Ext. PB. Wooden table was also taken into possession. The shirt is Ext. P-2 and Pajama is Ext. P-3. The burnt shirt is Ext. P-5 and burnt inner is Ext. P-6. The wooden pieces were Ext. P-10 and stick Ext. P-11. The chappal was Ext. P-13. The wooden table was also produced in the Court vide Ext.P-14. According to her, portion A to A of her statement mark A recorded under Section 154 Cr.P.C. was not correct. She was confronted with portion A to A of her statement mark A recorded under Section 154 Cr.P.C., she has deposed that this statement was not given by her to the police. Portion B to B of her statement mark A recorded under Section 154 Cr.P.C. was not correct. She was confronted with portion B to B of her statement mark A recorded under Section 154 Cr.P.C., she has deposed that this statement was not given by her to the police. Portion C to C of her statement mark A recorded under Section 154 Cr.P.C. was not correct. She was confronted with portion C to C of her statement mark A recorded under Section 154 Cr.P.C., she has deposed that this statement was not given by her to the police. Portion D to D of her statement mark A recorded under Section 154 Cr.P.C. was not correct. She was confronted with portion D to D of her statement mark A recorded under Section 154 Cr.P.C., she has deposed that this statement was not given by her to the police. She denied the suggestion that during night accused had dragged Neha from hair and started administering beatings to her without any cause. Portion E to E of her statement mark A recorded under Section 154 Cr.P.C. was not correct. She was confronted with portion E to E of her statement mark A recorded under Section 154 Cr.P.C., she stated that this statement was not given by her to the police. She denied the suggestion that when accused realized that death of Neha was inevitable due to the beatings given by him, he attempted to commit suicide by touching live wires of electricity transformer. She denied the suggestion that Neha had died due to administering of beatings with the aid of Phati by the accused. In her cross-examination, she admitted that the accused had demanded share in the property from his father. On the date of occurrence, accused had demanded his share in the property from his father. Hot words were exchanged between her, accused and her husband. Thereafter, she went to the house of Up-Pradhan of the Panchayat to bring him on the spot. She also admitted that Kala and Bir Chand had also accompanied her to the house of Up-Pradhan of Panchayat. There was retaining wall of 20 ft. height in the compound of her house. She also admitted that there were stones and bushes near the retaining wall. She also admitted that Neha had also run from the house after them when they had gone to the house of Up-Pradhan. She also admitted that accused used to look after his wife and children properly. She also admitted that they were locked in litigation with Kushal Chand, Duni Chand and Bindu. She did not call Kushal Chand, Duni Chand and Bindu to her house at the time of occurrence. She admitted the suggestion that accused has been falsely implicated in the case by Kushal Chand, Duni Chand and Bindu in connivance with the police.

9. PW-2 Amar Singh is the father of the accused. According to him, Neha and Dinesh came to their house. Both of them slept on the date of occurrence. He slept in the separate room. Gulabo Devi and Bir Chand were also present in his house on that day. At about 1:30 AM (night), accused came to his house under the influence of liquor. He asked him about the whereabouts of his children. He told him that his daughter and son were sleeping in separate room with Banti. He told accused that he should not take children to his house during night. Accused picked up a quarrel with him. His wife Banti came out of her room when accused quarreled with him. Accused pushed Banti Devi and he went inside the room and again stated that she fled from the spot. The accused again started picking up quarrel with him. He pushed him and fled away from the spot. Accused did not administer beatings to Neha in his presence. He was also declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that about three months prior to this incident, accused gave beatings to his wife and children and resultantly Kaushalya went to her parental house alongwith the youngest daughter. He denied the suggestion that about 6-7 days back prior to this incident, accused Bhim Singh had beaten his daughter Neha and that she has bleeding from nose and mouth. Kushal Chand was his nephew. He denied the suggestion that Neha had taken shelter in the house of Kushal Chand. He admitted that Neha was brought to his house by Kushal Chand and Prem Lata. He denied the suggestion that during night at about 2 or 2:30 AM, accused dragged Neha from the hair and brought her to his room. He also denied that accused was beating Neha and in the meantime, his wife Banti Devi also came inside the room. He also denied the suggestion that Banti Devi tried to save Neha from accused in his room but she was pushed by the accused. He also denied the suggestion that accused had threatened to kill them. He denied the suggestion that accused removed Phati from wooden table lying in the room. He denied the suggestion that accused gave beatings to Neha with the aid of Phati. He admitted that nobody came to his house when they had raised alarm. He denied the suggestion that Neha was bleeding from her head, forehead, arms, legs and back. He denied the suggestion that Neha was beaten mercilessly by the accused. He denied the suggestion that Phati was broken into pieces as a result of infliction of injuries on the person of Neha by the accused. He also denied the suggestion that Neha was also beaten by the accused with the aid of stick of Fagra. He denied the suggestion that they told Prem Lata that accused had killed Neha. He also denied the suggestion that Neha was unconscious when they went to the house of Prem Lata, Panch. He also denied the suggestion that Prem lala told Kushal Chand that Neha had been killed by accused and as such he should visit his house. He admitted that when they reached in their house, the accused was sitting on the bench lying in the house. He admitted that there was explosion at electricity transformer and supply of electricity was disrupted. He admitted that the accused was found lying burnt near the aforesaid transformer. He denied the suggestion that blood stained kurta and pajama was handed over to the police by him. He denied the suggestion that kurta and pajama were worn by him on the date of incident. He admitted that kurta and pajama Ext. P-2 and P-3 had been handed over to the police by him vide memo Ext. PA. The burnt shirt and inner of the accused were handed over to the police by him vide memo Ext. PA. He was not aware that blood stained pieces of plastic mattresses were taken into possession by the police. He admitted that memo Ext. PA was also signed by witnesses Prem Lata and Lata Kumari. He denied the suggestion that Neha had died on account of the beatings administered by the accused with the aid of Phati, kick and fist blows. He denied the suggestion that when accused realized that Neha might have died due to beatings administered by him to her, he made an attempt to commit suicide by touching live wire of electricity transformer. Portion A to A of his statement Mark C recorded under Section 161 Cr.P.C. was not correct. He was confronted with portion A to A of his statement Mark C under Section 161 Cr.P.C. He stated that he has not given this statement to the police. Portion B to B of his statement Mark C recorded under Section 161 Cr.P.C. was not

correct. He was confronted with portion B to B of his statement Mark C under Section 161 Cr.P.C.. He stated that he has not given this statement to the police. Similarly, he denied portion C to C, D to D, E to E, F to F and G to G of his statement recorded under Section 161 Cr.P.C. According to him, he never made these statements to the police. In his cross-examination by the learned defence counsel, he admitted that the accused has demanded his share in the property. The accused has demanded his share at the night of this incident. He alongwith his wife and second son Bir Chand went to the house of Prem Lata, Panch to bring her to their house to settle the dispute. He admitted that Neha had also run after them when they left the house in order to go to the house of Panch Prem Lata. He admitted that Neha had fallen from the compound of the house on the bushes beneath the retaining wall. He also admitted that Neha had sustained injuries on her body due to this fall. He did not know that accused had lifted Neha from the bushes and brought her to the house. He admitted that he had inimical relations with Kushal Chand, Duni Chand and Bindu. Neither Kushal Chand nor Duni Chand or Bindu had come to his house on the night of occurrence. He admitted that the accused was implicated falsely in the case at the instance of Kushal Chand, Duni Chand and Bindu. He also admitted that Kashalya, Neha, Dinesh and Nikata were looked after by the accused properly.

10. PW-3 Prem Lata, deposed that she was present in her house on 20.6.2009. During night, at about 2 or 2:30 AM, Banti, Amar Singh, Bir Chand and Kala came to her house. They disclosed her that Neha had been beaten mercilessly by accused and as such she should visit their house. She went to the house of Kushal Chand alongwith these persons. She took Kushal Chand with her and thereafter, they went to the house of Banti Devi. Accused was sitting on wooden bench. Neha was also lying on the bench. Neha was bleeding. She asked accused as to what had happened to Neha. The accused stated that "*Aaj mene ise dil se mara hai".* Thereafter, Banti, Amar Singh, Kushal Chand and Duni Chand went to the house of Yuv Raj, Up Pradhan in order to call him to the spot. She remained inside the house alongwith Bir Chand. Accused came out of the room and sat in the corner of old house of Amar Singh. She asked Bir Chand as to where Bhim Singh had gone. In the meantime, explosion took place at electrical transformer and supply of electricity was disrupted. Accused fell on the ground near transformer. Up Pradhan Yuv Raj, Banti, Amar Singh and Kushal Chand also reached near the transformer when this explosion took place. The accused was brought to the house. The shirt of the accused was burnt. Accused and Neha were immediately brought to the Civil Hospital, Karsog. Kushal Chand had disclosed to her that about 6-7 days prior to this incident, Neha had been beaten mercilessly by the accused and that she took shelter in his house. Kushal Chand had also visited her house and told her that Neha had taken shelter in his house because she was scared of her father. She had visited the house of Kushal Chand and found Neha sitting in the room of lower storey of the house. At that time, she had found that Neha was bleeding from her nose and her mouth was swollen. Banti had also disclosed to her that accused had beaten Neha with the aid of Phati removed from wooden table and stick of Fagra. The police visited the spot. Banti Devi handed over to the police eight pieces of 'kial' wood and one stick of Fagra in her presence and these articles were sealed in parcel. Memo Ext. PB was prepared in this connection by the police. Blood stained kurta and pajama were also handed over to the police. Blood stained pieces of plastic mattresses were also handed over to the police by Amar Singh and Banti Devi. Wooden table was also handed over to the police. In her cross-examination, she admitted that the accused has constructed his own house. She has not disclosed to the police that Neha has urinated in her Salwaar. She had also not disclosed to the police during the course of recording her statement that accused had dragged Neha inside the room and made her to lie on the cot. She has not disclosed to the police during the course of recording of her statement that accused had disclosed to her that "*Aaj mene ise dil se*

*mara hai".* She admitted that the accused has never administered beatings to his wife and children in her presence.

11. PW-4 Kaushalya Devi, is the mother of the deceased. According to her, Neha was eldest child. The accused used to administer beatings to her and her children under the influence of liquor. She used to leave the house in order to take shelter in the house of villagers to save herself from the accused. She also lodged report with the police regarding cruelty meted out to her by the accused. On 21.6.2009, she received a telephonic message that her daughter Neha had been killed by her husband and that she should immediately come to the Civil Hospital, Karsog. From Police Station, Karsog, she went to Civil Hospital Karsog. She admitted in her cross-examination that the accused has demanded his share from his father. Fight has taken place on 20.6.2009 regarding the disputed property.

12. PW-5 Baldev deposed that he received a telephonic message from Haru Ram about the disruption of supply of electricity in Village Pacthi. He went to check electricity transformer. He found one pair of chappal lying near the transformer. He also found that the fuse of the transformer was not in working order. He informed Assistant Engineer and Junior Engineer about the disruption of supply of electricity. He also informed them that some person had touched live wires of transformer. Sh. R.K.Sharma, Junior Engineer came to the spot and took the photographs of the spot. Thereafter, electricity supply was restored. Fuse of the transformer gets damaged in case somebody touches live wire of the transformer. In his cross-examination, he admitted that one cannot touch wires of transformer without the support of staircase. He also admitted that lightening can disrupt the supply of electricity.

13. PW-6 Kushal Chand deposed that the accused was married with Kaushalya about 6-7 years back. Neha came to his house. The mouth of Neha was swollen. He asked Neha as to what had happened. Neha told him that she was beaten by her father. He called Panch Prem Lata to his house. He told Prem Lata that Neha had been beaten by her father. He alongwith Prem Lata took Neha to the house of her grand father. They handed over Neha to her grand parents. On 29.6.2009, Amar Singh, Prem Lata and Banti Devi came in the compound of his house. They were also accompanied by Het Ram and Sushma. It was 2:30 AM at that time. All of them called him out from his house. He came out of his house. He asked all of them as to what had happened. Amar Singh and Banti told him that he should visit their house because Bhim Singh was administering beatings to his daughter Neha. Thereafter, he went to the house of Amar Singh alongwith Prem Lata, Duni Chand, Amar Singh, Banti, Het Ram and Sushma. When they reached the house of Amar Singh, it was found that Bhim Singh was sitting on the Bench and Neha was also lying on the Bench. Neha was unconscious. He asked Bhim Singh as to why he had beaten his daughter. Accused told him that "*Aaj mene ise dil se mara hai".* Neha demanded water. They had seen injuries on her body including bruises. They went to the house of Up Pradhan Yuv Raj. Up Pradhan was brought to the house of Amar Singh by them. When they were reaching near the house of Amar Singh, explosion took place at electricity transformer and supply of electricity was disrupted. Accused was lying near the transformer and his clothes were burnt. They brought the accused to the house of Amar Singh. Thereafter, Neha and Bhim Singh were brought to Civil Hospital, Karsog. In his cross-examination, he deposed that when Neha came to his house, about 6-7 days prior to this incident her mouth was found swollen. He did not lodge any report with the police. He admitted categorically that he was not on visiting terms with Amar Singh. His statement was recorded by the police one day after this incident. He has disclosed to the police during the course of recording of his statement that he had asked accused as to why he had beaten Neha. (Confronted with his statement Mark D under Section 161 Cr.P.C. wherein it is not so recorded). He had not disclosed to the police during the course of

recording of his statement that only Amar Singh, Banti, Bir Chand and Kala came to his house during night. Volunteered that he had disclosed to the police that apart from these persons, Het Ram, Sushma and Prem Lata had also come to his house. He has disclosed to the police during the course of recording of his statement that accused told him that "*Aaj mene ise dil se mara hai*". (Confronted with his statement Mark D under Section 161 Cr.P.C. wherein it is not so recorded). He disclosed to the police during the course of recording of his statement that Amar Singh told him that accused had beaten Neha with Phati and stick of Fagra. (Confronted with his statement Mark D under Section 161 Cr.P.C. wherein it is not so recorded). He has disclosed to the police during the course of recording of his statement that he has found Bhim Singh lying near transformer in burnt condition. (Confronted with his statement Mark D under Section 161 Cr.P.C. wherein it is not so recorded). He also admitted in cross-examination that Bindu and Duni Chand were his brothers.

14. PW-7 Yuv Raj, deposed that he was Up-Pradhan of Gram Panchayat Kalashan. On 20.6.2009, at about 3:15 AM Banti Devi, Amar Singh, Kushal Chand and Duni Chand came to his house. They told him that Bhim Singh had beaten his daughter and as such he should go to the house of Amar Singh. He accompanied them to the house of Amar Singh. When they reached near the house of Amar Singh, explosion took place at the electricity transformer. They went near the transformer. It was found by them that accused was lying near transformer in burnt condition. They took Bhim Singh accused to the house of Amar Singh. Neha was lying inside the room on cot. She was unconscious. There were injuries on her entire body. She was also bleeding. Wooden pieces and one stick of Fagra were lying inside the room. Banti Devi and Amar Singh told him that Neha had been beaten by the accused. He denied the suggestion that Neha sustained injuries due to fall. He admitted that quarrel had taken place between Tilak Raj and accused about one year prior to the date of the incident. He admitted that criminal case was registered at Police Station Karsog in this connection. The case was transferred to their Panchayat and compromise has taken place between Tilak Raj and the accused.

15. PW-8 Bir Chand deposed that he has passed +2 examination. Accused was his brother. On 20.6.2009, Neha was sleeping with her grand mother. He was sleeping with his father. Dinesh was also sleeping with them. During night, he heard noise. He woke up. He saw that accused was beating his parents. Neha was present in the room with his mother. He got frightened. He came out of his room. His mother Banti Devi raised alarm. Accused removed Phati from the table. The accused had not beaten anybody with the aid of Phati in his presence. He alongwith his father, mother and sister went to the house of Prem Lata. Prem Lata told them that they should also call other villagers to the spot. Thereafter they went to the house of Kushal Chand and Duni Chand. Both of them had also accompanied them to their house. When they reached their house, accused was sitting on the bench. Neha was also sitting on the bench resting her head on the same. Thereafter, his mother went to the house of Yuv Raj, Vice President of the Panchayat. Accused went towards the electricity transformer. After some time, they heard explosion at the electricity transformer. On hearing explosion, they went towards the transformer. Accused was found lying near the transformer. Clothes, chest and arm portion of the body of accused was burnt. When Neha was lying on the bench, blood was oozing from her person. Neha and accused were brought to Civil Hospital, Karsog. Neha died in the hospital. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that accused has beaten Neha with the aid of Phati. He also denied the suggestion that Neha was dragged from her hair by the accused and she was brought to their room. He was not aware that there was a nail in the Phati. He denied portion A to A and B to B of his statement recorded under Section 161 Cr.P.C. In his cross-examination, he admitted that the accused used to live separately in his house constructed by him. He used to demand his share in the property

from his father. He also admitted that Kaushalya takes liquor. He also admitted that accused used to ask his wife not to take liquor. He also admitted that during the night of occurrence, hot words were exchanged between accused and Amar Singh when accused demanded his share in the property from his father. He admitted that Amar Singh told accused that he would call Panchayat to settle this dispute. He also admitted that he alongwith his mother and sister went to the house of Panch and Up Pradhan to call them to their house. He did not know that Neha had run after them from the house when they had gone to the house of Up-Pradhan and Panch. He admitted the suggestion that Neha had fallen from the courtyard and resultantly, she had sustained injuries on her person. He also admitted that his father is locked in litigation with Kushal Chand and Duni Chand. He also admitted that Kushal Chand and Duni Chand are not in visiting terms with them. He also admitted that Neha was lifted from the bushes by accused and was brought to the room of the house. He has seen pieces of Phati outside the house when the same were taken into possession by the police. Table was lying in broken condition in a room. He did not know that it was raining on the night of occurrence. Towards the end of his cross-examination, he denied the suggestion that accused used to take proper care of his children.

16. PW-9 Dalip Singh Verma, deposed that he received telephonic message from Rajinder Kumar JE that one person had climbed on electricity transformer at Kumaro which has resulted in disruption of electricity.

17. PW-10 Nikka Ram, has taken photographs Ext. P-21 to P-25.

18. PW-11 Haru Ram, deposed that on 21.6.2009, at 4:30 AM, Bir Chand came to his house. Bir Chand told him that accused had beaten his daughter and she was lying unconscious. Bir Chand had also disclosed him that accused had beaten his daughter with Phati. He also told him that accused had climbed on electricity transformer and he was lying near the transformer. His condition was serious.

19. PW-12 Dr. Dinesh Sharma, has conducted post mortem on the body of deceased Neha Kumari. He issued MLC Ext. PE. According to him, the deceased died due to neurogenic shock due to ante mortem head injury. The injuries shown in MLC could have been caused with the aid of blunt weapon. The duration of injuries shown in the MLC was within few hours. PW-12 Dr. Dinesh Sharma, has also examined the accused. He has issued MLC Ext. PG.

20. Statements of PW-13 Pawan, PW-14 Jai Ram, PW-15 Const. Jai Singh, PW-16 Const. Lal Singh, are formal in nature.

21. PW-17 HC Shrawan Kumar deposed that on 21.6.2009, the case property relating to this FIR was deposited with him by the I.O. and the same was deposited in the Malkhana by him. On 23.6.2009, the case property was sent to FSL, Junga through Const. Lal Singh vide RC No. 60/2009.

22. PW-18 HC Tek Chand deposed that on 21.6.2009, he went to Civil Hospital, Karsog in connection with report No. 8 recorded in the *rojnamcha* at Police Station, Karsog. Neha was subjected to medical examination by the Medical Officer. Neha died in the hospital. The Police Station, Karsog was informed by him on telephone. Thereafter, SHO Vijay Sen visited the hospital.

23. Statement of PW-19 Tilak Singh, is formal in nature.

24. PW-20 Insp. Rajinder Parshad, deposed that the accused was likely to be discharged from the hospital on 16.7.2009. He directed HHC Ishwar Dass to bring accused to Police Station Karsog, after his discharge from the hospital for interrogation. He was subjected to interrogation.

25. Statement of PW-21 Insp. Amar Chand Sharma, is formal in nature.

26. PW-22 SI Vijay Sen, is the I.O. He deposed the manner in which the information was received at Police Station, Karsog at 6:10 AM. The dead body was kept in the mortuary of the hospital. The post mortem examination was got conducted. He recorded the statement of Banti Devi under Section 154 Cr.P.C. vide Ext. PY. The accused was also got medically examined. His blood and urine samples were taken separately. Site plan was prepared. He took into possession Phati, one stick of Phagra from the room, pair of Chappal and photographs of the spot. The parcels were sent to FSL, Junga. He denied the suggestion in the cross-examination by the learned Advocate appearing on behalf of the accused that Banti and Amar Singh had disclosed him during the course of investigation that the accused had picked up a quarrel with Amar Singh relating to some land dispute. He denied the suggestion that Neha fell on the stones and sustained injuries on her person. He denied the suggestion that Phati was taken into possession by him which was broken into pieces.

27. The case of the prosecution, precisely, is that the accused had beaten Neha mercilessly. Thereafter, he tried to commit suicide by touching electric wires of transformer. He received severe injuries. The accused and Neha were taken to hospital. Neha died in the hospital at 6:30 AM. The police investigated the matter.

28. According to the prosecution, PW-1 Banti Devi, PW-2 Amar Singh and PW-8 Bir Chand were eye-witnesses of the incident dated 20.6.2009. PW-1 Banti Devi is the mother of the accused. In her examination-in-chief, she has categorically deposed that the accused did not beat Neha in her presence. She was declared hostile. She was cross-examined. She denied the suggestion that the accused had inflicted injuries on the person of Neha with the aid of Phati, having been removed by him from the table, lying in the room. She denied the suggestion that Neha was bleeding from her head, forehead, arm and stomach. She also denied the suggestion that her family members had told her that Neha became unconscious and accused had fled from the room. She has denied portions A to A, B to B, C to C, D to D and E to E of her statement recorded under Section 154 Cr.P.C. In her cross-examination, she has admitted specifically that accused had demanded share in the property from his father. Hot words were exchanged between the accused, her and Amar Singh, her husband. Thereafter, she went to the house of Up Pradhan to bring her on the spot. She also admitted that there was retaining wall of 20 ft. height in the compound of her house. She also admitted that Neha was talking when she had returned to her house from the house of Up- Pradhan. She also admitted that the accused Bhim Singh used to look after his children properly. She also admitted that they were locked in litigation with Kushal Chand, Duni Chand and Bindu. She also admitted in her cross-examination that Neha had also run from the house after them when they had gone to the house of Up-Pradhan. PW-2 Amar Singh deposed that accused did not administer beatings to Neha in his presence. He also denied the suggestion that about 3 months prior to the incident, accused had given beatings to his wife and children and resultantly, Kaushalya, the wife of the accused, went to her parents' house. He also denied the suggestion that about 6-7 days back, accused had beaten his daughter Neha and she bled from the nose and mouth. He also denied the suggestion that accused gave beatings to Neha with the aid of Phati. He also denied the suggestion that Neha was beaten by the accused with the stick. He also denied portions A to A, B to B, C to C, D to D, E to E and G to G of his statement recorded under Section 161 Cr.P.C. In his cross-examination, he also admitted that accused had demanded his share in his property on the night of the incident. They went alongwith the wife and second son Bir Chand to the house of Prem Lata to bring her to their house to settle the dispute. He also admitted that Neha had also ran after them when they left the house in order to go to the house of Panch Prem Lata. He also admitted that Neha had fallen from the compound of the house on the bushes beneath the retaining wall. He also admitted the suggestion that Neha had sustained injuries on her body due to

this fall. PW-8 Bir Chand was also present on the spot as per the prosecution version. In his cross-examination, he denied that the accused has beaten anybody with the aid of Phati in his presence. He alongwith his father, mother and sister went to the house of Prem Lata Panch. He denied the suggestion that the accused had beaten Neha with the aid of Phati. In his cross-examination, he also denied the suggestion that Neha was pulled from her hair by the accused. He also denied that there was nail in the Phati. In his cross-examination, he further admitted that the accused used to demand share in the property from his father. He also admitted that his father was locked in litigation with Kushal Chand and Duni Chand. They were not in visiting terms.

29. According to PW-1 Banti Devi, PW-2 Amar Singh and PW-8 Bir Chand, the accused has not administered beatings to the deceased. According to the statements of PW-1 Banti Devi and PW-2 Amar Singh the accused was demanding his share in the property. A quarrel had taken place. They went to the house of Pradhan. Neha (deceased) followed them and according to the statement of PW-2, the father of the accused, Neha had fallen from the compound of the house in the bushes beneath the retaining wall and she received injuries on body due to this fall.

30. PW-1 Banti Devi, PW-2 Amar Singh and PW-8 Bir Chand have also resiled from their statements recorded under Section 154/161 Cr.P.C. They were cross-examined. In their cross-examination also, these witnesses have categorically denied that they have seen the accused giving beatings to the deceased Neha.

31. Now, as far as the statement of PW-3 Prem Lata is concerned, she was told by Kushal Chand, the manner in which Neha had received injuries 6-7 days prior to the incident. Kushal Chand has appeared as PW-6. According to him, Neha came to his house. Her face was swollen. It has come in the statements of PW-1 Banti Devi, PW-2 Amar Singh that relations with Kushal Chand were inimical. It has also come in the statement of PW-8 Bir Chand that the relations between Kushal Chand and his father were strained. They were involved in litigation and they were not in visiting terms. If the relations were strained, there was no occasion for Neha to visit the house of Kushal Chand. Thus, the statements of PW-3 Prem Lata and PW-6 Kushal Chand are not trustworthy. Duni Chand is also brother of Kushal Chand.

32. The statements of PW-3 Prem Lata and PW-6 Kushal Chand have been relied upon by the prosecution to prove extra judicial confession made by the accused by uttering "*Aaj maine dil se ise mara hai".* The statements cannot be relied upon for the simple reason that they have not stated so when their statements were recorded by the police under Section 161 Cr.P.C. PW-3 Prem Lata has admitted in her cross-examination that she has not disclosed to the police during the course of recording her statement that the accused has disclosed to her that "*Aaj maine dil se ise mara hai".* PW-6 Kushal Chand has also admitted that he was not in visiting terms with Amar Singh. He had disclosed to the police during the course of recording of his statement that he had asked the accused why he had beaten Neha. (Confronted with statement Mark D under Section 161 Cr.P.C., in which it is not so recorded). He had also disclosed to the police during the course of recording of his statement that accused told him that "*Aaj maine dil se ise mara hai". (*Confronted with the statement Mark D under Section 161 Cr.P.C. in which it is not so recorded). He admitted towards the end of his cross-examination that Bindu and Duni Chand were his brothers. In case the accused had made extra-judicial confession before PW-3 Prem Lata and PW-6 Kushal Chand, it ought to have been recorded in statements recorded under Section 161 Cr.P.C. The witnesses have made improvements upon their previous statement recorded under Section 161 Cr.P.C.

33. According to PW-12 Dr. Dinesh Sharma, the deceased died due to neurogenic shock due to ante mortem head injury. The accused was also examined by PW-12 Dr. Dinesh Sharma. According to the prosecution case, the accused felt repentant and tried to commit suicide by touching the live electric wire of the transformer. PW-12 Dr. Dinesh Sharma has specifically deposed that the accused had not sustained burn injuries on his hands. If the accused had touched the electric wire with his hands, there ought to have been burn injuries on his hands. He has received burn injuries mainly on his stomach. PW-5 Baldev has admitted in his cross-examination that no one can touch the transformer without the support of staircase. Thus, the prosecution version that the accused has tried to commit suicide by touching the transformer wire is not proved conclusively.

34. What emerges from the entire evidence discussed hereinabove, is that the accused had demanded a share of property from his father during the fateful night. The quarrel took place between the father, mother and the accused. The family went to the house of Pradhan to settle the dispute. We have already noticed, as per the statements of PW-1 Banti Devi and PW-2 Amar Singh that Neha came after them. PW-2 Amar Singh has deposed that Neha had fallen. Thus, the defence version is also probablized that Neha might have received injuries by falling from 20 feet compound wall.

35. According to the prosecution version, the accused was living separately from his family. His wife was also residing separately. Two children used to remain with the accused. The relations between the accused and his family members were strained due to property dispute. Thus, there was no occasion for Neha and Dinesh to come to the house of their grand parents during night, more particularly, when PW-1 Banti Devi deposed that they had not taken their meals at her house. PW-1 Banti Devi deposed that the accused was drunk. We have gone through the FSL report. The presence of ethyl alcohol in blood and his urine was only 32.88 mg% and 67.27 mg%, respectively. It cannot be stated on the basis of Ext. PA/J, report of the FSL that the accused was drunk at the time when he is stated to have gone to his father's house and the alleged incident took place.

36. The distance between the house of the accused and other family members was only 200 ft. away. There were other houses near the house of Amar Singh. In case, they had raised hue and cry, the same would have been noticed by the people residing near the house of Amar Singh.

37. PW-8 Bir Singh was young boy. He had already passed 10+2 examination. The mother, father and brother could easily save Neha, if she was beaten mercilessly by the accused. The prosecution has taken into possession the Pajama and Shirt of Amar Singh which were stained with blood. He has appeared as PW-2. PW-2 Amar Singh, in his statement has not deposed that he had tried to save Neha and had moved her to the hospital. How, his clothes were stained with blood has not been explained by the prosecution. The blood, if any, was bound to be present on the clothes of the accused and not of PW-2 Amar Singh vide Ext. 8a and 8b of Ext. PA/H, FSL report. The shirt of the accused was also sent for chemical examination. It was found with small holes of burning, characteristic of burning by spark from electricity. No blood stains were found on it as per Ext. PA/G, FSL report. The prosecution has failed to prove its case against the accused beyond reasonable doubt.

38. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 7.10.2010 rendered by learned Addl. Sessions Judge, Mandi, Camp at Karsog, H.P., in Sessions Trial No. 4 of 2009 is set aside. The accused is acquitted of the charges framed under Sections 302 and 309 IPC. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

39. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned in conformity with this judgment forthwith.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J.**

Manmohan Kansal & ors. .....Petitioners.

Versus

Hem Raj & ors. .....Respondents.

CMPMO No. 373 of 2014.
Decided on: 24.11.2014.

**Code of Civil Procedure, 1908-** Order 26 Rule 9- An application for appointment of Local Commissioner was filed when the case was listed for arguments- it was specifically asserted in the Written Statement that the land was demarcated prior to the institution of the suit- it was not asserted that the defendant had encroached upon the suit land during the pendency of the suit- held, that the application was filed at the belated stage for collection of evidence which was not permissible- hence, application dismissed. (Para-5)

For the petitioners: Mr. V.D.Khidta, Advocate.
For the respondents: None.

The following judgment of the Court was delivered:

**Justice Rajiv Sharma, J. (oral)**

This petition is instituted against the order dated 28.10.2014 rendered by the learned Civil Judge, (Sr. Divn.), Court No. 1, Paonta Sahib, passed in CMA No. 242/6 of 2014 in Civil Suit No. 89/1 of 2008.

2. Key facts, necessary for the adjudication of this petition are that the petitioners-plaintiffs (hereinafter referred to as the plaintiffs for convenience sake) have filed a suit for permanent prohibitory injunction restraining the respondents-defendants (hereinafter referred to as the defendants), from interfering, raising construction of any kind, whatsoever, in land comprised in Khata Khatauni No. 2 min/2 & 3, bearing Khasra Nos. 92/58 and 57, measuring 79-0 bighas, situated in Mauza Kodri-Parmanand, Tehsil Paonta Sahib, Distt. Sirmour, H.P., as per *jamabandi* for the year 1998-99.

3. The suit was contested by the defendants. Replication was filed. The issues were framed by the learned trial Court on 28.2.2009. The matter was listed for final arguments. At that stage, the plaintiffs moved an application under Order 26 Rule 9 CPC, for appointment of Local Commissioner. The application was contested by the defendants. The application was rejected by the learned trial Court on 28.10.2014. Hence, this petition.

4. I have heard Mr. V.D.Khidta, Advocate for the petitioners and gone through the record and order dated 28.10.2014.

5. The suit was instituted by the plaintiffs in the year 2008. The application under Order 26 Rule 9 CPC has been filed when the matter was listed for final arguments. The defendants have specifically averred in para 7 of the Written Statement that the Patwari and Field Kanungo had visited the spot on 5.9.2005, carried out demarcation and found that shrubs and trees were cut from Kh. Nos. 50, 48 and 58 and not from the suit land. The plaintiffs were

already aware about this position. The issues were framed by the learned trial Court on 28.2.2009. It is not the case of the plaintiffs that the defendants have encroached upon any portion of the suit land, during the pendency of the suit and thus the demarcation was necessary. The application was filed at a very belated stage. The plaintiffs cannot be permitted to collect evidence under the garb of filing application under Order 26 Rule 9 CPC. The plaintiffs, as rightly observed by the learned Civil Judge (Sr. Divn.), Court No. 1, Paonta Sahib, have alternative remedy to approach the revenue authorities for fixing the boundaries of the land. There is neither any illegality nor perversity in the order dated 28.10.2014. Accordingly, the present petition is dismissed. No costs.

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**BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.**

Naresh Chand and others .....Petitioners

Versus

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

CWP No. 1205 of 2014.
Date of decision: 24.11.2014

**Constitution of India, 1950-** Article 226- Petitioners were denied the appointment as JBT on the ground that they had not secured the qualifying marks for appointment- held, that the respondent will consider the case of the petitioner in accordance with law and in case decision goes against them, they will be at liberty to approach the Court again and in case decision is in their favour they would be entitled to seniority from the date of their appointment.

For the petitioners: Mr.Sanjeev Bhushan and Mr.Ajay Thakur, Advocates.

For the respondents: Mr.Shrawan Dogra, Advocate General with Mr.Romesh Verma & Mr.Anup Rattan, Additional Advocate Generals & Mr. J.K. Verma, Deputy Advocate General for respondents-State.

The following judgment of the Court was delivered:

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**Mansoor Ahmad Mir, Chief Justice** (oral)

By the medium of the present writ petition, the petitioners have challenged the action of the respondents-State, whereby the petitioners have been denied appointment as JBT teachers.

2. Respondents No.1 to 3 have filed the reply.

3. During the pendency of the writ petition, the grievance of the writ petitioners No.2, 4, 8 and 10 stands redressed and, therefore, they were ordered to be deleted from the array of the writ petitioners, vide order dated 21st April, 2014, passed by this Court. Thereafter, in terms of order dated 23rd September, 2014, the official respondents were directed to file fresh affidavit, but failed to do so.

4. We have gone through the reply filed by the respondents No.1 to 3. It is apt to reproduce paragraphs 4, 5 and 6, of the preliminary submissions hereunder:

> *"4. That as per the information received from respondent No.3 i.e. Deputy Director of Elementary Education, Chamba he advertised the post for*

*sponsoring the name of eligible candidates for the purpose of appointment as JBT on contract basis under entire reserve category/sub category from all the employment exchange of Chamba District. The petitioner No.1 was appeared for counseling on 26-11-2013 and had produced the IRDP certificate during the course of counseling, but the same was not considered due to the reason that the Employment Exchange, Churach, and District Chamba sponsored him just under Scheduled Tribe category. IT is further submitted that if the petitioner No.1 is considered under ST (IRDP) category, he cannot given appointment as JBT on contract basis in District Chamba, as he has just scored 100 marks in TET examination. Whereas, the last candidate under ST/IRDP category as selected has scored 104 marks in TET examination and if his candidature has been considered under ST category, the last candidate under ST category as selected has scored 102 marks in TET examination and it is further submitted that the last candidate of General category who was selected and given appointment as JBT in Chamba District had scored 100 marks in Teacher Eligibility Test (TET) and had scored 2222 out of 2800 marks in JBT examination that comes to 79.3% and whereas, the present petitioner No.1 who had also scored 100 marks in TET examination and had scored 1910 out of 2800 marks in JBT examination that comes to 68.7% was not selected. Hence, the petitioner No.1 not eligible for appointment as JBT on contract basis in Chamba District.*

*5. That the petitioner No.1, 3, 5 & 6 who had appeared for counseling, to be appointed as JBT on contract basis under Scheduled Tribe category had scored 100 marks respectively in Teacher Eligibility Test (TET) could not be selected, whereas the last candidate had been selected after applying the 200 points roster as per provision laid down under Rule 15 & 16 of Recruitment & Promotion Rules of JBT category namely Sh. Vinod Kumar who had scored 102 marks in TET and appeared at Sr. No.117 of the revised merit list. It is further submitted that the petitioner No.2, 4, 8 & 10 appeared for counseling and belonged to ST (IRDP)/SC/ST category respectively and had been selected. That the petitioner No.7 & 9 who were belonging to General IRDP category had scored 100 & 101 marks in TET examination respectively could not be selected, whereas the last candidate belonging to General IRDP category namely Sh. Sandeep Sharma appearing at Sr. No.114 of the revised merit list, had scored 102 marks in TET examination and had been selected as such.*

*6. That as per information received from respondent No.3 i.e. Deputy Director of Elementary Education, Chamba 191 posts allotted to District Chamba for appointment as JBT on contract basis out of which 183 posts has filled on contract basis by the respondent No.3 as per Recruitment & Promotion Rules of JBTs and remaining posts are not fill up due to non availability of reserve category candidates in the District. Hence, the present petition filed by the petitioners deserves to be dismissed."*

5. In view of the reply filed by respondents No.1 to 3 read with the rejoinder filed by the writ petitioners, we are of the considered view that petitioners No.1, 3, 5 to 7 and 9 have carved out a case for interference.

6. However, we deem it proper to dispose of the writ petition by directing respondents No.1 to 3/competent Authority to consider the case of petitioners No.1, 3, 5 to 7 and 9 as per law and make a decision within a period of six weeks from today.

7. It goes without saying that in case the consideration order goes against the petitioners, they are at liberty to challenge the same and in case the consideration order goes in their favour, seniority shall be assigned to them in view of the judgment rendered by this Court in **LPA No.170 of 2014**, titled as **Shri Balak Ram vs. State of Himachal Pradesh and others**, **on 19.11.2014**.

8. The petition stands disposed of accordingly, so also the pending CMPs, if any. Copy dasti.

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**BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR.JUSTICE P.S.RANA, J.**

1. Cr. Appeal No.368 of 2007.
2. Cr. Appeal No.32 of 2008.
Judgment reserved on: 3.9.2014.
Date of Decision: November 24, 2014.

**1. Cr.A. No. 368 of 2007**.

Prem Chand ....Appellant
Vs.
State of H.P. .....Respondent.

| | |
|---|---|
| For the Appellant(s): | Mr.Jagdish Vats, Advocate. |
| For the Respondent: | Mr.B.S.Parmar, Additional Advocate General with Mr. Ashok Chaudhary, Additional Advocate General, Mr.Vikram Thakur, Deputy Advocate General & Mr. J.S.Guleria, Assistant Advocate General |

**2. Cr.A. No. 32 of 2008**.

State of HP. ....Appellant.
Vs.
Pawan Kumar and others. .....Respondents.

| | |
|---|---|
| For the appellant: | Mr.B.S.Parmar and Mr.Ashok Chaudhary Addl. A.Gs with Mr.Vikram Thakur Dy. AG and Mr. J.S.Guleria Asstt. Advocate General. |
| For the respondents: | Mr.Jagdish Vats, Advocate. |

**Indian Penal Code, 1860-** Sections 302 and 324 read with Section 34- PW-1 specifically stated that accused was in possession of dagger and had inflicted a dagger blow on the back side of the deceased- when PW-1 tried to rescue the deceased, accused inflicted a dagger blow on his abdomen- his testimony was corroborated by other prosecution witnesses- medical evidence also showed that the deceased had died due to rupture of the descending thoracic aorta- medical evidence also proved incised wound on the abdomen of PW-1- dagger was recovered at the instance of accused- held, that in these circumstances, prosecution version was duly proved. (Para-12 to 17)

**Indian Penal Code, 1860-** Section 34- Common intention means a pre oriented plan – it must exist prior to the commission of the act- no evidence was led to prove that the accused shared common intention hence accused could not be convicted with the aid of Section 34.

(Para-26)

**Cases referred:**

Shyamal Ghosh Vs State of West Bengal AIR 2012 SC 3539
Hariom and others Vs. State of Uttar Pradesh AIR 1993 (1) Crimes 294
Ramashish Yadav and others Vs. State of Bihar AIR 1999 SC 3830
Krishnan and another Vs State AIR 2003 SC 2978
Narinder Singh and another Vs. State of Punjab AIR 2000 SC 2212
Suresh and another Vs. State of UP AIR 2001 SC 1344

State of Rajashthan Vs. Talevar and another 2011 (11) SCC 666
Surendra Vs. State of Rajasthan AIR 2012 SC (Supp) 78
State of Rajasthan Vs. Shera Ram @ Vishnu Dutt 2012 (1) SCC 602
Balak Ram and another Vs. State of UP AIR 1974 SC 2165
Allarakha K. Mansuri Vs. State of Gujarat (2002) 3 SCC 57
Raghunath Vs. State of Haryana (2003) 1 SCC 398
State of U.P Vs. Ram Veer Singh and others, AIR 2007 SC 3075
S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others
AIR 2008 SC 2066,
Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra (2008) 11 SCC 186
Arulvelu and another Vs. State (2009) 10 SCC 206
Perla Somasekhara Reddy and others Vs. State of A.P. (2009) 16 SCC 98
Ram Singh @ Chhaju Vs. State of Himachal Pradesh (2010) 2 SCC 445

The following judgment of the Court was delivered:

**P.S. Rana Judge**

Both appeals filed against the same judgment and sentence passed by learned Sessions Judge Una in Sessions Case No. 6 of 2006 titled State of H.P. Vs. Prem Chand @ Bhalli and others decided on 29.9.2007 as both appeals have arisen out of the same judgment and sentence. Hence both appeals are consolidated in order to avoid repetition in the ends of justice.

