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And

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Constitution of India, 1950- Article 226- An advertisement was issued for 25 posts of unskilled workers on contract basis- petitioner participated in the selection process- however, selection process was cancelled- held, that selection process once commenced cannot be stopped - no cogent reasons were given for cancelling the selection process- respondent directed to continue and conclude the selection process.

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Constitution of India, 1950- Article 226- Petitioner appeared for the post of Physiotherapist – she was not offered appointment on the ground that the veracity of her certificates was to be verified- petitioner had obtained the diploma in physiotherapy from Allahabad Agricultural Institute which was recognized till 2005- petitioner appeared in examination during the academic session 2005-2006 and 2006-2007- no document was placed on record to show that recognition was extended to sessions 2005-2006 and 2006-2007- course in Physiotherapy is technical one which cannot be undergone in a distant mode- held, that in these circumstances, petition was rightly dismissed.

Title: Jyoti Gautam Vs. State of Himachal Pradesh and others Page-1005

Constitution of India, 1950- Article 226- Petitioner applied for the post of Constable under OBC category- respondent No. 4 and 5 applied for the post under the category of OBC reserved for Antyodya and IRDP categories- respondent No. 4 secured higher marks than the petitioner and he was considered against the IRDP (general) OBC category – respondent No. 4 was appointed against the OBC (IRDP) category- petitioner contended that respondent No. 5 could not have been considered against the post of OBC (IRDP) category because this post was already filled up by respondent No. 4- State contended that both respondents No. 4 and 5 belong to the OBC (IRDP) category and because the respondent No. 4 had secured higher marks, his case was considered against the OBC un-reserved post as per rules and instructions of the government- petitioner had secured less marks than respondent No. 4- therefore, he could not be selected against the OBC (unreserved) category- respondent No. 5 had secured less marks than the petitioner but he was selected against the OBC (IRDP) category and not against OBC (unreserved) category – held, that reservation in favour of OBC is under Article 16 (4) of the Constitution and would be termed as vertical reservation, whereas the reservation thereafter in favour of other categories like Ex-serviceman, IRDP and Home Guard within the OBC category would be considered as horizontal reservation- horizontal reservations cut across the vertical reservations - therefore, even after providing for the horizontal reservations, the percentage of reservations

in favour of OBC would still remain the same - proper course for the respondents was to fill up all the vacancies on the basis of merit and thereafter to fill up special reservations like Ex-serviceman, IRDP and Home Guard - if the quota fixed for horizontal reservation was already satisfied, no question would arise further but in case there was a shortfall – the number of special reservation candidates were required to be taken and adjusted/ accommodated against their respective categories- name of the respondent No. 4 could not have been considered against the OBC un-reserved category- the seat vacated by him could not have been offered to respondent No. 5- respondent No. 5 could not have been considered against the post of OBC (IRDP) - the seat vacated by respondent No. 4 was to be filled up from OBC (unreserved) category – since, petitioner was next in merit, therefore, he was required to be appointed in place of respondent No. 5.

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Constitution of India, 1950- Article 226- Petitioner claimed that she belongs to a BPL family – she is landless and has a preferential right to be appointed- interview committee had wrongly awarded 6 marks to respondent No. 4 and one mark to petitioner- it was further claimed that respondent No. 4 is a member of joint family and is getting pension- family income of the respondent No. 4 is more than Rs. 12,000/- per month- respondent No. 4 claimed that she is widow and has five children- she is residing separately from her mother-in-law- held, that no allegation of favoritism or malafide were made in the petition- it was for the Selection Committee to award the marks- merely because less marks were awarded to the petitioner cannot lead to an inference that process of assessment is unfair- further, the petitioner had taken a chance and was not selected, hence, she cannot question the selection – petition dismissed.

Title: Anjna Kumari vs. State of H.P. and others Page-965

Constitution of India, 1950- Article 226- Petitioner joined as Manager with respondent No. 3, a Society- her pay was ordered to be reduced in view of the orders passed by the Deputy Registrar, Cooperative Societies- she filed a writ petition in which a statement was made that a reduction will not be applicable to the petitioner- when new Director joined, he passed various resolution reducing the salary of the petitioner-record showed that resolutions enhancing the salary were passed without seeking approval of the Registrar- it was stated in the writ petition that petitioner need not refund the enhanced salary received by her-no statement was made regarding the future salary- income of the society was Rs. 28,000/- and the petitioner claimed salary of Rs. 40,000/- held, that no fault can be found with the resolution reducing the salary of the petitioner.