**BRIEF FACTS OF THE PROSECUTION CASE:**

2. It is alleged by prosecution that on dated 29.5.2005 at about 8.30 p.m. near a flour mill in village Jalgran Tehsil and District Una co-accused Prem Chand @ Bhalli in furtherance of common intention committed murder intentionally and caused death of Karnail Singh through sword. It is further alleged by prosecution that on the same date time and place co-accused Prem Chand @ Bhalli in furtherance of common intention voluntarily caused hurt to complainant Kuldip Kumar through sharp edged weapon. It is alleged by prosecution that on dated 29.5.2005 PW1 Kuldip Kumar and deceased Karnail Singh went to attend a marriage ceremony at village Haroli. It is alleged by prosecution that after attending marriage ceremony PW1 Kuldeep Kumar boarded a bus to village Jalgran. It is further alleged by prosecution that on dated 29.5.2005 at about 8.30 p.m. when complainant Kuldeep Kumar and deceased Karnail Singh after alighting from the bus near village Jalgran and when they crossed the road they met with co- accused Prem Chand along with other co-accused persons. It is alleged by prosecution that co-accused Surat Ram was in possession of a stick and co-accused Prem Chand was in possession of a dagger. It is further alleged by prosecution that co-accused Prem Chand and other co-accused persons assaulted deceased Karnail Singh. It is further alleged by prosecution that co-accused Prem Chand inflicted a dagger blow on the left side of the back portion of body of deceased Karnail Singh and co-accused Surat Ram inflicted a stick blow upon deceased Karnail Singh. It is further alleged by prosecution that other co-accused namely Pawan Kumar, Surat Ram and Ashwani Kumar also assaulted deceased Karnail Singh with fist blows. It is further alleged by prosecution that when PW1 Kuldip Kumar intervened to rescue deceased Karnail Singh co-accused Prem Chand inflicted dagger blow upon injured PW1 Kuldip Kumar in the abdomen. It is further alleged by prosecution that thereafter PW1 Kuldip Singh raised alarm whereupon PW2 Purshotam and one Prem Chand both residents of village Jalgran came at the spot and thereafter accused persons left the place of incident. It is further alleged by prosecution that thereafter PW1 Kuldip Kumar and PW2 Purshotam and Prem Chand took deceased Karnail Singh to Zonal hospital Una where

Karnail Singh was declared brought dead. It is further alleged by prosecution that thereafter HHC Ashwani Kumar informed PW17 Inspector Ajay Rana that two persons namely Karnail Singh and Kuldeep Kumar were brought to regional hospital Una in injured condition and karnail Singh had died. It is further alleged by prosecution that on the basis of information PW17 Ajay Rana recorded daily diary report No. 17 Ext 13/A and proceeded to zonal hospital Una along with ASI Darshan Singh, HC Dilbag Singh, HC Sarabjit Singh, Constable Vijay Kumar, LHC Ram Avtar and LHC Nirmal Singh. It is further alleged by prosecution that statement of complainant PW1 Kuldeep Kumar under Section 154 Cr PC Ext PW1/A was recorded and thereafter FIR was registered. It is further alleged by prosecution that injured PW1 Kuldeep Kumar was also medically examined in regional hospital Una and medico legal certificate Ext PW8/A was issued. It is further alleged by prosecution that blood stained dust Ext P3 and two blood stained stones Ext P4 were took into possession and sealed in a parcel. It is further alleged by prosecution that site plan Ext PW17/A was prepared. It is further alleged by prosecution that blood stained shirt Ext P2 of complainant Kuldeep Kumar took into possession vide seizure memo Ext PW1/B. It is further alleged by prosecution that inquest reports Ext PW17/B and Ext PW17/C prepared and post mortem report also obtained. It is further alleged by prosecution that co-accused Ashwani Kumar was also medically examined and photographs of the spot Ext PC/1 to Ext PC/8 also obtained. It is further alleged by prosecution that sealed parcels were deposited in malkhana and disclosure statement of co-accused Prem Chand Ext PW6/A was obtained qua dagger Ext P1. It is further alleged by prosecution that pursuant to disclosure statement Ext PW6/A dagger Ext P1 was recovered and same was took into possession and sketch of weapon of offence Ext PA-1 was prepared. It is further alleged by prosecution that statements of prosecution witnesses were recorded. It is further alleged by prosecution that compromise executed between deceased Karnail Singh and accused persons also took into possession by PW16 Pritam Singh vide memo Ext PW3/B. It is further alleged by prosecution that sword sealed in a parcel was also deposited. It is alleged by prosecution that all the parcels were sent for chemical analysis to FSL Junga through PW12 Constable Kushal Dev vide RC No. 996 of 2005 dated 6.6.2005. It is further alleged by prosecution that chemical analyst report Ext PW17/H took into possession. Learned Sessions Judge Una framed charges against accused persons under Section 302 read with Section 34 of the Indian Penal Code and under Section 324 read with Section 34 of the Indian Penal Code. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined as many as seventeen witnesses in support of its case:

| Sr.No. | Name of Witnesses |
|---|---|
| PW1 | Kuldeep Kumar |
| PW2 | Prushotam Lal |
| PW3 | Rajender Bhogal |
| PW4 | Sikandar Kumar |
| PW5 | Rajender Kumar |
| PW6 | Madan Lal |
| PW7 | Prakash Chand |
| PW8 | Dr. V.K. Raizada |
| PW9 | Dr. G.Upadhayaya |
| PW10 | Dr. Ashok Dharoch |

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|---|---|
| PW11 | HC Rajesh Kumar |
| PW12 | HC Kushal Dev |
| PW13 | HC Sandeep Kumar |
| PW14 | HC Shashi Kumar |
| PW15 | ASI Mohinder Singh |
| PW16 | Insp. Pritam Singh |
| PW17 | Insp. Ajay Rana |

4. Prosecution also produced following piece of documentary evidence in support of its case:-

| Sr. No. | Description. |
|---|---|
| Ext. PA | Compromise. |
| Ext. PB | Application |
| Ext. PW1/A | Statement of Kuldeep Kumar U/S 154 Cr.P.C. |
| Ext. PW1/B | Recovery Memo |
| Ext. PW3/A | Recovery Memo |
| Ext. PW3/B | Memo of Compromise |
| Ext. PW4/A | Recovery Memo |
| Ext. PW5/A | Memo of statement of accused U/S 27 of Evidence Act. |
| Ext. PW5/B | Recovery Memo |
| Ext. PW6/A | Disclosure statement U/S 27 of Evidence Act. |
| Ext. PW7/A | Recovery Memo. |
| Ext. PW8/A | MLC of Kuldeep Kumar. |
| Ext. PW9/A | Postmortem Report of deceased Karnail Singh aged 23 years. |
| Ext. PW10/A | M.L.C. of Ashwani co-accused. |
| Ext. PW13/A | Copy of Rapat No. 17 Rojnamcha. Dated 29.5.2005 |
| Ext. PW15/A | FIR |
| Ext. PW17/A | Site Plan. |
| Ext. PW17/B | Death report. |
| Ext. PW17/C | Inquest Report. |
| Ext. PW17/D | Site Plan. |
| Ext. PW17/E | Site Plan. |
| Ext. PW17/F &Ext.PW17/G | Statement of Rajender Bhogal U/S 161 Cr.P.C. for contradiction purpose. |

| | |
|---|---|
| Ext. PW17/H | Chemical Examiner Report. |
| Ext. PA-1 | Sketch map of dagger |
| Ext. PC-1 to Ext. PC-12 | Photographs. |
| Ext. PC-13 | Negatives of photographs |
| Ext. DA | Copy of MLC of accused Prem Chand. |

5. Accused persons examined DW1 Raj Kumar. Learned Sessions Judge Una convicted co-accused Prem Chand @ Bhalli under Sections 302 and 324 read with Section 34 IPC and acquitted co-accused Pawan Kumar @ Bindu, Surat Ram and Ashwani Kumar. Learned trial Court imposed sentence of life imprisonment and fine of Rs.5000/- (Five thousand) and in default of payment of fine simple imprisonment for two months qua criminal offence under Section 302 IPC upon co-accused Prem Chand. Learned trial Court also imposed sentence of simple imprisonment for six months and fine of Rs.2000/- (Two thousand) and in default of payment of fine simple imprisonment for one month qua criminal offence under Section 324 IPC upon co-accused Prem Chand. Learned trial Court further directed that sentences of substantive imprisonment shall run concurrently.

6. Feeling aggrieved against the judgment and sentence passed by learned Sessions Judge Una two appeals filed i.e. Cr. Appeal No. 368 of 2007 titled Prem Chand Vs. State of HP and Cr. Appeal No. 32 of 2008 titled State of HP Vs. Pawan Kumar and others.

7. We have heard learned Advocate appearing on behalf of appellant and learned Addl. Advocate General appearing on behalf of State of HP in both appeals.

8. Question that arises for determination before us in these appeals is whether learned Sessions Judge Una did not properly appreciate oral as well as documentary evidence adduced by the parties as alleged in both appeals.

**ORAL EVIDENCE ADDUCED BY PROSECUTION**:

9 PW1 Kuldeep Kumar has stated that he is permanent resident of village Jakhera Tehsil and District Una. He has stated that he is residing with his father's sister at village Jalgran for the past six years. He has stated that accused persons are also residents of village Jalgran. He has stated that about one month ago co-accused Ashwani Kumar and co-accused Pawan Kumar quarreled with him and thereafter a compromise was executed by the members of gram panchayat Jalgran. He has stated that about 15 days later co-accused Ashwani Kumar and co-accused Pawan Kumar assaulted deceased Karnail Singh resident of same village and thereafter a compromise was got executed between deceased Karnail Singh and said assailants. He has stated that on dated 29.5.2005 he and deceased Karnail Singh went to attend a marriage ceremony at village Haroli and after attending the marriage ceremony he and deceased Karnail Singh boarded a bus to village Jalgran. He has stated that at about 8.30 p.m. on dated 29.5.2005 when he and deceased Karnail Singh after alighting from the bus reached near Jalgran village and when they crossed the road they met accused persons. He has stated that at that time co-accused Surat Ram was in possession of stick while co-accused Prem Chand was armed with dagger. He has stated that all the accused persons assaulted deceased Karnail Singh. He has stated that co-accused Prem Chand administered a dagger blow on the left side of the back portion of body of deceased Karnail Singh. He has stated that co-accused Surat Ram had given a stick blow upon the deceased. He has stated that co-accused Ashwani Kumar and Pawan Kumar assaulted him with fist cuffs because he intervened to rescue the deceased from

the assault of accused persons. He has stated that one of co-accused Prem Chand also administered a dagger blow on his abdomen. He has stated that he raised alarm where upon Purshotam and Prem Chand came at the spot. He has stated that thereafter accused persons left the place of incident. He has stated that he, Parshotam and Prem Chand took deceased Karnail Singh to Zonal hospital Una where he was declared brought dead. He has stated that soon thereafter police arrived at the hospital and recorded statement under Section 154 Cr PC Ext PW1/A.He has stated that he identified all accused persons in the Court. He has stated that he was also medically examined on the same day. He has stated that dagger Ext P1 is the same which was used by accused persons at the time of occurrence. He has stated that during the course of investigation the police recovered his blood stained T-shirt which he was wearing at the time of incident vide memo Ext PW1/B. He has stated that T-shirt Ext P2 is the same which he was wearing at the time of incident. He has stated that fight lasted about 10 to 15 minutes at the spot. He has denied suggestion that it was dark at the time of incident and assailants could not be identified from the distance of ten feet. He denied suggestion that deceased was a quarrelsome person and used to pick up quarrels with many people in the village. He denied suggestion that he and deceased Karnail Singh had consumed liquor and picked up a quarrel with accused persons during the marriage party at village Haroli on dated 29.5.2005. He denied suggestion that he and deceased Karnail Singh, Madan Lal, Parshotam, Kehar Singh, Chaman Lal, Sikandar, Rajender and Jagdev after coming back from village Haroli went to the house of co-accused Surat Ram in the evening on dated 29.5.2005. He denied suggestion that when co-accused Ashwani Kumar had alighted from the bus he and deceased had assaulted co-accused Ashwani Kumar with sticks in the evening on dated 29.5.2005. He denied suggestion that dagger Ext P1 was in his hand. He has denied suggestion that co-accused Prem Chand was beaten by him, by deceased Karnail Singh and other co-accused persons. He denied suggestion that deceased Karnail Singh had caught hold of co-accused Prem Chand and asked him to administer a dagger blow to co-accused Prem Chand. He denied suggestion that co-accused Surat Ram and co-accused Pawan Kumar were not present at the spot. He denied suggestion that accused persons have been falsely implicated in the present case.

9.1. PW2 Purshotam Lal has stated that he is permanent resident of village Jalgran-Tabba Tehsil and District Una. He has stated that he is mason by profession. He has stated that accused persons are also residents of same village. He has stated that on dated 29.5.2005 at about 8.30 p.m. when he was returning home from day's work co-accused Prem Chand met him on the road side in Jalran village. He has stated that he saw co-accused Ashwani Kumar and Pawan Kumar were beating deceased Karnail Singh. He has stated that co-accused Surat Ram was assaulting deceased Karnail Singh with stick. He has stated co-accused Prem Chand administered a dagger blow on the left side of the back portion of deceased Karnail Singh. He has stated that complainant Kuldeep Kumar was raising the alarm. He has stated that thereafter co-accused Prem Chand also administered dagger blow on the abdomen of Kuldeep Kumar injured. He has stated that he and one Prem Chand intervened to rescue deceased Karnail Singh and complainant Kuldeep Kumar from the assault of accused persons. He has stated that thereafter accused persons ran away from the scene. He has stated that thereafter he took deceased Karnail Singh and injured Kuldeep Kumar to Zonal Hospital Una. He has stated that deceased Karnail Singh was declared brought dead. He has stated that accused persons were visible to him when he saw them from near the flour mill. He has stated that incident took place for about 10 to 15 minutes. He has stated that he had also received stick blow injury on his left arm but he was not medically examined. He has denied suggestion that he and deceased Karnail Singh and the prosecution witnesses namely Madan, Prem Chand, Kehar Singh, Chaman Lal, Skinder Kumar, Rajinder Singh and Jagdev Ram have gone in the house of

co-accused Surat Ram in the evening on dated 29.5.2005. He has denied suggestion that complainant party is in the habit of picking up quarrel on small matters in village. He denied suggestion that co-accused Ashwani Kumar had alighted from a private bus and soon thereafter complainant Kuldeep Kumar, deceased Karnail Singh, Madan Lal, Kehar Singh, Prem Chand, Chaman Lal, Rajinder and Jagdev came from the house of co-accused Prem Chand and assaulted co-accused Ashwani Kumar with sticks. He denied suggestion that complainant Kuldeep Kumar was in possession of dagger Ext P1. He denied suggestion that co-accused Prem Chand intervened to rescue co-accused Ashwani Kumar. He denied suggestion that co-accused Prem Chand had also received injury on his head and chest. He denied suggestion that complainant Kuldeep Kumar and deceased Karnail Singh and others have beaten up co-accused Ashwani Kumar and co-accused Prem Chand under the influence of liquor. He denied suggestion that deceased Karnail Singh had received injury from the hands of complainant Kuldeep Kumar. He has denied suggestion that accused persons have been falsely implicated in the present case due to old enmity.

9.2. PW3 Rajender Bhogal has stated that he is permanent resident of village Jalgran. He has stated that in the year 2005 he was Pradhan of gram panchayat Tabba. He has stated that his shop is less than a half kilometer away from the flour mill of Jagat Singh. He has stated that in the month of May 2005 when he was present at his shop certain police officials happened to pass in front of his shop and they directed him to accompany them. He has stated that thereafter he went to the flour mill of Jagat Singh where police officials were sitting. He has stated that one of the police officials was holding a dagger at that time and seizure memo was prepared. He has stated that recovery memo Ext PW3/A bears his signature. He has stated that accused persons are known to him. He has stated that accused persons did not give any disclosure statement in his presence. He denied suggestion that on dated 1.6.2005 co-accused Prem Chand @ Bhalli had given a disclosure statement in his presence that he had concealed a dagger in the field. He denied suggestion that disclosure statements of accused persons were also reduced into writing in his presence. He has stated that no sketch of dagger was prepared in his presence. He denied suggestion that he deposed falsely in order to save accused persons. He has stated that no weapon of offence was recovered in his presence.

9.3. PW4 Sikandar Kumar has stated that he is permanent resident of village Jalgran. He has stated that on dated 30.5.2005 he joined investigation of the case. He has stated that in his presence the investigating officer took into possession blood stained soil and stones from the spot of incident and memo of recovery Ext PW4/A was prepared. He denied suggestion that he did not join investigation of the present case. He denied suggestion that he deposed falsely against accused persons due to enmity.

9.4. PW5 Rajender Kumar has stated that he is permanent resident of village Jalgran. He has stated that accused persons also reside in the same village. He has stated that on dated 2.6.2005 co-accused Surat Ram while in custody gave a disclosure statement that he had concealed a stick near a street at village Jalgran and the same was got recovered. He has stated that memo Ext PW5/B was prepared. He has stated that at the instance of co-accused Surat Ram stick Ext P5 was got recovered. He denied suggestion that he belongs to complainant party. He denied suggestion that he had joined hands with complainant Kuldeep Kumar for assaulting accused persons. He has stated that deceased Karnail Singh was distantly related to him. He denied suggestion that no disclosure statement was given by co-accused Surat Ram in his presence. He denied suggestion that no stick was recovered as per disclosure statement of co-accused Surat Ram.

9.5. PW6 Madan Lal has stated that he is permanent resident of village Jalgran. He has stated that accused persons also reside in the same

village. He has stated that he joined investigation of the case. He has stated that on dated 1.6.2005 co-accused Prem Chand @ Bhalli while in police custody gave a disclosure statement that he had concealed a dagger under the edge of a field behind the flour mill of one Jagga in village Jalgran and he could recover the same. He has stated that disclosure statement Ext PW6/A was prepared. He has stated that as per disclosure statement dagger was recovered and took into possession vide memo Ext PW3/A. He has stated that dagger Ext P1 was recovered at the instance of co-accused Prem Chand. He has denied suggestion that disclosure statement was given by co-accused Prem Chand. He denied suggestion that police was already in possession of dagger. He denied suggestion that he, complainant Kuldeep Kumar and deceased Karnail Singh had assaulted co-accused Ashwani Kumar and Prem Chand. He denied suggestion that he deposed falsely due to old enmity with accused persons.

9.6. PW7 Parkash Chand has stated that he is permanent resident of village Jalgran. He has stated that about two years ago co-accused Prem Chand produced before the police a blood stained shirt in his presence. He has stated that police took shirt into possession vide memo Ext PW7/A. He has stated that shirt Ext P6 is the same which was produced before the police by co-accused Prem Chand. He has denied suggestion that co-accused Prem Chand did not produce shirt before the police. He denied suggestion that investigating officer has prepared a false recovery memo Ext PW7/A.

9.7. PW8 Dr. V.K.Raizada has stated that he was posted as Medical Officer at regional hospital Una since 1996. He has stated that on dated 29.5.2005 at about 9 p.m. he examined complainant Kuldeep Kumar son of Ramesh Kumar and observed the following injuries. He has stated there was an incised wound over the left side of upper abdomen and the size of the wound was 8 cm in length and 3 cms in width in the middle. He has stated that width of the wound was more at the centre than the periphery and the wound was deep as the muscles were visible through opening of the wound. He has stated that bleeding was reddish in colour and its margins were clean. He has stated that the nature of the above injury was simple which was caused with sharp edged weapon. He has stated that probable duration of the injury was within four hours. He has stated that he issued MLC Ext PW8/A. He has stated that he also seen dagger Ext P1. He has stated that injury found upon the person of injured Kuldeep Kumar could be sustained by dagger Ext P1. He has stated that injury sustained by Kuldeep Kumar could not be caused in the process of snatching the weapon Ext P1. He has denied suggestion that injury mentioned in the MLC could be possible in the process of snatching and turning the dagger Ext P1 towards victim.

9.8. PW9 Dr. G.Upadhyaya Medical Officer has stated that he was posted as Medical officer at regional hospital Una since 2002. He has stated that on May 2005 he conducted autopsy of deceased Karnail Singh and following injury was observed. He has stated there was an obliquely placed cut wound on the left side of the back of deceased and it was between 9$^{th}$ and 10$^{th}$ rib. He has stated that the size of the wound was 3x2 cm and the depth thereof was reaching up to the vertebrae bones and a tear of the size of 3x3 cm was found present in diaphragm. He has stated that the wound was 20 cms away from the anterior superior lilac spine and 4 cms from midline and thoracic cavity was full of blood. He has stated that descending thoracic aorta was found ruptured and about 750 ml blood was found present in the thoracic cavity. He has stated that the cause of death of deceased Karnail Singh was rupture of the descending thoracic aorta. He has stated that probable time that elapsed between the injury and the death was 5 to 30 minutes and probable time that elapsed between the death and post mortem was 15 hours. He has stated that he prepared post mortem report Ext PW9/A. He has stated that he also seen the dagger Ext P1. He has stated that injury could be caused with dagger Ext P1. He has stated that on dated 31.5.2005 at about 8.45 p.m. he medically examined co-accused

Prem Chand and observed following injury. (1) There was an abrasion on the frontal area of his skull (left side). The size of the abrasion was 2 cm x 0.2 cm. Coagulated blood was present on the abrasion. (2) There was abrasion on the left tempro parietal area. The size of this abrasion was 2 cm x 0.2 cm. Coagulated blood was present on this abrasion as well. (3) There was an obliquely placed abrasion on the left side of the back. The size of the abrasion was 10 cm x 2 cm. (4) There was a bruise on the right side of the chest. The size of the bruise was 2 cm x 2 cm. He has stated that the nature of all the injuries was simple and probable duration was 12 to 72 hours. He has stated that he issued medico legal certificate Ext DA. He has stated that head is a vital part of the body. He has stated that two of the abrasions were simple. He has stated that injuries could be caused with a stick. He has stated that injuries sustained by co-accused Prem Chand were not dangerous to life. He has stated that above said injuries could be caused in a struggle by a victim.

9.9. PW10 Dr. Ashok Dharoch has stated that he was posted in regional hospital Una in 2005. He has stated that on dated 30.5.2005 he examined co-accused Ashwani Kumar son of Surat and observed following injuries. (1) There was a lacerated wound on the right side of his face. Tenderness was present there. (2) There was a lacerated wound on the left side of his forehead. The margins of the wound were irregular. He has stated that nature of the injury was simple caused with blunt weapon. He has stated that he issued MLC Ext PW10/A. He has stated that injury could be possible in the process of disengaging him from scuffle. He has admitted that head is a vital part of the body and injury No.2 was on the forehead. He has stated that injury could be caused by way of beating with fist blow. He has stated that injury could be possible with stick. He has stated that nature of injury sustained by co-accused Ashwani Kumar was in fact grievous.

9.10. PW11 Rajesh Kumar has stated that he was posted as Moharar Head Constable at police station Dadar Una in 2005. He has stated that on dated 30.5.2005 four sealed parcels were deposited with him by Inspector Ajay Rana. He has stated that on dated 31.5.2005 another sealed parcel containing shirt stained with blood was also deposited with him by Inspector Ajay Rana. He has stated that on dated 1.6.2005 he deposited another parcel with him containing a small dagger. He has stated that on dated 6.6.2005 he sent all the aforesaid parcels for chemical analysis to FSL Junga through constable Kushal Dev. He has stated that on dated 7.6.2005 constable Kushal Dev handed over to him receipt in respect of said parcels. He has stated that receipt according to him was obtained from the concerned official FSL Junga. He has stated that parcels remained intact in his custody. He denied suggestion that parcels were tampered with.

9.11. PW12 HC Kushal Dev has stated that he was posted as constable at police station Una since 2003 He has stated that on dated 6.6.2005 MHC Rajesh Kumar handed over to him six sealed parcels related to the case vide RC No. 96 of 2005 and he was directed to deposit the said parcels in the office of FSL Junga. He has stated that he carried parcels and deposited same with concerned official and also obtained receipt. He has stated that parcels remained intact in his custody. He denied suggestion that no parcel was entrusted to him by MHC. He denied suggestion that parcels were tampered with during transit process from Una to FSL Junga.

9.12. PW13 HC Sandeep Kumar has stated that he was posted as LHC at Police Station Una in 2005. He has stated that on dated 29.5.2005 when he was present at police station he received information on telephone that two persons namely Karnail Singh and Kuldeep Kumar were brought to regional hospital Una in an injured state and he also received information that Karnail Singh had died. He has stated that information was given by HHC Ashwani Kumar from police Assistance Cell Regional Hospital Una. He has stated that he recorded daily diary report No.17 dated 29.5.2005 copy of which is Ext PW13/A.

9.13. PW14 HC Shashi Kumar has stated that he was posted as photographer in police department. He has stated that on dated 30.5.2005 he clicked photographs of the spot and surrounding location of village Jalgran. He has stated that photographs are Ext PC1 to Ext PC8. He has stated that he also took photographs of the body of deceased Karnail Singh and photographs are Ext PC9 to Ext PC12 and its negative films are Ext PC13. He has stated that camera used by him in clicking the photographs was issued by higher authorities. He has stated that he did not develop the negative films.

9.14. PW15 ASI Mohinder Singh has stated that he was posted as Investigator in Police Station Una from 2003 to 2005. He has stated that on dated 29.5.2005 at about 10.55 p.m. when he was present in police station a report in the shape of statement of Kuldeep Kumar under Section 154 Cr PC Ext PW1/A was handed over to him by LHC Vijay Kumar for registration of case. He has stated that on the basis of said statement he registered FIR Ext PW15/A. He has denied suggestion that FIR Ext PW15/A was not drawn at the time mentioned in the FIR.

9.15 PW16 Pritam Singh has stated that he was posted as Additional Station House Officer at police station Una from 2004 to 2006. He has stated that he has partly investigated the case. He has stated that on dated 19.7.2005 PW3 Rajender Bhogal handed over to him an application Ext PB and a compromise deed Ext PA which he took into possession vide memo Ext PW3/B. He has stated that he recorded the statements of Rajender Bhogal, Kamal Dev Sharma and Om Parkash as per their versions. He denied suggestion that no statement was given to him by Om Parkash and Kamal Dev. He denied suggestion that no document was produced before him by Rejender Bhogal.

9.16. PW17 Inspector Ajay Rana has stated that he was posted as Station House Officer police station Una from February 2005. He has stated that on dated 29.5.2005 at about 9.25 p.m. when he was present at police station he received a telephonic call from HHC Ashwani Kumar who informed him that two persons namely Karnail Singh and Kuldeep Kumar came to regional hospital Una in an injured state. He has stated that he was also informed that Karnail Singh had received grievous injuries and was brought to the hospital and had died. He has stated that after receiving information he immediately recorded daily diary report No. 17 Ext PW13/A and proceeded to said hospital along with ASI Darshan Singh, HC Dilbag Singh, HC Sarabjit singh, Constable Vijay Kumar, LHC Ram Avtar and LHC Nirmal Singh. He has stated that he reached at hospital and found that Karnail Singh had died. He has stated that thereafter he recorded the statement of complainant Kuldeep Kumar under Section 154 Cr PC Ext PW1/A and thereafter FIR Ext PW15/A was registered. He has stated that complainant Kuldeep Kumar was also medically examined. He has stated that he took into possession medico legal certificate Ext PW8/A issued by the Medical Officer qua injury sustained by Kuldeep Kumar. He has stated that dead body of Karnail Singh was kept in the mortuary of hospital. He has stated that on dated 30.5.2005 he proceeded to the spot and observed some dust, straws and two stones which were lying there stained with blood. He has stated that he picked up sample of the blood stained dust, straws and two stones and sealed them in a parcel. He has stated that seal after use was entrusted to an independent witness Chaman Lal vide recovery memo Ext PW4/A. He has stated that he prepared site plan Ext PW17/A. He has stated that he went to the mortuary and prepared inquest reports Ext PW17/B and Ext PW17/C and also got an autopsy Ext PW9/A qua deceased Karnail Singh. He has stated that on dated 30.5.2005 co-accused Prem Chand and co-accused Pawan Kumar @ Bindu surrendered at their own before him and he apprehended them. He has stated that shirt of co-accused Pawan Kumar was stained with drops of blood and he took shirt Ext P6 into possession vide memo Ext PW7/A. He has stated that shirt was sealed in a parcel. He has stated that co-accused Prem Chand given a disclosure statement that he had concealed a small dagger behind the

flour mill of one Jagga Singh. He has stated that he reduced his disclosure statement into writing which is Ext PW6/A. He has stated that pursuant to the disclosure statement co-accused Prem Chand dagger Ext P1 was recovered vide memo Ext PW3/A. He has stated that he prepared a sketch map of weapon of offence Ext PA. He has stated that seal after use was entrusted to Madan Lal. He has stated that site plan of the spot of recovery and the surrounding area was prepared which is Ext PW17/E. He has stated that co-accused Surat Ram has also given disclosure statement under Section 27 of the Indian Evidence Act that he had thrown bamboo stick in the bushes. He has stated that he reduced his disclosure statement into writing which is Ext PW5/A and thereafter stick Ext P5 was recovered by him from the bushes. He has stated that he also prepared site plan and also recorded the statements of witnesses strictly in accordance with their versions. He has stated that on completion of investigation he handed over case file to Sub Inspector Pritam Singh. He has stated that he recorded the statement of Rajinder Bhogal Ext PW17/F and Ext PW17/G in accordance with his version. He has stated that report of forensic science laboratory is Ext PW17/H. He has denied suggestion that complainant Kuldeep Kumar was not in a position to give any statement when he recorded his statement under Section 154 Cr PC. He denied suggestion that no disclosure statement was given by co-accused Prem Chand and Surat Ram. He denied suggestion that weapon of offence was not recovered at the instance of co-accused Prem Chand. He denied suggestion that stick Ext P5 was not recovered at the instance of co-accused Surat Ram. He denied suggestion that he did not record the statements of the witnesses as per their version. He denied suggestion that FIR was recorded by him after deliberations. He has admitted that co-accused Prem Chand had also sustained injury.

10. Statement of co-accused Prem Chand under Section 313 Cr PC was recorded. Co-accused Prem Chand and Ashwani Kumar have stated that they have been falsely implicated in the present case. They have stated that co-accused Ashwani Kumar was assaulted by deceased Karnail Singh and the prosecution witnesses PW1 Kuldeep Kumar PW2 Purshotam Lal PW4 Sikender PW5 Rajinder Kumar PW6 Madan Lal Prem Chand Kehar Singh Chaman Lal and Jagdev have joined hands in assaulting them after co-accused Ashwani Kumar alighted from Partap bus. They have stated that they intervened to rescue Ashwani Kumar from the clutches of the assailants but assailants also assaulted them too with sticks and fist cuffs. They have stated that deceased Karnail Singh who had grabbed co-accused Prem Chand from behind had asked complainant Kuldeep Kumar to administer a dagger blow on him which was in the hand of Kuldeep Kumar. They have stated that in the process of saving from the attack appellant Prem Chand suddenly took a turn towards his right side and dagger which was aimed at appellant Prem Chand hit deceased Karnail Singh. They have stated that thereafter complainant Kuldeep Kumar again attacked them and scuffle ensued. They have stated that during the scuffle complainant Kuldeep Kumar had sustained injury. They have stated that co-accused Prem Chand and co-accused Ashwani Kumar were rescued by Joginder Singh and Lali who took them to police station Una. They have stated that they narrated true facts of the incident to the Investigating Officer but Investigating Officer did not listen to them and filed present case against him. Co-accused Surat Ram has stated that he has been falsely implicated in the present case. He has stated that he is government servant and always used to stay outside his house for his work. He has stated that on dated 29.5.2005 he attended marriage ceremony and after taking lunch at village Haroli he and co-accused Pawan Kumar went to village Basoli in the marriage of his sister-in-law's daughter. He has stated that on dated 29.5.2005 at about 12.30 a.m. police came at village Haroli and thereafter he and co-accused Pawan Kumar were brought to police station Una. He has stated that he had no knowledge about the incident but the Investigating Officer did not listen to him. Co-accused Pawan Kumar has stated that he has been falsely implicated in the present case. He has stated that on

dated 29.5.2005 he attended marriage ceremony at village Haroli from where he and co-accused Surat Ram went to attend marriage of his relative at village Basoli. He has stated that on the intervening night of 29.5.2005 police came and took them to police station Una. He has stated that they requested the investigating agency that they are innocent but investigating agency did not listen to them.

11. DW1 Raj Kumar has stated that he is permanent resident of village Basoli Tehsil and District Una. He has stated that on dated 29.5.2005 the marriage of one Naseeb Chand's daughter Neelam Kumari was solemnized at his residence at village Basoli and he was also invited to attend the marriage. He has stated that co-accused Surat Ram and co-accused Pawan Kumar were also present in the house of Naseeb Chand. He has stated that at about 11.30 p.m. on dated 29.5.2005 a police party headed by Inspector Ajay Rana the then Station House Officer arrived at the house of Nasseb Chand and apprehended co-accused Surat Ram and Pawan Kumar saying that they were to be taken to police station Una. He has stated that he remained present in the house of Naseeb Chand from 6.30 p.m. to 11.30 p.m. on dated 29.5.2005. He has stated that during this period co-accused Surat Ram and Pawan Kumar were also present at the house of Naseeb Chand. He has stated that he is press reporter by profession. He has stated that he is serving as Press Reporter with City Channel Shimla. He has denied suggestion that co-accused Surat Ram and co-accused Pawan Kumar had not gone to the house of Naseeb Chand on dated 29.5.2005.

**Findings in Criminal Appeal No. 368 of 2007 titled Prem Chand Vs. State of HP.**

Testimony of PW1 Kuldeep Kumar is fatal to appellant Prem Chand beyond reasonable doubt.

12. In the present case testimony of PW1 Kuldeep Kumar eye witness of the incident is fatal to appellant Prem Chand. PW1 Kuldeep Kumar has specifically stated in positive manner that at the time of incident appellant Prem Chand @ Bhalli was in possession of dagger and has stated in positive manner that appellant Prem Chand inflicted a dagger blow on the left side of the back portion of body of deceased Karnail Singh. PW1 Kuldeep Kumar has stated in positive manner that he intervened to rescue deceased Karnail Singh from further assault thereafter appellant Prem Chand also inflicted dagger blow on his abdomen. Testimony of PW1 Kuldeep Kumar to this effect is trust worthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of PW1 Kuldeep Kumar qua inflicting of injury by appellant Prem Chand upon deceased Karnail Singh and upon injured Kuldeep Kumar.

Testimony of eye witness PW2 Purshotam Lal is also fatal to appellant Prem Chand

13. PW2 Purshotam Lal is the eye witness of the incident. He has stated in positive manner that appellant Prem Chand had inflicted dagger blow on the left side of the back portion of body of deceased Karnail Singh. PW2 Purshotam Lal has stated in positive manner that co-accused Prem Chand also inflicted a dagger blow on the abdomen of PW1 Kuldeep Kumar. The testimony of eye witness of PW2 to this effect is also trust worthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of PW2 Purshotam Lal.

Testimony of corroborative witnesses PW4 Sikandar Kumar, PW5 Rajender Kumar, PW6 Madan Lal, PW7 Prakash Chand, PW11 Rajesh Kumar, PW12 Kushal Dev, PW13 Sandeep Kumar, PW14 Shashi Kumar, PW15 Mohinder Singh, PW16 Pritam Singh and PW17 Ajay Rana are also fatal to appellant Prem Chand.

14. PW4 Sikander Kumar has stated in positive manner that blood stained soils and blood stained stones were recovered by the investigating agency in his presence. PW5 Rajender Kumar has stated in positive manner that as per disclosure statement stick was recovered in his presence vide seizure memo Ext PW5/B. PW6 Madan Lal has stated in positive manner that dagger was recovered as per disclosure statement given by appellant Prem Chand in his presence. PW7 Prakash Chand has stated in positive manner that blood stained shirt Ext P6 was produced by appellant Prem Chand and the same was took into possession vide memo Ext PW7/A. PW11 HC Rajesh Kumar has specifically stated in positive manner that parcel was deposited and he sent the parcels for chemical examination to FSL Junga. PW12 HC Kushal Dev has stated in positive manner that he deposited parcel in the office of FSL Junga. PW13 HC Sandeep Kumar has stated in positive manner that report No. 17 dated 29.5.2005 Ext PW13/A was recorded. PW14 HC Shashi Kumar has stated in positive manner that he took the photographs of incident and dead body of deceased Karnail Singh. PW15 ASI Mohinder Singh has stated in positive manner that he registered FIR on the basis of the statement recorded under Section 154 Cr PC. PW16 Inspector Pritam Singh has specifically stated in positive manner that compromise deed Ext PA was took into possession vide memo Ext PW3/B placed on record. PW17 Inspector Ajay Rana has stated in positive manner that appellant Prem Chand had given disclosure statement. Testimonies of above stated prosecution witnesses are trust worthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of above stated corroborative prosecution witnesses.

Testimonies of medical officer PW8 Dr. V.K.Raizada and PW9 Dr. G.Upadhyaya are also fatal to appellant Prem Chand

15. PW8 Dr. V.K.Raizada has specifically stated that he had examined injured Kuldeep Kumar. He has stated that injured Kuldeep Kumar has sustained incised wound over the left side of upper abdomen. He has further stated that size of the wound was 8 cm in length and 3 cm in width in the middle. He has stated that width of the wound was more at the centre than the periphery. He has stated in positive manner that wound was deep as the muscles were visible through opening of the wound. He has stated in positive manner that injured was bleeding. He has stated in positive manner that injury was caused with sharp edged weapon and he proved report MLC Ext PW8/A. The testimony of PW8 Dr V.K.Raizada qua injury sustained by injured Kuldeep Kumar is also trust worthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of PW8 Dr. V.K.Raizada. There is no evidence on record in order to prove that PW8 Dr V.K.Raizda has hostile animus against appellant Prem Chand at any point of time.

Testimony of PW9 Dr. G.Upadhaya is fatal to appellant Prem Chand

16. PW9 Dr.G.Upadhaya has specifically stated in positive manner that he has conducted post mortem of deceased Karnail Singh. He has stated in positive manner that there was an obliquely placed cut wound on the left side of the back of deceased and it was between 9$^{th}$ and 10$^{th}$ rib. He has specifically stated in positive manner that the size of the wound was 3x2 cm and the depth was reaching up to the vertebrae bones and tear of the size of 3x3 cm was found present in diaphragm. He has further stated that wound was 20 cm away from the anterior superior lilac spine and 4 cm from midline. He has stated in positive manner that thoracic cavity was full of blood and the descending thoracic aorta was found ruptured. He has stated that about 750 ml blood was found present in the thoracic cavity. He has stated in positive manner that cause of death of deceased was rupture of the descending thoracic aorta leading to profuse hemorrhage and hemorrhagic shock. He has specifically stated that death was caused between 5 to 30 minutes and he proved post mortem report Ext PW9/A. Testimony of PW9 Dr.G.Upadhyaya is also trust worthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of PW9.

There is no evidence on record in order to prove that PW9 Dr.G.Upadhyaya has hostile animus against appellant Prem Chand at any point of time.

Even disclosure statement given by appellant Prem Chand under Section 27 of the Indian Evidence Act is also fatal to the appellant

17. Appellant Prem Chand has given disclosure statement Ext PW6/A placed on record under Section 27 of the Indian Evidence Act and as per disclosure statement given by appellant Prem Chand dagger was recovered at the instance of appellant Prem Chand. Even post mortem report Ext PW9/A clearly mentioned that deceased Karnail Singh aged 23 years died on dated 29.5.2005 due to rupture of the descending thoracic aorta leading to profuse hemorrhage and hemorrhagic shock. Even inquest report Ext PW17/C and site plan Ext PW17/D and Ext PW17/E placed on record proved the case against appellant Prem Chand beyond reasonable doubt.

18. Submission of learned Advocate appearing on behalf of appellant Prem Chand that as per prosecution story the incident took place near a flour mill and prosecution did not examine the owner of the mill and appellant Prem Chand be acquitted on this ground is rejected being devoid of any force for the reason hereinafter mentioned. It is not the case of the prosecution that owner of the said mill was the eye witness of the incident. It is well settled law that facts can be proved by a single witness only as per Section 134 of the Indian Evidence Act 1872. As per Section 134 of the Indian Evidence Act 1872 no particular number of witnesses shall be required for the proof of any fact. It was held in case reported in AIR 2003 SC 854 titled Lalu Manjhi and another Vs. State of Jharkhand that law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. It was held that oral testimony of the witness can be divided into three categories (1) Wholly reliable (ii) Wholly un-reliable (iii) Neither wholly reliable nor wholly unreliable. It was held that in first two categories there will be no difficulty in accepting or discarding the testimony of single witness. It was held that difficulty arises in the third category of cases.

19. Submission of learned Advocate appearing on behalf of appellant Prem Chand that complainant party had assaulted co-accused Prem Chand and co-accused Ashwani Kumar who have received injury on their person due to assault and appellant Prem Chand is liable to be acquitted on this ground is also rejected being devoid of any force for the reason hereinafter mentioned. There is positive, cogent and reliable evidence on record in order to prove that appellant Prem Chand had given dagger blow upon deceased Karnail Singh and upon injured Kuldeep Kumar. The testimonies of eye witness PW1 and PW2 are trust worthy, reliable and inspire confidence of the Court. The testimonies of PW1 and PW 2 are also corroborated by documentary evidence placed on record. Co-accused Prem Chand and Co-accused Ashwani Kumar have sustained abrasion injures only upon their person.

20. Another submission of learned Advocate appearing on behalf of the appellant that prosecution did not explain the injury sustained by co-accused Prem Chand and co-accused Ashwani Kumar in the incident and on this ground appellant Prem Chand be acquitted is rejected being devoid of any force for the reason hereinafter mentioned. Learned trial Court had acquitted co-accused Ashwani Kumar in the present case and co-accused Prem Chand had sustained abrasion injuries only. Abrasion injuries upon person of appellant Prem Chand are not fatal to prosecution in view of fact that Karnail Singh had died due to injuries sustained by him from dagger and in view of fact that Kuldeep Kumar had sustained incised injuries with sharp edged weapon.

21. Another submission of learned Advocate appearing on behalf of appellant Prem Chand that as per prosecution story the clash lasted for about fifteen minutes and deceased as well as injured have received only one injury on

their person and on this ground appellant Prem Chand be acquitted is also rejected being devoid of any force for the reason hereinafter mentioned. As per MLC Ext PW8/A placed on record injured Kuldeep Kumar has sustained incised wound over left side of his upper abdomen and the size of the wound was 8 cm in length and 3 cm in width in the middle with sharp edged weapon and as per post mortem report the death of deceased Karnail Singh caused due to rupture of the descending thoracic aorta leading to profuse hemorrhage and hemorrhagic shock. Hence it is held that both deceased and injured have received injury upon their vital part of their body inflicted by appellant Prem Chand with sharp edged weapon.

22. Another submission of learned Advocate appearing on behalf of appellant Prem Chand that genesis of the occurrence has been concealed by the prosecution and on this ground appeal filed by appellant Prem Chand be accepted is also rejected for the reason hereinafter mentioned. There is no positive, cogent and reliable evidence on record in order to prove that deceased Karnail Singh and injured Kuldeep Kumar have inflicted injury upon the person of appellant Prem Chand. Appellant Prem Chand had stated when his statement was recorded by learned trial Court that he was rescued by Joginder Singh and Lali. But appellant did not examine Joginder Singh and Lali in the Court in order to prove his defence. Story alleged by prosecution remained un-rebuttal through positive, cogent and reliable oral as well documentary evidence. There is no oral evidence on record in order to prove that deceased Karnail Singh and injured Kuldeep Kumar have inflicted injury upon the person of appellant Prem Chand.

23. Another submission of learned Advocate appearing on behalf of appellant Prem Chand that learned trial Court has acquitted other co-accused persons and on this ground appellant Prem Chand be also acquitted is also rejected for the reason hereinafter mentioned. It is well settled law that conviction in criminal cases is imposed according to proved oral as well as documentary evidence adduced by prosecution. In the present case there are positive, cogent and reliable oral eye witness as well as medical evidence and corroborative documentary evidence against appellant Prem Chand for the commission of crime as alleged by the prosecution.

24. Another submission of learned Advocate appearing on behalf of appellant Prem Chand that conviction cannot be sustained upon the testimonies of PW1 and PW2 in the present case upon appellant Prem Chand is also rejected being devoid of any force for the reason hereinafter mentioned. It was held in case reported in AIR 1973 SC 944 titled Jose Vs. The State of Kerla that conviction can be sustained on the solitary evidence of the witnesses in a criminal case if testimony of the witness is trust worthy, reliable and inspires confidence of the Court. See AIR 1957 SC 614 titled Vadivelu Thevar Vs. The State of Madras and also see AIR 1965 SC 202. It was held in case reported in AIR 1987 SC 1328 titled Dalbir Singh and others Vs. State of Punjab that there is no hard and fast rule which could be laid down for appreciation of evidence and it was held that each case should be decided as per proved facts. In view of the above stated facts it is held that learned trial Court had convicted the appellant strictly as per oral as well as documentary evidence placed on record and it is held that there is no infirmity in the judgment passed by learned trial Court against appellant Prem Chand.

Findings in Criminal Appeal No. 32 of 2008 titled State of HP Vs. Pawan Kumar and others

25. Submission of learned Additional Advocate General appearing on behalf of appellant State that learned trial Court has not properly appreciated the testimony of PW1 Kuldeep Kumar and PW2 Purshotam Lal qua co-accused Pawan Kumar, Surat Ram and Ashwani Kumar is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that there is no

evidence on record in order to prove that in which part of the body co-accused Pawan Kumar, Surat Ram and Ashwani Kumar have inflicted injuries upon deceased Karnail Singh and complainant Kuldeep Kumar. It is also proved on record vide MLC Ext PW10/A that co-accused Ashwani Kumar has also sustained two simple injuries upon his body with blunt weapon.

26. Another submission of learned Additional Advocate General appearing on behalf of appellant State that it is proved on record that all the accused persons shared common intention to commit the offence in furtherance of common motive and on this ground co-accused Pawan Kumar, Surat Ram and Ashwani Kumar be convicted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused oral as well as documentary evidence placed on record. It is well settled law that common intention means a pre oriented plan. It is well settled law that common intention must exist prior to the commission of the act in a point of time. See AIR 2012 SC 3539 titled Shyamal Ghosh Vs State of West Bengal. There is no positive, cogent and reliable evidence placed on record by the prosecution in the present case that there was pre oriented plan between the accused persons and prosecution did not adduce any positive, cogent and reliable evidence on record in order to prove common intention prior to the commission of the act. It was held in case reported in AIR 1993 (1) Crimes 294 titled Hariom and others Vs. State of Uttar Pradesh that in order to bring a case under Section 34 of the Indian Evidence Act it is necessary that there must be prior conspiracy or pre meeting of minds. See AIR 1999 SC 3830 titled Ramashish Yadav and others Vs. State of Bihar. Prosecution did not adduce any proper cogent and reliable evidence on record in order to prove that there was prior meeting of mind between the accused persons in order to commit criminal offence. It was held in case reported in AIR 2003 SC 2978 titled Krishnan and another Vs State that constructive liability under Section 34 IPC would arise in three well defined cases (i) That common intention of all to commit such an offence (ii) That co-accused being a member of such conspiracy to commit such an offence (iii) That co-accused knew that an offence was likely to be committed. It was held in case reported in AIR 2000 SC 2212 titled Narinder Singh and another Vs. State of Punjab that a person could be convicted under Section 34 IPC when ingredients of offence are present. It was held in case reported in AIR 2001 SC 1344 titled Suresh and another Vs. State of UP that to attract Section 34 IPC two conditions should be proved (i) Criminal act should have been done not by one person but more than one person (ii) Criminal act should have been done in furtherance of common intention of all such persons. It was held that merely because co-accused was present at or near the scene would not sufficient to convict the person with the aid of Section 34 IPC .

27. Another submission of learned Additional Advocate General appearing on behalf of appellant State that acquittal of co-accused Pawan Kumar, Surat Ram and Ashwani Kumar had resulted in the gross failure of justice in the present case is also rejected for the reason hereinafter mentioned. We have carefully perused oral as well as documentary evidence adduced by the prosecution. There is no positive, cogent and reliable evidence against co-accused Pawan Kumar, Surat Ram and Ashwani Kumar for conviction. There is no positive, cogent and reliable evidence on record that co-accused Pawan Kumar, Surat Ram and Ashwani Kumar have constituted a conspiracy to commit criminal offence. It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned trial Court. (See (2013) 2 SCC 89 titled Mookkiah and another Vs. State. See 2011 (11) SCC 666 titled State of Rajashthan Vs. Talevar and another. See AIR 2012 SC (Supp) 78 titled Surendra Vs. State of Rajasthan. See 2012 (1) SCC 602 titled State of Rajasthan Vs. Shera Ram @ Vishnu Dutt). It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal

the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into consideration any admissible fact (iv) That learned trial court took into consideration evidence brought on record contrary to law. (See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP, See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat, See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana, See AIR 2007 SC 3075 State of U.P Vs. Ram Veer Singh and others, See AIR 2008 SC 2066, (2008) 11 SCC 186 S.Rama Krishna Vs. S. Rami Raddy (D) by his LRs. & others. Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, See (2009) 10 SCC 206 titled Arulvelu and another Vs. State, See (2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P,See:(2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh).

28. In view of the above stated facts and case law cited supra Criminal Appeal No. 368 of 2007 titled Prem Chand Vs. State of HP and Criminal Appeal No. 32 of 2008 titled State of HP Vs. Pawan Kumar and others are dismissed and we affirmed the judgment and sentence passed by learned trial Court. It is held that learned trial Court has properly appreciated oral as well as documentary evidence placed on record. Certify copy of judgment be placed in Criminal Appeal No. 32 of 2008 titled State of HP Vs. Pawan Kumar and others. File of the learned trial Court along with certified copy of the judgment be sent back forthwith. Pending application(s) if any are also disposed of.

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

Suresh Kumar ...Appellant/defendant.

Vs.

Smt. Sarla Vaidya .....Respondent/Plaintiff.

RSA No.402 of 2003.
Reserved on: 19th November, 2014.
Decided on:24th November, 2014.

**Specific Relief Act, 1963-** Section 38- Plaintiff claimed to be a tenant – she further alleged that the defendant had broken the lock and had removed the articles- defendant was threatening to dispossess the plaintiff forcibly from the premises- hence, injunction was sought- defendant asserted that plaintiff had vacated the shop after six months of the death of her husband and a false suit was filed – held, that evidence of the defendant did not prove the date, month and year when the possession was handed over by the plaintiff to the land owner- even, the name of the land owner to whom the possession was handed over was not mentioned- name of the husband of the plaintiff was recorded in the jamabandi- no efforts were made by the defendant to seek the deletion of his name- therefore, in these circumstances, the version of the defendant that the plaintiff had handed over the possession to the land owner was not acceptable and the version of the plaintiff that she was forcibly dispossessed was to be accepted on the balance of probability.

(Para- 8 to 10)

For the Appellant: Mr. Raman Sethi, Advocate.

For the Respondent: Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge**

This appeal is directed against the impugned judgment and decree, rendered on 14.7.2003 by the learned District Judge, Mandi, H.P., in Civil Appeal No. 60 of 2001, whereby, the learned District Judge dismissed the appeal preferred, by the appellant/defendant and affirmed the findings of the learned trial Court rendered on 10.8.2001 in Civil Suit No. 207 of 1997.

2. The brief facts of the case are that the plaintiff/respondent filed a suit for permanent prohibitory and mandatory injunction against the defendant/appellant. It has been averred by the plaintiff that she is tenant of the premises located in the ground floor comprised in khasra No. 1519, measuring 18.60 sq. meters situated in Muhalla Bhagwahan 366/4, Tehsil Sadar, Mandi town. It has been further averred that previously Bhupinder Singh husband of the plaintiff was a tenant of the premises on payment of rent and had been doing the business in the premises in question. After the death of Bhupinder Singh the plaintiff inherited the tenancy rights and came in possession and had been running the business and paying rent to the landlords. It has been averred that for the last two months the plaintiff was not fit and has closed the shop, locked the same and had kept her articles in the shop. The sons of the plaintiff was away from Mandi town. On 5.11.1997, the defendant taking advantage of the illness of the plaintiff broke open the lock of the shop, broke the outer door and dismantled the back wall of the shop. The defendant removed the articles of the plaintiff lying in the shop for which a report was lodged with the police. It was alleged that the defendant is intending to demolish the first floor of the premises in question and to forcibly dispossess the plaintiff from the suit premises. Hence the suit.

3. The defendant/appellant contested the suit and filed the written statement wherein he has taken the preliminary objection that the suit was not maintainable since the plaintiff was not in possession of the suit property. It was denied that the plaintiff was tenant of the suit property. However, it was admitted that the husband of the plaintiff was tenant and had been doing karyana business and he had died in the year 1988. It has been further averred that after his death, after 6 months, the plaintiff vacated the shop and handed over its possession to the defendant in accordance with the wishes of her husband. It was denied that the plaintiff had been doing her business in the shop or that she was ill and the possession was taken after breaking the locks. It was pleaded that in 1997 a private partition took place between the owners and the shop in question fell in the share of the defendant, who wanted to reconstruct his property including the suit property and the work was started in 1997. It is averred that taking benefit of the entries in the jamabandi the plaintiff filed the suit wrongly.

4. The plaintiff/respondent filed replication to the written statement of the defendant/appellant, wherein, she denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is in possession of the suit premises as tenant?.....OPP
2. Whether the plaintiff is entitled to the relief of permanent prohibitory injunction?OPP

3. Whether the plaintiff is also entitled to the relief of mandatory injunction? OPP

4. Relief.

6. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiff/respondent. In appeal, preferred against the judgment and decree of the learned trial Court by the appellant/defendant before the learned first Appellate Court, the learned first Appellate Court dismissed the appeal and affirmed the findings recorded by the learned trial Court.

7. Now the defendant/appellant has instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 07.05.2004, this Court, admitted the appeal instituted by the defendant/appellant against the judgment and decree rendered by the learned first Appellate Court on the hereinafter extracted substantial question of law:-

1. Whether there has been gross misreading and mis-appreciation of evidence leading to total injustice?

**Substantial question of Law No.1.**

8. The deceased husband of the plaintiff/respondent Bhupinder Singh was a tenant in the disputed/suit premises. The aforesaid Bhupinder Singh, original tenant in the demised premises died in the year 1988. On his demise, the defendant/appellant contended that the possession of the suit premises was handed over to the land owner by the plaintiff/respondent. The learned counsel appearing for the defendant/appellant has concerted to contend that when the plaintiff/respondent had handedover the possession of the suit premises to the owners, as such, both the learned Courts below fell into error in affording the relief as prayed for by the plaintiff/respondent. Both the learned Courts below while decreeing the suit of the plaintiff/respondent had decreed it, in consonance with the rendition of an order by the learned District Judge, Mandi comprised in Ex.PB which order preceded the rendition of the judgment and decree by the learned trial Court. The learned Courts below had concluded that the plaintiff/respondent had not voluntarily handed over the possession of the suit premises to the defendant/appellant, as such, when the suit premises came to be reconstructed within the period stipulated in Ex.PB which portrays the decision rendered in appeal preferred by the defendant/appellant before the learned District Judge, Mandi, against the order of ad interim injunction granted in favour of the plaintiff/respondent by the learned trial Court, she in consonance with the directions comprised in Ex.PB was held entitled to the reliefs as were ultimately afforded in her favour by both the learned Courts below. However, during the course of arguments, the learned counsel for the defendant/appellant has vigorously strived to sway this Court to conclude that given the rendition of findings in paragraph No.6 of Ex.PB portraying the fact that the plaintiff/respondent is not in possession of the shop/suit premises, hence, when the according of relief of mandatory as well as permanent prohibitory injunction, is bedrocked upon hers being in possession of the suit premises at the time of institution of the suit, hers having been portrayed in paragraph No.6 of the Ex.PB to be not in possession of the suit premises ought to have goaded both the learned Courts below to refuse relief as untenably afforded in her favour. The above submission is highly illusory and has no foundation in the face of the evidence as exist on record. Even though in paragraph No.6 of Ex.PB, there is a finding of the plaintiff/respondent not being in possession of the suit premises, nonetheless, the occurrence of the fact aforesaid therein would not per se constrain a conclusion from this Court that, hence, she had abdicated the possession of the suit premises in favour of the

landowners and that too volitionally. Rather only when on an incisive perusal of the evidence on record, it upsurges that at the time of institution of the suit at her instance she was not forcibly dispossessed or her dispossession from the suit premises at the instance of the defendant/appellant was in accordance with law, in that event, it would warrant the conclusion that she had volitionally abdicated the possession of the suit premises, as a corollary, then the effect of the findings in paragraph No.6 of Ex. PB would not fade rather would gain significance in determining the rights of the plaintiff/respondent qua the suit premises.

9. The learned counsel appearing for the appellant/defendant though has relied upon the testimonies of the defendant's witnesses portraying the factum of possession of the suit premises having been handed over by the plaintiff/respondent to the land owners. Nonetheless, the factum of absence of adduction of precise evidence qua the date, month and year when the possession of the suit premises was handed over by the plaintiff/respondent to the land owner, renders the evidence adduced by the defendant/appellant qua the purported volitional abdication of possession of the suit premises by the plaintiff/respondent in favour of land owner to not acquire any probative worth. Furthermore, the frail evidence of the defendant qua the purported volitional handing over of possession of the suit premises by the plaintiff/respondent to the land owner becomes all the more infirm in the face of their being absence of evidence adduced by the defendant/appellant portraying with specificity the name of the land owner to whom the possession of the suit premises was purportedly handed over by the plaintiff/respondent. For absence of the aforesaid pieces of evidence the fortifying conclusion which ensues is that there is abysmal lack of potent evidence adduced by the defendant to constrain a conclusion qua the volitional abdication of possession of the suit premises by the plaintiff/respondent in favour of the landowner. Preponderantly, what further enfeebles the espousal of the plaintiff/respondent having volitionally handed over the possession of the suit premises to the landowner, is the absence of proof of execution of a relinquishment deed inter se the plaintiff/respondent and the land owner portraying the factum of volitional handing over of possession of the suit premises by the plaintiff/respondent to the landowner. Rather on the other hand, when the jamabandi qua the suit premises comprised in Ex.PA to which a presumption of truth is attached and when such presumption has remained un-rebutted for lack of adduction cogent evidence to dislodge it, as such, to be concluded to be truthfully portraying the factum of the suit premises to be in possession of Bhupinder Singh as a tenant. When the jamabandi for the year 1991-92 comprised in Ex.PA and its reflecting Bhupinder Singh to be a tenant over the suit premises, who rather died earlier in the year 1988, yet when obviously till the preparation of Ex.PA in the year 1991, there is a palpable marked absence of concerted endeavour on the part of the defendant/appellant to on his demise seek deletion of the said entry in the jamabandi aforesaid, portrays acquiescence by the defendant/appellant to the factum of the plaintiff/respondent on demise of her predecessor-in-interest having succeeded to the tenancy rights of the former in the suit premises, besides she having continued in possession of the suit premises. Moreover, the further absence of any entry in the rapat rojnamcha of the Patwari reflecting the fact of handing over of possession of the suit premises by the plaintiff/respondent to the defendant/appellant forcefully conveys that, hence, the plaintiff/respondent did not volitionally handedover the possession of the suit premises to the defendant/appellant. What fortifies the aforesaid conclusion is the fact of the plaintiff/respondent having asserted that locks of the suit premises were broken open at the instance of the defendant/appellant and in consequence thereto, the defendant/appellant took forcible possession of the suit premises. When the said fact finds corroboration from the fact of the plaintiff/respondent having registered a criminal case in the police station concerned against the defendant/appellant for committing the offence of

criminal trespass, hence, prods this Court to with aplomb conclude that the plaintiff/respondent never volitionally abdicated the possession of the suit premises in favour of the defendant/appellant. With the formation of the aforesaid inference by this Court, the sequelling effect is that the defendant/appellant cannot capitalize upon the factum of his having involitionally gained possession of the suit premises from the plaintiff/respondent nor such involitional possession gives leverage to him to canvass a relief from this Court that, hence, he is in lawful possession of the suit premises and that concomitantly, the relief as accorded in favour of the plaintiff/respondent has been unwarrantedly afforded. Therefore in the backdrop of the aforesaid factual martrix the enduring conclusion is that the plaintiff/respondent was in lawful possession of the suit premises and was forcibly dispossessed therefrom at the instance of the defendant/appellant. The forcible dispossession of the plaintiff/respondent from the suit premises at the instance of the defendant/appellant to the considered mind of this Court constitutes her to be rather in symbolic lawful possession of the suit premises. As a corollary, then her lawful symbolic possession of the suit premises has to be vindicated. In aftermath, the relief as afforded by both the learned Courts below in consonance with Ex.PB in favour of the plaintiff/respondent cannot at all be construed to be legally frail. If, this Court condones the unauthorized or unlawful taking over of possession of the suit premises by the defendant/appellant and declines the relief as afforded to the plaintiff/respondent by both the learned Courts below, it would unwarrantedly result in condonation of the unauthorized and legally invinidcable acts on the part of the defendant/appellant to secure the possession of the suit premises and to permit him, despite his retaining unlawful possession of the suit premises, to deny the relief as tenably granted in the favour of the plaintiff/respondent by both the learned Courts below.

10. Even though, the learned counsel for the defendant/appellant concerted to rely upon the findings recorded in Ex.PB in paragraph No.6 portraying the factum of the plaintiff being not in possession of the suit premises. Nonetheless, in the face of this Court at the out set having calibrated the effect thereof on the anvil of proof emanating and its loudly pronouncing upon the factum of the plaintiff/respondent having not volitionally abdicated the possession of the suit premises in favour of the defendant/appellant, consequently, when the discussion hereinabove markedly displays the factum of the plaintiff/respondent having not volitionally handed over the possession of the suit premises to the defendant/appellant pales the effect of the findings existing in Ex.PB as relied upon by the learned counsel for the appellant/defendant to succor his argument that in face thereof the rendition of decrees by both the learned Courts below in favour of the plaintiff/defendant is legally infirm. Also when it has been concluded with aplomb hereinabove that the symbolic lawful possession of the suit premises remained with the plaintiff/respondent, hence, necessitating its legal vindication comprised in this Court affirming the judgments and decrees of both the learned Courts below besides prod this Court to render a relief in consonance with Ex.PB. Consequently, the findings in Ex.PB qua the plaintiff/respondent not being in possession of the suit premises on the date preceding to the rendition of the judgment and decree by the learned trial Court would not countervail not detract the effect of the findings recorded at the stage of the rendition of judgment and decree by the learned trial Court. Besides when in compliance of the mandate in Ex.PB, the defendant/appellant reconstructed the suit premises and when the plaintiff/respondent has been held to be in lawful symbolic possession of the suit premises which finding sprouts from the inference of hers having been illegally dispossessed therefrom, too besides spurs the inevitable conclusion that she, hence, was to be clothed with the protection of the decrees as rendered in her favour by both the learned Courts below in consonance with Ex.PB. The plaintiff/respondent not having cogently proved the fact of hers

running business in the demised premises or she having not obtained the registration certificate qua the suit premises on demise of her husband are inconsequential and may constitute good ground for the plaintiff/respondent being evicted from the demised premises in accordance with law. However, the defendant/appellant cannot derive any leverage therefrom to contend that the plaintiff/respondent never acquired the possession of the suit premises nor was dispossessed therefrom in accordance with law. The findings as recorded by both the learned Courts below are based upon a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication. Accordingly, the substantial question of law is answered against the defendant/appellant and in favour of the plaintiff/respondent.

11. The result of the above discussion is that the appeal preferred by the defendant/appellant is dismissed and the judgments and decrees rendered by the learned Courts below are affirmed and maintained. Record of the learned Courts below be sent back forthwith. All pending applications, if any, are also disposed of. No costs.

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**BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.**

Vijay Amrit Raj .....Petitioner
Versus
State of H.P. and others. ..... Respondents

CWP No. 2422 of 2014.
Date of decision: 24.11.2014

**Constitution of India, 1950-** Article 226- Respondents admitted that the petitioner was wrongly denied the appointment and the appointment would be offered shortly - in view of this statement, respondents No.1 and 3 directed to offer appointment for petitioner within period of four weeks and to grant seniority from the date of wrongful denial of the appointment.

For the petitioner: Mr.Dalip K. Sharma and Mr.Pardeep Kumar, Advocates.
For the respondents: Mr.Shrawan Dogra, Advocate General with Mr.Romesh Verma & Mr.Anup Rattan, Additional Advocate Generals & Mr. J.K. Verma, Deputy Advocate General for respondents-State.

The following judgment of the Court was delivered:

**Mansoor Ahmad Mir, Chief Justice** (oral)

At the very outset, Mr.Anup Rattan, Additional Advocate General, stated at the Bar that the petitioner has been wrongly denied the appointment to the post in question and that respondents No.1 to 3 are offering appointment to the petitioner within a short period. His statement is taken on record.

2. In view of the above, the writ petition is disposed of with a direction to respondents No.1 to 3/comptent Authority to offer appointment to the writ petitioner within a period of four weeks from today. As far as the issue of seniority is concerned, the same shall be governed by the judgment rendered by this Court in **LPA No.170 of 2014**, titled as **Shri Balak Ram vs. State of Himachal Pradesh and others**, on 19.11.2014.

3. The petition stands disposed of accordingly, so also the pending CMPs, if any. Copy dasti.

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**BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.**

Brig. S.C.Kuthiala .....Applicant/Plaintiff.
Versus
Sh.Radha Krishan Kuthiala and another .... Non-applicants/Defendants.

OMP No. 339 of 2014 in
Civil Suit No.137 of 2012.
Order reserved on : 14.11.2014.
Date of decision:25th November, 2014.

**Code of Civil Procedure, 1908-** Order 18 Rule 3-A- An application was filed for seeking permission to examine the plaintiff after the examination of other witnesses on the ground that most of the witnesses referred in the list of witnesses are witnesses of record and it is not possible to record the statement of the plaintiff without proving the document by the examination of official witnesses- held, that plaintiff is required to prove the relinquishment deed and the power of attorney- he is required to lead evidence regarding the manner of execution of these documents and the relationship between the parties- plaintiff may be required to prove the document from the witnesses- therefore, application allowed subject to the condition that plaintiff will step into witness box immediately after the examination of the witnesses of the record. (Para- 7 to 9)

**Case referred:**
Smt.Uma Devi versus Smt.Raj Kumari (1981) 10 Indian Law Reports (Himachal Series) 16

| | | |
|---|---|---|
| For the Applicant/ Plaintiff. | : | Mr.K.D.Sood, Senior Advocate with Mr.Dushyant Dadwal, Advocate. |
| For the Non-Applicants/ Defendants. | : | Mr.Ajay Kumar Sood, Senior Advocate with Mr.Dheeraj K.Vashisht, Advocate. |

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge.***

The plaintiff-applicant has preferred this application under Order 18 Rule 3A read with Section 151 CPC for grant of permission to examine himself after the examination of other witnesses. It is averred that the case had been fixed on 1st April, 2014 for recording the statements of witnesses on behalf of the plaintiff and on such date only one official witness appeared, who had not brought the summoned record but then the defendants had objected that the plaintiff be first examined as per the provisions of Order 18 Rule 3A CPC. It is claimed that most of the witnesses referred to in the list of witnesses filed on behalf of the plaintiff are witnesses of record and, therefore, the statement of the plaintiff cannot be recorded till and so long these documents are not exhibited.

2. The defendants/non-applicants have filed reply wherein it has been stated that the evidence of the official witnesses in the case has no relevance with the statement of the plaintiff because the plaintiff has not to

prove any document summoned from the witnesses. Under the law, the plaintiff has to open his case, but in the present case, he is abusing the process of the Court by summoning such witnesses, whose statements have no relevance to the issues framed in the case. According to the defendants, the only issue involved in the case is whether so-called relinquishment deed/release deed is a genuine document or a forged and fabricated document manufactured on the basis of a forged and fabricated alleged Power of Attorney. The plaintiff by introducing family history is trying to complicate the matter.

3. This Court on 14.08.2013 framed the following issues:-

1. Whether the plaintiff is exclusive owner of the suit property on the basis of relinquishment deed dated 04.05.2010, said to have been executed in his favour by defendant No.1 through his power of attorney, Sh. Lakhwinder Singh son of Sh. Charan Singh? OPP

2. In case issue No.1 is proved in affirmative, whether sale deed dated 07.08.2012, executed by defendant No.1 in favour of defendant No.2, is illegal, null and void and not binding on the rights of the plaintiff, as alleged? OPP

3. In case issue No.2 is proved in affirmative, whether the plaintiff is entitled for grant of a decree for declaration along with consequential relief, as prayed for? OPP

4. Whether the power of attorney on the basis of which relinquishment deed dated 04.05.2010 has been executed by Sh.Lakhwinder Singh son of Sh. Charan Singh, is a fake and forged document, as alleged and if so, its effect? OPD.5. Relief.

4. The learned counsel for the plaintiff strenuously argued that in order to prove the issues, the plaintiff would be required to give some background as to how the relinquishment deed dated 04.05.2010 came to be executed in his favour by defendant No.1 through his power of attorney Sh.Lakhwinder Singh son of Sh. Charan Singh and the issue(s) cannot be proved simply by making a reference to the document. While, on the other hand, the learned counsel for the defendants/non-applicants has vehemently opposed the claim of the plaintiff by saying that in terms of the mandate of Order 18 Rule 3A CPC, a party is required to appear in the witness box before the other witnesses are examined.

5. Order 18 Rule 3A CPC reads as follows:-

> ***"3A Party to appear before other witnesses.-Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage."***

6. The question as to whether this rule is mandatory or directory came up for consideration before a Division Bench of this Court in ***Smt.Uma Devi*** *versus* ***Smt.Raj Kumari (1981) 10 Indian Law Reports (Himachal Series) 16*** wherein it was held as under:-

> ***"2. Whether a party who wishes to appear as a witness is required to obtain the permission of the court to appear at a later stage before any other witness on his behalf has been examined or the party can ask for the permission at any stage before concluding his evidence? Is the question which falls for determination in these revisions. The facts are not relevant. Suffice it to say that in all the cases either the plaintiff or the defendant did not ask for permission to examine himself at a later stage before examining his witnesses. The trial court has refused permission in view of the***

***judgment of a learned single Judge of this Court in Civil Revision No. 197 of 1979, Chet Ram v. Rajinder Kaur, decided on 7th May, 1980, where the learned Judge, following a judgment of a learned single Judge of the Orissa High Court in Jagannath Nayak v. Laxminarayan Thakur, AIR 1978 Orissa 1 held, that rule 3 A of Order 18 of the Code of Civil Procedure requires a party to obtain the requisite permission before examining his witnesses. As a Division Bench of Orissa High Court has since overruled the case of Jagannath Nayak, the matter has been referred to a Division Bench of this Court.***

***3. In the trial of civil suits a practice had grown up to examine the party after the party had examined his witnesses. This perhaps was done in order to fill up the lacuna left by the witnesses. This practice was, from time to time, frowned upon but since the law gave a right to the party to produce and examine his witnesses in the manner he liked the practice could not be curbed. The Law Commission in order to curb this practice, in its 54th Report recommended :***

> ***"18.3. The Fourteenth Report had recommended that ordinarily, a party who wishes to be examined as a witness should offer himself first, before the other witnesses are examined. The Commission, in its Report on the Code, however, considered it unnecessary to make any such statutory provision. It noted that this should be the ordinary rule, but thought that a rigid provision on the subject would not be desirable.***
>
> ***18.4. We think that the amendment recommended in the 14th Report should be carried out. Since the proposed rule will be confined to ordinary cases, the hardships arising from special features of the case, should not present a problem. Having regard to the persistent and notorious malpractice indulged in by litigants in this respect- malpractice which borders on dishonesty -we think that the time has come to insert a statutory provision."***

***4. The result of the recommendation was the addition of rule 3A in Order 18 of the Code of Civil Procedure.***

> ***Rule 3A reads ;***
>
> ***"Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage."***

***5. No doubt this rule is mandatory. It enjoins upon a party, who wishes to appear as a witness, to examine himself first before examining any other witness on his behalf. However, an exception has been made. The court has been given the discretion to allow a party to examine himself later on after examining one or more witnesses on his behalf. But we do not find anything in this rule which compels a party to ask for the requisite permission from the court before he examines his first witness. We cannot overlook the fact that the rule is a procedural one. It is meant to curb a particular evil for the enhancement of justice. It has to be interpreted in such a manner that while the evil is curbed, it does not lead to any injustice.***

***8. We, therefore, hold that a party who wishes to examine himself at a later stage is not bound to ask for the permission of the court before examining his first witness, and that the party can ask for the permission at a later stage. However, we must emphasise that the trial courts should remember that it is the duty of a party to examine himself first in case the party wishes to appear as his own witness. The discretion which has been given by the exception has not to be exercised lightly. It is for this reason that it is enjoined upon the courts to record their reasons in writing while allowing the party to examine himself at a later stage. It is neither possible nor desirable to lay down any hard and fast rules for the exercise of this discretion. The facts of each case are bound to vary. But the party must have some weighty reasons to convince the court for not examining himself first before the court exercises its discretion in favour of the party. It may be repeated that rule 3A has been framed to curb the evil practice of a party examining himself last."***

7. In view of the aforesaid exposition of law, there is no gain saying that a party can always be permitted to examine its witnesses before stepping into the witness box subject to the condition that the party seeks permission of the Court. This is only an exception and not a rule and, therefore, the discretion has not to be exercised lightly.

8. I find considerable force in the submissions of the learned counsel for the plaintiff that the issues cannot be simply answered in 'Yes' or 'No' or by a mere reference to the relinquishment deed or by making a reference to the power of attorneys which documents alone find mention in the issues framed. The plaintiff-applicant will have to build an edifice upon which his structure would stand. How and in what manner the relinquishment deed came into existence and how and in what manner the power of attorney came to be executed, what was the relationship interse parties and how the same was carried forward, would be certain essential questions which will have to be introduced by the plaintiff while proving the issues the onus of which has been fastened upon him. In this process, it can happen that certain documents may also be required to be proved from the witnesses.

9. In view of the aforesaid discussion, there is merit in this application and the same is allowed subject to the condition that the plaintiff shall step into the witness box immediately after the witnesses of record are examined. The application is disposed of with no order as to costs.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J.**

Hans Raj (died) through LRs. ...Appellants.

Versus

Bilwamangal and others. ...Respondents.

RSA No. 390 of 2001
Reserved on : 12.11.2014
Decided on: 25.11. 2014

**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Section 2(10)- Defendant claimed to be a tenant who had become the owner under the provision of H.P. Tenancy and Land Reforms Act- Jamabandi for the year 1987-88 showed the defendant to be a Gair Maurusi Tehat Murtan (tenant under the mortgagee) - held, that tenant inducted by

mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act. (Para-11 and 12)

**Code of Civil Procedure, 1908-** Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court. (Para-14)

**Cases referred:**

Kanta Devi versus Khushia, 1996 (2) Sim.L.C.

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

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|---|---|
| For the Appellants: | Mr. R.K. Gautam, Sr. Advocate with Mr. Vikrant Chandel, Advocate. |
| For the Respondent: | Mr. Ajay Sharma, Advocate. |

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, Judge.**

This Regular Second Appeal is directed against the judgment and decree dated 3.4.2001 rendered by the Additional District Judge (1) Kangra at Dharmashala in Civil Appeal No. 94-K/98.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that predecessor-in-interest of respondents-plaintiffs, Sandhya Devi (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for declaration and in the alternative for possession against the appellants-defendants (hereinafter referred to as the "defendants" for convenience sake). The suit was filed to the effect that plaintiff was owner in possession of the land as detailed in the head note of the plaint and entries of tenancy in favour of defendants in the revenue record were wrong, illegal and unauthorized. The defendants or their predecessors were never inducted as tenant by the plaintiff. The suit land was under mortgage and redeemed by the plaintiff vide Rapat Roznamcha No.27 dated 18.9.1992 on the basis of order of Senior Sub Judge, Dharamshala. In the alternative, plaintiff also prayed that in case it was found that plaintiff is not entitled to the decree as per prayer 'A" then he be granted a decree for possession in respect of the suit land. The suit land was under mortgage with mortgagee and the same was got redeemed vide judgment dated 31.7.1991 rendered by the Senior Sub Judge, Dharamshala in Civil Suit No. 158/74. The possession was also delivered to the plaintiff on 18.9.1992 by the Senior Sub Judge, Dharamshala on the spot vide rapat roznamcha No.27. Mutation No.417 was entered to this effect. Neither the defendants nor their ancestors were inducted as tenant, hence, the entry of tenancy after redemption of the mortgage was stated to be wrong, illegal and null void.

3. Suit was contested by the defendants. According to them, the land was under the tenancy prior to the inception of the mortgage. The defendants had acquired the proprietary rights under the provisions of H.P. Tenancy and Land Reforms Act. They have become owners of the suit land.

4. Plaintiff filed replication. Sub-Judge 1st Class framed issues on 17.3.1997 and 30.12.1997. The suit was decreed by the Sub-Judge 1st Class on 20.8.1998. Defendants feeling aggrieved by the judgment and decree dated 20.8.1998 preferred an appeal before the Additional District Judge (1), Kangra at Dharmashala. He dismissed the same on 3.4.2001. Hence, the present Regular

Second Appeal. It was admitted on the following substantial questions of law on 27.8.2001.

1. **"Whether the courts below have failed to appreciate evidence on its proper and legal sense and specially has failed to take into consideration the documentary evidence pertaining to the revenue record Ex. D-1 to D-6?**

2. **Whether the courts below have failed to take adverse inference of the fact that plaintiff has not examined himself as a witness and has not put himself for cross-examination. Therefore, adverse inference was required to be taken as per the settled law decided in cases (1) Kamla Devi Vs. Dev Raj- RSA No. 531 of 2000 decided on 13.11.2000, (2) Harswaroop Vs. Ramlok Sharma, Civil Revision No. 272 of 1996 decided on 30.5.2000, (3) Gurdev Vs. Gulabo R.S.A. No. 302 of 1992 decided on 24.4.2000 and (4) Vidya Dhar Vs. Mankikro & others, AIR 1999 SC 1441?"**

5. Mr. R.K. Gautam, learned Senior Counsel for the appellants, on the basis of the substantial questions of law, has vehemently argued that both the courts below have misconstrued the evidence led by the parties. He has also argued that the defendant was tenant under the mortgagor.

6. Mr. Ajay Sharma, has supported the judgments and decrees passed by both the courts below.

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

8. Since both the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Amar Chand has produced copy of power of attorney Ext. PW1/A. He has specifically deposed that he was well conversant with the facts of the case. The land in question was 16 Kanals and 7 marlas. The land was mortgaged with Kuldeep Singh and others. The suit was filed for redemption of the suit land. Decree was passed in favour of the plaintiff. The party was put in possession on 18.9.1992. Defendants were never inducted as tenants. The entries to the contrary were wrong. The suit for redemption was filed in the year 1968. Plaintiff has tendered in evidence Ex.P-1 to Ex.P-5 and mark 'A'.

10. Defendant No.1 Hans Raj has appeared as DW-1. He has deposed that he is son of original defendant No.1. He has simply deposed that his father was cultivating the suit land and they have been paying the rent also.

To the similar effect is the statement of PW-2 Raghubir Singh.

12. According to Jamabandi for the year 1987-88, Ext. P-1 defendants were shown to be tenant *gair marausi* tehat murtan (tenants under the mortgagee). According to Jamabandi for the year 1971-72, defendants have been shown as tenants under mortgagee. It is not discernible from the Jamabandi for the year 1965-66 whether the defendants were tenants under the mortgagee or mortgagor. According to Jamabandi Ex.D-3 for the year 1917-18 and Ex.D-4 for the year 1891-92 neither the defendants nor their ancestors have been inducted as tenant under the original owners such as Chaudhary Hardyal etc. According to Jamabandi Ex.P-1 for the year 1987-88, status of the defendants has been shown as tenants under the mortgagee. The plaintiff was put in possession on the spot vide Rapat Rojnamcha dated 18.9.1992.

13. This Court in ***Kanta Devi*** versus ***Khushia***, 1996 (2) Sim.L.C. has held as under:

**"18. Section 2 (10) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 defines "land owner" as meaning a person defined as such in the Himachal Pradesh Land Revenue Act, 1953 or the Punjab Land Revenue Act, 1887, as the case may be and shall include the predecessor or successor in interest of the land owner'. The definition of the word "land owner" as contained in section 4 (9) of the Himachal Pradesh Land Revenue Act, 1953 as well as in section 3 (2) of the Punjab Land Revenue Act, 1887 is practically the same. Both the sections provide that "land owner" does not include a tenant or an assignee of land revenue but does include a person to whom a holding revenue or of a sum recoverable as such an arrear, and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate. This definition, prima facie, does not include a mortgagee. Therefore, a person holding the land as a tenant under the mortgagee cannot be deemed to be a tenant under a landowner. Therefore, the protection which was available to the tenant inducted by the mortgagee in Bhagat Ram's case (supra), cannot be extended to the defendant in the present case.**

**19. Similarly in Prabhu v, Ramdeo and others, AIR 1966 SC 1721, the protection to the tenant inducted by the mortgagee was extended by virtue of section 15 of the Rajasthan Tenancy Act, 1955, which had come into force before the redemption of the mortgage by the mortgagor The statutory benefit was thus extended to the tenant inducted by the mortgagee in view of the relevant provisions of the Rajasthan Tenancy Act, 1955 and it was held that the tenant inducted by the mortgagee would become a tenant under the owner-mortgagor after the redemption of the mortgage. No such statutory protection, as stated above, is available to the defendant in the present case under any provision of the law as inforce at the time of the redemption of the mortgage."**

**CMP No. 636/2010**

14. Appellant has also filed an application under Order 41 Rule 27 Code of Civil Procedure, plaintiff has filed the detailed reply to the same. Appellant wanted to produce on record copy of proceedings conducted by Land Reforms Officer, Kangra dealing with form No. L.R.-V under the H.P. Land Reforms Act and Rules. According to the appellant, plaintiff has admitted that defendant is tenant and had applied for redemption of land under H.P. Tenancy and Land Reforms Act. The Civil Suit was instituted on 2.3.1993 and the application filed is belated. These documents are not necessary for the adjudication of the matter.

15. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Ibrahim Uddin and another***, (2012) 8 SCC 148 have held that party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. There must be satisfactory reasons for non-production of the evidence in trial court for seeking production thereof in appellate court. Their Lordships have held as under:

**"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply,**

**when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).**

**37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).**

**38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra) ].**

**39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).**

**40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.**

**41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.**

**42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.**

**43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.**

**44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).**

**45. In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:**

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence."**

**(Emphasis added)**

**A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.**

**46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:**

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."**
>
> **(Emphasis added)**

**In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.**

**47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.**

**48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.**

**Stage of Consideration :**

**49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such**

**occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053)."**

16. Therefore, the present application is dismissed.

17. The substantial questions of law are answered accordingly.

18. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application, if any, also stands disposed of. No costs.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J.**

Madho (died) through LRs. ...Appellants.

Versus

Bilwamangal. ...Respondent.

RSA No. 375 of 2001
Reserved on : 12.11.2014
Decided on: 25.11. 2014

**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Section 2(10) - Defendant claimed that tenant of mortgagee was a tenant for all intents and purpose- jamabandi for the year 1987-88 showed the defendant to be a tenant Gair Maurusi Tehat Murtan- held, that tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act. (Para-11 and 12)

**Code of Civil Procedure, 1908-** Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court. (Para-14)

**Cases referred:**

Kanta Devi versus Khushia, 1996 (2) Sim.L.C

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

For the Appellants: Mr. R.K. Gautam, Sr. Advocate with Mr. Vikrant Chandel, Advocate.

For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, Judge.**

This Regular Second Appeal is directed against the judgment and decree dated 3.4.2001 rendered by the Additional District Judge (1) Kangra at Dharmashala in Civil Appeal No. 96-K/98.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that predecessor-in-interest of respondent-plaintiff, Sandhya Devi (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for

declaration and in the alternative for possession against the predecessor-in-interest of the appellants-defendants Madho (hereinafter referred to as the "defendant" for convenience sake). The suit was filed to the effect that plaintiff was owner in possession of the land as detailed in the head note of the plaint and entries of tenancy in favour of defendant in the revenue record were wrong, illegal and unauthorized as defendant or his predecessors were never inducted as tenant by the plaintiff. The suit land was under mortgage and redeemed by the plaintiff vide Rapat Roznamcha No.27 dated 18.9.1992 on the basis of order of Senior Sub Judge, Dharamshala. In the alternative, plaintiff also prayed that in case it was found that plaintiff is not entitled to the decree as per prayer 'A" then he be granted a decree for possession in respect of the suit land. The suit land was under mortgage with mortgagee and the same was got redeemed vide judgment dated 31.7.1991 rendered by the Senior Sub Judge, Dharamshala in Civil Suit No. 158/74. The possession was also delivered to the plaintiff on 18.9.1992 by the Senior Sub Judge, Dharamshala on the spot vide rapat roznamcha No.27 and mutation No.417 was entered to this effect. Neither the defendant nor his ancestors was inducted as tenant, hence, the entry of tenancy after redemption of the mortgage was stated to be wrong, illegal and null void.

3. Suit was contested by the defendant. According to him, the land was under the tenancy prior to the inception of the mortgage. He had acquired the proprietary rights under the provisions of H.P. Tenancy and Land Reforms Act. He has become owner of the suit land. Since the defendant was not party to the civil suit No.158/74 on the basis of which possession was delivered on 18.9.1992, hence the decree did not affect his legal rights.

4. Plaintiff filed replication. Sub-Judge 1st Class framed issues on 19.1.1996. The suit was decreed by the Sub-Judge 1st Class on 20.8.1998. Defendant feeling aggrieved by the judgment and decree dated 20.8.1998 preferred an appeal before the Additional District Judge (1), Kangra at Dharmashala. He dismissed the same on 3.4.2001. Hence, the present Regular Second Appeal. It was admitted on the following substantial questions of law on 23.8.2001.

1. **"Whether the courts below have failed to appreciate evidence in its proper and legal sense and specifically has failed to take into consideration the documentary evidence comprising of the revenue records Ex.D-1 to D-6?**

2. **Whether the courts below have erred in not taking adverse inference of the fact of failure of the plaintiff to have stepped into the witness box in support of his case and subjected himself to cross-examination?**

5. Mr. R.K. Gautam, learned Senior Counsel for the appellants, on the basis of the substantial questions of law, has vehemently argued that both the courts below have misconstrued the evidence led by the parties. He has also argued that the defendant was tenant under the mortgagor.

6. Mr. Ajay Sharma, has supported the judgments and decrees passed by both the courts below.

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

8. Since both the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Amar Chand has produced copy of power of attorney Ext. PW1/A. He has specifically deposed that he was well conversant with the facts of the case. The total land was 5 kanal 2 marlas. The land was in possession of the plaintiff. It was mortgaged with Kuldip and others. The suit was filed for

redemption of the suit land. Decree was passed in favour of the plaintiff and possession was handed over to the plaintiff on 18.9.1992. The land was never given for cultivation to Madho.

PW-2 Roshan Lal has deposed that plaintiff was the owner. She was put in possession of the suit land in the year 1992. Plaintiff has tendered in evidence Ex.P-1 to Ex.P-9.

10. Defendant Madho Singh has appeared as DW-1. He has deposed that he was in possession of the suit land. He did not know who was cultivating the land before him.

DW-2 Mangat Ram has deposed that Madho cultivated the suit land for the last so many years.

11. DW-3 Om Prakash has deposed that Madho Ram was cultivating the land.

12. Defendant has tendered in evidence the documents Ex. D-1 to Ex.D-2.

12. According to Jamabandi for the year 1987-88, Ext. P-1 defendants were shown to be tenant *gair marausi* tehat murtan (tenants under the mortgagee). According to Jamabandi for the year 1971-72, defendants have been shown as tenants under mortgagee. It is not discernible from the Jamabandi for the year 1965-66 whether the defendants were tenants under the mortgagee or mortgagor. The plaintiff was put in possession on the spot vide Rapat Rojnamcha dated 18.9.1992.

13. This Court in ***Kanta Devi*** versus ***Khushia***, 1996 (2) Sim.L.C. has held as under:

> **"18. Section 2 (10) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 defines "land owner" as meaning a person defined as such in the Himachal Pradesh Land Revenue Act, 1953 or the Punjab Land Revenue Act, 1887, as the case may be and shall include the predecessor or successor in interest of the land owner'. The definition of the word "land owner" as contained in section 4 (9) of the Himachal Pradesh Land Revenue Act, 1953 as well as in section 3 (2) of the Punjab Land Revenue Act, 1887 is practically the same. Both the sections provide that "land owner" does not include a tenant or an assignee of land revenue but does include a person to whom a holding revenue or of a sum recoverable as such an arrear, and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate. This definition, prima facie, does not include a mortgagee. Therefore, a person holding the land as a tenant under the mortgagee cannot be deemed to be a tenant under a landowner. Therefore, the protection which was available to the tenant inducted by the mortgagee in Bhagat Ram's case (supra), cannot be extended to the defendant in the present case.**
>
> **19. Similarly in Prabhu v, Ramdeo and others, AIR 1966 SC 1721, the protection to the tenant inducted by the mortgagee was extended by virtue of section 15 of the Rajasthan Tenancy Act, 1955, which had come into force before the redemption of the mortgage by the mortgagor The statutory benefit was thus extended to the tenant inducted by the mortgagee in view of the relevant provisions of the Rajasthan Tenancy Act, 1955 and it was held that the tenant inducted by the mortgagee would become a tenant under the owner-mortgagor after the redemption of the mortgage. No such statutory protection, as stated above, is available to the defendant**

**in the present case under any provision of the law as inforce at the time of the redemption of the mortgage."**

**CMP No. 630/2010**

14. Appellant has also filed an application under Order 41 Rule 27 Code of Civil Procedure; plaintiff has filed the detailed reply to the same. Appellant wanted to produce on record copy of proceedings conducted by Land Reforms Officer, Kangra dealing with form No. L.R.-V under the H.P. Land Reforms Act and Rules. According to the appellant, plaintiff has admitted that defendant is tenant and had applied for redemption of land under H.P. Tenancy and Land Reforms Act. The Civil Suit was instituted on 2.3.1993 and the application filed is belated. These documents are not necessary for the adjudication of the matter.

15. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Ibrahim Uddin and another***, (2012) 8 SCC 148 have held that party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. There must be satisfactory reasons for non-production of the evidence in trial court for seeking production thereof in appellate court. Their Lordships have held as under:

**"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).**

**37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).**

**38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that**

**the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra) ].**

**39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).**

**40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.**

**41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.**

**42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.**

**43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.**

**44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the**

**fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).**

**45. In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:**

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence."**
>
> **(Emphasis added)**

**A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.**

**46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:**

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."**
>
> **(Emphasis added)**

**In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.**

**47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.**

**48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.**

**Stage of Consideration :**

**49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053)."**

16. Therefore, the present application is dismissed.

17. The substantial questions of law are answered accordingly.

18. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application, if any, also stands disposed of. No costs.

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**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J.**

Partap Chand. ...Appellant.

Versus

Bilwamangal and another. ...Respondents.

RSA No. 391 of 2001
Reserved on : 12.11.2014
Decided on: 25.11. 2014

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**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Section 2(10)- Defendant claimed to be a tenant who had become the owner

under the provision of H.P. Tenancy and Land Reforms Act- Jamabandi for the year 1987-88 showed the defendant to be a Gair Maurusi Tehat Murtan (tenant under the mortgagee) - held, that a tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act. (Para-11 and 12)

**Code of Civil Procedure, 1908-** Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff and the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court. (Para-14)

**Cases referred:**

Kanta Devi versus Khushia, 1996 (2) Sim.L.C

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

For the Appellants: Mr. R.K. Gautam, Sr. Advocate with
Mr. Vikrant Chandel, Advocate.

For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

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**Justice Rajiv Sharma, Judge.**

This Regular Second Appeal is directed against the judgment and decree dated 3.4.2001 rendered by the Additional District Judge (1) Kangra at Dharmashala in Civil Appeal No. 100-K/98.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that predecessor-in-interest of respondent-plaintiff, Sandhya Devi (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for declaration and in the alternative for possession against the predecessor-in-interest of the appellant-defendant Jeetu (hereinafter referred to as the "defendant" for convenience sake) and proforma respondent. The suit was filed to the effect that plaintiff was owner in possession of the land as detailed in the head note of the plaint and entries of tenancy in favour of defendant in the revenue record were wrong, illegal and unauthorized as defendant or his predecessors were never inducted as tenant by the plaintiff. The suit land was under mortgage and redeemed by the plaintiff vide Rapat Roznamcha No.27 dated 18.9.1992 on the basis of order of Senior Sub Judge, Dharamshala. In the alternative, plaintiff also prayed that in case it was found that plaintiff is not entitled to the decree as per prayer 'A" then he be granted a decree for possession in respect of the suit land. The suit land was under mortgage with mortgagee and the same was got redeemed vide judgment dated 31.7.1991 rendered by the Senior Sub Judge, Dharamshala in Civil Suit No. 158/74. The possession was also delivered to the plaintiff on 18.9.1992 by the Senior Sub Judge, Dharamshala on the spot vide rapat Rojnamcha No.27 and mutation No.417 was entered to this effect. Neither the defendants nor their ancestors was inducted as tenant, hence, the entry of tenancy after redemption of the mortgage was stated to be wrong, illegal and null void.

3. Suit was contested by the defendants. According to them, the land was under the tenancy prior to the inception of the mortgage. They acquired the proprietary rights under the provisions of H.P. Tenancy and Land Reforms Act. They have become owner of the suit land. Since the defendants

were not party to the civil suit No.158/74 on the basis of which possession was delivered on 18.9.1992, hence the decree did not affect their legal rights.

4. Plaintiff filed replication. Sub-Judge 1st Class framed issues on 14.3.1996. The suit was decreed by the Sub-Judge 1st Class on 20.8.1998. Defendants feeling aggrieved by the judgment and decree dated 20.8.1998 preferred an appeal before the Additional District Judge (1), Kangra at Dharmashala. He dismissed the same on 3.4.2001. Hence, the present Regular Second Appeal. It was admitted on the following substantial questions of law on 27.8.2001.

1. **"Whether the courts below have failed to appreciate evidence on its proper and legal sense and specially has failed to take into consideration the documentary evidence pertaining to the revenue record Ex. D-1 to D-6?**

2. **Whether the courts below have failed to take adverse inference of the fact that plaintiff has not examined himself as a witness and has not put himself for cross-examination. Therefore, adverse inference was required to be taken as per the settled law decided in cases (1) Kamla Devi Vs. Dev Raj- RSA No. 531 of 2000 decided on 13.11.2000, (2) Harswaroop Vs. Ramlok Sharma, Civil Revision No. 272 of 1996 decided on 30.5.2000, (3) Gurdev Vs. Gulabo R.S.A. No. 302 of 1992 decided on 24.4.2000 and (4) Vidya Dhar Vs. Mankikro & others, AIR 1999 SC 1441?"**

5. Mr. R.K. Gautam, learned Senior Counsel for the appellant, on the basis of the substantial questions of law, has vehemently argued that both the courts below have misconstrued the evidence led by the parties. He has also argued that the defendant was tenant under the mortgagor.

6. Mr. Ajay Sharma, has supported the judgments and decrees passed by both the courts below.

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

8. Since both the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Amar Chand has produced copy of power of attorney Ext. PW1/A. He has specifically deposed that he was well conversant with the facts of the case. The suit land was 28 Kanals and 17 Marlas. The suit land was mortgaged. Suit was filed for the redemption of the suit land. The possession was delivered to the plaintiff on 18.9.1992. Plaintiff was in possession of the same. Plaintiff has tendered in evidence Ex.P-1 to Ex.P-9.

DW-1 Partap has produced copy of general power of attorney Ex.DW-1/A. He has deposed that he was cultivating the suit land alongwith his fore-fathers.

DW-2 Roomi Chand has deposed that the land was cultivated by Jeetu Ram.

12. According to Jamabandi for the year 1987-88, Ext. P-1 defendant was shown to be tenant *gair marausi* tehat murtan (tenants under the mortgagee). In the *missal hakiyat bandobast jadid*, Ext. D-1, defendant's predecessor has been recorded in possession of the suit land as a tenant under the mortgagee. In the Jamabandi for the year 1971-72, defendant has been shown as tenant of the mortgagee. In the Jamabandi for the year 1965-66, it is not discernible whether defendant was tenant under the mortgagee or mortgagor. Moreover, it was a stray entry. According to Rapat Rojnamcha, Ext. D-2 dated 18.9.1995, possession of the suit land was handed over to the

plaintiff/mortgagor. Defendant has not filed any appeal against the judgment dated 31.7.1991. According to Jamabandi for the year 1959-60 Ext. D-3 and Ext. D-4 Jamabandi for the year 1891-92 neither the defendant nor his predecessor-in-interest was inducted as a tenant under the original owner such as Chaudhary Hardyal. In Ext. P-1, copy of Jamabandi for the year 1987-88, status of the defendant has specifically been shown as under the mortgagee. The final decree for redemption of the suit land was granted by the Learned Sub Judge vide Ext. P-3, on 31.7.1991. The possession was given to the plaintiff as per Rapat Rojnamcha No. 27, dated 18.9.1992, Ext. P-2. There is overwhelming evidence produced by the plaintiff that defendant was tenant under the mortgagee and not under the mortgagor. The plaintiff was put in possession on the spot vide Rapat Rojnamcha dated 18.9.1992.

13. This Court in ***Kanta Devi*** versus ***Khushia***, 1996 (2) Sim.L.C. has held as under:

> **"18. Section 2 (10) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 defines "land owner" as meaning a person defined as such in the Himachal Pradesh Land Revenue Act, 1953 or the Punjab Land Revenue Act, 1887, as the case may be and shall include the predecessor or successor in interest of the land owner'. The definition of the word "land owner" as contained in section 4 (9) of the Himachal Pradesh Land Revenue Act, 1953 as well as in section 3 (2) of the Punjab Land Revenue Act, 1887 is practically the same. Both the sections provide that "land owner" does not include a tenant or an assignee of land revenue but does include a person to whom a holding revenue or of a sum recoverable as such an arrear, and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate. This definition, prima facie, does not include a mortgagee. Therefore, a person holding the land as a tenant under the mortgagee cannot be deemed to be a tenant under a landowner. Therefore, the protection which was available to the tenant inducted by the mortgagee in Bhagat Ram's case (supra), cannot be extended to the defendant in the present case.**
>
> **19. Similarly in Prabhu v, Ramdeo and others, AIR 1966 SC 1721, the protection to the tenant inducted by the mortgagee was extended by virtue of section 15 of the Rajasthan Tenancy Act, 1955, which had come into force before the redemption of the mortgage by the mortgagor The statutory benefit was thus extended to the tenant inducted by the mortgagee in view of the relevant provisions of the Rajasthan Tenancy Act, 1955 and it was held that the tenant inducted by the mortgagee would become a tenant under the owner-mortgagor after the redemption of the mortgage. No such statutory protection, as stated above, is available to the defendant in the present case under any provision of the law as inforce at the time of the redemption of the mortgage."**

**CMP No. 635/2010**

14. Appellant has also filed an application under Order 41 Rule 27 Code of Civil Procedure, plaintiff has filed the detailed reply to the same. Appellant wanted to produce on record copy of proceedings conducted by Land Reforms Officer, Kangra dealing with form No. L.R.-V under the H.P. Land Reforms Act and Rules. According to the appellant, plaintiff has admitted that defendant is tenant and had applied for redemption of land under H.P. Tenancy and Land Reforms Act. The Civil Suit was instituted on 2.3.1993 and the application filed is belated. These documents are not necessary for the adjudication of the matter.

15. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Ibrahim Uddin and another***, (2012) 8 SCC 148 have held that party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. There must be satisfactory reasons for non-production of the evidence in trial court for seeking production thereof in appellate court. Their Lordships have held as under:

> **"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).**
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> **37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).**
>
> **38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra) ].**
>
> **39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).**

**40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.**

**41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.**

**42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.**

**43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.**

**44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v.**

**Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).**

**45. In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:**

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence."**
>
> **(Emphasis added)**

**A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.**

**46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:**

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."**
>
> **(Emphasis added)**

**In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.**

**47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.**

**48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.**

**Stage of Consideration :**

**49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053)."**

16. Therefore, the present application is dismissed.

17. The substantial questions of law are answered accordingly.

18. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application, if any, also stands disposed of. No costs.

**********

**BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J.**

Pritam Chand (died) through LRs. ...Appellants.

Versus

Bilwamangal. ...Respondent.

RSA No. 374 of 2001
Reserved on : 12.11.2014
Decided on: 25.11. 2014

**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Section 2(10) - Defendant claimed that tenant of mortgagee was a tenant for all intents and purpose- jamabandi for the year 1987-88 showed the defendant to be a tenant Gair Maurusi Tehat Murtan- held, that tenant inducted by mortgagee does not fall within the definition of tenant and is not entitled to the benefit of the Act. (Para-11 and 12)

**Code of Civil Procedure, 1908-** Order 41 Rule 27- Appellant wants to produce on record the proceedings conducted by the Land Revenue Officers to show that defendant was admitted to be a tenant by the plaintiff - the Civil Suit was instituted in the year 1993- held, that a party guilty of remissness in not producing evidence in trial Court cannot be allowed to produce it in the Appellate Court. (Para-14)

**Cases referred:**

Kanta Devi versus Khushia, 1996 (2) Sim.L.C

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

For the Appellants: Mr. R.K. Gautam, Sr. Advocate with
Mr. Vikrant Chandel, Advocate.
For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

**Justice Rajiv Sharma, Judge.**

This Regular Second Appeal is directed against the judgment and decree dated 3.4.2001 rendered by the Additional District Judge (1) Kangra at Dharmashala in Civil Appeal No. 98-K/98.

2. "Key facts" necessary for the adjudication of this Regular Second Appeal are that predecessor-in-interest of respondent-plaintiff, Sandhya Devi (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit for declaration and in the alternative for possession against the appellants-defendants (hereinafter referred to as the "defendants" for convenience sake). The suit was filed to the effect that plaintiff was owner in possession of the land as detailed in the head note of the plaint and entries of tenancy in favour of defendants in the revenue record were wrong, illegal and unauthorized. The defendants or their predecessors were never inducted as tenant by the plaintiff. The suit land was under mortgage and redeemed by the plaintiff vide Rapat Roznamcha No.27 dated 18.9.1992 on the basis of order of Senior Sub Judge, Dharamshala. In the alternative, plaintiff also prayed that in case it was found that plaintiff is not entitled to the decree as per prayer 'A" then he be granted a decree for possession in respect of the suit land. The suit land was under mortgage with mortgagee and the same was got redeemed vide judgment dated 31.7.1991 rendered by the Senior Sub Judge, Dharamshala in Civil Suit No. 158/74. The possession was also delivered to the plaintiff on 18.9.1992 by the Senior Sub Judge, Dharamshala on the spot vide rapat roznamcha No.27. Mutation No.417 was entered to this effect. Neither the defendants nor their ancestors were inducted as tenant, hence, the entry of tenancy after redemption of the mortgage was stated to be wrong, illegal and null void.

3. Suit was contested by the defendant. According to him, the land was under the tenancy prior to the inception of the mortgage and if it was not so proved then the tenant of the mortgagee was a tenant for all intents and purposes and in that event also, the defendant was tenant over the suit land. He has become owner of the suit land.

4. Plaintiff filed replication. Sub-Judge 1st Class framed issues on 3.1.1994. The suit was decreed by the Sub-Judge 1st Class on 20.8.1998. Defendants feeling aggrieved by the judgment and decree dated 20.8.1998 preferred an appeal before the Additional District Judge (1), Kangra at Dharmashala. He dismissed the same on 3.4.2001. Hence, the present Regular Second Appeal. It was admitted on the following substantial questions of law on 20.8.2001.

1. **"Whether the courts below have failed to appreciate evidence on its proper and legal sense and specially has failed to take into consideration the documentary evidence pertaining to the revenue record Ex. D-1 to D-6?**

2. **Whether the courts below have failed to take adverse inference of the fact that plaintiff has not examined himself as a witness and has not put himself for cross-examination. Therefore, adverse inference was required to be taken as per the settled law decided in cases (1) Kamla Devi Vs. Dev Raj- RSA No. 531 of 2000 decided on 13.11.2000, (2) Harswaroop Vs. Ramlok Sharma, Civil Revision No. 272 of 1996 decided on 30.5.2000, (3) Gurdev Vs. Gulabo R.S.A. No. 302 of 1992 decided on**

**24.4.2000 and (4) Vidya Dhar Vs. Mankikro & others, AIR 1999 SC 1441?"**

5. Mr. R.K. Gautam, learned Senior Counsel for the appellants, on the basis of the substantial questions of law, has vehemently argued that both the courts below have misconstrued the evidence led by the parties. He has also argued that the defendant was tenant under the mortgagor.

6. Mr. Ajay Sharma, has supported the judgments and decrees passed by both the courts below.

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

8. Since both the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Amar Chand has produced copy of power of attorney Ext. PW1/A. He has specifically deposed that he was well conversant with the facts of the case. Plaintiff was owner of the suit land. The suit was filed for redemption of the suit land. Decree was passed in favour of the plaintiff. The land was 10 kanals 7 marlas. He has tendered in evidence Ex.PA to Ex.PC.

10. Defendant Pritam has appeared as DW-1. He did not know when the tenancy was created. He has simply stated that his father had been paying rent to the original owner. He has produced in evidence Ex.D-1 to Ex.D-4.

11. According to Jamabandi for the year 1987-88 Ex.P-1, defendant is shown to be tenants "Gair Murusi Tehat Murtan". According to Jamabandi for the year 1992-93 Ex.D-2, the same position is reflected. It is not discernible from the Jamabandi Ex.D-4 for the year 1965-66 whether the defendants were tenants under the mortgagee or mortgagor. According to Jamabandi for the year 1917-18 Ex.D-6 and for the year 1990-91 Ex.D-7 neither the defendant nor his ancestors were inducted as tenant under the original owners such as Chaudhary Hardyal etc. The plaintiff was put in possession vide rapat rojnamcha dated 18.9.1992.

12. This Court in ***Kanta Devi*** versus ***Khushia***, 1996 (2) Sim.L.C. has held as under:

> **"18. Section 2 (10) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 defines "land owner" as meaning a person defined as such in the Himachal Pradesh Land Revenue Act, 1953 or the Punjab Land Revenue Act, 1887, as the case may be and shall include the predecessor or successor in interest of the land owner'. The definition of the word "land owner" as contained in section 4 (9) of the Himachal Pradesh Land Revenue Act, 1953 as well as in section 3 (2) of the Punjab Land Revenue Act, 1887 is practically the same. Both the sections provide that "land owner" does not include a tenant or an assignee of land revenue but does include a person to whom a holding revenue or of a sum recoverable as such an arrear, and every other person not hereinbefore in this clause mentioned who is in possession of an estate or any share or portion thereof, or in the enjoyment of any part of the profits of an estate. This definition, prima facie, does not include a mortgagee. Therefore, a person holding the land as a tenant under the mortgagee cannot be deemed to be a tenant under a landowner. Therefore, the protection which was available to the tenant inducted by the mortgagee in Bhagat Ram's case (supra), cannot be extended to the defendant in the present case.**

**19. Similarly in Prabhu v, Ramdeo and others, AIR 1966 SC 1721, the protection to the tenant inducted by the mortgagee was extended by virtue of section 15 of the Rajasthan Tenancy Act, 1955, which had come into force before the redemption of the mortgage by the mortgagor The statutory benefit was thus extended to the tenant inducted by the mortgagee in view of the relevant provisions of the Rajasthan Tenancy Act, 1955 and it was held that the tenant inducted by the mortgagee would become a tenant under the owner-mortgagor after the redemption of the mortgage. No such statutory protection, as stated above, is available to the defendant in the present case under any provision of the law as inforce at the time of the redemption of the mortgage."**

**CMP No. 626/2010**

13. Appellant has also filed an application under Order 41 Rule 27 Code of Civil Procedure, plaintiff has filed the detailed reply to the same. Appellant wanted to produce on record copy of proceedings conducted by Land Reforms Officer, Kangra dealing with form No. L.R.-V under the H.P. Land Reforms Act and Rules. According to the appellant, plaintiff has admitted that defendant is tenant and had applied for redemption of land under H.P. Tenancy and Land Reforms Act. The Civil Suit was instituted on 2.3.1993 and the application filed is belated. These documents are not necessary for the adjudication of the matter.

14. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs. ***Ibrahim Uddin and another***, (2012) 8 SCC 148 have held that party guilty of remissness in not producing evidence in trial court cannot be allowed to produce it in appellate court. There must be satisfactory reasons for non-production of the evidence in trial court for seeking production thereof in appellate court. Their Lordships have held as under:

**"36. The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).**

**37. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).**

**38. Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra) ].**

**39. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non- production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).**

**40. The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.**

**41. The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.**

**42. Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.**

**43. The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer**

**for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.**

**44. It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice - delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).**

**45. In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held as under:**

> **"We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence."**
>
> **(Emphasis added)**

**A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.**

**46. A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held:**

> **"It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory."**
>
> **(Emphasis added)**

**In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record**

**was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.**

**47. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.**

**48. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.**

**Stage of Consideration :**

**49. An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053).”**

15. Therefore, the present application is dismissed.

16. The substantial questions of law are answered accordingly.

17. Accordingly, in view of the analysis and discussion made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application, if any, also stands disposed of. No costs.

**********

**BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.**

CWP Nos. 4654 and 4708 of 2013.
Judgement reserved on: 19.11.2014.
Date of decision: 26.11.2014.

**1. CWP No. 4654 of 2013.**

Avtar Singh Dyal ..... Petitioner
Vs.
H.P. State Electricity Board Ltd. ..... Respondent.

**2. CWP No. 4708 of 2013.**

Salinder Singh ..... Petitioner
Vs.
H.P. State Electricity Board Ltd. & ors. ..... Respondents.

**Constitution of India, 1950-** Article 226- Petitioners were appointed as Junior Engineers in general open category - they belonged to ex-servicemen category and their case was not being considered in the category of ex-serviceman- respondent contended that the case of the petitioners could not be considered against the vacancy of ex-serviceman in view of direction of Hon'ble High Court in ***V.K. Behal vs. State of H.P & ors.*** reported in ***Latest HLJ 2009 (HP) 402*** - Rule 5(1) of the Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non- Technical Services) Rules, 1972 has two parts- first pertains to counting of services for fixation of the pay and second pertains to counting of service for the purpose of seniority- held, that in V.K. Behal case, Court had only considered the case for the seniority and not for fixation of the pay- therefore, respondents were not in position to say that petitioners are not entitled for the benefit of the military service for fixation of the pay. (Para-7 to 11)

**Case referred:**
V.K.Behal vs. State of H.P & ors. Latest HLJ 2009 (HP) 402

For the petitioner(s) : Mr. Ajay Sharma, Advocate, for the petitioner in CWP No. 4654 of 2013.
Mr. P.P.Chauhan, Advocate, for the petitioner in CWP No. 4708 of 2013.
For the respondents : Ms. Richa Sharma, Advocate, for the respondents.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge.***

The petitioners have sought directions against the respondents for considering their case for appointment as Junior Engineers from the date of their appointment against the vacancy meant for Ex-serviceman alongwith all consequential benefits.

**2.** It is not disputed that the petitioners are Ex-servicemen and came to be appointed as Junior Engineers with the respondent-department in general open category. Now the grievance of the petitioners is that despite available vacancies reserved for Ex-serviceman, their cases are not being

considered against these vacancies. This action on the part of the respondent is stated to be illegal, arbitrary and contrary to the provisions of instructions contained in the Handbook on Personnel Matters, more particularly Para 18.4.6. which reads as under:-

> ***"18.4.6. Consideration of an ex-serviceman for recruitment against un-reserved posts and benefits as consequence thereof.*** *An ex-serviceman can also be recruited to non-reserved posts in the normal course. At the time of such appointment he should be required to opt whether he would like to be considered against the reserved vacancy as and when it arises. If he does so then the benefit of seniority, pay fixation etc. will be available under the Rules when the vacancy in question arises, and the reserved vacancy will be deemed to have been filled accordingly. If however, he does not so opt, the benefits of pay and seniority under the Rules will not be available to him and the next reserved vacancy will be filled by an ex-serviceman as per the procedure. This benefit of option is to be allowed to incumbents appointed against unreserved posts after the coming into force of the rules /instructions regarding availability of option for ex-serviceman in Non-Technical and Technical services/ posts and not from earlier dates."*

**3.** The respondents have filed their reply. However, the long and the short of it is that there were no vacancies of ex-serviceman quota available during 2008, 2009, 2010 and 2011 and the case of the petitioners was being considered against the vacancies against ex-serviceman quota which may fall vacant during the year 2012 against which the claim of the petitioners could be considered. But in the meantime, the respondents received a letter from the government informing them that a provision of Rule 5 (1) of Demobilized Indian Armed Forces Personnel Rules, 1974 had been quashed and the matter was now sub-judice before the apex court.

**4.** The petitioners filed rejoinders, wherein it is stated that as per information received under the Right to Information Act, in all, the names of 26 persons had been sponsored by the Ex-serviceman Cell, but three out of them did not join and many of those who had joined the service against the reserved posts stand superannuated from service and therefore, the cases of the petitioners could conveniently be considered against these vacancies.

**5.** When the matter came up for consideration before this Court on 20.11.2013, the respondents were directed to file a supplementary affidavit in CWP No. 4654 of 2013 meeting out the averments made in the rejoinder. The respondents filed supplementary affidavit wherein it is stated that a requisition to fill up 34 vacancies of Junior Engineers from the Ex-serviceman quota was sent to the Ex-serviceman Cell, Hamirpur against which 26 candidates were sponsored by the Ex-serviceman Cell. Subsequently, the Ex-serviceman Cell, Hamirpur directed the official respondents not to consider the candidature of the persons appearing at Serial Nos. 1, 8 and 23. However, vide letter dated 9.9.2008, it again sponsored the names of three candidates in their place. Out of aforesaid 26 persons one person namely Rasila Ram Bhardwaj did not join and the said post could not be filled in and given by the respondents to the Ex-serviceman recruited against general category. The person at Serial No. 31 also did not join, while the person listed at Serial No. 32 of Annexure P-6 vacated the post on his retirement on 30.6.2011. Besides these seven persons recruited through the Ex-serviceman quota were promoted and the said vacancies became available during 6/2012. Another vacancy became available on the retirement of person at Serial No. 33 on 31.8.2012 and yet again another vacancy became available on retirement of person at Serial No. 36 Sh. Kashmir Chand, who retired on 31.12.2011. The petitioners could not be appointed since there were four persons senior to them, who were waiting for their turn and consideration against these posts. Two vacancies which became available during the year 2011 would go to Salinder Singh and Tilak Raj who were senior to the

petitioners and against the vacancies, which became available during 6, 2012, the claim of the persons at Serial Nos. 3 to 6 would be considered.

**6.** It was then submitted that this court in its judgement dated 29.12.2008 in ***CWP No. 488 of 2001 titled V.K.Behal vs. State of H.P & ors.*** reported in ***Latest HLJ 2009 (HP) 402*** has held that the Ex-servicemen, who are recruited during emergency alone are entitled for counting the service rendered in the military and the Ex-servicemen who joined the Indian Army as a career are not entitled for counting of service and the matter is now pending before the Hon'ble apex court.

We have heard the learned counsel for the parties and have gone through the records.

**7.** Indisputedly the respondents were ready to consider the cases of the petitioners against the vacancy of ex-serviceman which would have arisen in the year 2012 but for the decision rendered by this court in ***V.K.Behal's*** case (supra), where this court held as follows:-

> "17. In view of the above discussion, the writ petition is allowed. The Provision of Rule 5(1) of the Rules are read down and they are held to be unconstitutional in so far as they give benefit of counting the past army service towards seniority in civil employment in case of ex-servicemen who have not joined the Armed forces during the period of emergency. It is also held that the benefit of such service can not be given from a date prior to the date when the ex-serviceman attains the minimum educational eligibility criteria prescribed in the rules. Consequently, the seniority list Annexure P-3 is held to be illegal and is accordingly quashed and the respondents are directed to re-frame the same in accordance with the directions issued hereinabove. There shall be no order as to costs."

Rule 5(1) of the Demobilized Armed Forces Personnel (Reservation of vacancies in the Himachal Pradesh State Non- Technical Services) Rules, 1972, reads thus:

> *"(1) Only the period of approved military service rendered after attaining the minimum age prescribed for appointment to the service concerned by the candidates appointed against reserved vacancies under the relevant rules, shall count towards fixation of pay and seniority in that service. This benefit shall however be allowed at the time of first civil employment only and it shall not be admissible in subsequent appointments of ex-servicemen who are already employed under the State/Central Govt. against reserved posts."*

**8.** In case the aforesaid rule is minutely analyzed, it would be seen that it comprises of two parts, 1st pertains to counting of service for the purpose of fixation of pay and 2nd pertains to counting of service for the purpose of seniority.

**9.** The question therefore, required to be determined is as to whether this court while deciding **V.K.Behal's** case (supra) declined all the benefits provided under Rule 5(1) (supra) to those ex-servicemen, who admittedly had joined the Armed Forces as a career. In our humble and considered opinion the court has only adjudicated upon the benefit of counting of past army service towards seniority in civil employment and has not adjudicated upon the conferment of benefit of past army service in so far it pertains to fixation of pay. In fact this claim was neither agitated by the petitioners therein nor adjudicated upon by this court. Rather what appears from the perusal of judgment is that even the petitioners therein had no objection in case financial benefit like fixation of pay was granted to the ex-servicemen, as would be clear from para-3 of report, which reads as follows:-

*"3. The main contention raised on behalf of the petitioners by Sh.Dalip Sharma is that the Rules are unconstitutional because they give benefit of even those ex-servicemen who had not joined service in the armed forces during the period of emergency. According to the petitioners, the persons who join the armed forces when the situation in the Country is normal do not do anything extra-ordinary and they join the armed forces like any other career and therefore, there is no rationale for giving them benefit of the service rendered by them in the armed forces for the purposes of pay and seniority. Sh. Dalip Sharma, learned counsel for the petitioners had urged that he is not in any manner arguing that the ex-servicemen do not form a separate class. He submits that to satisfy the tests of Article 14 not only should the classification be justified but there should be a reasonable nexus with the object sought to be achieved. It is his submission that if the object is to rehabilitate the ex-serviceman this object is served by providing reservations to them. However, according to him, there is no justification in granting them the benefit of seniority by adding the period of service rendered by them in the Army. He submits that once the persons are recruited from various sources and become members of one service no further distinction can be made between them on the ground of the past service rendered in a totally unrelated employment. In the alternative he submits that the benefit, if any, should be restricted to grant of financial benefits like fixation of pay only and the rights of other individuals who joined service much before the ex-servicemen cannot be jeopardized by giving the ex-servicemen benefit of adding the service rendered by them in the armed forces for reckoning their seniority. According to him, the case of ex-servicemen who joined armed forces during the period of emergency when the Nation was facing foreign aggression or when the sovereignty and integrity of the Country was at stake, stands on a completely different footing and the ex-servicemen who joined during emergency have to be treated as a different class. The benefit given to such ex-servicemen who joined during emergency cannot be extended to the person who joined service during normalcy. In the alternative it is urged that even if the Rule is held to be valid the deemed date of appointment cannot be from a date prior to such persons acquiring the minimum educational eligibility criteria prescribed in the Rules."*

**10.** Notably even this court did not find any illegality in so far as the pay of ex-servicemen was protected, as would be clear from the following observations:-

*"10. There may exist an intelligible criteria for providing reservation to ex-servicemen. The object is also reasonable i.e.. to rehabilitate the ex-servicemen but this object can be achieved by providing reservations to them.Nobody is against such reservation. Their pay can also be protected. The problem arises when there is a conflict between persons from the civil society who have joined service much earlier than the ex-servicemen but then they are placed lower when the ex-servicemen who are given benefit of their past service regardle*ss of the fact whether they have joined during emergency or not."

**11.** Once this is the position, the respondents cannot under pretext of judgment in ***V.K.Behal's*** case (supra), being sub-judice before the Hon'ble Supreme Court, deny to the petitioners the benefit of approved military service for counting the same towards fixation of pay.

**12.** In so far as the question of counting the same towards the seniority is concerned, the same shall essentially have to abide by the decision of the apex court in ***V.K.Behal's*** case. In the event of the Hon'ble Supreme

Court ultimately deciding in favour of the ex-servicemen, then needless to say that the same benefit shall also have to be extended to the petitioners.

**13.** With these observations, the petitions are partly allowed. The respondents are directed to grant the benefit of approved military service towards fixation of pay after considering their cases against the vacancies of ex-servicemen, which have arisen in the year 2012.

The Registry is directed to place a copy of this judgment on the file of connected matter.

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**BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.**

Dilbag Singh son of late Shri Bhoda Ram ....Applicant
Versus
State of H.P. ....Non-applicant

Cr.MP(M) No. 1280 of 2014
Order Reserved on 13th November,2014
Date of Order 26th November, 2014

**Code of Criminal Procedure, 1973-** Section 438- An FIR was registered against the petitioner for the commission of offence punishable under Section 306 read with Section 34 IPC - prima facie, the name of the applicant was mentioned in the suicide note of the deceased- custodial interrogation of the applicant is necessary keeping in view the gravity- grant of bail would affect the investigation adversely, therefore, application rejected. (Para- 7 to 9)

**Cases reffered:**

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

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

Parvinderjit Singh and another vs. State (Union Territory Chandigarh) and another, AIR 2009 SC 502

For the Applicant: Mr. Surinder Saklani, Advocate.
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General, Mr. J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

***P.S. Rana, Judge***

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 182 of 2014 dated 31.10.2014 registered under Section 306/34 IPC in Police Station Dehra District Kangra Himachal Pradesh.

2. It is pleaded that FIR was registered against the deceased in theft case. It is pleaded that deceased and applicant have cordial relations for years. It is pleaded that applicant has deposed in the theft case against the deceased and deceased had kept a grudge against the applicant. It is further pleaded that due to grudge name of applicant has been mentioned in the suicide note. It is pleaded that applicant will not abscond and will not tamper with prosecution evidence and will join the investigation. It is further pleaded that applicant will abide all conditions imposed by the Court. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report case under Section 306/34 IPC is registered against the applicant in P.S. Dehra vide FIR No. 182 of 2014 dated 31.10.2014. There is recital in police report that on dated 31.10.2014 statement of Shri Kushal Singh son of Rai Singh resident of VPO Gheori P.S. and Tehsil Dehra District Kangra (HP) was recorded. There is recital in police report that deceased Rai Singh son of Munshi Ram Age 52 years resident of VPO Gheori P.S. Dehra District Kangra H.P. was working as Secretary in the society. There is recital in police report that case under Section 420 IPC was registered and deceased was accused in that case. There is further recital in police report that deceased had obtained the interim anticipatory bail from Hon'ble High Court of H.P. Shimla which was pending for disposal. There is recital in police report that accused Dilbag Singh, accused Tilak Raj and accused Bhajan Singh were harassing the deceased since 10-15 days. There is also recital in police report that deceased committed suicide through rope of plastic. There is recital in police report that suicide note was also obtained. There is further recital in police report that post mortem of deceased was conducted at CHC Dehra and cause of death was mentioned as asphyxia as a result of ante mortem hanging. There is further recital in police report that statements of prosecutions witnesses were also recorded. There is also recital in police report that report of RFSL is still awaited and in case applicant is released on anticipatory bail applicant will threat the prosecution witnesses and will influence the investigation. Prayer for rejection of anticipatory bail application is sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record.