Title: Satish Dadwal Vs. State of H.P. and others Page-954

Constitution of India 1950- Article 226- Petitioner was promoted as JE as per Military Engineering Services (Superintendents (Electrical Mechanical) Grade I and Grade II) Recruitment Rules , 1983- petitioner had appeared in the diploma Course, the result of which was declared on 6.2.2001 after the cut-off date- however, examination was conducted in

the month of December, 2000 prior to cut-off date- held, that petitioner was eligible to be considered for promotion and relevant date is the date of taking of the examination and not the date of pronouncement of the result.

Title: Union of India & Others Vs. Tej Ram Page-968

Constitution of India, 1950- Article 226- Respondent No. 3 issued an advertisement inviting an applications for filling up the post of Junior Engineers- petitioners, members of the scheduled castes, participated in the selection process - they qualified the test and were called for interviews - Petitioners were successful but the appointment letters were not issued to them on the basis of instructions dated 9.6.2014- held, that selection process had commenced on 20.5.2014- test was held on 10.1.2014- Interviews were held on 24.3.2014 and 25.3.2014 and the result was declared on 20.4.2014- selection process had commenced and the instructions would only apply prospectively- further held that the reservation of the ex-servicemen is horizontal in nature- the persons have to be first selected against the respective quotas in favour of Ex-servicemen, physically handicapped persons and thereafter depending upon the fact as to which of the reserved categories under Article 16(4) or the residuary general category, they belong to, they have to be adjusted against those categories- Writ petition allowed and respondent directed to fill up the posts of Junior Engineer from the category of scheduled caste ex-servicemen (unreserved) and if the candidates of ex-servicemen scheduled caste are not available, the posts are permitted to be filled up from the candidates belonging to scheduled caste category.

Title: Praveen Bharti and another Vs. State of H.P. and others.

Page-927

'H'

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2 (10)- Plaintiff claimed that land was mortgaged – the mortgage was redeemed and the possession was delivered on 18.9.1992- defendants or their predecessor-in-interest were never inducted as tenants- defendants claimed that they were in possession prior to the mortgage- evidence showed that land was mortgaged by the predecessor-in-interest with Sardar of Shamirpur – it was proved that defendants were inducted as tenant by mortgagee or not by mortgagor- held, that tenant of a mortgagee does not acquire any right of ownership- tenants of the mortgagee do not become the tenants of the mortgagor.

Title: Deemanu Ram and others Vs. Bilwa Mangal Page-939

H.P. Town and Country Planning Act, 1977- Section 16 (c)- Plaintiff filed a civil suit seeking specific performance of the contract entered into between the predecessor-in-interest of the plaintiffs and defendants regarding the land situated within the jurisdiction of Town and Country Planner – held that there is no blanket bar in the planning area to sell, gift, exchange, lease or mortgage with possession any land if its Sub-Division is duly approved by the Director – further, held that separate khasra can be alienated without seeking permission from Town and Country Planning Department.

'I'

proved on record that defendant No. 2 was looking after the deceased during his life time- deceased was residing alone and defendant No. 2 was married at a walk able distance of 5 minutes from the house of the deceased- version of the witnesses regarding the visit to Sub Registrar by deceased was also contradictory- scribe stated that the Will was earlier written in favour of all real brothers- 3-4 persons came who quarreled with the deceased on which the deceased tore the earlier Will and executed a fresh Will in the name of the defendant No.1 – the fact that deceased had got the Will executed in favour of all brothers showed that she never executed the Will in favour of the defendant No.1- defendant No.1 is the client of DW-1- DW-3 is his clerk, therefore, their testimonies cannot be relied upon- in these circumstances, Will was rightly held to be not proved.

Title: Gilja Ram vs. Barfi Devi & Others Page-949

'L'

Limitation Act, 1963- Article 65- Plaintiff filed a civil suit stating that he is owner in possession of suit land and the defendants have no concern with the same- entries in favour of defendants were wrong and illegal- defendants claimed that they are in open, peaceful and continuous possession of the suit land since time immemorial- they have become owners by way of adverse possession- jamabandi showed that suit land was recorded in possession of defendant since 1987-1988- entries were repeated in the subsequent jamabandies – land was earlier cultivated by the father of the defendant and the house was constructed over a portion of the land- there is no entry of payment of rent by the predecessor-in-interest of the defendants to the plaintiff – held, that in these circumstances the plea of the adverse possession is duly proved.

Title: Bias Dev vs. Munshi Ram and others Page- 932

Limitation Act, 1963- Section 54- where the purchasers had stated that they were ready to perform their part of the contract and had kept the money for registration expenses- seller admitted that sale consideration was received by him and contract did not provide that time was the essence of the contract, suit cannot be said to be barred by limitation.