5. Following points arise for determination in this bail application:-

***Point No. 1***

Whether bail application filed under Section 438 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of anticipatory bail application?

***Point No. 2***

Final Order.

***Findings upon Point No.1***

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that name of applicant was figured in the suicide note due to ill-will and grudge against the applicant and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. The fact whether the name of applicant was mentioned in the suicide note due to ill-will or grudge cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

8. Another submission of learned Advocate appearing on behalf of the applicant that applicant will abide all conditions imposed by the Court and on this ground anticipatory bail application filed by applicant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial

or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case there is prima facie suicide note against the applicant and case is at the initial stage of investigation. Court is of the opinion that custodial interrogation of applicant is essential in present case in view of the gravity of criminal offence registered against the applicant under Section 306 IPC. Court is of the opinion that if anticipatory bail is granted to the applicant at this stage then investigation of the case will be adversely affected. Court is also of the opinion that if anticipatory bail is granted to the applicant at this stage then interest of State and general public will also be adversely affected.

9. Submission of learned Additional Advocate General appearing on behalf of the State that investigation is in initial stage and allegations made against the applicant are grave in nature qua commission of criminal offence under Section 306 IPC and if applicant is released on anticipatory bail at this stage investigation will be adversely affected is accepted for the reasons hereinafter mentioned. It was held in case reported in ***AIR 2009 SC 502 titled Parvinderjit Singh and another vs. State (Union Territory Chandigarh) and another*** that order under Section 438 Cr.P.C. is neither a passport to the commission of crimes nor a shield against any kind of accusations.

10. In view of gravity of offence under Section 306 IPC and in view of the fact that investigation is at the initial stage and in view of suicide note against the applicant it is held that custodial interrogation is essential in present case. Point No.1 is answered in negative.

***Point No. 2***

Final Order

11. In view of my findings upon point No. 1 anticipatory bail application filed under Section 438 Cr.P.C. is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this anticipatory bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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**BEFORE HON'BLE MR.JUSTICE RAJIV SHARMA, J. AND HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.**

Karam Singh ...Appellant.
Versus
State of H.P. ...Respondent.

Cr.Appeal No.305 of 2011.
Reserved on: 21.11.2014.
Decided on: 26th November, 2014.

**N.D.P.S. Act, 1885-** Section 20- As per prosecution case, accused was found in possession of 4.85 kg. of charas- police officials carrying out the search were posted at different places- according to them, they had stayed in hotel- however, prosecution had not placed on record the registers of hotel located at Sunder Nagar or Karsog, which shows that prosecution version regarding this fact could not be relied upon- further, police officials had arrived in the private vehicle of Head Constable 'L' – in the absence of hotel record the whole version that police had stayed in

the hotel and had arrived in the vehicle became doubtful which makes the genesis of the incident suspicious. (Para-20)

**N.D.P. S. Act, 1885-** Section 55- Column No. 1 to 8 of NCB Form were filled up by I.O. – column No. 9 to 12 were filled up by ASI Mohan Lal- however, he was not posted as SHO- therefore, he was not competent to sign the column No. 9 to 12- no Roznamcha was produced to prove that he was discharging duty of SHO or that SHO was absent from the police Station, which leads to an inference that the case property was not brought to the police station and the exercise was completed at a place other than Police Station. (Para-21)

For the Appellant: Mr.Harish Sharma, Advocate.
For the Respondent: Mr.P.M.Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

**Sureshwar Thakur, Judge.**

The instant appeal is directed against the judgment, rendered on 10th June, 2011, by the learned Special Judge, Mandi, District Mandi, H.P., in Sessions Trial No.55 of 2010, whereby, the accused/appellant has been convicted and sentenced to undergo rigorous imprisonment for twelve years and to pay a fine of Rs.1,20,000/- under Section 20(b)(ii)(c) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (herein-after referred to as the 'NDPS Act') and in default of payment of fine, he has been sentenced to further undergo simple imprisonment for a period of two years.

2. The brief facts of the case are that on 28th July, 2010, Head Constables Laxman Dass, Tek Chand, Constables Vinod Kumar and Jitender Kumar were going towards Karsog to Kotlu. The accused was found coming from Teban when they reached Teban. He was carrying a polythene bag Ext.P-2 in his hand. He got frightened on seeing the police and tried to return. He was apprehended by the police. He revealed his name as Karam Chand son of Budhi Singh on inquiry. The polythene bag smelled of charas and the police became suspicious about the presence of Charas in the polythene bag. HC Laxman Dass informed the accused in writing that he was suspecting the possession of charas by the accused and the search of the accused was conducted. The accused also informed about his legal right to be searched before a Magistrate or a Gazetted Officer. The accused consented to be searched by the police at the spot. Memo Ext.PW-1/A was prepared. It was signed by HC Tek Chand, constable Vinod Kumar and the accused. HC Laxman Dass gave his personal search to the accused in presence of the witnesses. Memo Ext.PW-1/B was prepared. Polythene bag Ext.P-2 was checked and it was found to be containing black coloured substance in the shape of spheres and sticks. The substance was found to be charas on smelling. It was weighed and its weight was found to be 4.850 kilograms. Charas was put in the polythene bag and the bag was wrapped in a piece of cloth. The parcel was sealed with six impressions of seal 'D'. Sample seal was taken on separate pieces of cloths and one such impression is Ext.PW-1/C. NCB-1 form Ext.PW-8/A was filled in triplicate and seal impression was taken on NCB-1 form. The seal was handed over to witness Tek Chand after the use. Charas was seized vide seizure memo Ext.PW-1/D, which was signed by Tek Chand and C.Vinod Kumar. Copy of seizure memo was supplied to the accused and his signatures were also obtained. Ruka Ext.PW-14/A was prepared and it was sent to police station through constable Vinod Kumar. C. Vinod Kumar carried it to P.S.Karsog and handed it over to H.C. Gian Chand PW-3. Gian Chand recorded F.I.R. Ext.PW-3/A and handed over the case file to C. Vinod Kumar with the direction to carry it to the spot. Investigation was carried out by HC. Laxman Dass who prepared

site plan Ext.PW-1/B and recorded the statements of witnesses as per their version. The accused was arrested and memo of his arrest Ext.PW-1/E was prepared. The police party went towards P.S.Karsog in the vehicle of H.C. Laxman Dass. C.Vinod Kumar met the police party at Kelo Dhar and handed over the case file to H.C. Laxman Dass. H.C. Laxman Dass recorded his statement and proceeded to police station. The case property, case file and accused were produced before ASI Mohan Lal PW-8 who was working as SHO on that day. ASI Mohan Lal resealed the parcel with three impressions of seal C. He prepared memo of resealing Ext.PW-1/F. Sample seal was taken separately on separate pieces of cloths and one such impression is Ext.PW-1/G. NCB-1 form Ext.PW-8/A was filled in triplicate and seal impression was put on NCB-1 form. Seal was handed over to HC Tek Chand after the use. The case property sealed with three impressions of seal C and six impressions of seal D, NCB-1 form in triplicate, seal impressions C and D were handed over to MHC Gian Chand for depositing these in Malkhana. MHC Gian Chand made an entry in the register of malkhana, the copy of which is Ext.PW-3/B and deposited all these articles in Malkhana. He handed over all these articles to PW-4 C. Bhaskar Bhanu alongwith docket on 29.07.2010 with the direction to carry these to FSL Junga vide RC No. 119/10, the copy of which is Ext.PW-3/C. C. Bhaskar Bhanu deposited all these articles at FSL Junga and handed over the receipt to MHC on his return. Special report, the copy of which is Ext.PW7/A was handed over to Raj Kumar SDPO, who handed it over to his Reader PW-7 HC Ram Lal on the same day. HC Ram Lal made an entry in the register of special report, copy of which is Ext.PW-7/A and filed the special report in the record. Result of chemical analysis Ext.PW-5/A was issued in which it was shown that the sample was of charas, which was containing 27.62% of resin in it. Affidavit of Raj Kumar Ext.PW-6/A was taken into possession. On conclusion of investigation into the offences, allegedly committed by the appellant/accused, challan was filed under Section 173 of the Code of Criminal Procedure.

3. The accused was charged for his having committed offences punishable under Section 20 of the NDPS Act by the learned trial Court, to which he pleaded not guilty and claimed trial.

4. In proof of the prosecution case, the prosecution examined as many as 14 witnesses. On closure of the prosecution evidence, statement of appellant/accused under Section 313 Cr.P.C. was recorded by the Court in which the accused claimed false implication and pleaded innocence. In defence, the appellant/accused examined two witnesses.

5. On appraisal of evidence on record, the learned trial Court convicted and sentenced the accused for his having committed the offence, aforesaid.

6. The appellant/accused is aggrieved by the judgment of conviction, recorded by the learned trial Court. The learned counsel for the appellant/accused, has concertedly and vigorously contended that the findings of conviction, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of conviction be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

7. On the other hand, the learned Deputy Advocate General, appearing for the respondent-State, has, with considerable force and vigour, contended that the findings of conviction, recorded by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

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

9. The first witness, who stepped into the witness box, in support of the prosecution case, is, PW-1 Tek Chand. He, in his deposition, deposes a version in square tandem to the prosecution story, referred to herein-above. In his cross-examination he deposes that HC Lachhman Dass had recorded his statement on 28.7.2010. He further deposes that C. Vinod Kumar met the police party at Kelodhar. He continues to depose that HC Lachhman Das was posted in S.I.U on 28.7.2010. Constable Jitender Kumar and C. Vinod Kumar were probably posted in Police Line Mandi at that time. He further deposes that C.Vinod Kumar, H.C. Lachman and C. Jitender Kumar met him in P.S. Sundernagar. He further deposes that they proceeded in a private vehicle of H.C.Lachhman Dass and stayed in Kumar Hotel during the night at Karsog. He further deposes that people were going from that place after the completion of investigation but no person went to during the investigation. I.O. had not sent any police official to call independent person.

10. Constable Vinod Kumar (PW-2), in his deposition, deposes a version in square tandem to the prosecution story, referred to herein-above and as also in corroboration to the testimony of PW-1. In his cross-examination, he deposes that his statement was recorded at Kelodhar on 28.7.2010 in a private vehicle of HC Lachhman Dass. He further deposes that MHC of PL Mandi asked him to accompany H.C. Lachhman Dass towards Karsog and Sundernagar. He further deposes that they stayed in a hotel at Sundernagard during the night and did not remember the name of the hotel. He further deposes that he had not report his arrival at P.S.Karsog. He further deposes that he do not know the name of the hotel in which they stayed at Karsog. He proceeds to depose that there is a market at Kotlu. He feigns ignorance about the name of the place where the accused was apprehended. He goes on to depose that the search of polythene bag was conducted first. Ext.PW-1/A was prepared after the search was conducted by the Investigating Officer and Ext.PW-1/D was prepared by the Investigating Officer at the spot while he was sitting. NCB-I form is stated to be filled at the spot in the presence of this witness. He feigns ignorance that which columns were filled in by Investigating Officer. Investigating Officer had taken the seal impression only on one piece of cloth. He denies the suggestion, put to him, that H.C. Laxman Dass and Constable Jitender Kumar were present at Kotlu on 27.7.2010 and he was never associated with the raiding party. He proceeds to depose that ASI was discharging the duties of S.H.O. at that time and did not remember his name.

11. PW-3 (HC Gian Chand) deposes that Constable Vinod Kumar brought one Ruqua (Mark A) to Police station on 28.7.2010 on which this witness recorded the F.I.R. Ext.PW-3/A in the official computer of the Police Station, print out of which is deposed to have been signed by ASI Mohan Lal. He further deposes that the case file was prepared and handed over to Constable Vinod Kumar with a direction to carry it to the spot. ASI/SHO Mohan Lal handed over one parcel sealed with six impressions of seal 'D' and three impressions of seal 'E'. This witnesses further deposes that he made an entry at Sr.No.403 in the register of Malkhana, the copy of which is Ext.PW-3/B and deposited these articles in the Malkhana. He proceeds to depose that he took all these articles from Malkhana on 29.7.2010 and handed over to Constable Bhaskar Bhanu with a direction to deposit the same at FSL Junga vide RC No.119/10, copy of which is Ext.PW-3/C. He admits the suggestion that he had not made an engtry regarding the time of deposit in the Malkhana register and the NCB-1 Form in triplicate was written subsequently.

12. PW-4 (Constable Bhaskar Bhanu) deposes that MHC Gian Chand handed over one parcel sealed with six impressions of seal 'D' and three impressions of seal 'C' along with NCB-1 Form in triplicate, docket number

5516, sample seals on 29.7.2010 with a direction to carry these to FSL, Junga vide RC No.119/10. He further deposes that he deposited all the articles at FSL, Junga and handed over the receipt to MHC on his return.

13. PW-5 (Constable Devu Ram) deposes that he brought the result Ext.PW-5/A and a parcel sealed with seal impressions of FSL-II from FSL, Junga on 21.8.2010 and deposited all these articles with MHC on 22.8.2010.

14. PW-6 (Constable Vijay Kumar) deposes that Constable Devu Ram handed over one sealed parcel sealed with seven impressions of FSL-II on 22.8.2010 along with one sealed envelope containing the result of Chemical analysis Ext.PW-5/A and NCB-I Form and handed over the result and NCB-I Form to Investigating Officer ASI Mohan Lal and deposited the parcel in Malkhana. He further deposes that an entry was made at Sr.No.403, the copy of which is stated to be Ext.PW-3/B. He proceeds to depose that he conducted the investigation in this F.I.R. and took the copy of special report from the Reader to SDPO, Sundernagar and the copy of the register regarding special report. In his cross-examination, he deposes that ASI Mohan Lal was discharging the duties of SHO on 27.7.2010 to 28.7.2010. He denies the suggestion, put to him, that Amar Chand Sharma was discharging the duties of SHO during those days.

15. PW-7 (HC Ram Lal) deposes that Raj Kumar Chandel, SDPO Sundernagar handed over the special report, copy of which is stated to be Ext.PW-7/A, to him on 29.7.2010 at 12.40 p.m. and made an entry in the register of special report at Sr.No.115. The endorsement and signatures of SDPO are stated by this witness to be inside the red circle of Ext.PW-7/A.

16. PW-8 (ASI Mohan Lal) deposes that Constable Vinod Kumar brought one ruqua Mark-K on 28.7.2010 at 10:25 a.m. to Police Station and F.I.R. Ext.PW-3/A was recorded on the basis of said ruqua which is stated by this witness to be signed by him. He further deposes that HC Laxman Dass brought one parcel sealed with six impressions of seal 'D' in the Police Station at 2 p.m. on the same day along with the sample seal 'D'. NCB-I Form in triplicate, case file and the accused were produced before him. He further deposes that he re-sealed the parcel with three impressions of seal 'C' in the presence of HC Tek Chand, MHC Gian Chand and HC Laxman Dass and the sample seal was taken separately on a piece of cloth and one such impression is Ext.PW-1/G. Seal was handed over to HC Tek Chand after its use. He proceeds to depose that the specimen of seal was taken on the NCB-I Form Ext.PW-8/A. He further deposes that he handed over all these three articles to MHC Gian Chand for depositing the same in the Malkhana. He proceeds to depose that he prepared the re-sealing memo Ex.PW1/F and also recorded the statements of Constable Devu Ram, H.C. Vijay Kumar, Constable Virender Kumar, MHC Gian Chand and Constable Bhaskar Bhanu.

17. PW-9, (SHO Amar Chand Sharma), prepared the challan in this case and presented it before the learned trial Court. PW-10 Constable Virender Kumar carried the special report to SDPO Sunder Nagar and handed over it to SDPO on the same day at 12.30 P.M. PW-11 H.C. Kamal Deep deposes that Ex.PW-11/A is the true copy of the original register brought by him in Court. PW-12 HHC Manoj Kumar, proved the report No.10 of 26.7.2010, Ex.PW12/A. PW-13 H.C. Tak Chand deposes that the name of the Court in entry No.11(A) of 27.7.2010 was wrongly mentioned as Addl. Sessions Court whereas he had proceeded to the Court of Ld. JMIC, Karsog, vide DD No.12 dated 25.7.2010.

18. PW-14 H.C. Laxman Dass, in his deposition deposes a version in square tandem to the prosecution story, as referred to hereinabove, as also in corroboration to the testimonies of PW-1 and PW-2. In cross-examination he deposes that he cannot tell the distance between Kotlu and Teban is eight kilometers. He admitted the suggestion that he was having any authority letter

to carry out the search. He denied the suggestion that he was having sufficient time to intimate his superior. He deposes that there were chances of escape of the accused. He further deposes that he has not sent any police official to call any independent witness. He has denied the suggestion that father of the accused had visited the police station at 10.00 a.m. He further deposes that he had not sent the information under Section 57 to his superior officer because he had handed over the case file and case property to the SHO and left the Police Station. He has denied the suggestion that he had not visited the spot. He has denied the suggestion that Tek Chand was not accompanying them.

19. The proceedings, relating to search, seizure and recovery of contraband from the alleged conscious and exclusive possession of the accused, were purportedly concluded at place Kotlu falling under Police Station, Karsog. However, the police party, comprising Head Constable Tek Chand, Head Constable Laxman Dass, Constables Vinod Kumar and Jitender Kumar, all are police officials not of Police Station, Karsog, rather PW-1 Head Constable Tek Chand was posted at Police Station, Sundernagar, whereas, Head Constable Laxman Dass and Constable Jitender Kumar were posted in Police Line, Mandi at the relevant time. Head Constable Laxman Dass, Constable Vinod Kumar and Constable Jitender Kumar of Police Line, Mandi had met Head Constable Tek Chand at Sundernagar. They stayed overnight in a Hotel at Sundernagar. They proceeded for Karsog in a private vehicle of Head Constable Laxman Dass along with the latter. On 28.7.2010, when they were performing patrolling duty, then at some distance ahead of Kotlu at about 6.15 a.m. the alleged occurrence took place. However, preceding theirs having allegedly recovered contraband from the purported exclusive and conscious possession of the accused as is apparent on a reading of the cross-examination of PW-1, they stayed overnight at Kumar Hotel, Karsog. The prosecution has not placed on record potent material comprised in the adduction into evidence of Hotel Registers of the Hotel at Sundernagar where the police officials other than Head Constable Tek Chand stayed overnight before proceeding there-from to Karsog nor also there is adduction into evidence of the Hotel Register of Kumar Hotel Karsog where on the arrival of the police officials there, they had stayed there overnight before on the succeeding day, proceeding to the place of occurrence. The absence of adduction into evidence of the Hotel Registers of the Hotels situated both at Sundernagar and Kumar Hotel, Karsog with their concomitantly displaying therein entries of the factum of the police officials having stayed respectively at both the places spurs a conclusion that the prosecution has been unable to unfailingly and convincingly bring forth unflinching evidence conveying the fact of stay overnight of the police officials other than PW-1 at Sundernagar before their departure to Karsog or also qua the fact of theirs having subsequent to their departure from Sundernagar to Karsog theirs having stayed overnight at the latter destination. Absence of the above evidence rids the prosecution version qua the aforesaid factum of departure of police officials from Sundernagar to Karsog as also qua their stay overnight at Karsog with the malady of prevarication. Furthermore, the police officials had purportedly traveled in a private vehicle of Head Constable Laxman Dass. The defence has put suggestions to the prosecution witnesses of Laxman Dass being unavailable at the site of occurrence. The factum of absence of HC Laxman Dass at the site of occurrence gains succor in the face of non adduction into evidence of Hotel Registers of Hotels at Sundernagar and at Karsog with entries therein marking and portraying the factum of Head Constable Laxman Dass, then while accompanying the police officials having stayed there overnight along with them at Sundernagar and at Karsog wherefrom the latter place, they departed for the site of occurrence. Consequently, it has to be invincibly concluded, even if the police officials, other than Head Constable Laxman Dass, had traveled from Sundernagar to Karsog in a mode other than the vehicle of Head Constable Laxman Dass of the latter being unavailable with them at the site of occurrence, besides as a corollary, the aforesaid discussion marking the absence of HC

Laxman Dass at the site of occurrence along with the other police officials ingrains with doubt the prosecution version, of the entire proceedings at the site of occurrence having taken place in his presence. However, with the prosecution pressing the fact of HC Laxman Dass being present along with other police officials at the site of occurrence stands to, hence render its version bereft of veracity. In aftermath, the genesis of the prosecution version of Head Constable Laxman Dass having accompanied the other police officials to the site of occurrence when suffering from prevarication, also concomitantly erodes the genesis of the prosecution version.

20. Furthermore, a perusal of the NCB Form, as existing on record, displays that Columns No.1 to 8 were filled in by the Investigating Officer, SIU Mandi. He being the Investigating Officer, Special Investigation Unit, Mandi, was competent to fill Columns No.1 to 8, the columns existing at Sr.Nos.9, 10, 11 and 12 of the NCB Form, pertaining to re-sealing, have, however, been signatured by PW-8 ASI Mohan Lal of Police Station, Karsog. A legal obligation, however, was cast upon the SHO of the police station concerned for rendering legal sacrosanct the filling of Columns existing at Sr.Nos.9, 10, 11 and 12 of the NCB form that they be filled up and signatured by him. PW-8 being not the S.H.O. did not enjoy the legal competence to signature the Columns existing at Sr.Nos.9, 10, 11 and 12 of the NCB Form. His being dis-empowered to signature the entries in Columns No.9, 10, 11 and 12 of the NCB Form renders the factum of entries recorded against Columns No.9, 10, 11 and 12 to be hence enjoying no legal sanctity besides belying the authenticity of the portrayals against Column Nos.9, 10, 11 and 12 of the NCB form. The effect thereof, is, that the factum of re-sealing of the seized contraband from the purported conscious and exclusive possession of the accused comes to be smeared with a taint of suspicion and spuriousness devolving upon its authenticity. Even though, the prosecution contends that since the S.H.O. was not present at the relevant date, hence, PW-8 was discharging the duties in his absence, as such, the entries in Column Nos.9, 10, 11 and 12 of the NCB Form signatured by PW-8 are not deprived of their authenticity. However, in the face of omission of adduction of cogent evidence comprised in the Roznamcha of the Police Station concerned and its manifesting the fact of PW-9 the S.H.O. of Police Station, Karsog having departed there from on the relevant date on account of leave or his being busy elsewhere, leaves scope for an inference that PW-9 was not either on leave nor had proceeded elsewhere for performing public duty on the relevant date, rather was in the Police Station, as such, he alone when competent to signature the entries in Column Nos.9, 10, 11 and 12 of the NCB Form, his having omitted to do so, rather PW-8 having proceeded to do so, displays that the recovered contraband was not as portrayed by the prosecution brought to the Police Station, Karsog for carrying out the exercise of re-sealing or its being deposited in the Malkhana, rather the exercise was completed at a place other than Police Station, Karsog rendering suspect, hence, the factum of re-sealing of the contraband. Cumulatively the conclusion with aplomb which can be formed is that the entries in Column Nos.9, 10, 11 and 12 are suspect and do not carry forth the prosecution case that the contraband allegedly recovered from the conscious and exclusive possession of the accused was seized in the legally ordained manner. The formation of the above conclusion leads to a further apt conclusion that the property as allegedly recovered from the conscious and exclusive possession of the accused and sent for examination to FSL, Junga was not the property as recovered from the conscious and exclusive possession of the accused, rather when may have been tampered with, hence, was not the property recovered from the alleged conscious and exclusive possession of the accused, besides, abundant space is left open for an inference that the opinion rendered on the case property as sent to FSL, Junga was not an opinion rendered on the case property recovered from the conscious and exclusive possession of the accused, rather was qua some other case property. In aftermath, the opinion as rendered by the FSL comprised in Ext.PW-5/A is to

be concluded to be not linkable to the accused. In other words, the consummate link in the chain of circumstances comprised in the opinion of the FSL gets unerringly broken and severed, prodding this Court to give the benefit of doubt to the accused.

21. The infirmities, aforesaid, noticed by this Court erode the substratum and bed-rock of the prosecution version as the infirmities are pervasive and major. Furthermore, even though the testimonies of the prosecution witnesses would not lose their veracity on the solitary score of non association of independent witnesses, if otherwise they are credible. However, when for reasons afforded herein-above, their testimonies are bereft of truth, therefore, when entwined with the fact of non association of independent witnesses by the Investigating officer in the proceedings relating to search, seizure and recovery despite availability, as pronounced in the testimony comprised in the cross examination of PW-2 of a small market being available at Kotlu inhabitants whereof / residents whereof could well have been joined as witnesses to lend a hue of impartisanship as well as transparency to the prosecution case. In sequel, omission of concerted efforts on the part of the Investigating Officer to join them in the proceedings relating to search, seizure and recovery of contraband despite availability constrains this Court to conclude that such omission was prompted by no reason other than the Investigating Officer carrying out a slanted and tainted investigation, besides smothering the truth of the investigation. Obviously, then a smothered, slanted and tainted investigation is not to be imputed credibility.

22. In view of the above discussion, the appeal is allowed and the impugned judgment, rendered on 10th June, 2011, by the learned Special Judge, Mandi, H.P., in Sessions Trial No.55 of 2010, is set aside. The appellant is acquitted of the offence charged. He be set at liberty forthwith, if not required in any other case. The fine amount, if any, deposited by the accused/appellant be refunded to him.

23. The Registry is directed to prepare the release warrant of the appellant and send it to the Superintendent of the Jail concerned, in conformity with this judgment forthwith. Records of the trial Court be sent down forthwith.

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

Ramesh Chand ....Appellant.

Vs.

Kamli Ram and others ....Respondents.

FAO No.115 of 2014
Reserved on : 21.11.2014.
Date of Decision: November 26, 2014.

**Code of Civil Procedure, 1908-** Order 41- Appellate Court framed additional issues and remanded the case for trial - held, that Appellate Court should not have remanded whole matter for trial and consideration on all issues but should have obtained the findings on additional issues so framed by it. (Para- 6 to 9)

**Code of Civil Procedure, 1908-** Order 43 Rule 1- An appeal against the order of wholesale remand would lie under Order 41 Rule 1(u) of CPC. (Para-11 to 15)

**Cases referred:**

Nagar Mal and another v. Bimal Kumar and another, Latest HLJ 2005(HP) 679

Prem Kumar and others v. Parkash Chand and others, 2002(3) SLC 358

Jabbar Singh v. Shanti Swaroop, 2006 (3) SLC 58

Mangluram Dewangan v. Surendra Singh and others, (2011) 12 SCC 773

Jegannathan v. Raju Singamani and another, (2012) 5 SCC 540

Shanmugam v. Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, (2012) 6 SCC 430

Narayanan v. Kumaran and others, (2004) 4 SCC 26

For the Appellant : Mr. Sanjeev Kuthiala, Advocate.
For the Respondents : Mr. G.S. Rathore, Advocate.

The following judgment of the Court was delivered:

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**Sanjay Karol, Judge**

In the instant appeal, following points arise for consideration:

1. As to whether after framing of additional issues, the lower Appellate Court was right in remanding the matter for consideration afresh on all issues, by setting aside the judgment and decree so passed by the trial Court or not?

2. As to whether the present appeal so filed under the provisions of Order 43 Rule 1-A of the Code of Civil Procedure, assailing the order of remand, is legally maintainable or not?

2. Having heard learned counsel for the parties as also perused the record, this Court is of the considered view that the issues arising for consideration are no longer res-integra.

3. Appellant Ramesh Chand, hereinafter referred to as the plaintiff, filed a suit for permanent prohibitory injunction against the defendants-respondents, hereinafter referred to as the defendants. Based on respective pleadings of the parties, trial Court framed the following issues:

1. Whether the plaintiff is entitled for injunction? OPP

2. Whether the plaintiff has no locus-standi to file the present suit? OPD

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

4. Whether there is no cause of action to file the present suit? OPD.

5. Relief.

4. After appreciation of evidence on record, trial Court found favour with the evidence so led by the plaintiff and decided the issues in his favour, decreed the suit vide judgment and decree dated 27.11.2013, passed in Civil Suit No.145 of 2009, titled as *Ramesh Chand versus Kamli Ram and others*, restraining the defendants from interfering in the function of Kardar of Devta Markandey Rishi Ji and also taking away the Devta for the function from temple Percha without permission of the Kardar.

5. Lower Appellate Court, vide impugned order dated 11.3.2014, passed in Civil Appeal No.114 of 2013, titled as *Kamli Ram and others v. Ramesh Chand,* set aside said judgment and decree, and by framing the following additional issues, remanded the matter for consideration afresh, on all the issues:

4(a) Whether plaintiff is Kardar of Devta Markandey Rishi? OPP

4(b) Whether defendant No.1 has been authorized by the District Magistrate, Kullu as duly appointed Kardar of Devta Markandey Rishi? OPD

Operative portion of the impugned order reads thus:

> "For the reasons, recorded herein above, the appeal filed by the appellants is allowed and the judgment and decree passed by the learned trial Court in civil suit No.145 of 2009 dated 27.11.2013 is hereby set aside. The case is remanded to the learned trial court with the directions to give opportunity to both the par5ties to lead evidence on the aforesaid amended issues framed by this court and, thereafter, to take into account all the evidence together and decide the suit afresh. Parties shall bear their own costs. However, parties through counsel are directed to appear before the learned trial Court on 25.03.2014. The record of the learned trial Court be returned with a copy of this judgment and the file of this Court after due completion be consigned to record room."

6. In somewhat similar circumstances, this Court in ***Nagar Mal and another v. Bimal Kumar and another,*** **Latest HLJ 2005(HP) 679,** deprecated the practice of wholesale remand of the case by the appellate Court, more so keeping in view the provisions of Order 41 of the Code of Civil Procedure.

7. A Division Bench of this Court in ***Prem Kumar and others v. Parkash Chand and others,*** **2002(3) SLC 358,** while dealing with an identical issue, held that:-

> "6. Learned Counsel for the appellants contended that the directions issued by the learned Additional District Judge are not in accordance with the provisions of Rules 23, 23-A or 25 of Order 41, Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code'). He submitted that the appellate Court can make an order of remand either under Rule 23 or 23-A or Rule 25 of Order 41 of the Code.
>
> 7. So far as Rule 23 is concerned, the said provision obviously is not applicable to the case in hand in view of the fact that the trial Court had not disposed of the suit on a preliminary point. The question, therefore, is either the order is passed by the first appellate Court under Rule 23-A or Rule 25 of Order 41 of the Code. But, in either case, contended the learned Counsel, it was obligatory on the part of the first appellate Court to frame issue(s). If the first appellate Court was of the view that the decree passed by the trial Court was liable to be reversed which had been passed on merits, it was open to the appellate Court if it thought fit to remand the matter by directing what issue or issues should be framed in the case so remanded and by sending a copy of the judgment or order to the Court from whose decree the appeal was preferred, i.e., to the trial Court. But the said course has not been adopted by the first appellate Court. Similarly, Rule 25 has also not been invoked inasmuch as it was incumbent upon the first appellate Court to frame issue or issues and refer the same to the trial Court from whose decree the appeal is preferred by directing the said Court to take additional evidence if required, proceed to try such issue or issues and return the evidence to the appellate Court together with its findings thereon and the reasons therefor within such time as may be fixed by the appellate Court. That is, however, not done. Hence, in either case, the order passed by the first appellate Court deserves to be quashed and set aside.
>
> 8. We find considerable force in the argument of the learned Counsel for the appellants. In our opinion, in either case, i.e. either under Rule 23-A

or under Rule 25 of Order 41 of the Code, the first appellate Court ought to have framed additional issue(s) and ought to have issued necessary directions. In our considered opinion, the order passed by the first appellate Court is not in conformity with law. It is, therefore, liable to be quashed and set aside. Accordingly, the appeal filed by the appellants stands allowed. The order passed by the Additional District Judge, Mandi, dated 30th June, 2001 is hereby quashed and set aside by directing the appellate Court to pass an appropriate order by framing necessary issue(s) and by making necessary directions to the trial Court. In the facts and circumstances of the case, no order as to costs."

(Emphasis supplied)

8. Lower appellate Court, rather than setting aside the judgment and decree, without adjudicating the issues on merit and remanding the matter for trial and consideration of all issues, ought to have resorted to the provisions of Order 41 Rule 25 of the Code of Civil Procedure. (See: ***Jabbar Singh v. Shanti Swaroop*, 2006 (3) SLC 58**).

9. Thus, in the instant case, order of wholesale remand is legally unsustainable. Point No.1 is thus answered accordingly.

10. While contending that the impugned order dated 11.3.2014, passed by the lower appellate Court, is not a decree, so as to fall within the ambit and scope of 'decree', so defined in Section 2(2) of the Code of Civil Procedure, Mr. Sanjeev Kuthiala, learned counsel for the plaintiff, has rightly invited attention of this Court to the decision rendered by the Hon'ble the Supreme Court of India in ***Mangluram Dewangan v. Surendra Singh and others*, (2011) 12 SCC 773**, wherein it has been held as under:

"11. We may next consider the remedies available to an applicant whose application under Order 22 Rule 3 of the Code, for being added as a party to the suit as legal representative of the deceased plaintiff, has been rejected. The normal remedies available under the Code whenever a civil court makes an order under the Code are as under:

(i) Where the order is a 'decree' as defined under section 2(2) of the Code, an appeal would lie under section 96 of the Code (with a provision for a second appeal under section 100 of the Code).

(ii) When the order is not a 'decree', but is an order which is one among those enumerated in section 104 or Rule 1 of Order 43, an appeal would lie under section 104 or under section 104 read with order 43, Rule 1 of the Code (without any provision for a second appeal).

(iii) If the order is neither a 'decree', nor an appealable 'order' enumerated in section 104 or Order 43 Rule 1, a revision would lie under section 115 of the Code, if it satisfies the requirements of that section.

12. When a party is aggrieved by any decree or order, he can also seek review as provided in Section 114 subject to fulfillment of the conditions contained in that section and Order 47 Rule 1 of the Code. Be that as it may. The difference between a 'decree' appealable under section 96 and an 'order' appealable under section 104 is that a second appeal is available in respect of decrees in first appeals under section 96, whereas no further appeal lies from an order in an appeal under section 104 and Order 43, Rule 1 of the Code. The question for consideration in this case is whether the order dated 31.8.1996 of the trial court dismissing an application under Order 22 Rule and consequently dismissing the suit is an order amenable to the remedy of appeal or revision. If the remedy is by way of appeal, the incidental question would be whether it is under section 96, or under section 104 read with Order 43, Rule 1 of the Code.

13. Section 96 of the Code provides that save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear appeals from the decision of such court. The word 'decree' is defined under section 2(2) of the Code thus:

> "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default.
>
> Explanation.--A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

14. A reading of the definition of decree in Section 2(2) shows that the following essential requirements should be fulfilled if an order should be treated as a 'decree' :

> (i) there should be an adjudication in a suit;
>
> (ii) the adjudication should result in a formal expression which is conclusive so far as the court expressing it;
>
> (iii) the adjudication should determine the rights of parties with regard to all or any of the matters in controversy in the suit; and
>
> (iv) the adjudication should be one from which an appeal does not lie as an appeal from an order (under section 104 and order 43 Rule 1 of the Code) nor should it be an order dismissing the suit for default. (emphasis supplied)"

11. In fact, while dealing with identical issue, the said Court in ***Jegannathan v. Raju Singamani and another,*** **(2012) 5 SCC 540**, has held that an appeal against an order of wholesale remand would lie under clause (u) of Rule 1 Order 43 of the Code of Civil Procedure.

12. While opposing maintainability of the appeal, Mr. G.S. Rathore, learned counsel for the respondents, has referred to and relied upon decisions rendered by Hon'ble the Supreme Court of India in ***A. Shanmugam v. Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam,*** **(2012) 6 SCC 430;** and ***Narayanan v. Kumaran and others*****, (2004) 4 SCC 26**. I have perused the same. The ratio of law laid down therein is squarely inapplicable to the given facts and circumstances.

13. In fact, Court had the occasion to deal with *Narayanan (supra)* in *Jegannathan (supra)*, and observed as under:

> "11. The High Court relied upon a decision of this Court in the case Narayanan Vs. Kumaran & Ors. (2004) 4 SCC 26 in holding that Civil Miscellaneous Appeal from the order of remand was not maintainable. The High Court was clearly in error. What has been held by this Court in Narayanan is that an appeal under Order 43 Rule 1 Clause (u) should be heard only on the ground enumerated in Section 100 of the Code. In other words, the constraints of Section 100 continue to be attached to an appeal under Order 43 Rule 1(u). The appeal under Order 43 Rule 1(u)

can only be heard on the grounds a second appeal is heard under Section 100.

12. There is a difference between maintainability of an appeal and the scope of hearing of an appeal. The High Court failed to keep in view this distinction and wrongly applied the case of Narayanan in holding that miscellaneous appeal preferred by the appellant was not maintainable."

14. The appeal is legally sustainable. Point No.2 is answered accordingly.

15. Thus, for the aforesaid reasons, appeal is allowed and the impugned order dated 11.3.2014, passed in Civil Appeal No.114 of 2013, titled as *Kamli Ram and others v. Ramesh Chand,* is quashed and set aside. Matter is remanded back to the lower appellate Court with a direction to pass a fresh order, in compliance of provisions of Order 41 of the Code of Civil Procedure. Parties are directed to appear before the lower appellate Court on 22.12.2014. Records of the Courts below be returned immediately.

16. Assistance rendered by Mr. Sanjeev Kuthiala, Advocate, is highly appreciated. Appeal stands disposed of, so also the pending application(s), if any.

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**BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.**

Ramesh Chand and others .....Petitioners.
Versus
Trilok Chand .....Respondent.

CMPMO No.142 of 2014.
Judgment reserved on : 13.11.2014.
Date of decision: 26th November, 2014.

**Code of Civil Procedure, 1908-** Order 39 Rules 1 and 2- Applicant filed an application seeking mandatory injunction directing the respondents to remove the lock put on the gate- record showed that the applicant had constructed a house – Gair Mumkin Kuhal was recorded in the revenue record- he had also constructed a path adjoining to Kuhal to go to his house- respondent had put a gate on the path- applicant produced a certificate from Gram Panchayat showing that he had started construction work about 11 years ago and had carried material from the path through vehicle – this was the only path available to the applicant to go to his house – a compromise in another suit also showed that there was a path which was four meters wide and was being used for going to the house of the applicant- held, that in these circumstances, the mandatory injunction was rightly granted. (Para-10 to 18)

**Cases referred:**
M.Gurudas and others versus Rasaranjan and others (2006) 8 SCC 367
Surya Dev Rai versus Ram Chander Rai and others (2003) 6 SCC 675

For the Petitioners : Mr.G.D.Verma, Senior Advocate with B.C.Verma, Advocate.

For the Respondent : Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

***Tarlok Singh Chauhan, Judge.***

This petition under Article 227 of the Constitution of India is directed against the order dated 13.01.2014 passed by the learned Additional District Judge-III, Kangra at Dharamshala, Camp at Baijnath, in Civil Misc. Appeal No.32-B/XIV/13/08, whereby he dismissed the appeal preferred by the petitioners/appellants and affirmed the order dated 14.11.2008 passed by the learned Civil Judge (Senior Division), Baijnath, in CMA No.103/2008 under Order 39 Rules 1 and 2 CPC.

***The facts, in brief, may be noticed thus.***

2. Respondent herein has filed a suit for mandatory and permanent prohibitory injunction against the petitioners herein in which an application under Order 39 Rules 1 and 2 read with Section 151 CPC was filed and prayed for issuance of ad interim mandatory injunction against the petitioners directing them to remove the lock unauthorizedly and illegally put on the gate of respondent in land comprising Khata No.315min, Khatauni No.612, Khasra No. 1834, situate in Mohal Dharehrr, Mauza Deol, Tehsil Baijnath, District Kangra, whereby the passage 'IJKL' shown in site plan passing through the land comprising Khata No.315min, Khasra Nos.1834, 1838 and 1839, has been permanently blocked. It is averred that the petitioners be restrained from creating any sort of obstacle/obstruction in the use of said passage leading from main Baijnath-Phatahar Road to the land and house of the respondent situate in Khasra No.1836 and 1838 of Khata No.315 min. The land comprising Khasra No.1836 measuring 0-41-68 hectares is exclusively owned and possessed by the respondent as the same has been purchased from Bishan Dass, son of Kunda Ram vide registered sale deed dated 02.02.1996. The respondent is a co-owner in possession to the extent of 280/3472 share of the land comprising Khata No. 315, Khatauni No.614, Khasra No. 1838 measuring 0-37-72 hectares i.e. 0-02-80 hectares, situate in Mohal Dharehrr, Mauza Deol, Tehsil Baijnath, District Kangra. The said land has been purchased vide sale deed dated 13.01.2004. The land comprising Khata No.315, Khatauni No.640, Khasra No.1835 measuring 0-05-00 hectares described as 'Gair Mumkin Kuhal' is recorded in the column of possession as 'Aabpash-Kunindgaan'. There was existing one metre wide passage abutting the said 'kuhal' on its southern side and the same was in use of the respondent, his predecessor-in-interest and other right holders since the time of their forefathers.

3. It is also averred that the respondent after purchase of the above lands with the consent of the owners of Khasra No.1834, 1838 and 1839 extended the existing width of said path to three metres from PWD road up to the land comprising Khasra No.1836 and the said passage in the site plan is depicted as 'IJKL' and this passage was constructed by the respondent in the year 1997. After construction of the said passage, the respondent started construction work of his house shown as H1 in the site plan in the year 1997 and completed the same in October, 1999. The entire construction material was carried by the respondent through trucks and tractors through the said passage and the said passage is used by the respondent and his family members as access for coming and going to from their house from the main road without any hindrance or objection. The gate as depicted as GI in the site plan was constructed just adjacent to the main PWD road in September, 2004, in the land comprising Khasra No.1834 with the consent of the owners through which passage has been constructed. An agreement to sell 32/120299 share of the land comprising Khata No.315min, Khatauni No.612, Khasra Kita 92, measuring 12-02-99 hectares i.e. measuring 0-00-32 hectares on 07.05.2008 has been entered into by Mani Ram with the respondent and entire sale

consideration has been paid by the respondent to Mani Ram and the possession of land in Khasra No. 1834 abutting main Baijnath-Phatahar Road has been delivered to him.

4. The petitioners in order to cause inconvenience and harassment to the respondent and his family members illegally put their lock on the main gate G1 on 24.07.2008 thereby depriving them from its use. The respondent purchased a car in the year 2005 and the same was in use of the said passage but now the same is lying stranded in his courtyard. The respondent and his family members now have to cross a four feet high retaining wall abutting the said gate in order to have access to their house and road. The said act of putting lock on the gate is illegal and unlawful on the part of the petitioners and the respondent requested the petitioners to remove the same but in vain, hence this application was filed.

5. The petitioners filed reply wherein it is averred that the land comprising Khata No.315min, Khatauni No.623min, Khasra Nos.1839 and 1841 measuring 0-25-88 hectares situate in Mohal Dharehrr, Mauza Deol, Tehsil Baijnath, District Kangra, is exclusively owned and possessed by the petitioners since the time of their predecessor-in-interest and the petitioners have constructed a passage therein to go to their fields. The petitioners have also installed an iron gate over the same in the year 2003 with a safety measure to save the crops from the stray animals. The Khasra No.1835 is recorded in the column of possession as 'Aabpashi Kunindgaan' but there does not exist any path in this Khasra Number.

6. It is further averred that the respondent has a separate passage which leads to his house on the Southern side and he carried the construction material by mules through this separate passage and he along with his family members is using the same. The respondent till 20.07.2008 used to park his car somewhere else but on the said date the petitioners had gone to Village Patti to attend the funeral of their close relative, the respondent by opening the gate drove his vehicle to his house through their lands. The petitioners protested this unlawful act of the respondent and put lock on the gate as the respondent has no right, title or interest in the said land of the petitioners.

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

7. The learned trial Court after going through the pleadings and the documents placed on record by each of the parties allowed the application and directed the petitioners/defendants to remove the lock placed on the gate and further restrained them from causing interference with the passage.

8. Aggrieved against such findings, the petitioners/defendants preferred an appeal before the learned lower appellate Court, who too after detailed findings dismissed the appeal. Undeterred, the petitioners have come up before this Court in this petition under Article 227 of the Constitution of India questioning the orders passed by the learned Courts below.

9. What factors have to be borne in mind while granting or refusing an injunction have been succinctly dealt with by the Hon'ble Supreme Court in ***M.Gurudas and others*** *versus* ***Rasaranjan and others (2006) 8 SCC 367*** in the following manner:-

> ***"18.While considering an application for injunction, it is well-settled, the courts would pass an order thereupon having regard to:***
>
> ***(i) Prima facie case***
>
> ***(ii) Balance of convenience***
>
> ***(iii) Irreparable injury.***

***19. A finding on 'prima facie case' would be a finding of fact. However, while arriving at such finding of fact, the court not only must arrive at a conclusion that a case for trial has been made out but also other factors requisite for grant of injunction exist. There may be a debate as has been sought to be raised by Dr. Rajeev Dhawan that the decision of House of Lords in American Cyanamid v. Ethicon Ltd. (1975) 1 All ER 504 would have no application in a case of this nature as was opined by this Court in Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.(1999) 7 SCC 1 and S.M. Dyechem Ltd. v. Cadbury (India) Ltd. (2000) 5 SCC 573, but we are not persuaded to delve thereinto.***

***20. We may only notice that the decisions of this Court in Colgate Palmolive (supra) and S.M. Dyechem Ltd (supra) relate to intellectual property rights. The question, however, has been taken into consideration by a Bench of this Court in Transmission Corpn. of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd. (2006) 1 SCC 540 stating: (SCC pp. 552-53, paras 36-40)***

> ***"36.The Respondent, therefore, has raised triable issues. What would constitute triable issues has succinctly been dealt with by the House of Lords in its well-known decision in American Cyanamid Co. v. Ethicon Ltd.(1975)1 All ER 504 holding: ( All ER p.510 c-d)***
>
> > ***'Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expression as 'a probability', 'a prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.'***
>
> ***It was further observed (All ER pp.511 b-c & 511j)***
>
> > ***'Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.***
>
> > * * *
>
> > ***The factors which he took into consideration, and in my view properly, were that Ethicon's sutures XLG were not yet on the market; so that had no business which would be brought to a stop by the injunction; no factories would be closed and no workpeople would be thrown out of work. They held a dominant position in the United Kingdom market for absorbable***

***surgical sutures and adopted an aggressive sales policy.'***

***37.We are, however, not oblivious of the subsequent development of law both in England as well as in this jurisdiction. The Chancery Division in Series 5 Software v. Clarke (1996) 1 All ER 853] opined: (All ER p.864 c-e)***

> ***'In many cases before American Cyanamid the prospect of success was one of the important factors taken into account in assessing the balance of convenience. The courts would be less willing to subject the plaintiff to the risk of irrecoverable loss which would befall him if an interlocutory injunction was refused in those cases where it thought he was likely to win at the trial than in those cases where it thought he was likely to lose. The assessment of the prospects of success therefore was an important factor in deciding whether the court should exercise its discretion to grant interlocutory relief. It is this consideration which American Cyanamid is said to have prohibited in all but the most exceptional case. So it is necessary to consider with some care what was said in the House of Lords on this issue.'***

***38. In Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd. (1999) 7 SCC 1, this Court observed that Laddie, J. in Series 5 Software (supra) had been able to resolve the issue without any departure from the true perspective of the judgment in American Cyanamid. In that case, however, this Court was considering a matter under Monopolies and Restrictive Trade Practices Act, 1969.***

***39.In S.M. Dyechem Ltd. v. Cadbury (India) Ltd. (2000) 5 SCC 573, Jagannadha Rao, J. in a case arising under Trade and Merchandise Marks Act, 1958 reiterated the same principle stating that even the comparative strength and weaknesses of the parties may be a subject matter of consideration for the purpose of grant of injunction in trade mark matters stating : (SCC p.591, para 21)***

> ***'21.....Therefore, in trademark matters, it is now necessary to go into the question of "comparable strength" of the cases of either party, apart from balance of convenience. Point 4 is decided accordingly.'***

***40.The said decisions were noticed yet again in a case involving infringement of trade mark in Cadila Health Care Ltd. v. Cadila Pharmaceuticals Ltd.(2001) 5 SCC 73."***

***21.While considering the question of granting an order of injunction one way or the other, evidently, the court, apart from finding out a prima facie case, would consider the question in regard to the balance of convenience of the parties as also irreparable injury which might be suffered by the plaintiffs if the prayer for injunction is to be refused. The contention of the plaintiffs must be bona fide. The question sought to be tried must be a serious question and not only on a mere triable issue.(See Dorab Cawasji Warden v. Coomi Sorab Warden and Others , (1990) 2 SCC 117, Dalpat Kumar v. Prahlad Singh(1992) 1 SCC 719, United Commercial Bank v. Bank of India (1981) 2 SCC 766, Gujarat Bottling Co. Ltd. v. Coca Cola Co. (1995) 5 SCC 545, Bina***

***Murlidhar Hemdev v. Kanhaiyalal Lokram Hemdev* (1999) 5 SCC 222 and Transmission Corpn. of A.P. Ltd (supra).”**

10. Now, reverting to the case in hand, it would be seen that the learned Courts below have discussed the pleadings and the documents in detail and it is only after that an injunction order has been passed in favour of the respondent/plaintiff. The learned Courts below on the basis of the revenue record have come to the conclusion that Khasra No.1836 had been purchased by the respondent, who thereafter had constructed a house over this land. Khasra No.1835 is classified as ‘Gair Mumkin Kuhal’ and this fact was recorded to have been admitted by both the parties. The respondent/plaintiff had constructed the path adjoining this ‘kuhal’ to go to his house and the path has been mentioned as ‘IJKL’ in the attached site plan. It is over this path that the respondent has installed an iron gate over Khasra No.1834. Though, the petitioners/defendants have disputed this position and claim to have installed the gate, but then they have not produced any document on the file which could show or prove this fact. Only a bill in the name of Parkash Chand showing that some gate was prepared has been produced.

11. On the contrary, the respondent/plaintiff has produced on record certificate issued by the vice President of Gram Panchayat, Dharer dated 01.11.2008 in which it has been mentioned that the respondent had started the construction work of his house about 11 years back and he had carried the construction material from the path in question through vehicle. He has also mentioned that the link road was open which was being used by the respondent/plaintiff and now the gate has been blocked. This was the only path available to the respondent/plaintiff for going to his house. No document whatsoever has been produced by the petitioners/defendants to rebut this document. It is on the basis of this certificate that the learned Courts below have concluded that the disputed path was in use for the last more than 11 years.

12. Besides, the aforesaid documents, compromise deed dated 21.07.2008 has also been produced on the file which was made in Civil Suit titled Trilok Chand versus Kolto Devi wherein also it has been admitted that there is house of the respondent on Khasra No.1836 and the path goes to his house from Khasra Nos. 1834, 1839 and 1838. It has been mentioned in this compromise that the respondent has installed an iron gate. The path on the spot is four metres wide which is being used by the respondent for going to his house for the last 11 years. The learned Courts below on the basis of such evidence have concluded that the documents produced by the respondent, prima facie, show that there is a disputed path which path alone is available to the respondent to go to his house from the main road over which the respondent had installed the gate by the side of the road but the petitioners had illegally put their lock over the same.

13. The other question required to be determined is as to what is the scope of interference with the orders concurrently passed by the learned Courts below in exercise of jurisdiction under Article 227 of the Constitution of India. In ***Surya Dev Rai*** *versus* ***Ram Chander Rai and others (2003) 6 SCC 675***, the Hon’ble Supreme Court discussed the entire case law and culled out the following principles:-

> ***“38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:-***
>
> > ***(1) Amendment by Act No.46 of 1999 with effect from 01.07.2002 in Section 115 of Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.***

***(2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by the CPC Amendment Act No. 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.***

***(3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction, i.e., when a subordinate court is found to have acted (i) without jurisdiction - by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction- by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.***

***(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step into exercise its supervisory jurisdiction.***

***(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied : (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.***

***(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.***

***(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal***

***to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.***

***(8) The High Court in exercise of certiorari or supervisory jurisdiction will not covert itself into a Court of Appeal and indulge in re-appreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.***

***(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."***

14. After culling out the aforesaid broad principles and working rules, it was cautioned that these should not be tied down in a strait-jacket formula or rigid rules. But then, it would be clear from the reading of conclusion of paragraph 38 (4) to (9) (supra) that mere error in exercise of jurisdiction by the learned Courts below is not sufficient to interfere in the absence of showing of failure of justice resulted therefrom; without which jurisdiction under Article 227 of the Constitution of India is not available.

15. Moreover, this Court in exercise of its supervisory jurisdiction will not convert itself into a Court of appeal and indulge in reappreciation and evaluation of evidence or correct errors in drawing inference or correct errors of mere formal and technical character.

16. Lastly, this Court cannot be unmindful of the fact that the suit is pending trial for the last more than six years having been instituted on 19.09.2008 and, therefore, at this stage, this Court has to act with due care, caution and circumspection to ensure that the rights of the parties are balanced. Even if, it is assumed that there is error calling for correction, I feel the same is capable of being corrected at the conclusion of the proceedings in an appeal preferred there against and entertaining a petition under the supervisory jurisdiction of this Court would obstruct the smooth flow and disposal of the suit. This is not one of those cases where this Court must intervene at this very moment.

17. In view of the aforesaid, I find no merit in this petition and the same is dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

18. However, taking into consideration that the suit has been instituted on 19.09.2008 and is on the dockets of the learned trial Court for the last more than six years, it is expected that the trial of the suit shall be expedited and the learned trial Court shall make every endeavour to decide the suit as expeditiously as possible and in no event later than **30th June, 2015.**

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**BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.**

Sanjay Sharma son of Om Parkash and others. ....Applicants.

Versus:

State of Himachal Pradesh and others. ...Non-applicants.

Cr.MMO No. 119 of 2014
Order reserved on:14.11.2014.
Date of Order: November 26, 2014.

**Code of Criminal Procedure, 1973-** Section 482- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420 and 120-B IPC read with Section 34 IPC- applicant claimed that matter was settled between the parties- complainant had received amount of Rs. 1,35,000/- on 15.5.2014 and had compromised the matter - accordingly, a prayer was made for quashing the FIR- held, that the offence punishable under Section 120-B IPC is non-compoundable offence- power to quash the FIR should be exercised sparingly and not to stifle the prosecution- offence of criminal conspiracy is against the society and to maintain public peace and tranquility, offence punishable under Section 120-B IPC cannot be allowed to be compounded even if the parties have compromised the same- petition rejected. (Para-6)

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|---|---|
| For the applicant: | Mr. Ashwani Sharma, Advocate. |
| For Respondent 1 to 3. | Mr.M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana Asstt. Advocate General. |
| For respondent No.4. | Mr. Arun Raj, Advocate |

The following judgment of the Court was delivered:

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**P.S.Rana, Judge.**

Present petition is filed under Section 482 of the Code of Criminal Procedure 1973 for quashing FIR No. 202 of 2013 dated 21.10.2013 registered under Sections 420, 120B read with Section 34 IPC at Police Station Sadar Shimla.

2. It is pleaded that FIR was registered at the instance of Maheswar Dutt Sharma. It is pleaded that complainant Maheswar Dutt Sharma and accused persons have amicably settled the dispute by way of executing compromise deed duly attested by Oath Commissioner in the presence of two independent witnesses on dated 15.5.2014. It is pleaded that complainant had received the amount of Rs. 1,35,000/- (One lac thirty five thousand) on dated 15.5.2014. It is further pleaded that offence punishable under Sections 420, 120B read with Section 34 IPC are compoundable offences under Section 320 Cr PC with prior permission of the Court. Prayer for acceptance of petition filed under Section 482 Cr PC sought.

3. Per contra reply and police report filed. There is recital in reply and police report that FIR No. 202 of 2013 dated 21.10.2013 has been registered against the applicants under Sections 420, 120B read with Section 34 IPC at Police Station Sadar Shimla District Shimla HP. There is further recital in police report that applicants joined the investigation of the case. There is further recital in police report that during the investigation accused persons did not disclose anything about cheque book, pass book and ATM cards. There is further recital in police report that recoveries of cheque book, pass book and ATM card are still to be recovered from the accused persons. There is further recital in police report that accused persons are residing outside the State of Himachal Pradesh.

There is further recital in police report that accused persons have given advertisement in the news paper 'Amar Ujala' that they would install telephone tower and they would also provide employment and hand some salary. There is further recital in police report that thereafter accused persons demanded an amount of Rs.1,35,000/- (one lac thirty five thousand) from the complainant and complainant paid Rs.1,35,000/- (one lac thirty five thousand) to the accused persons. It is further pleaded that criminal offence is committed against State and not against complainant Maheshwar Dutt Sharma individually. It is pleaded that offence under Section 120B is not compoundable criminal offence. There is further recital in police report that despite receiving an amount of Rs. 1,35,000/- (One lac thirty five thousand) by the accused persons, they did not execute the promise as has been assured by them. Prayer for rejection of application filed under Section 482 of the Code of Criminal Procedure sought. Per contra separate reply filed on behalf of complainant Maheshwar Dutt Sharma pleaded therein that he had received amount to the tune of Rs.1,35,000/- (One lac thirty five thousand) on dated 15.5.2014 and he has no objection if FIR No.202 of 2013 dated 21.10.2013 registered at Police Station Sadar Shimla District Shimla is quashed.

4. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of non-applicant.

5. Following points arise for determination in the present application.

(1) Whether petition filed under Section 482 of the Code of Criminal Procedure is liable to be accepted as mentioned in memorandum of grounds of application.

(2) Final Order.

**Finding upon point No.1**.

6. Submission of learned Advocate appearing on behalf of the applicants that a compromise has been executed inter se the parties and permission to compound the present case be granted and FIR be quashed are rejected being devoid of any force for the reason hereinafter mentioned. FIR has been registered against the applicants under Sections 420, 120B read with Section 34 IPC. Although offence under Section 420 IPC is compoundable but offence under Section 120B IPC is not compoundable. The allegations against the applicants are that applicants have committed cheating and dishonestly received an amount of Rs.1,35,000/- (One lac thirty five thousand) from complainant Maheswar Dutt Sharma and applicants have also committed criminal conspiracy. It is held that criminal offence under Section 120B IPC is non-compoundable offence. Case is in the stage of investigation. It was held in case reported in AIR 2014 SC 3352 titled Mosiruddin Munshi Vs. Md.Siraj and another that quashing of FIR at the stage of investigation is pre mature. It was held in case reported in 2014 (3) Him. L.R 1654 titled TT Siddarth Vs. State of HP and others that power to quash the FIR should not be exercised in order to stifle or scuttle a legitimate prosecution. It was held that power should be used sparingly and with abundant caution. Also see (2009) 1 SCC 516 titled R.Kalyani Vs. Janak C.Mehta and others and (2006) 6 SCC 736 titled Indian Oil Corporation Vs. NEPC India Ltd and others. Court is of the opinion that criminal offence under Section 120B criminal conspiracy by four accused in order to grab Rs.1,35,000/- (One lac thirty five thousand) is offence against State and State had not consented compromise deed dated 15.5.2014 and State had also not signed compromise deed dated 15.5.2014. Offence of criminal conspiracy is offence against society and effect public peace and tranquility. Court is of the opinion that payment of Rs.1,35,000/- (One lac thirty five thousand) on dated 15.5.2014 subsequently by accused persons to Maheshwar Dutt Sharma will

not automatically discharge the accused persons qua criminal offence under Sections 420, 120B read with Section 34 IPC which was alleged to be committed on dated 2.9.2013. It was held in case reported in 2011(3) SLJ 1537 titled Gulab Dass and others Vs. State of HP that criminal offences which are not compoundable under Section 320 of the Code of Criminal Procedure could not be allowed to be compounded even if there is settlement between complainant and accused. In the present case criminal offence under Section 120B IPC is not compoundable criminal case. In view of the above stated facts point No.1 is answered in negative against the applicants.

**Final Order**.

7. In view of the above finding application filed under Section 482 Cr. PC for quashing of FIR No. 202 of 2013 dated 21.10.2013 registered under Sections 420, 120B read with Section 34 IPC is rejected. Observation made hereinabove is strictly for the purpose of deciding the present application filed under Section 482 of the Code of Criminal Procedure and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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**BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.**

Sanjay Sharma son of Om Parkash. .....Applicant.

Versus:

State of Himachal Pradesh. ...Non-applicant.

Cr.MP(M) No.671 of 2014
Order reserved on:14.11.2014.
Date of Order: November 26 ,2014.

**Code of Criminal Procedure, 1973-** Section 438- An FIR for commission of offences punishable under Sections 420 and 120-B read with Section 34 IPC was registered against the petitioner- dispute was settled between the parties after the registration of the FIR- held, that while granting the bail, the Court has to keep in view nature and seriousness of offence, character of the evidence, circumstances which are peculiar to the accused, possibility of the presence of the accused at the trial or investigation, reasonable apprehension of witnesses being tampered with and the larger interests of the public or the State- Bail is rule and jail is the exception- bail could not be denied on the ground that cheque book, pass book and ATM Card are to be recovered from the applicant. (Para-6 to 8)

For the applicant: Mr. Ashwani Sharma, Advocate.
For Respondent. Mr.M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana Asstt. Advocate General.

The following judgment of the Court was delivered:

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**P.S.Rana, Judge.**

Present petition filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 202 of 2013 dated 21.10.2013 registered under Sections 420, 120B read with Section 34 Indian Penal Code at Police Station Sadar Shimla.

2. It is pleaded that during the pendency of the investigation the disputes between complainant Maheswar Dutt Sharma and applicant have been amicably settled down and a compromise has been executed inter se the complainant and applicant. It is further pleaded that offences punishable under Sections 420, 120B read with Section 34 IPC are compoundable offences under Section 320 Cr PC with prior permission of the Court. It is further pleaded that applicant will abide by the terms and conditions imposed by the Court. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. There is recital in police report that FIR No. 202 of 2013 dated 21.10.2013 has been registered against the applicant under Sections 420, 120B read with Section 34 IPC at Police Station Sadar Shimla District Shimla HP. There is further recital in police report that applicant joined the investigation of the case after the grant of interim anticipatory bail by the Court. There is further recital in police report that cheque book, pass book and ATM card are still to be recovered from the applicant. There is further recital in police report that if anticipatory bail application is allowed then applicant will threat the prosecution witness. There is further recital in police report that applicant is residing outside the State of Himachal Pradesh. Prayer for rejection of anticipatory bail application sought.

4. Court heard learned Advocate appearing on behalf of applicant and Court also heard learned Additional Advocate General appearing on behalf of non-applicant.

5. Following points arise for determination in the present anticipatory bail application.

(1) Whether anticipatory bail application filed under Section 438 of the Code of Criminal Procedure is liable to be accepted as mentioned in memorandum of grounds of bail application.

(2) Final Order.

**Finding upon Point No.1.**

6. Submission of learned Advocate appearing on behalf of the applicant that applicant will join investigation of the case as and when directed by the Investigating Officer and any condition imposed by the Court will be binding upon the applicant and on this ground anticipatory bail application be allowed is accepted for the reason hereinafter mentioned. It is well settled law that at the time of granting bail following factors are considered (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration. Also see AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh. It was held in case reported in 2012 Cri.L.J 702 titled Sanjay Chandra Vs. Central Bureau of Investigation that the object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period. It is well settled law that accused is presumed to be innocent till convicted by the competent Court of law. In the present case as per police report that cheque book, pass book and ATM card are to be recovered from the applicant. It is well settled law that anticipatory bail application should not be declined only on the ground that some recovery is to be effected from the accused persons. Court is of the opinion that if anticipatory bail application is

granted to the applicant at this stage then investigation of the case and the interest of general public will not be adversely effected.

7. Submission of learned Additional Advocate General appearing on behalf of the non-applicant that if anticipatory bail is granted to the applicant then applicant will induce and threat the prosecution witness and on this ground anticipatory bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that applicant will not induce and threat the prosecution witness in any manner. If the applicant will induce and threat the prosecution witness then prosecution will be at liberty to file application for cancellation of bail in accordance with law.

8. Another submission of learned Additional Advocate General appearing on behalf of the non-applicant that cheque book, pass book and ATM card are still to be recovered from the applicant and on this ground anticipatory bail application be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that bail could not be declined on the ground that some recovery is to be effected from the applicant. See. 1982 SLJ (HP) 415 titled Miss Nirmal Walia and another Vs State It is held that it is expedient in the ends of justice to allow anticipatory bail application filed by the applicant. Hence point No.1 is answered in affirmative.

**Final Order**

9. In view of the finding in point No.1 anticipatory bail application filed by the applicant is allowed in the ends of justice. In the event of arrest, the applicant will be released on bail on following terms and conditions on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of Investigating Officer. (i) That applicant will join investigation of case as and when called for by the Investigating Officer in accordance with law. (ii) That applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iii) That applicant will not leave India without prior permission of the Court. (iv) That applicant will not commit similar offence qua which he is accused. (v) That applicant will give his residential address to the Investigating Officer in written manner.(vi) That applicant will hand over cheque book, pass book and ATM card to the Investigating Officer forthwith. (vii) That applicant will attend proceedings of learned trial Court regularly. Application filed under Section 438 of the Code of Criminal Procedure 1973 disposed of. Observation made hereinabove is strictly for the purpose of deciding the present bail application and it shall not effect merits of case in any manner. All pending application(s) if any are also disposed of.

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**BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.**

Tilak Raj Sharma, son of late Sh. Harish Chand ....Applicant

Vs.

State of H.P. ....Non-applicant

Cr.MP(M) No. 1279 of 2014
Order Reserved on 13th November,2014
Date of Order 26th November, 2014

**Code of Criminal Procedure, 1973-** Section 438- An FIR was registered against the petitioner for the commission of offence punishable under

Section 306 read with Section 34 IPC - prima facie, the name of the applicant was mentioned in the suicide note of the deceased- custodial interrogation of the applicant is necessary keeping in view the gravity- grant of bail would affect the investigation adversely, therefore, application rejected. (Para- 7 to 9)

**Cases referred:**

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

The State Vs. Captain Jagjit Singh AIR 1962 SC 253.

Parvinderjit Singh and another vs. State (Union Territory Chandigarh) and another AIR 2009 SC 502

For the Applicant: Mr. Surinder Saklani, Advocate.
For the Non-applicant: Mr. M.L. Chauhan, Additional Advocate General, Mr. J.S. Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

***P.S. Rana, Judge***

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 182 of 2014 dated 31.10.2014 registered under Section 306/34 IPC in Police Station Dehra District Kangra Himachal Pradesh.

2. It is pleaded that FIR was registered against the deceased in theft case. It is pleaded that applicant is a heart patient and is in continuous treatment from Nehru Hospital PGI MER Chandigarh and even stunts were also inserted to the applicant and till date applicant is under treatment. It is further pleaded that deceased had obtained interim anticipatory bail from the Hon'ble High Court of H.P. Shimla but before the confirmation of ad-interim orders deceased committed suicide on dated 31.10.2014. It is further pleaded that there is some interpolation as name of applicant has been named without anything on part of applicant. It is further pleaded that deceased felt irritated against the applicant that he accompanied the boys who were named by deceased in theft case and this is only reason which irked the deceased against the applicant otherwise there is nothing against the applicant. It is pleaded that applicant will not abscond and will not tamper with prosecution evidence and will join the investigation. It is further pleaded that applicant will abide all conditions imposed by the Court. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. As per police report case under Section 306/34 IPC is registered against the applicant in P.S. Dehra vide FIR No. 182 of 2014 dated 31.10.2014. There is recital in police report that on dated 31.10.2014 statement of Shri Kushal Singh son of Rai Singh resident of VPO Gheori P.S. and Tehsil Dehra District Kangra (HP) was recorded. There is recital in police report that deceased Rai Singh son of Munshi Ram Age 52 years resident of VPO Gheori P.S. Dehra District Kangra H.P. was working as Secretary in the society. There is recital in police report that case under Section 420 IPC was registered and deceased was accused in that case. There is further recital in police report that deceased had obtained the anticipatory bail from Hon'ble High Court of H.P. Shimla which was pending. There is recital in police report that accused Dilbag Singh, accused Tilak Raj and accused Bhajan Singh were harassing the deceased since 10-15 days. There is also recital in police report that deceased committed suicide through rope of plastic. There is recital in police report that suicide note was also obtained. There is further recital in police report that post mortem of deceased was conducted at CHC Dehra and

cause of death was mentioned as asphyxia as a result of ante mortem hanging. There is further recital in police report that statements of prosecutions witnesses were also recorded. There is also recital in police report that report of RFSL is still awaited and in case applicant is released on anticipatory bail applicant will threat the prosecution witnesses and will influence the investigation. Prayer for rejection of anticipatory bail application is sought.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Additional Advocate General appearing on behalf of the State and also perused the record.

5. Following points arise for determination in this bail application:-

***Point No. 1***

Whether anticipatory bail application filed under Section 438 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of bail application?

***Point No. 2***

Final Order.

***Findings on Point No.1***

6. Submission of learned Advocate appearing on behalf of applicant that applicant is innocent and applicant did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the applicant that name of applicant figured in the suicide note due to ill-will and grudge against the applicant and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. The fact whether the name of applicant was mentioned in the suicide note due to ill-will or grudge cannot be decided at this stage. Same fact will be decided when the case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

8. Another submission of learned Advocate appearing on behalf of the applicant that applicant will abide all conditions imposed by the Court and on this ground anticipatory bail application filed by applicant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In present case there is prima facie suicide note against the applicant and case is at the initial stage of investigation. Court is of the opinion that custodial interrogation of applicant is essential in present case in view of the gravity of criminal offence registered against the applicant under Section 306 IPC. Court is of the opinion that if anticipatory bail is granted to the applicant at this stage then investigation of the case will be adversely affected. Court is also of the opinion that if anticipatory bail is granted to the applicant at this stage then interest of State and general public will also be adversely affected.

9. Submission of learned Additional Advocate General appearing on behalf of the State that investigation is in initial stage and allegations made against the applicant are grave in nature qua commission of criminal offence

under Section 306 IPC and if applicant is released on anticipatory bail at this stage investigation will be adversely affected is accepted for the reasons hereinafter mentioned. It was held in case reported in ***AIR 2009 SC 502 titled Parvinderjit Singh and another vs. State (Union Territory Chandigarh) and another*** that order under Section 438 Cr.P.C. is neither a passport to the commission of crimes nor a shield against any kind of accusations.

10. In view of gravity of offence under Section 306 IPC and in view of the fact that investigation is at the initial stage and in view of suicide note against the applicant it is held that custodial investigation is essential in present case. Point No.1 is answered in negative.

***Point No. 2***

Final Order

11. In view of my findings upon point No. 1 anticipatory bail application filed under Section 438 Cr.P.C, is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

**********

**BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.**

Bakshi Ram son of Achharu resident of village and PO Ropari, Tehsil Barsar,District Hamirpur H.P. ....Appellant/Plaintiff

Versus

Mandro Devi widow of Karam Chand and others Resident of Tika Ropri Tappa Lohdar, Tehsil Barsar, District Hamirpur HP

....Respondents/Defendants

RSA No. 147 of 2003
Judgment Reserved on 13th November,2014
Date of Judgment: 27th November, 2014

**Himachal Pradesh Tenancy and Land Reforms Act, 1972-** Copy of jamabandi for the year 1984-85 shows B to be the owner to the extent of 1/3rd share, and in possession as tenant of 2/3rd share- one L is shown to be the owner of remaining 2/3rd share- held, that entries are not based upon the order of any competent authority, therefore, it is void ab-initio- a person cannot acquire the status of ownership as well as status of tenancy simultaneously. (Para-10)

**Cases referred:**

Sant Ram Nagina Ram vs. Daya Ram Nagina Ram and others AIR 1961 Punjab 528

Lal Chand and others vs. Pala 1998 (2) SLJ 1526 (H.P.)

Durga vs. Milkhi Ram 1969 Punjab Law Journal (Apex Court of India Full Bench)

Jai Kishan and others vs. Saran Dass and others 1998(1) Shimla Law Cases page 398

Jattu Ram vs. Hakam Singh and others 1994(1) S.L.J. 68 (SC)

Guru Amarjit Singh vs. Rattan Chand and others, AIR 1994 SC 227 DB

Chander Bhan vs. Hari Ram and another, 1996(1) SLJ 696 (P&H)

Milkha vs. Makhan, 2009(1) SLJ (P&H) page 205

Savtri Devi and Santa 1981 ILR 563 (HP)

Om Parkash vs. State of H.P. AIR 2001 HP 18
Santosh Hazari vs. Purushottam Tiwari (2001)3 SCC 179
Krishan Chand vs. Mohinder (2008)2 S.L.J. 1145 (HP)
Madhukar and others vs. Sangram and others AIR 2001 SC 2171
State of Rajasthan vs. Harphool Singh (dead) through his LRs (2000)5 SCC 652
United India Insurance Co. Ltd. vs. Kanwal Nain Sachdeva and others (1999)9 SCC 193 (1969) 71 P.L.R. Delhi High Court
Lalagar vs. Shiv Ram, Himachal Bench at Shimla Vol. LXXI-1969 page 276
Karnataka Board of Wakf vs. Anjuman-E-Ismail Madris-Un-Niswanm AIR 1999 SC 3067
Bismillah Begum (dead) through LRs. vs. Rahmatullah Khan (dead) through LRs AIR 1998 SC 970

For the Appellant: Mr. K.D. Sood, Sr. Advocate with Mr. Mukul Sood, Advocate.
For the Respondents: Mr. K.S. Kanwar, Advocate.

The following judgment of the Court was delivered:

***P.S. Rana, Judge.***

Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure by the appellant against the judgment and decree dated 22.2.2003 passed by learned Additional District Judge Hamirpur H.P. in Civil Appeal No. 26/95 (RBT) No. 133 of 2002 titled Bakshi Ram vs. Indri Devi and others and against the judgment and decree passed by learned Civil Judge Hamirpur in Civil Suit No. 96/89 titled Bakshi Ram vs. Indri Devi and others.

2. Brief facts of the case as pleaded are that Shri Bakshi Ram plaintiff filed a suit for declaration with consequential relief of injunction and in alternative relief of possession pleaded therein that plaintiff is tenant over 2/3rd share of land comprised in Khata No. 23 Khatauni No. 23 Khasra Nos. 13, 14, 15, 16, 20 and Khata No. 23 Khatauni No. 25 Khasra Nos. 5, 18 and 19 situated in Suphan Tappa Lohdar Tehsil Barsar District Hamirpur H.P. as per jamabandi for the year 1984-85. It is pleaded that land was under the tenancy of plaintiff Bakshi Ram since long time and deceased defendant Lachhman through his LRs has no concern with suit land. It is pleaded that deceased defendant Lachhman was very aggressive and quarrelsome person and he threatened to reap the crop from the suit land forcibly sown by the plaintiff. It is pleaded that plaintiff requested the deceased defendant Lachhman several time to accept and acknowledge the status of plaintiff as tenant over suit property but he did not accept the request of plaintiff. It is further pleaded that relief as sought in relief clause of plaint be granted to plaintiff.

3. Per contra written statement filed on behalf of contesting defendant pleaded therein that suit is not maintainable and plaintiff is estopped from filing the suit by his act and conduct. It is pleaded that plaintiff has no cause of action. It is further pleaded that suit land is joint between the parties and entry of non-occupancy tenant is wrong and contrary to law in favour of the plaintiff. It is pleaded that plaintiff was wrongly entered as non-occupancy tenant upon 2/3rd share under deceased defendant Lachhman. It is pleaded that plaintiff and defendant are co-owners of suit land and further pleaded that plaintiff has only 1/3rd share on the suit land. It is pleaded that deceased defendant through his LRs is in settled possession of 2/3rd share at the spot. It is pleaded that defendant has also filed a correction application before the LRO Barsar for correction of Khasra Girdawari of suit property and same was allowed by learned Land Reforms Officer vide case No. 109/92 titled Smt. Indri Devi widow of Lachhman and others vs. Shri Bakshi Ram on dated 17.7.1993 w.e.f.

Kharif 1992. Prayer for dismissal of suit sought. During pendency of suit sole defendant Lachhman died and his LRs brought on record.

4. As per the pleadings of parties learned trial Court framed following issues on dated 7.9.1989:-

1. Whether the plaintiff is tenant in possession of 2/3 share of suit land as alleged?…OPP
2. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction? …OPP
3. Whether the suit is not maintainable in present form? ……OPD
4. Whether the plaintiff is estopped from filing the suit by his act and conduct? ..OPD
5. Whether the plaintiff has not cause of action? …..OPD
6. Whether entries in the revenue record showing plaintiff to be tenant of 2/3rd share are wrong and illegal? ….OPD.
7. Relief.

5. On dated 23.1.1995 learned trial Court decided issues Nos. 1 and 2 in negative and learned trial Court held that issues No. 3, 4 and 5 became redundant. Learned trial Court decided issue No. 6 in favour of the defendant and suit filed by the plaintiff was dismissed.

6. Feeling aggrieved against judgment and decree passed by learned trial Court dated 23.1.1995 appellant Bakshi Ram preferred Civil Appeal No. 26/1995 (RBT 133/02) titled Bakshi Ram vs. Indri Devi and others and learned Additional District Judge Hamirpur (H.P.) on dated 22.2.2003 dismissed the appeal filed by Bakshi Ram.

7. Thereafter feeling aggrieved by judgments and decrees passed by learned trial Court and affirmed by learned first Appellate Court appellant Bakshi Ram filed present Regular Second Appeal and Hon'ble High Court admitted present appeal on the following substantial questions of law on dated 22.4.2003:-

1. Whether the findings of the Courts below are perverse, based on misreading of oral and documentary evidence and disregard to the jamabandi entries Ext.P1 to Ext.P3 and statements of DW2 and DW3 which have vitiated the findings?
2. Whether the judgment of the Additional District Judge which was a court of fact is vitiated for not examining critically the oral and documentary evidence and is not a judgment within Order 20 Rule 5 CPC and is liable to be set aside?
3. Whether the judgments of the Courts below are vitiated for non-consideration of evidence and the pleas of the appellant and the judgment of the District Judge deserves to be set aside in view of the decision in AIR 2001 HP 18?

8. Court heard learned Advocates appearing on behalf of the parties and also perused the entire record carefully.

***Evidence adduced by parties***

9. PW1 Bakshi Ram has stated that area of suit land is 6 kanals and 7 marlas and he is tenant over the suit land. He has stated that his father Achroo was inducted as tenant. He has stated that deceased defendant Lachhman has inducted his father Achroo as tenant. He has stated that his father Achroo died in the year 1983 and he has further stated that he used to

pay rent to the deceased defendant Lachhman. He has stated that his father Achroo used to pay rent of 1/3 share of suit land to the deceased defendant Lachhman. He has stated that plaintiff is in settled possession of suit land since 1965 and he is cultivating the land. He has stated that he is Kabir Panthi by caste. He has further stated that defendant is Rajput by caste and in the year 1965 the family partition was effected. He has stated that he is not co-sharer in the suit land but is tenant over the suit property. He has stated that he personally did not pay any rent to the deceased defendant Lachhman. He has stated that there was no custom of obtaining rent receipt. He has further stated that there is no eye witness of payment of rent. He has stated that his father Achroo had purchased the land in the year 1965 measuring 5 kanals. He has admitted that correction application was filed before the Land Reforms Officer. He has denied suggestion that Field Kanungo had visited the spot. He has stated that consolidation was effected in the village. He has denied suggestion that defendant is in possession of 11 kanals of land at the spot. Plaintiff tendered documents Ext.P1 to Ext.P3 in evidence and closed the evidence in affirmative. Plaintiff did not adduce any independent oral evidence in support of induction of tenancy in suit property.

9.1. DW1 Karam Singh has stated that suit land is 15 kanals and further stated that deceased defendant through his LRs is in settled possession of 10 kanals of land and plaintiff is in possession of 5 kanals of land. He has stated that contesting defendants have cultivated the land and sown wheat crop. He has stated that Land Reforms Officer has decided that 2/3rd share of land would remain in possession of contesting defendants and 1/3rd share of land would remain in possession of plaintiff. He has stated that plaintiff and his father were not inducted as tenants at any point of time. He has stated that no tenancy rent was received from the plaintiff or predecessor-in-interest at any point of time. He has denied suggestion that plaintiff is in cultivating possession of suit property and also denied suggestion that plaintiff is paying tenancy rent. He has also denied suggestion that plaintiff is in possession of entire suit property at the spot.

9.2 DW2 Kashmir Singh has stated that parties are known to him and he has seen the suit property. He has stated that contesting defendants are in possession of 10 kanals of land and plaintiff is in possession of 5 kanals of land. He has stated that he has seen the possession of parties since his childhood. He has stated that plaintiff is not tenant in the suit land and further stated that both plaintiff and deceased defendant through his LRs are owners of the suit property. He has stated that deceased defendant did not induct the father of plaintiff as tenant at any point of time. He has stated that Land Reforms Officer also visited the spot and further stated that at the spot Land Reforms Officer had recorded the statements of witnesses.

9.3 DW3 Bhagwan Dass has stated that parties are known to him and he has seen the suit property. He has stated that he was Up-Pardhan of Panchayat and plaintiff and defendant are residents of his Panchayat. He has stated that 10 kanals of land is in settled possession of contesting defendants and remaining land is in possession of plaintiff. He has stated that deceased defendant did not induct plaintiff's father as tenant at any point of time and further stated that contesting defendants have sown the wheat crop upon 10 kanals of land. He has denied suggestion that plaintiff is tenant over the suit property. Defendant tendered in evidence documents Ext.D1 and Ext.D2 and closed the evidence. Plaintiff did not adduce any rebuttal evidence.

***Findings upon Substantial Question of law No.1 framed by Hon'ble High Court:-***

10. Submission of learned Advocate appearing on behalf of the appellant that findings of learned trial Court and learned first Appellate Court are perverse and based on misreading of oral and documentary evidence i.e.

jamabandi entries Ext.P1 to Ext.P3 and statements of DW2 and DW3 is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the entries of jamabandi Ext.P1 to Ext.P3 and Court has also carefully perused the statements of DW2 and DW3. Document Ext.P1 is jamabandi for the year 1984-85 relating to suit property. In the ownership column of jamabandi Ext.P1 placed on record name of Bakshi Ram son of Achroo Ram has been recorded as 1/3rd share and name of Lachhman son of Nihala has been recorded as 2/3rd share. In cultivation column of jamabandi for the year 1984-85 it has been shown that Bakshi Ram is in cultivating possession of 1/3rd share as owner of suit property and is recorded as non-occupancy tenant qua 2/3rd share of Lachhman. It is proved on record that suit land is joint inter se the parties and same has not been partitioned in accordance with law. Ext.P1 and Ext.P2 are the same documents i.e. jamabandi for the year 1984-85 and same entries have been recorded in both documents as mentioned above. Ext.P3 is jamabandi for the year 1973-74 and Achroo son of Kharkoo has been shown as owner of 1/3rd share in suit property and Lachhman has been shown as owner of 2/3rd share in suit property in ownership column. In possession column of Jamabandi for the year 1973-74 Achroo has been shown as non-occupancy tenant over 2/3rd share of Lachhman son of Nihala in join immovable suit property and has been shown as possession of 1/3rd share as co-sharer. It is well settled law that a person cannot acquire two status at the same time i.e. status of ownership and status of tenancy in joint immovable property. In jamabandi Ext.P3 for the year 1973-74 Achroo father of plaintiff has been shown as owner of 1/3rd share in the ownership column of suit property and Shri Lachhman has been shown as owner of 2/3rd share and in cultivation column it has been shown that Achroo Ram is in possession as tenant qua share of Lachhman. It is proved on record that suit land is joint inter se the parties. It is held that a person cannot acquire two status at the same time in joint immovable property simultaneously i.e. (1) Status of ownership (2) Status of tenancy. Right and liability of a co-owner has been defined in ruling ***AIR 1961 Punjab 528 titled Sant Ram Nagina Ram vs. Daya Ram Nagina Ram and others.*** Operative part is quoted. (1) A co-owner has an interest in the whole property and also in every parcel of it. (2) Possession of the joint property by one co-owner is in the eye of law possession of all even if all but one are actually out of possession. (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all. (4) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property. (5) Every co-owner has a right to use the joint property in a husband like manner. There is no order of competent authority on record in order to prove that plaintiff Bakshi Ram or Achroo Ram father of plaintiff or Kharkoo grandfather of plaintiff were ordered to be inducted as tenant under co-owner Lachhman Dass. Entries of tenancy mentioned in documents Ext.P1 to Ext.P3 are not based upon any order of competent authority of law. It is well settled law that any entry in the revenue record which is recorded without any order of competent authority of law is void abinitio. It was held in case reported in ***1998(2) SLJ 1526 (H.P.) titled Lal Chand and others vs. Pala*** that change in revenue entries without any competent authority automatically loose legal entity. ***(Also see 1969 Punjab Law Journal (Apex Court of India Full Bench) titled Durga vs. Milkhi Ram. Also see 1998(1) Shimla Law Cases page 398 titled Jai Kishan and others vs. Saran Dass and others.)*** Hence it is held that entry of Achroo Ram as non-occupancy tenant under Lachhman is void abinitio entry because same was recorded without order of any competent authority of law in joint immovable property. It was held in case reported in ***1994(1) S.L.J. 68 (SC) titled Jattu Ram vs. Hakam Singh and others*** that ----jamabandi entries are only for fiscal purpose and they did not create any title in favour of any party. It was held in case reported in ***AIR 1994 SC 227 DB titled Guru Amarjit Singh vs. Rattan Chand and others*** that entries in jamabandi are not proof of title. Hence it is

held that jamabandis entries Ext.P1 to Ext.P3 are not helpful to the plaintiff qua tenancy in any manner and it is held that entries of jamabandis Ext.P1 to Ext.P3 did not give any status of tenant to the plaintiff. Even plaintiff did not produce any receipt of payment of rent on record and plaintiff also did not examine any independent witness in order to prove the induction of tenancy in his favour or in favour of father of the plaintiff namely Achroo or in favour of grandfather of plaintiff namely Kharkoo qua 2/3rd share of deceased Lachhman in joint immovable property. Even no document of any family partition duly signed by Lachhman placed on record. Even family partition not recorded in revenue record. Even there is no evidence on record in order to prove that family partition was sanctioned by revenue officer. It was held in case reported in ***1996(1) SLJ 696 (P&H) titled Chander Bhan vs. Hari Ram and another*** that if family partition not sanctioned by revenue officer same could not be considered final family partition. ***(Also see 2009(1) SLJ (P&H) page 205 titled Milkha vs. Makhan.)***

11. Another submission of learned Advocate appearing on behalf of the appellant that in view of testimonies of DW2 and DW3 placed on record tenancy in favour of the plaintiff is proved is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimonies of DW2 and DW3 placed on record. DW2 has stated that defendant has filed correction application before LRO because plaintiff was tenant. It is well settled law that testimony of a witness should be read as a whole and should not be read in isolation. Court has perused the testimony of DW2 carefully. DW2 has specifically stated that plaintiff or his father was not inducted as tenant over the suit land at any point of time and DW2 has also stated in positive manner that no rent was paid by plaintiff to the deceased defendant at any point of time. In view of contradictory testimony of DW2 in examination in chief and cross examination it is not expedient in the ends of justice to grant status of tenant to the plaintiff in present suit on the contradictory testimony of DW2 in examination in chief and in cross examination.

12. Submission of learned Advocate appearing on behalf of the appellant that in view of testimony of DW3 that plaintiff was tenant over the suit land in cross examination this regular second appeal be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has perused the testimony of DW3 carefully. It is well settled law that evidence of a witness should not be read in isolation but should be read as a whole as per Indian Evidence Act because as per Indian Evidence Act evidence is complete when examination in chief and cross examination is completely recorded. In examination in chief DW3 has specifically stated that deceased defendant was in settled possession of 10 kanals of land and he has further stated that plaintiff is in settled possession of 5 kanals of land. He has also specifically stated in examination in chief that deceased defendant did not induct any person as tenant at any point of time. DW3 has also stated in positive manner in examination in chief that deceased defendant during his life time has sown wheat crop over 10 kanals of suit land. In view of conflicting testimony of DW3 in examination in chief and cross examination it is not in the ends of justice to grant the status of tenancy to the plaintiff on the testimony of DW3 in cross examination. Hence point No.1 of substantial question of law is answered in negative against the appellant.

***Findings upon Substantial question of law No. 2 framed by Hon'ble High Court.***

13. Submission of learned Advocate appearing on behalf of appellant that findings of learned District Judge which was a court of fact is vitiated for not examining critically oral and documentary evidence and same is not a judgment as mentioned under Order 20 Rule 5 CPC is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has perused the

judgment passed by learned first Appellate Court carefully. First appeal was filed from original decree under Section 96 of Code of Civil Procedure 1908 and as per Order 41 of Code of Civil Procedure 1908. As per Order 41 Rule 31 of Code of Civil Procedure 1908 the judgment of appellate Court shall be in writing and shall state (1) Points for determination. (2) Decision thereon (3) Reason for decision (4) where the decree appealed from is reversed or varied the relief to which the appellant is entitled. In present case learned first Appellate Court has framed the point for determination in para 6 of judgment and learned Appellate Court has also mentioned the decision in para 13 of relief clause and in other paras learned first Appellate Court has given reasons in brief manner. It is held that reasons given in brief manner by learned first Appellate Court in its judgment has not caused any miscarriage of justice to the appellate because learned first Appellate Court has affirmed the judgment and decree passed by learned trial Court. It is held that judgment of first Appellate Court should state ingredients mentioned in Order XLI Rule 31 of Code of Civil Procedure 1908. Point No. 2 of substantial question of law is decided in negative against the appellant.

***Findings upon Substantial question of law No. 3 framed by Hon'ble High Court:-***

14. Submission of learned Advocate appearing on behalf of the appellant that findings of learned first Appellate Court are vitiated for non-consideration of evidence and pleas of the appellant in view of ruling reported in AIR 2001 HP 18 titled Om Parkash vs. State of H.P. Court has perused the judgment reported in AIR 2001 SC 18 titled Om Parkash vs. State of H.P. carefully. Facts of present case and facts of case reported in AIR 2001 HP 18 are distinguishable. Learned First Appellate Court had given brief reasons in its judgment. It is held that brief reasons given by learned first Appellate Court in judgment had not caused any miscarriage of justice to appellant because induction of tenancy is not proved on record. It is well settled law that tenancy is a bilateral agreement and induction of tenancy should be proved by way of positive, cogent and reliable evidence when tenancy is disputed by adverse party.

15. Submission of learned Advocate appearing for the appellant that predecessor of plaintiff was also recorded as tenant as per jamabandi for the year 1955-56 and he has acquired proprietary rights qua entire share of Lachhman Dass as per Section 104 of Tenancy and Land Reforms Act is rejected being devoid of any force for the reasons hereinafter mentioned. In present case it is proved on record that father of the plaintiff namely Achroo Ram has purchased 1/3rd share of suit land along with house for a consideration amount of Rs. 2000/- (Rupees two thousand only) as per sale deed Ext.DY dated 3.10.1964 placed on record and he became co-owner of 1/3rd share of suit property after purchase of portion of suit land from Mola Ram. It is proved on record that Achroo Ram has acquired 1/3rd ownership title of share in ownership through testamentary document Ext.DY i.e. sale deed placed on record over the suit land on dated 3.10.1964. It is proved on record that father of plaintiff became co-owner of suit property through testamentary document Ext.DY placed on record after sale deed dated 3.10.1964 for the first time. There is no evidence on record in order to prove that father of plaintiff Achroo Ram or grandfather of plaintiff namely Kharkoo Ram were recorded as tenant over suit property even prior to 3.10.1964. Court has also perused jamabandi for the year 1955-56 Ext.DX placed on record. In jamabandi Ext.DX placed on record in ownership column name of Lahnoo son of Inder qua 1/3rd share has been shown as mortgagor and name of Ganga son of Chowdry has been shown as mortgagee and Lachhman predecessor in interest of defendants has been shown as owner of 2/3rd share in suit property. In possession column Lahnoo mortgagor has been shown as non-occupancy tenant under mortgagee and under co-sharer Lachhman. There is no evidence on record in order to prove

that Lahnoo Ram was ancestor of plaintiff Bakshi Ram or father of plaintiff namely Achroo Ram or grandfather of plaintiff Kharkoo as per jamabandi Ext.DX for the year 1955-56 placed on record. It is proved that vide mutation No. 78 property of Lehnu after his death was devolved upon Mola Ram and mutation was attested on dated 9.4.1961. There is also recital in jamabandi for the year 1955-56 Ext.DX in remarks column that vide mutation No. 81 the mortgaged land of 1/3rd share of Lehnu was redeemed on dated 20.8.1962. There is further recital in Ext.DX jamabandi for the year 1955-56 placed on record that vide mutation No. 84 Mola Ram has executed a sale deed in favour of Achroo Ram father of plaintiff qua 05 kanals one marlas of land through sale deed dated 3.10.1964. It is proved on record that Achroo Ram father of plaintiff became owner of suit property for the first time after purchase of 1/3rd share from Mola Ram on dated 3.10.1964. Prior to 1964 there is no entry of tenancy in favour of plaintiff Bakshi Ram or Achroo Ram father of plaintiff or in favour of Kharkoo grandfather of plaintiff. Father of plaintiff namely Achroo son of Kharkoo had acquired only proprietary rights of 1/3rd share in suit property as per sale deed Ext.DY on dated 3.10.1964 for the first time because there is recital in sale deed Ext.DY dated 3.10.1964 that Achroo father of plaintiff would get only 1/3rd share in suit property. There is no reference of any tenancy rights in sale deed Ext.DY dated 3.10.1964 in favour of Achroo father of plaintiff. Hence it is held that father of plaintiff Achroo had acquired only ownership rights in the suit property to the extent of 1/3rd share only on the basis of testamentary document i.e. sale deed Ext.DY dated 3.10.1964. It is held that plaintiff or father of plaintiff namely Achroo or grandfather of plaintiff Kharkoo did not acquire any tenancy rights over suit property qua 2/3rd share of Lachhman or his LRs. Facts of case laws cited by learned counsel appearing for the appellant i.e. ***1981 ILR 563 (HP) titled Savtri Devi and Santa, AIR 2001 HP 18 titled Om Parkash vs. State of H.P., (2001)3 SCC 179 titled Santosh Hazari vs. Purushottam Tiwari (2008)2 S.L.J. 1145 (HP) titled Krishan Chand vs. Mohinder, AIR 2001 SC 2171 titled Madhukar and others vs. Sangram and others, (2000)5 SCC 652 titled State of Rajasthan vs. Harphool Singh (dead) through his LRs, (1999)9 SCC 193 titled United India Insurance Co. Ltd. vs. Kanwal Nain Sachdeva and others and (1969) 71 P.L.R. Delhi High Court Himachal Bench atShimla Vol. LXXI-1969 page 276 titled Lalagar vs. Shiv Ram*** and facts of present case are entirely different. Hence case law cited by learned Advocate appearing on behalf of appellant are not applicable in present case and are distinguishable. It was held in case reported in ***AIR 1999 SC 3067 titled Karnataka Board of Wakf vs. Anjuman-E-Ismail Madris-Un-Niswanm*** that High Court should not interfere with the concurrent finding of fact in routine and casual manner by substituting its subjective satisfaction in place of lower Court. It was held in case reported in ***AIR 1998 SC 970 titled Bismillah Begum (dead) through LRs. vs. Rahmatullah Khan (dead) through LRs*** that findings of fact arrived by Court below are binding in second appeal. In view of the fact that Achroo Ram father of plaintiff or Kharkoo grandfather of plaintiff were not recorded as non-occupancy tenant over the suit land as per jamabandis placed on record prior to 1964 when Achroo Ram father of plaintiff became co-owner of suit property to the extent of 1/3rd share on the basis of sale deed dated 3.10.1964 point No. 3 of substantial question of law framed by Hon'ble High Court of H.P. is answered in negative against the appellant.

16. In view of above stated facts appeal is dismissed. Judgment and decree passed by learned trial Court in Civil Suit No. 96 of 1989 decided on 23.1.1995 and judgment and decree passed by learned Additional District Judge Hamirpur in Civil Appeal No. 26/1995 (RBT 133/02) decided on 22.2.2003 are affirmed. Sale deed Ext.DY dated 3.10.1964 will form part and parcel of decree sheet. Decree shee be prepared strictly as per provisions of Section 100 of Code of Civil Procedure 1908. No order as to costs. Record of learned trial Court and learned first Appellate Court be sent back forthwith along with certified copy of

this judgment and decree sheet prepared as per provision of Section 100 of Code of Civil Procedure. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

**********

**BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.**

The Baghal Land Loosers Transport Co-operative Societies Ltd. and others ...Petitioners

*Versus*

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

CMPMO No. 362 of 2014.
Judgment reserved on: 21.11.2014
Date of decision: November 27, 2014.

**Constitution of India, 1950,** Article 226- H.P. Co-operative Act- Section 94- A revision is not maintainable before the State Government against an administrative order passed by registrar. (Para-7)

**Constitution of India, 1950-** Article 226- The act of drawing of the election program and the act of dividing the area of operation into zones cannot be termed to be an administrative act- they would be termed as quasi judicial function which are to be performed after hearing parties or making an inquiry- such decision would affect the rights and obligations of the parties. (Para-11 and 12)

**Case referred:**
State of Maharashtra and others etc.etc. vs. Saeed Sohail Sheikh etc. AIR 2013 Supreme Court 168

For the Petitioners : Mr. Sanjeev Bhushan, Advocate.
For the Respondents : Mr. V.K.Verma, Ms. Meenakshi Sharma and Mr. Rupinder Singh, Additional Advocate Generals, for respondents No. 1 to 3.
Mr. J.L. Bhardwaj, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

**Tarlok Singh Chauhan, Judge**

This petition under Article 227 of the Constitution of India is directed against the order dated 31.10.2014 passed by respondent No.2, whereby he ordered the rectification of the zones as approved by respondent No.3 vide order dated 18.10.2014 with the prayer to quash and set-aside the same being illegal and without jurisdiction.

2. The facts giving rise to the present petition are that at the end of the completion of the term of the committee of the petitioner No.1-Society, a schedule was prepared and after preparing the zones, which were prepared after calling the objections, the election programme was sent to respondent No.3 for approval. Certain persons filed objections before respondent No.3, who after hearing the concerned parties, decided the objections and gave his final approval for conducting the elections vide order dated 18th October, 2014. He also appointed the Returning Officer, Registration Officer and Election Manager.

3. Respondents No. 4 to 10 filed revision petition under Section 94 of the Himachal Pradesh Co-operative Societies Act (for short 'Act') before

respondent No.2 seeking rectification of the zones by challenging the aforesaid order of respondent No.3. The revision petition was allowed by respondent No.2 on 31.10.2014.

The petitioner has assailed this decision as being unjust, unfair and without jurisdiction.

4. During the pendency of the petition, an application for amendment of the petition was preferred wherein the following prayer was sought to be incorporated:

> *"and also the order dated 10.11.2014 may very kindly be ordered to be quashed and set aside by ordering the respondents to restore the zones as these were approved by AR, CS originally".*

5. I have heard learned counsel for the parties and have gone through the records of the case carefully.

6. The petitioner though not in many words has questioned the jurisdiction of respondent No.2 to entertain the revision petition, however, during the course of argument, he vehemently argued that the revision petition was not maintainable as the order passed by respondent No.3 was purely an administrative order against which no revision was competent. In support of his proposition, learned counsel for the petitioner has relied upon the Division Bench judgment of this Court in ***CWP No. 533 of 2000 titled K.D.Sharma and others*** vs. ***Financial Commissioner-cum-Secretary (Co-operation) to the Govt. of H.P. and others,*** decided on 6th June, 2001, wherein the Court held:

> ***"6. On the other hand, the Bank in its reply has pointed out various infirmities. It has been pointed out that the Registrar had no powers to review his earlier order dated 8.9.1998 passed by his predecessor without the bank making any request in this regard. The Bank has also tried to find fault not only in the decree and judgment dated 16.1.1997 but also in its own decisions and actions taken for the appointment of the petitioners as Mobile Guides. But in the present petition the controversy is limited to the extent whether the revision petition filed by the Bank against the order dated 27.6.2000 passed by the Registrar before respondent No. 1 is maintainable under Section 94 (1) of the Act or not? Reference to Section 94 of the Act is desirable. It is:-***
>
> > ***"94. Review and Revision: (1) The State Government except in a case in which an appeal is preferred under Section 93 may call for and 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 of 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."***

***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. Biswеswar 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."***

7. There is no quarrel with the exposition of law laid down by the Division Bench in the aforesaid case because there the Court was dealing with an order passed by the Registrar which was purely an administrative order. However, a bare perusal of the underlined portion would clearly go to show that this Court has clearly held that 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 order are subjected to revision by the State. The perusal of Section 93 of the Act would show that number of the orders passed by the Registrar in exercise of his powers under various provisions of the Act are made appealable but all orders passed or actions taken by the Registrar in discharge of his

statutory functions may not attract the applicability of the revision or review under Section 94 of the Act. Thus, where only an administrative power is exercised by the Registrar, a revision petition would not be maintainable before the State Government. I may emphasis at the cost of repetition that most of the functions of the Registrar, in terms of the Act and Rules are in the sphere of administration and governance with few additional duties having quasi-judicial character.

8. Rule 37 of the Himachal Pradesh Co-operative Societies Rules, 1971 (for short 'Rules') provides for election of the Committee and reads thus:

> ***"37. Election of Committee – Notwithstanding anything contained in the foregoing rules, the members of the managing committee of a Co-operative Society shall be elected in accordance with the rules given in Appendix 'A'. Appendix 'A' contends the Rule of election of the Committee wherein Rule-4 reads thus:***
>
> ***"4. Election – (1) The Manager shall draw up a detailed programme of election in accordance with the instructions issued by the Registrar from time to time.***
>
> ***(2) The Manager , shall, when so required by the Registrar for the purpose of such election, divide the area of operation of the co-operative society into such number of zones, as there are members to be elected, or into such lesser number as may be specified by the Registrar and communicate the zones so constituted to the Registrar for his prior approval. The members residing in the zone concerned shall from the general body for purpose of election of the Committee member/members for that zone and one third of the membership of the zone or 30 whichever is less, shall form the quorum for such general meeting.***
>
> ***(3) Notwithstanding anything contained in rule 28, the notice of the general meeting for the election together with the zones constituted, if any , shall be exhibited not less than 10 days before the date fixed for such general meeting at the registered office of the society and at some common place in the area of operation of the co-operative society for intimation of all the members of the co-operative society indicating :-***
>
> ***(a) the number of members to be elected zone-wise if any;***
>
> ***(b) the date, hour and place of holding the general meeting and polling;***
>
> ***(c) the last date of making nominations, which shall not be later than seven days before the date fixed for holding the said meeting;***
>
> ***(d) the date on which, the place at which, and hours between which the scrutiny of nomination papers shall be made; and***
>
> ***(e) the last date for the withdrawal of candidatures.***
>
> ***This could be in addition to any other mode of notice which may be laid down these rules, or the bye-laws of the society, or laid down in a resolution of the Committee, or as may be specified by the Registrar by a general or special order***
>
> ***.(4) The nomination papers duly completed on the forms prescribed by the Registrar and supplied by the co-operative society to its members on demand shall reach the head office of the society by such date and time as may be specified by the Manager in the programme drawn up in sub-rule (1) or this rule.***

***(5) A candidate shall not be entitled to file his nomination paper for more than one office of the Committee. If nomination paper , for more than one office are filed, the nomination paper filed for the first office shall only be considered, and the nomination papers for the other office/offices shall be deemed to be rejected.***

***(6) The person who is to receive the nomination paper under sub-rule (4), shall on receiving the nomination paper, enter thereon the serial number of its receipt and shall endorse thereon the date on which, and the hour at which the nomination was delivered to him. Nomination papers received after the date and time fixed under clause (b) of sub-rule (3) shall not be valid. The person submitting nomination paper shall be entitled to a receipt in writing from the person who is to receive nomination papers as an acknowledgement of having it received by the later.***

***(7) After the nomination papers are scrutinised by the Returning Officer , the list of the validly nominated candidates for election shall be announced, where necessary zonewise, four days before the general meeting is held.***

***(8) The Registrar may by general or special order grant exemption from the provisions of the rule 3 and 4 to any co-operative society or any class of co-operative societies."***

9. The question which would arise for determination is as to whether the process of dividing the area of operation of the co-operative society into zones can be termed to be merely an administrative exercise or is it in the nature of quasi judicial function.

10. However, before answering this question, the Court would be required to determine the difference between the quasi judicial act and an administrative act. This question has been elaborately dealt with by the Hon'ble Supreme Court in recent judgment in ***State of Maharashtra and others etc.etc.*** vs***. Saeed Sohail Sheikh etc.etc. AIR 2013 Supreme Court 168*** in the following manner:

***"29. "Prof. De Smith in his book on 'Judicial Review' (Thomson Sweet &Maxwell, 6th Edn. 2007) refers to the meaning given by Courts to the terms 'judicial', 'quasi-judicial', 'administrative', 'legislative' and 'ministerial' for administrative law purposes and found them to be inconsistent. According to the author 'ministerial' as a technical legal term has no single fixed meaning. It may describe any duty the discharge whereof requires no element of discretion or independent judgment. It may often be used more narrowly to describe the issue of a formal instruction, in consequence of a prior determination which may or may not be of a judicial character. Execution of any such instructions by an inferior officer sometimes called ministerial officer may also be treated as a ministerial function. It is sometimes loosely used to describe an act that is neither judicial nor legislative. In that sense the term is used interchangeably with 'executive' or 'administrative'. The tests which, according to Prof. De Smith delineate 'judicial functions', could be varied some of which may lead to the conclusion that certain functions discharged by the Courts are not judicial such as award of costs, award of sentence to prisoners, removal of trustees and arbitrators, grant of divorce to petitioners who are themselves guilty of adultery etc. We need not delve deep into all these aspects in the present case. We say so because pronouncements of this Court have over the past decades***

***made a distinction between quasi-judicial function on the one hand and administrative or ministerial duties on the other which distinctions give a clear enough indication and insight into what constitutes ministerial function in contra-distinction to what would amount to judicial or quasi-judicial function.***

***30. In Province of Bombay v. Khusaldas Advani (AIR 1950 SC 222) this Court had an occasion to examine the difference between a quasi-judicial order and an administrative or ministerial order. Chief Justice Kania, in his opinion, quoted with approval an old Irish case on the issue in the following passage:***

> ***".....the point for determination is whether the order in question is a quasi-judicial order or an administrative or ministerial order. In Regina (John M' Evoy) v. Dublin Corporation [1978] 2 L.R. Irish 371, 376, May C.J. in dealing with this point observed as follows:***
>
> > ***"It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection, the term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."***
> >
> > ***This definition was approved by Lord Atkinson in From e United Breweries Co. v. Bath Justices [1926] A.C. 586, 602, as the best definition of a judicial act as distinguished from an administrative act."***

***31. In Khushaldas Advani's case (supra) the Court was examining whether the act in question was a ministerial/administrative act or a judicial/quasi-judicial one in the context of whether a writ of certiorari could be issued against an order under Section 3 of the Bombay Land Requisition Ordinance, 1947. The Court cited with approval the observation of L.J. Atkin in The King v. The Electricity Commissioner [1924] 1 K.B. 171that laid down the following test::***

> ***"Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."***

***32. "The Court quoted with approval the decision in The King v. London County Council [1931] 2 K.B. 215 according to which a rule of certiorari may issue; wherever a body of persons***

> ***(1) having legal authority***
>
> ***(2) to determine questions affecting rights of subjects and***
>
> ***(3) having the duty to act judicially***
>
> ***(4) act in excess of their legal authority-a writ of certiorari may issue.***

***33. Justice Fazl Ali, in his concurring opinion in Khushaldas' case (supra) made the following observations as regards judicial and quasi-judicial orders:***

> ***"16. Without going into the numerous cases cited before us, it may be safely laid down that an order will be a judicial or quasi- judicial order if it is made by a court or a judge, or by some person or authority who is legally bound or authorised to act as if he was a court or a judge.To act as a Court or a judge necessarily involves giving an opportunity to the party who is to be affected by an order to make a representation, making some kind of enquiry, hearing and weighing evidence, if any, and considering all the facts and circumstances bearing on the merits of the controversy before any decision affecting the rights of one or more parties is arrived at. The procedure to be followed may not be as elaborate as in a court of law and it may be very summary, but it must contain the essential elements of judicial procedure as indicated by me.***
>
> ***xxx xxx xxx***
>
> ***xxx xxx xxx.***
>
> ***.....The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference and the real test is: Is there any duty to decide judicially?***

***34. The detailed concurrent opinion of Justice Das, in the same case, also agreed with the above test for determining whether a particular act is a judicial or an administrative one. Das J., observed:***

> ***"The real test which distinguishes a quasi-judicial act from an administrative act is the third item in Atkin L.J.'s definition, namely the duty to act judicially."***

***35. In State of Orissa v. Dr. Binapani Dei (AIR 1967 SC 1269) Justice Shah, speaking for the Court observed that the duty to act judicially arose from the very nature of the function intended to be performed. It need not be shown to be superadded. The Court held:***

> ***"If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power."***

***36. In A.K. Kraipak v. Union of India (1969) 2 SCC 262, Hegde, J., as His Lordship then was, recognised that the dividing line between an administrative power and a quasi-judicial power was fast vanishing. What was important, declared the Court, was the duty to act judicially which implies nothing but a duty to act justly and fairly and not arbitrarily or capriciously. The Court observed:***

> ***"13. The dividing line between an administrative power and a quasi- judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. Under our Constitution the rule***

***of law pervades over the entire field of administration. Every organ of the State under our Constitution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power."***

***37. To the same effect is the decision of this Court in Mohinder Singh Gill. v. Chief Election Commission (1978) 1 SCC 405 : (AIR 1978 SC 851) where Krishna Iyer, J. speaking for the Court observed:***

***"48. Once we understand the soul of the rule as fair play in action - and it is so - we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation: nothing more - but nothing less. The "exceptions" to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that audi alter am partem is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation.***

***38. "Recently this Court in Jamal Uddin Ahmad v. Abu Saleh Najmuddin (2003) 4 SCC 257 dealt with the nature of distinction between judicial or ministerial functions in the following words:***

***"14. The judicial function entrusted to a Judge is inalienable and differs from an administrative or ministerial function which can be delegated or performance whereof may be secured through authorization."The judicial function consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in dispute according to the law of evidence. The organs which the State sets up to exercise the judicial function are called courts of law or courts of justice. Administration consists of the operations, whatever their intrinsic nature may be, which are performed by administrators; and administrators***

***are all State officials who are neither legislators nor judges." (See Constitutional and Administrative Law, Phillips and Jackson, 6th Edn., p. 13.) P. Ramanatha Aiyar's Law Lexicon defines judicial function as the doing of something in the nature of or in the course of an action in court. (p. 1015) The distinction between "judicial" and "ministerial acts" is: If a Judge dealing with a particular matter has to exercise his discretion in arriving at a decision, he is acting judicially; if on the other hand, he is merely required to do a particular act and is precluded from entering into the merits of the matter, he is said to be acting magisterially. (pp. 1013-14). Judicial function is exercised under legal authority to decide on the disputes, after hearing the parties, maybe after making an enquiry, and the decision affects the rights and obligations of the parties. There is a duty to act judicially. The Judge may construe the law and apply it to a particular state of facts presented for the determination of the controversy. A ministerial act, on the other hand, may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done. (Law Lexicon, ibid., p. 1234). In ministerial duty nothing is left to discretion; it is a simple, definite duty."***

11. Now, in case the provisions of Rule 4 are minutely scrutinized, it would be seen that the drawing up of the election programme and the act of dividing the area of operation into zones cannot be termed to be an administrative act simpliciter because while doing so, the members of the Society have a right to object and such right cannot be curtailed on the ground that the Registrar was only performing administrative duties when he assigned the Manager the task of drawing up a detailed programme of election. It is the members of the Society, who ultimately would be affected by drawing up of the election process, more particularly, when it pertains to the carving of zones and when a grievance is made by any member(s) challenging the constitution of the zones in terms of Rule 4 (supra), the same shall have to be adjudicated by exercising quasi judicial powers and would therefore not be an administrative act.

12. Now, when the functions required to be performed by an authority while exercising the powers under the provisions of Rule 4 are tested on the exposition of law laid down in *Saeed Sohail's* case (supra), it can safely be concluded that respondent No.3 while determining the validity of the objections regarding carving out of zones, was essentially acting as a quasi judicial authority because he was required to adjudicate on the dispute after hearing the parties and may be after making an inquiry. Obviously, this decision would affect the rights and obligations of the parties. Moreover, while adjudicating upon the dispute, there was a duty cast upon respondent No.3 to act judicially. Manifestly this was not merely a ministerial act where one was to perform his duty in a given state of facts in a prescribed manner or in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act done. Respondent No.3 had wide discretion to accept or reject the objections and, therefore, was essentially performing judicial functions.

13. The next question now required to be determined is regarding the validity of the order passed by respondent No.2. The only direction passed by respondent No.2 in the impugned order reads as under:

***".....Thus, to suffice the interest of justice, the Assistant Registrar Cooperative Societies Solan is directed to ensure that the zones are constituted in such a way that members from contiguous areas are included in a particular zone and the provisions of Rule 4 (2) of the Rules have been complied with in letter as well as in spirit. While doing so, he will take the zones of 2009 as base and thereafter add the newly enrolled members in a particular zone in such a way that contiguity of area is maintained as per provisions of the law. He will complete this exercise on or before 10.11.2014 without disturbing the already approved election schedule. It must be ensured that election process should not be stopped. It is also noticed that election programme has been approved in cursory and hasty manner and the election programme has been approved for one ward only, for this, he is directed to correct the mistake and also advise to be careful and cautious in future in dealing such matters."***

14. I fail to understand as to how the petitioner can be aggrieved by such an innocuous order which only directs the authorities to ensure that the zones are constituted in such a manner that members from contiguous areas are included in a particular zone and the provisions of Rule 4 (2) of the Rules are complied with in letter as well as in spirit.

15. The learned counsel for the petitioner would then argue that though the order may appear to be an innocuous one, but the authorities below are not implementing it in its letter and spirit and that is why he has moved an application for amendment whereby he has questioned the order passed by respondent No.3 on 10.11.2014. I am afraid that as per the provisions of the Act the remedy to question the order passed by respondent No.3 on 10.11.2014 lies elsewhere and not before this Court.

16. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed, so also the pending application(s) if any. The parties are left to bear their own costs.

**********

**BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.**

Oriental Insurance Company Ltd. ...Appellant.

VERSUS

Smt. Indira Devi and others ...Respondents.

FAO (MVA) No. 35 of 2010.
Judgment reserved on: *21st November, 2014.*
Decided on:28th November, 2014.

**Motor Vehicle Act, 1988,** Section 149- It is for the insurer to plead and prove that the deceased was travelling in the vehicle as a gratuitous passenger and the owner has committed willful default but when no evidence was led by the insurer to prove this fact, Insurance Company cannot be absolved of its liability to pay the compensation. (Para-12)

**Motor Vehicle Act, 1988-** Section 166- Claimant had filed a petition before Workmen Compensation Commissioner which was dismissed on the ground that deceased was not a workman- held, that the claimants are not debarred from filing the claim petition on the ground that deceased was travelling in the vehicle as owner of the goods. (Para-17)

**Case referred:**

National Insurance Co. Ltd. versus Swaran Singh & others, reported in AIR 2004 SC 1531

For the Appellant: Mr. Lalit K. Sharma, Advocate.
Mr.G.R. Palsara, Advocate, for respondent No. 1 to 7.
Nemo for respondent No.8.

The following judgment of the Court was delivered:

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**Mansoor Ahmad Mir, Chief Justice.**

This appeal is directed against the judgment and award dated 5.11.2009, passed by the Motor Accident Claims Tribunal, Mandi, in Claim Petition No. 82 of 2007, (hereinafter referred to as "the Tribunal", for short") whereby the claim petition filed by the claimants came to be allowed and compensation to the tune of Rs.5,33,400/- came to be awarded in favour of the claimants and insurance company was saddled with the liability, for short, "the impugned award", on the grounds taken in the memo of appeal.

2. The claimants and insured have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer/appellant has questioned the impugned award on the ground that the Tribunal has fallen in error in saddling the insurance company with the liability and has prayed for setting aside the impugned award and dismissal of the claim petition, on the ground taken in the memo of appeal.

**BRIEF FACTS.**

4. Khem Raj was travelling in a Mahindra Pick-up bearing registration No. HP-07-5359 on 23.4.2004 at about 10 a.m., became victim of the road accident, which was caused by its driver, namely, Prem Singh who has driven the said Mahinder Pick-up rashly and negligently.

5. The claimants, who are widow, minor daughters and parents, had invoked the jurisdiction of the Tribunal, in terms of Section 166 of the Motor Vehicles Act, for short "the Act", for the grant of compensation, on the ground that they have lost the bread earner of the family. It is averred that he was travelling in the said offending vehicle as a coolie-cum-clerk and as care taker of the fruits.

6. The respondents, i.e., insurer, driver and owner contested the claim petition and following issues came to be framed by the Tribunal:

*(i) Whether on 23.4.2004 at about 10.00 at Baglyara the respondent No.3 was driving Mahindra Pick-up bearing No. HP-07-5359 rashly and negligently and as such caused the death of one Sh. Khem Raj? ……OPP*

*(ii) If issue No. 1 is proved, to what amount of compensation, the petitioner is entitled to and from whom? OPP*

*(iii) Whether the driver of Mahindra Pick-up NO. HP-07-5359 was not having any valid and effective driving licence at the time of the accident? OPR*

*(iv) Whether the deceased was travelling in the vehicle as a gratuitous passenger? OPR.*

*(v) Relief.*

7. The claimants have examined Suresh Kumar (PW1), Karam Singh (PW3), Om Prakash (PW4) and Indira Devi widow of deceased also stepped into the witness-box as PW2.

8. The insurer, owner and driver have not examined any witness. However, Desh Raj owner of the vehicle stepped as DW1 in the witness-box. The claimants have also placed on record, copies of FIR, (Ext. PA), copy of Pariwar Register (Ext. PB), copy of Post-mortem report (Ext. PC) and academic certificate of Diploma of the deceased (Ext.PD).

9. The Tribunal, after scanning the evidence held that the claimants have proved by leading oral as well as documentary evidence that the driver Prem Singh has driven the vehicle rashly and negligently, on the said date and has caused the accident in which deceased lost his life. Prem Singh has not questioned the findings returned by the Tribunal and even is not in dispute in this appeal. Accordingly findings on Issue No. 1 are upheld.

10. I deem it proper to deal with Issues No. 3 and 4 before I deal with Issue No. 2.

11. **Issue No. 3.** It was for the insurer to prove that the driver was not having a valid and effective driving licence. The insurer has not led any evidence thereby failed to discharge the onus. Thus, findings returned on issue No. 3 are accordingly upheld.

12. **Issue No. 4.** The insurer has to prove Issue No. 4 and discharge the onus, has not led any evidence. It is beaten law of the land that it is for the insurer to plead and prove that the deceased was traveling in the vehicle as a gratuitous passenger and owner has committed willful breach, has not led any evidence, thus failed to discharge the onus.

13. This Court in **FAO No. 362 of 2012** titled ***ICICI Lombard General Insurance Company versus Sumitra Devi and others***, in terms of the apex Court judgment in case titled ***National Insurance Co. Ltd. versus Swaran Singh & others***, reported in ***AIR 2004 SC 1531***, held that the insurer has to plead and prove that the deceased was a gratuitous passenger, which they have failed to do so. The relevant portion of para 105 of the apex Court judgment, supra reads as under:-

> *"105..*
>
> *(i)….*
>
> *(ii)…..*
>
> *(iii)…..*
>
> *(iv) The insurance company are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings; but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them."*

14. In FAO No. 169 of 2011 titled ***Shanti Devi*** *versus* ***National Insurance Company & others*** decided on 25.7.2014, along with connected matters, this Court also took the same view and held that the Insurance Company has to prove that deceased was travelling in the vehicle as a gratuitous passenger. Accordingly, findings returned on issue No. 4 are upheld.

15. **Issue No. 2**. The deceased was 28 years of age at the time of the accident and claimants have pleaded and proved that the deceased was earning Rs.10000/- per month. He was also earning some income from agriculture vocations. The Tribunal, after examining the record, evidence and after making a guess work held that the deceased was earning not less than 3600/- per moth and after making 1/3rd deduction, held that the claimants have lost source of dependency to the tune of Rs.2400/- per month. The Tribunal also rightly applied the multiplier of "12".

16. It appears that the Tribunal has fallen in error in assessing the income of the deceased. However, claimants have not questioned the same, is reluctantly upheld.

17. The learned counsel for the appellant has argued that the claimants had filed application before the Commissioner, under the workmen's

Compensation Act, which was dismissed. Thus, the claim petition was not maintainable. The claimants have admitted in the claim petition that they had filed petition before the Commissioner, under the Workmen's Compensation Act, which was dismissed on the ground that the deceased was not a workman, in terms of mandate of the Workmen's Compensation Act, 1923 are not estopped or precluded from filing the claim petition in terms of the provisions of Section 166 of the Act. The claimants have specifically averred that the deceased was coolie-cum-clerk and was also travelling in the vehicle as owner of the fruits, which stands admitted by PW5, driver, owner and finds mention in paras 28 and 32 of the impugned award. It is apt to reproduce paras 28 and 32 of the impugned award herein:

> *"28.Sh. Jassa Ram PW-5 by way of affidavit has testified that the deceased was working as coolie-cum- conductor with the Mahindra Pick-up No. HP07-5359 and was going to load vegetables at Thunag and deceased was carrying his 3 to 4 bags of peas when the vehicle met with an accident. He in cross-examinations stated that he did not know that in what capacity the deceased was sitting in the vehicle. Ext. PE was copy of order dated 27.11.2006 passed by the Commissioner, Gohar.*
>
> *29-31….. …….*
>
> *32.The respondent No. 3 on account of the fact that the claim of the petitioners under the Workmen Compensation Act was declined by the Commissioner, Gohar per Ext.PE on the ground that the deceased was not cleaner of the vehicle cannot contend that the deceased was travelling in the vehicle as gratuitous passenger. The Commissioner in the order has observed that the deceased was travelling in the jeep as dealer of the peas. This strengthens the case of the petitioners that the deceased was working as coolie-cum-cleaner and caretaker of the goods even if the capacity of the deceased as a cleaner is not considered."*

18. It is also a fact that the owner had filed a petition before the Commissioner under the Workmen's Compensation Act and that does not, in any way, affect the rights of the claimants and Tribunal has rightly recorded the findings on this issue in paras 30 and 33 of the impugned award. It is apt to reproduce paras 30 and 33 of the impugned award herein:

> *"30.The respondent Nos. 1 and 3 in rebuttal have adduced Ext. PA copy of order passed by the Consumer Disputes Redressal Forum Mandi dated 11.8.2005 and copy of complaint of the respondent No. Ext.RB dated 9.12.2004.*
>
> *31-32.*
>
> *33.The respondent No.2 before the learned Consumer Forum did not come up with the plea that the deceased was travelling in the vehicle as a gratuitous passenger and the complaint rather makes out that the respondent No. 1 has contested the repudiation of own damage claim filed by the respondent No.2 on account of travelling of gratuitous passenger. The learned Forum per order Ex. RA did not find any strength in the case of the respondent and the claim of the respondent No.1 was allowed. The respondents have adduced no evidence to substantiate that the deceased was travelling in the Mahindra Pick-up no.HP07-5359 as a gratuitous passenger. The respondent No. 3 has failed to substantiate that the deceased was travelling in Mahindra Pick-upno.HP07-5359 as a gratuitous passenger. This issue is decided against the respondent No.3."*

19. Having said so, no interference is called for. Accordingly, the appeal merits dismissal and is accordingly dismissed and the impugned award is upheld.

20. The Registry is directed to release the awarded amount in favour of the claimants, through payee's account cheque, strictly in terms of the conditions contained in the impugned award. Send down the record forthwith.

**********

**BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR,C.J.**

Oriental Insurance Company Ltd. ...Appellant.
Versus
Smt. Mokshri Devi & others ...Respondents.

FAO No. 501 of 2007
Decided on: 28.11.2014

**Motor Vehicle Act, 1988-** Section 149- As per the testimony of Junior Assistant from the Office of R.T.O., Driving Licence was issued from Dehradun and was renewed from the Office of R.T.O. Kullu- held, that in these circumstances, the plea of the Insurance Company that driver did not have a valid driving license to drive the vehicle was not acceptable. (Para-11 and 12)

**Motor Vehicle Act, 1988-** Section 149- Insurance Company pleaded that deceased was travelling as a gratuitous passenger- claimants led the evidence to prove that deceased was travelling as owner of timber- no evidence was led by the Insurance Company to prove that the deceased was travelling as a gratuitous passenger- held, that in these circumstances the plea of the Insurance Company that deceased was travelling as a gratuitous passenger could not be relied upon and the Insurance Company was rightly held liable to pay the compensation. (Para-14)

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 1 to 5.
Nemo for respondents No. 6 and 7.

The following judgment of the Court was delivered:

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**Mansoor Ahmad Mir, Chief Justice** *(Oral)*

Appellant-insurer has called in question the award, dated 22nd September, 2007, made by the Motor Accident Claims Tribunal, Kullu, District Kullu, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 75 of 2006, titled as Smt. Mokshri Devi & others versus Jagan Nath & others, whereby compensation to the tune of Rs. 3,75,000/- with interest @ 7% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants, as per the apportionment and against the owner-insured and the insurer came to be fastened with liability (hereinafter referred to as "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimants, the owner-insured and the driver have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has questioned the impugned award on the following two grounds:

(i) That the driver of the offending vehicle was not holding a valid and effective driving licence;

(ii) That the deceased was travelling in the offending vehicle as a gratuitous passenger.

4. In order to determine the issue, it would be profitable to give a brief resume of the case herein:

**Brief facts:**

5. The claimants, being the victims of the motor vehicular accident, invoked the jurisdiction of the Tribunal in terms of Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") for grant of compensation on the ground that their bread earner, deceased-Om Chand, met with an accident on 7th May, 2006, near GPS Barnout, District Kullu, which was caused by the driver, namely Shri Prem Bahadur, while driving Max Jeep, bearing registration No. HP-66-0780, rashly and negligently. He sustained multiple injuries, was taken to Zonal Hospital, Kullu and succumbed to the injuries. The claimants have sought compensation to the tune of Rs. 15,00,000/-, as per the break-ups given in the claim petition.

6. The owner-insured, the driver and the insurer contested the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal on 8th March, 2007:

*"1. Whether the deceased Shri Om Chand died in a motor accident caused on 7.5.2006 near GPS Barnaut as a result of rash and negligent driving of Max Jeep bearing registration No. HP-66-0780 by its driver-respondent No. 2? OPP*

*2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP*

*3. Whether the driver of the vehicle in question was not holding a valid and effective driving licence at the time of accident? OPR-3*

*4. Whether the vehicle was being plied in violation of the terms and conditions of the insurance policy at the time of accident, as alleged? OPR-3*

*5. Whether the deceased was travelling as an unauthorised/gratuitous passenger in the vehicle in question at the time of accident? OPR-3*

*6. Relief."*

8. The claimants have examined Dr. Rajesh Thakur as PW-1, HC Hari Singh as PW-2, Shri Hitesh Kumar as PW-4, Shri Alam Chand as PW-5 and one of the claimants, Smt. Mokshri Devi, has herself stepped into the witness box as PW-3. The owner has examined Miss Ashita Bodh, Criminal Ahlmad in the office of CJM Kullu as RW-1 and the driver-Prem Bahadur himself appeared as RW-2. The insurer has examined Shri Davinder Singh, Summary Clerk, CJM Kullu as RW-3; Shri Mohan Singh, Licence Clerk, SDM Office, Kullu, as RW-4, Shri Chander Mohan Rawat, Senior Assistant, RTO Dehradun as RW-5, Shri Krishan Sharma, Junior Assistant, RTO Kullu, as RW-6 and ASI Gangvir Singh as RW-7.

**Issue No. 1:**

9. There is no dispute about the findings returned on issue No. 1. However, I have gone through the impugned award and the record. The claimants have proved by leading evidence that the driver had driven the

offending vehicle rashly and negligently at the time of accident in which deceased-Om Chand sustained injuries and succumbed to the injuries. Accordingly, findings returned by the Tribunal on issue No. 1 are upheld.

10. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 to 5.

**Issue No. 3:**

11. Appellant-insurer had to discharge the onus, has not led any evidence to prove that the driver of the offending vehicle was not having a valid and effective driving licence. Admittedly, RW-6, Shri Krishan Sharma, Junior Assistant from the office of Regional Transport Office, Kullu, has stepped into the witness box and has deposed that the licence was renewed from their office and was issued from Dehradun. The Tribunal has rightly returned the findings in paras 15 and 16 of the impugned award.

12. Keeping the statement of RW-6 in view, one comes to an inescapable conclusion that the driver of the offending vehicle was having a valid and effective driving licence at the relevant point of time and the renewal of the same is not in dispute. Accordingly, findings returned on issue No. 3 are upheld.

**Issue No. 4:**

13. The appellant-insurer has also not proved, in order to seek exoneration, that the owner-insured has committed any willful breach. In view of findings returned by the Tribunal in para 16 of the impugned award and keeping in view the admitted fact that the driving licence was issued at Dehradun and renewed at Kullu, it cannot be said and held that the owner-insured has committed any willful breach. Hence, the findings returned on issue No. 4 are also upheld.

**Issue No. 5:**

14. It was for the insurer to lead evidence and prove that the deceased was travelling as a gratuitous passenger in the offending vehicle at the relevant point of time. There is evidence on the file led by the claimants and the documents to the effect that the deceased was travelling in the offending vehicle as owner of timber. The Tribunal has rightly recorded findings that the insurer has failed to prove that the deceased was travelling as a gratuitous passenger and the findings returned on issue No. 5 are also upheld.

**Issue No. 2:**

15. The Tribunal has rightly returned the findings and saddled the insurer with liability. The adequacy of the compensation is not in dispute. Accordingly, the findings returned on issue No. 2 are also upheld.

16. Viewed thus, the appeal merits to be dismissed. Accordingly, the appeal is dismissed and the impugned award is upheld.

17. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque.

18. Send down the record after placing copy of the judgment on Tribunal's file.

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**BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.**

Raj Kumar & another ...Appellants.

Versus

Sukh Dev & others ...Respondents.

FAO No. 505 of 2007
Decided on: 28.11.2014

**Motor Vehicle Act, 1988-** Section 149- Offending vehicle is Tata Bolero- the gross vehicle weight is 2750 kg - it falls within the definition of light motor vehicle- driver possessed a license to drive light motor vehicle- held, that there was no requirement of having endorsement of PSV and the Tribunal had wrongly granted the right to recovery to the Insurance Company. (Para- 9 to 26)

**Cases referred:**

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

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

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

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

Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellants: Mr. Rajesh Kumar, Advocate.
For the respondents: Mr. Dalip K. Sharma, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. Praneet Gupta, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

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**Mansoor Ahmad Mir, Chief Justice** *(Oral)*

By the medium of this appeal, the appellants-insured have called in question the award, dated 25th April, 2006, made by the Motor Accident Claims Tribunal, Solan (hereinafter referred to as "the Tribunal") in MAC Petition No. 33-S/2 of 2005, titled as Shri Sukhdev versus Shri Raj Kumar & others, whereby compensation to the tune of Rs. 88,000/- with interest @ 7.5% per annum from the date of institution of petition till deposit of the amount alongwith costs assessed at Rs. 1,000/- came to be awarded in favour of the claimant-injured and insurer came to be saddled with liability with right of recovery (hereinafter referred to as "the impugned award) on the grounds taken in the memo of appeal.

2. It is profitable to give a brief resume of the facts of the case herein.

**Brief facts:**

3. The claimant-injured became the victim of a motor vehicular accident, which was allegedly caused by the driver, namely Shri Pawan Kumar, on 14th October, 2004, at about 11.45 a.m., near Village Bakhalag, while driving Tata Bolero, bearing registration No. HP-12A-5234, rashly and negligently, hit the claimant-injured, sustained injuries, was taken to PHC Arki, wherefrom was referred to Zonal Hospital, Solan, and remained admitted with effect from 14th October, 2004 to 20th October, 2004. The claimant-injured filed claim petition for grant of compensation to the tune of Rs. 5,50,000/-, as per the break-ups given in the claim petition.

4. The insurer, the driver and the owner-insured resisted the claim petition on the grounds taken in the memo of objections.

5. The Tribunal, after scanning the pleadings and the documents, framed the following issues on 10th November, 2005:

> *"1. Whether the petitioner suffered injuries and disability on account of rash/negligent driving of the vehicle by respondent No. 2? OPP*
>
> *2. If issue No. 1 is proved in affirmative what amount of compensation the petitioner is entitled to and from whom? OPP*
>
> *3. Whether the respondent No. 2 did not possess a valid and effective driving licence, if so its effect? OPR-3.*
>
> *4. Relief."*

6. The parties have led the evidence. The Tribunal, after scanning the evidence, oral as well as documentary, held the claimant-injured entitled to compensation to the tune of Rs. 88,000/- with interest @ 7.5% per annum from the date of institution of petition till deposit of the amount alongwith the costs assessed at Rs. 1,000/- and saddled the insured-appellants with liability.

7. The claimant-injured, the insurer and the driver have not questioned the impugned award on any count, thus, has attained finality so far it relate to them.

8. The appellants-insured have questioned the impugned award only to the extent whereby right of recovery has been granted to the insurer to recover the amount from them.

9. The only question to be determined in this appeal is – whether the Tribunal has rightly granted the right of recovery to the insurer? The answer is in negative for the following reasons:

10. Admittedly, the offending vehicle was Tata Bolero, the gross vehicle weight of which is 2750 kg, as per the registration certificate, Ext. RW-3/C, which falls within the definition of light motor vehicle.

11. I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

> *"2. .....*
>
> *(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.*
>
> *xxx xxx xxx*
>
> *(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.*
>
> *xxx xxx xxx*
>
> *(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.*

*xxx xxx xxx*

*(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."*

12. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

13. At the cost of repetition, definition of "light motor vehicle" includes the words "transport vehicle" also. Thus, the definition, as given, mandates the "light motor vehicle" is itself a "transport vehicle", whereas the definitions of other vehicles are contained in Sections 2(14), 2 (16), 2 (17), 2 (18), 2 (22), 2 (23) 2 (24), 2 (25), 2 (26), 2 (27), 2 (28) and 2 (29) of the MV Act. In these definitions, the words "transport vehicle" are neither used nor included and that is the reason, the definition of "transport vehicle" is given in Section 2 (47) of the MV Act.

14. In this backdrop, we have to go through Section 3 and Section 10 of the MV Act. It is apt to reproduce Section 3 of the Act herein:

***"3. Necessity for driving licence.*** *- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*

*(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."*

15. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

16. My this view is supported by Section 10 of the MV Act, which reads as under:

*"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*

*(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-*

*(a) motor cycle without gear;*

*(b) motor cycle with gear;*

*(c) invalid carriage;*

*(d) light motor vehicle;*

*(e) transport vehicle;*

*(i) road-roller;*

*(j) motor vehicle of a specified description."*

17. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, which was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stand deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

18. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

*"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgement hereunder:-*

*"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*

*.....*

*17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or*

*passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*

*In the given circumstances of the case PSV endorsement was not required at all."*

19. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

*"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.*

*20. .....*

*21. .....*

*22. .....*

*23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."*

20. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR**

**SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

> *"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.*
>
> *A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.*
>
> *Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].*
>
> *9. .....*
>
> *10. .....*
>
> *11. .....*
>
> *12. .....*
>
> *13. .....*
>
> *14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.*
>
> *Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.*
>
> *15. .....*
>
> *16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.*
>
> *A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."*

21. The Apex Court in a latest judgment in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** held that endorsement is not required.

22. Having glance of the above discussions, I hold that the endorsement was not required.

23. The Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court**

**1531,** has laid down principles, how can insurer avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

24. In a case titled as **Lal Chand versus Oriental Insurance Co. Ltd.,** reported in **2006 AIR SCW 4832,** the owner had performed his job whatever he was required to do and satisfied himself that the driver was having valid driving licence. The Apex Court held the insurer liable. It is apt to reproduce paras 8, 9 and 11 of the judgment herein:

> *"8. We have perused the pleadings and the orders passed by the Tribunal and also of the High Court and the annexures filed along with the appeal. This Court in the case of United India Insurance Co. Ltd. v. Lehru & ors., reported in 2003 (3) SCC 338, in paragraph 20 has observed that 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). He will, therefore, have to check whether the driver has a driving licence and 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 test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.*
>
> *9. In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of*

*the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, 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) and the Insurance Company would not then be absolved of its liability.*

*10. .....*

*11. As observed in the above paragraph, the insurer, namely the Insurance Company, has to prove that the insured, namely the owner of the vehicle, 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 point of time."*

25. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

*"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

26. Having said so, I am of the considered view that the Tribunal has fallen in error in granting the right of recovery to the insurer.

27. Viewed thus, the appeal deserves to be allowed and the impugned award is to be modified. The appeal is allowed, the insurer is directed to satisfy the entire liability and the impugned award is modified accordingly.

28. Registry to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award.

29. Send down the records after placing copy of the judgment on Tribunal's file.

**********

**BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.**

Sushil Kumar Dogra son of Sh. Balak Ram ...Petitioner.
Versus
State of HP and another. ....Respondents.

CWP No.508 of 2013.
Order reserved on: 13.11.2014.
Date of Order: November 28,2014.

**Constitution of India, 1950-** Article 226- Petitioner was compulsorily retired – he filed an application before Administrative Tribunal which was transferred to Hon'ble High Court and was allowed- petitioner was permitted to make a representation against the findings of the Inquiry Officer- petitioner made a representation, which was rejected – petitioner claimed that order passed by the Disciplinary Authority rejecting the representation was incorrect- held, that the petitioner was given an opportunity to appear as defence evidence but he had failed to do so- petitioner had signed the statements of the witnesses which means that he was present during the time of recording the statements - he had failed to join the duty despite issuance of notice- employer had legal right to transfer the petitioner- as the petitioner had not joined the place of posting after transfer- therefore, he was rightly held guilty.(Para-5 to 8)

For the petitioner: Mr.J.P.Upadhayaya with Mr. Sunil Bisht, Advocate.
For Respondents. Mr. M.L.Chauhan, Addl. Advocate General with Mr.J.S.Rana, Assistant Advocate General.

The following judgment of the Court was delivered:

**P.S.Rana, Judge.**

Present Civil Writ Petition is filed under Article 226 of the Constitution of India. It is pleaded that on dated 10.11.2006 OA No (D) 471 of 2006 was filed before HP Administrative Tribunal against compulsory retirement order dated 4.9.2002. It is pleaded that in the year 2008 OA No. 471 of 2006 was transferred to Hon'ble High Court of HP when HP Administrative Tribunal was scrapped. It is further pleaded that on dated 5.8.2011 CWP(T) No. 14534 of 2008 was decided by Hon'ble High Court of HP and the same was allowed. It is further pleaded that order of penalty Annexure A14 and order of Appellate Authority dismissing the appeal of the petitioner Annexure A20 were quashed. It is further pleaded that Hon'ble High Court of HP in CWP(T) 14534 of 2008 further directed that punishing authority shall pass appropriate orders on the basis of inquiry report after affording the petitioner an opportunity to make representation against the finding of Inquiry Officer. It is further pleaded that thereafter Director of Agriculture-cum-Disciplinary Authority vide order dated 1.8.2012 rejected representation of the petitioner to reinstate him. It is further pleaded that impugned order No. 3-187/67-Ag.I- dated 1.8.2012 Annexure P4 passed by respondent No.2 in the capacity of Disciplinary Authority be declared as null and void. It is further pleaded that petitioner be declared in continuous service w.e.f. 4.9.2002 till date of his retirement i.e.30.4.2007 with all

consequential service benefits. It is further pleaded that respondents be directed to release the pay and allowances of the petitioner w.e.f. 4.9.2002 to 30.4.2007. It is further pleaded that retired benefit such as pension, DCRG and leave encashment be also released with all arrears along with interest at the rate of 12% per annum. Prayer for acceptance of civil writ petition sought.

2. Per contra reply filed on behalf of the respondents pleaded therein that petitioner was transferred from the office of Deputy Director of Agriculture Palampur to the Directorate of Agriculture Shimla on dated 25.9.1997. It is further pleaded that petitioner was relieved by Deputy Director of Agriculture Palampur on dated 19.11.1997 but he did not join in the office of Directorate of Agriculture Shimla. It is further pleaded that petitioner willfully remained absent and was placed under suspension. It is further pleaded that thereafter petitioner was reinstated on dated 10.5.1999 with direction to resume duty in the Directorate of Agriculture Shimla and suspension period was treated as leave of the kind due and penalty of censure was imposed against the petitioner. It is further pleaded that even thereafter petitioner did not report for duty in the Directorate of Agriculture HP Shimla and remained absent without intimation. It is further pleaded that thereafter registered letter was issued to the petitioner and petitioner was informed that disciplinary action would be initiated against him. It is further pleaded that notice was also issued to the petitioner and same was published in the Indian Express on dated 29.7.1999 but despite the above stated facts petitioner did not resume the duty and behave in irresponsible manner and violated rules and office procedure. It is further pleaded that petitioner remained absent from duty without intimation and did not submit any leave application. It is further pleaded that thereafter Disciplinary Authority passed compulsory retirement order. It is further pleaded that thereafter OA No. (D) 471 of 2006 was filed by the petitioner before HP Administrative Tribunal and after scraped of the HP Administrative Tribunal the petition was transferred to Hon'ble High Court of HP and the same was registered as CWP(T) 14534 of 2008. It is further pleaded that petitioner submitted a representation and was afforded two opportunities to represent his case but he did not turn up. It is further pleaded that thereafter representation of the petitioner to reinstate from the date of compulsory retirement was again rejected. It is further pleaded that petitioner is not entitled for any relief. It is further pleaded that order dated 1.8.2012 Annexure P4 was issued after careful consideration by the Disciplinary Authority. It is further pleaded that Annexure P4 is legal document and the same be upheld. It is further pleaded that writ petition is devoid of any merit and the same be dismissed.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of respondents and also perused entire records carefully.

4. Following points arise for determination in the present writ petition:

(1) Whether civil writ petition filed by the petitioner under Article 226 of the Constitution of India is liable to be accepted as mentioned in memorandum of grounds of civil writ petition.

(2) Final Order.

**Finding upon Point No.1.**

5. Submission of learned Advocate appearing on behalf of petitioner that impugned order No. 3-187/67-Agr.I dated 1.8.2012 Annexure P4 passed by respondent No.2 in the capacity of Disciplinary Authority be declared as null and void being contrary to law is rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that on dated 5.8.2011 Hon'ble High Court of HP in CWP(T) No. 14534 of 2008 titled Sushil Kumar

Dogra Vs. State of HP and another directed the Disciplinary Authority to pass an appropriate order on the basis of inquiry report after affording the petitioner an opportunity to make representation against the finding of Inquiry Officer. It is proved on record that in compliance to order of Hon'ble High Court of HP passed in civil writ petition cited supra Director of Agriculture Himachal Pradesh on dated 3.11.2011 directed petitioner to file representation against the findings of inquiry report within 20 days positively. It is proved on record that thereafter on dated 19.3.2012 Director of Agriculture Himachal Pradesh again directed the petitioner to file representation against the findings of inquiry report by way of personal hearing fixed on 28.3.2012 at 10.00 AM sharp in the chamber of Director of Agriculture Himachal Pradesh Shimla. It is proved on record that thereafter petitioner Sushil Kumar has submitted that date of hearing be fixed after 20.4.2012. It is also proved on record that thereafter again Director of Agriculture Himachal Pradesh directed the petitioner to file representation against the finding of inquiry report by way of personal hearing fixed on dated 25.4.2012 at 10.00 AM sharp in the chamber of Director of Agriculture Himachal Pradesh. It is proved on record that thereafter representation was filed by petitioner Sushil Kumar and petitioner further submitted in written manner that facts stated in his representation be treated as his statement in personal hearing. It is proved on record that despite several opportunities granted by the Disciplinary Authority petitioner did not appear before the Disciplinary Authority for his statement. On the contrary petitioner has specifically mentioned in his representation that representation qua compulsory retirement w.e.f. 4.9.2002 be treated as a statement in personal hearing. It is well settled law that there is difference between the pleading and oral testimony. It is also well settled law that facts can be proved by way of oral testimony or by way of documentary evidence. No sufficient reason has been mentioned by the petitioner for non-appearance before the Disciplinary Authority. Petitioner did not place on record any medical certificate in order to prove his health problem.

6. Submission of learned Advocate appearing on behalf of the petitioner that Inquiry Officer has not permitted the petitioner to examine himself as defence witness is rejected being devoid of any force for the reason hereinafter mentioned. Petitioner was asked by the Inquiry Officer on dated 27.11.2001, 2.2.2002 and 15.2.2002 to give statement in his defence but petitioner failed to do so.

7. Another submission of learned Advocate appearing on behalf of the petitioner that written briefs dated 20.4.2002 and 24.5.2002 stated to have been given to the Inquiry Officer was not received by the Inquiry Officer is also rejected being devoid of any force for the reason hereinafter mentioned. There is no evidence on record in order to prove that written briefs dated 20.4.2002 and 24.5.2002 given to the Inquiry Officer. This appears to be after thought story of the petitioner.

8. Another submission of learned Advocate appearing on behalf of the petitioner that inquiry is vitiated is not substantive with records because petitioner has himself signed the statement given by the prosecution witness from page 52 to 55 and page 64 to 66. The concerned Assistant Director of Agriculture has also stated in his statement before the Inquiry Officer on dated 28.5.2001 during cross examination that letter A6, A21 and A22 were not received in the office of Directorate of Agriculture. In the present case it is proved on record through affidavit that petitioner was transferred from the office of Deputy Director Agriculture Palampur to the Directorate Agriculture Shimla on dated 25.9.1997 and it is also proved on record that petitioner was relieved by Deputy Director Agriculture Palampur on dated 19.11.1997 but petitioner did not join at his place of posting and petitioner remained willfully absent and was placed under suspension. It is also proved on record that petitioner was reinstated on dated 10.5.1999 with direction to resume duty in the office of Directorate of Agriculture Shimla and the period of suspension was treated as

leave of kind due. It is also proved on record that despite reinstatement of the petitioner on dated 10.5.1999 petitioner did not join the duty at his place of posting and willfully remained absent from duty. It is proved on record that thereafter notice was issued to the petitioner through registered letter dated 31.5.1999 and 21.6.1999 which was duly acknowledged by the petitioner but despite the above stated facts petitioner did not join at his place of posting. It is well settled law that employee cannot be permitted to flout the transfer order of appointing authority. No reason has been assigned by the petitioner as to why the petitioner did not join at the place of his posting. It is well settled law that employee has no legal right to be retained in a particular station. It is well settled law that employer has legal right to transfer the employee at a particular station as per exigency of the circumstances of service. In the present case keeping in view conduct of the petitioner for non joining posting station he is not legally entitled for any relief as sought in the writ petition because it is proved on record that petitioner had committed non-compliance of the order of appointing authority qua transfer order. It is proved on record that petitioner willfully did not join at the place of his posting. It is also proved on record that even after reinstatement on dated 10.5.1999 petitioner did not join at the place of his posting intentionally and voluntarily. Court is of the opinion that employee cannot be allowed to dictate the terms to the appointment authority qua place of posting. In view of the above stated facts point No.1 is answered in negative against the petitioner.

**Point No.2.**

**Final Order**.

9. In view of the findings in point No.1 civil writ petition filed under Article 226 of the Constitution of India is dismissed and relief(s) sought in relief clause from paras (a) to (h) are declined in the ends of justice keeping in view the fact that petitioner intentionally did not join at the place of his posting despite several opportunities granted by appointment authority. Writ petition is disposed of with no order as to costs. All miscellaneous application(s) are also disposed of.

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**HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C. J.**

**FAOs No. 339, 340, 460 & 461 of 2007**
**Decided on : 28.11.2014**

| | | |
|---|---|---|
| | **FAO No. 339 of 2007** | |
| | United India Insurance Company Limited | ...Appellant |
| | Versus | |
| | Smt. Poonam Sharma & others | ...Respondents |
| **2.** | **FAO No. 340 of 2007** | |
| | United India Insurance Company Limited | ...Appellant |
| | Versus | |
| | Smt. Sheela Devi & others | ....Respondents |
| **3.** | **FAO No. 460 of 2007** | |
| | Smt. Sheela Devi | ...Appellant |
| | Versus | |
| | Ashok Kumar & others | ....Respondents |
| **4.** | **FAO No. 461 of 2007** | |
| | Smt. Poonam Sharma | ...Appellant |
| | Versus | |
| | Ashok Kumar & others | ....Respondents |

**Motor Vehicle Act, 1988-** Section 149- Insurance Company claimed that driver did not have valid driving licence to drive the vehicle and that insured had committed willful breach of the terms and conditions of the insurance policy- however, no evidence was led to prove this fact- held, that insurer had to plead and prove that the owner of the vehicle has committed willful breach of the terms and conditions of the insurance policy and mere plea is not sufficient to seek exoneration. (Para- 12)

**Case referred:**
National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 SC 1531

**FAOs No. 339 & 340 of 2007**
For the appellant(s) : Mr. Ashwani K. Sharma, Advocate.
Mr. S.C. Sharma, Advocate, for respondent(s) No. 1.
Mr. Ajay Sharma, Advocate, for respondent(s) No. 2 & 3.

**FAOs No. 460 & 461 of 2007**
For the appellant(s) : Mr. S.C. Sharma, Advocate.
Mr. Ajay Sharma, Advocate, for respondent(s) No. 1 & 2.
Mr. Ashwani K. Sharma, Advocate, for respondent(s) No. 3.

The following judgment of the Court was delivered:

***Mansoor Ahmad Mir, Chief Justice*** *(oral*

All these appeals are outcome of a common award dated 22.06.2007, made by the Motor Accident Claims Tribunal, Shimla, (hereinafter referred to as "the Tribunal") in M.A.C.C. No. 42-S/2 of 2003, titled *Smt. Poonam Sharma versus Shri Ashok Kumar & others* and M.A.C.C. No. 43-S/2 of 2003, titled as *Smt. Sheela Devi versus Shri. Ashok Kumar & others,* whereby compensation to the tune of Rs. 1,75,000/- and Rs.3,54,000/, came to be awarded in favour of the claimants in Claim Petition No. 42-S/2 of 2003, and Claim Petition No. 43-S/2 of 2003, respectively, with interest @ 7.5% per annum from the date of filing of the claim petitions till its realization and the United India Insurance Company, being the insurer of the vehicle, was saddled with liability, in both the claim petitions, for short the "impugned award".

**BRIEF FACTS:**

2. Claimants, Smt. Poonam Sharma in M.A.C.C. No. 42-S/2 of 2003 and Smt. Sheela Devi in M.A.C.C. No. 43-S/2 of 2003, have invoked the jurisdiction of the Tribunal, for grant of compensation to the tune of Rs.5,00,000/- and Rs.10,00,000/- respectively, with interest @ 18% per annum, as per the break-ups given in the claim petitions, on the ground that driver, namely, Jeet Ram, was driving vehicle-bus bearing registration No. HP-19-4870, rashly and negligently, on 09.12.1999, at about 6.50 p.m., at Kinnu, Police Station, Amb; caused the accident; Akash Kumar and Sanjeev Kumar sustained injuries and succumbed to the injuries and the claimants have lost their bread-earners.

3. The respondents have resisted the claim petitions on the grounds taken in the memo of objections.

4. Common issues came to be framed by the Tribunal in both the petitions on 27.10.2004. It is apt to reproduce the issues framed in claim petition No. 42-S/2 of 2003:-

*"i) Whether the death of Akash Kumar took place due to rash and negligent driving of Bus No. HP-19-4870 by the respondent Jeet Ram? ..OPP*

*ii) In case Issue No. 1 is proved in affirmative to what amount of compensation the petitioner is entitled to? ...OPP*

*iii) Whether the vehicle in question at the time of accident was being driven by a person not holding a valid and effective driving licence and in violation of terms and conditions of the Insurance Policy?*

*iv) Whether the petition is filed by the petitioner in collusion with the respondents No. 1 and 2? OPR-3*

*v) Whether the petition is bad for mis-joinder of necessary parties? OPR-3*

vi) *Relief."*

5. The parties led evidence. The Tribunal after examining the pleadings and scanning the evidence on record, held that the deceased sustained injuries; succumbed to the injuries in a vehicular accident, which was caused by driver Jeet Ram, while driving the offending bus, rashly and negligently; the claimants are entitled to compensation to the tune of Rs.1,75,000/- and Rs.3,54,000/- in claim petitions No. 42-S/2 of 2003 and 43-S/2 of 2003, respectively, with interest at the rate of 7.5% per annum from the date of filing of the claim petitions till its realization and saddled the insurer with liability.

6. The insured-owner and the driver have not questioned the impugned award, on any count. Thus, it has attained finality so far as it relates to them.

7. The Insurer-United India Insurance Company has questioned the impugned award on the ground that the Tribunal has fallen in error in saddling it with liability.

8. The claimants have also questioned the impugned award on the ground of adequacy of compensation.

**Issue No. 1**

9. The findings returned by the Tribunal on this issue are not in dispute. However, I have gone through the impugned award, pleadings and the evidence on the record. The claimants have proved by leading oral as well as documentary evidence that the driver had driven the offending vehicle in a rash and negligent manner on the fateful day and caused the accident, in which the deceased sustained injuries and succumbed to the injuries. Thus, the findings returned by the Tribunal on this issue are upheld.

**Issues No. 4 & 5**

10. There is no dispute regarding these issues. Accordingly, the findings returned by the Tribunal on these issues are upheld.

**Issue No. 3.**

11. The onus to prove this issue was upon the insurer-Insurance Company, but it has failed to discharge the same.

12. It is beaten law of the land that insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms and conditions of the insurance policy and mere plea here and there cannot be a ground for seeking exoneration.

13. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 SC 1531.** It is apt to reproduce relevant portion of para 105 of the aforesaid judgment**,** herein:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) …….*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

14. The insurer-insurance company has failed to prove this issue, thus the Tribunal has rightly recorded the findings on this issue. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

**Issue No. 2**

15. The claimants have also sought the enhancement of compensation on the ground that the award amount is inadequate. The Tribunal has made discussion in para 40 of the impugned judgment in claim petition No. 42-S/2 of 2003 and paras 41 to 45 of the judgment, *supra,* in claim petition No. 43-S/2 of 2003, about the grant of compensation. The Tribunal has rightly assessed the compensation, which cannot be said to be inadequate, in any way. Accordingly, the findings returned by the Tribunal on this issue are also upheld.

16. Having said so, I am of the considered view that the Tribunal has rightly assessed the adequate and just compensation and saddled the insurer-United India Insurance Company with liability to satisfy the award and all these appeals merit to be dismissed; are dismissed as such and the impugned award is upheld accordingly.

17. Registry is directed to release the awarded amount in favour of the claimants, strictly as per the terms and conditions, contained in the impugned award.

18. Send down the records after placing copy of the judgment on the record.

**********

**BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.**

Sh. Vipan Kumar .....Appellant

Versus

Naushad Ahmed and another .....Respondents.

FAO (MVA) No. 164 of 2007
Date of decision: 28.11.2014.

**Motor Vehicle Act, 1988-** Sections 149 and 157- Unless and until the transfer is effected in the registration certificate and the other documents, registration certificate continues to be in the name of the owner and the transferee in whose name the vehicle has been transferred cannot be said to be the registered owner. (Para-7)

| | |
|---|---|
| For the appellant: | Mr. Jagdish Thakur, Advocate. |
| For the respondents: | Nemo for respondent No.1.<br>Ms. Sunita Sharma, Advocate, for respondent No.2. |

The following judgment of the Court was delivered:

**Mansoor Ahmad Mir, Chief Justice** *(Oral)*

Challenge in this appeal is to the judgment and award dated 28.2.2007, passed by the Motor Accident Claims Tribunal-II Sirmaur District at Nahan, H.P. in MAC Petition No. 33-N/2 of 2002, titled *Sh. Vipan Kumar versus Sh. Naushad Ahmed and others*, whereby claim petition of the claimant came to be dismissed, for short "the impugned award", on the grounds taken in the memo of appeal.

2. The claimant being the victim of a vehicular accident filed claim petition before the Tribunal for the grant of compensation, on the grounds taken in the memo of claim petition.

3. The respondents resisted and contested the claim petition and following issues came to be framed:

(i) *Whether petitioner Vipan Kumar sustained grievous injuries in a motor accident caused by rash and negligent driving of a Maruti Car ( No.UGX-4001) by its driver (who also died) near Paonta Sahib Tehsil on January 15,2002, as alleged? ……. OPP*

*(ii) If the issue 1 is proved, whether the petitioner is entitled to compensation? If so, to what amount and from whom? ……OPP*

*(iii) Whether the Maruti Car driver (deceased) had no valid driving licence at the relevant time. If so, its effect? …….OPR-2.*

*(iv) Whether the petition is bad for mis-joinder and non-joinder of necessary parties, as alleged? OPR-2.*

*(v) Whether the Car involved in the accident was being plied in violation of the terms and conditions of the insurance policy.OPR-2.*

*(vi) Relief.*

4. The parties led the evidence.

5. Issue No. 1 came to be decided in favour of the claimant by holding that driver had driven the offending vehicle rashly and negligently.

6. Before I deal with Issue No. 2, I deem it proper to deal with Issues No. 3, 4 and 5. Respondent No. 2- insurer has failed to lead any evidence on Issues No. 3 and 5. However, I have gone through the record. The respondents have not discharged the onus to prove these issues, came to be rightly decided by the Tribunal.

7. The Tribunal has fallen in error in deciding Issue No. 4. It is beaten law of the land that unless and until the transfer is effected in the Registration certificate and other documents, registration continues to be in the name of the owner of the vehicle and so called transferee in whose name the vehicle was to be transferred, cannot be said to be registered owner.

8. I, while dealing with the issue of the same and similar nature in **FAO No. 7 of 2007** titled *Ashok Kumar & another Versus Smt. Kamla Devi & others* decided on 5.9.2014, in terms of the apex court judgments laid down the same principles. It is apt to reproduce paras 15 to 19 of the said judgment herein:

> "15. Section 157 of the Act reads as under:
>
> ***"Transfer of certificate of insurance.***
>
> *(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.*
>
> *[Explanation.—For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.]*
>
> *(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."*
>
> While going through the aforesaid provision, one comes to an inescapable conclusion that transfer of a vehicle cannot absolve insurer from third party liability and the insurer has to satisfy the award.
>
> 16. Admittedly, on the date of accident, i.e. 05.06.2000, the offending vehicle was not transferred in the name of appellant-Ashok Kumar. It was transferred in his name w.e.f. 17.06.2000. Thereafter, the appellant-respondent No. 1 Ashok Kumar was supposed to give information regarding transfer of the vehicle to the insurer-Insurance Company. The vehicle was not transferred on the date of accident, thus the question of informing the insurer about the transfer of the vehicle does not arise, at all. If the offending vehicle would have been transferred on the date of accident, i.e. 5th June, 2000, that can not be a ground to defeat the rights of the third party. As per the mandate of the Section (*supra),* the insurance policy shall be deemed to have been issued in favour of the transferee.
>
> 17. My this view is fortified by the Apex Court Judgment in case titled as **G. Govindan versus New India**

**Assurance Company Ltd. and others,** reported in **AIR 1999 SC 1398.** It is apt to reproduce paras-10, 13 & 15 of the aforesaid judgment herein:

*" 10. This Court in the said judgment held that the provisions under the new Act and the old Act are substantially the same in relation to liability in regard to third party. This Court also recognised the view taken in the separate judgment in Kondaiah's case that the transferee-insured could not be said to be a third party qua the vehicle in question. In other words, a victim or the legal representatives of the victim cannot be denied the compensation by the insurer on the ground that the policy was not transferred in the name of the transferee.*

*11. .....*

*12. .....*

*13. In our opinion that both under the old Act and under the new Act the Legislature was anxious to protect the third party (victim) interest. It appears that what was implicit in the provisions of the old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts.*

*14. .....*

*15. As between the two conflicting views of the Full Bench judgments noticed above, we prefer to approve the ratio laid down by the Andhra Pradesh High Court in Kondaiah's case (AIR 1986 Andh Pra 62) as it advances the object of the Legislature to protect the third party interest. We hasten to add that the third party here will not include a transferee whose transferor has not followed procedure for transfer of policy. In other words in accord with the well-settled rule of interpretation of statutes we are inclined to hold that the view taken by the Andhra Pradesh High Court in Kondaiah's case is preferable to the contrary views taken by the Karnataka and Delhi High Courts (supra) even assuming that two views are possible on the interpretation of relevant sections as it promotes the object of the Legislature in protecting the third party (victim) interest. The ratio laid down in the judgment of Karnataka and Delhi High Courts (AIR 1990 Kant 166 (FB) and AIR 1989 Delhi 88) (FB) (supra) differing from Andhra Pradesh High Court is not the correct one."*

18. The Apex Court in case titled as **Rikhi Ram and another** versus **Smt. Sukhrania and others,** reported in **AIR 2003 SC 1446** held that in absence of intimation of transfer to Insurance Company, the liability of Insurance Company does not cease. It is apt to reproduce paras 5, 6 & 7 of the judgment, *supra,* herein:-

*"5. The aforesaid provision shows that it was intended to cover two legal objectives. Firstly, that no one who was not a party to a contract would bring an action on a contract; and secondly, that a person who has no interest in the subject matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the owner as well as any other person can use the vehicle with the*

*consent of the owner. Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use.*

*6. On an analysis of Ss. 94 and 95, we further find that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and other third party is for whose benefit the vehicle was insured. So far, the transferee who is the third party in the contract, cannot get any personal benefit under the policy unless there is a compliance of the provisions of the Act. However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer.*

*7. For the aforesaid reasons, we hold that whenever a vehicle which is covered by the insurance policy is transferred to a transferee, the liability of insurer does not ceases so far as the third party/victim is concerned, even if the owner or purchaser does not give any intimation as required under the provisions of the Act."*

19. The Apex Court in latest judgment titled as **United India Insurance Co. Ltd., Shimla** versus **Tilak Singh and others,** reported in **(2006) 4 SCC 404** has held the same principle. It is apt to reproduce paras- 12 & 13 of the said judgment herein:

"*12. In Rikhi Ram v. Sukhrania [(2003) 3 SCC 97 : 2003 SCC (Cri) 735] a Bench of three learned Judges of this Court had occasion to consider Section 103-A of the 1939 Act. This Court reaffirmed the decision in G. Govindan case and added that the liability of an insurer does not cease even if the owner or purchaser fails to give intimation of transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interests of the third party.*

*13. Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts before us, or the new Act applies, as far as the deceased third party was concerned, the result would not be different. Hence, the contention of the appellant on the second issue must fail, either way, making a decision on the first contention unnecessary, for deciding the second issue. However, it may be necessary to decide which Act applies for deciding the third contention. In our view, it is not the transfer of the vehicle but the accident which furnishes the cause of action for the application before the Tribunal. Undoubtedly, the accident took place after the 1988 Act had come into force. Hence it is the 1988 Act which would govern the situation."*

9. Thus, the findings recorded are wrong and illegal. Even otherwise, the purpose of granting compensation is a social one and to save the victim of a vehicular accident from starvation and social evils. The claim petition cannot be dismissed in view of Section 158 (6) and 166 (4) of the Motor Vehicles Act, 1988.

10. Having said so, the findings on issue No. 4 are set aside.

11. Now coming to issue No. 2, the Tribunal has decided Issue No. 2 on the basis of the findings recorded on Issues No. 3 and 4. The question is, to what amount of compensation, the petitioner is entitled to. The Tribunal has made assessment and come to the conclusion that the claimant is entitled to Rs.3,14,659/- which is not in dispute in this appeal.

12. The question is who is to be saddled with the liability. This Issue has not been decided by the Tribunal. The insurer has not led any evidence to prove whether it is an "Act policy" or otherwise.

13. In the given circumstances, I deem it proper to remand the appeal by directing the Tribunal to decide the said issue, i.e., who is to be saddled with the liability. The insurer and owner are at liberty to lead evidence to that effect.

14. The parties are directed to cause appearance before the Tribunal on **20th December, 2014** and the Tribunal is directed to decide the matter by or before **20th February, 2015.**

15. Send down the record forthwith.

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