Title: Rattan Chand (deceased) through his LRs Smt. Kunti Devi and others vs. Pawan Kumar and others Page-1007

'M'

Motor Vehicle Act, 1988- Section 149- Owner claimed that he had engaged one 'R' as driver and 'A' on his own had started vehicle and had caused accident- A did not have a valid driving licence at the time of accident- held, that if 'R' was engaged as driver it was not explained as to how 'A' could have opened the door of the vehicle and could have started the same- no police report was filed before the Tribunal- held, that in these circumstances, Tribunal had rightly held owner to be liable.

Title: Kesari Devi Vs. Anil Kumar Mastana & others Page-1060

Motor Vehicle Act, 1988- Section 149- Passengers carrying capacity of the vehicle was '4+1' which means that risk of 4 passengers and one driver was covered- deceased was travelling in the vehicle at the time of

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of 7 kg of charas concealed under the clothes- an option was given to him whether he wanted to be searched by police on the spot, magistrate or gazetted officer prior to the search- held, that accused has to be given an option to be searched before gazetted officer or magistrate- option given to the accused to be searched before the Magistrate, gazetted officer or the police is against the letter and spirit of Section 50 of the ND & PS Act- the entire trial is vitiated due to non-compliance of the provisions of Section 50-accused acquitted

Title: Sagar Chaudhary Vs. State of H.P. Page-1068

'S'

Specific Relief Act, 1963- Section 34- Plaintiffs claimed that they are joint owner in possession of the suit land with defendant No. 1 to the extent of half share and that the land was never partitioned – predecessor-in-interest of the defendants had sold the suit land exceeding his share vide sale deed dated 1.3.1983- defendant claimed that land was mortgaged prior to the sale- plaintiff had no right, title or interest over the suit land- according to recital in the sale deed, vendor had half share over the suit land, however, he had sold the entire suit land- held, that only half share could have been sold and not the whole.

Title: Kanahya Lal & ors. Vs. Kirpa Ram & ors. Page-947

Specific Relief Act, 1963- Section 34- Plaintiff claimed that he and defendants No. 4 and 8 are owners in possession of suit land- order passed by Settlement Officer, Dharamshala and consequent mutation attested in favour of defendants No. 1 and 3 are wrong- defendants claimed that suit land was the subject matter of consolidation – the predecessor-in-interest of the plaintiff and defendants No. 4 and 5 and others had filed a revision petition before the State Government- Khasra Nos. 221 and 222 were re-allotted- order is binding upon the plaintiff- record showed that only Khasra Nos. 221, 222 and 223 were re-allotted- thus the order would not apply to the other Khasra numbers- plaintiff claimed that order was passed by settlement Officer without hearing him- trial Court held that in absence of the file, the version of the plaintiff could not be relied upon- held, that in absence of file, version of the plaintiff that he was not heard prior to passing of the order cannot be brushed aside – further, the fact that suit land was allotted to defendants No. 1 to 3 beyond entitlement would show that plaintiff was not heard, otherwise, plaintiff would have pointed out this fact to the Settlement Officer.

Title: Pawan Kumar Vs. Rajinder Lal and others Page-996

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be the co-owners in possession of the suit land and the defendant to be a stranger- defendant claimed that suit land was allotted to him by Government under H.P. Village Common Land and Utilization Scheme- the copy of revenue record showed that suit land was recorded in ownership of Shamlat Deh Hasab Rasad Malguzari- the name of the defendant was recorded to be in possession of suit land- remarks column showed that ownership was transferred in the name of the Government and that the govt. had allotted the land in favour of the defendant- mutation was

attested-Settlement collector reviewed and cancelled it - held, that certificate of allotment of land is a substantial piece of evidence-allotment made by Settlement Collector could not be challenged before the Civil Court but could only be challenged by filing an appeal.

Title: Jarmej Singh son of Shri Rasila Singh and others Vs. Hazauro son of Shri Mangtu Page-1040

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be the co-owners in possession of the suit land and the defendant to be a stranger-defendant claimed that suit land was allotted to him by Government under H.P. Village Common Land and Utilization Scheme- the copy of revenue record showed that suit land was recorded in ownership of Shamlat Deh Hasab Rasad Malguzari- the name of the defendant was recorded to be in possession of suit land- remarks column showed that ownership was transferred in the name of the Government and that the govt. had allotted the land in favour of the defendant- mutation was attested-Settlement collector reviewed and cancelled it - held, that certificate of allotment of land is a substantial piece of evidence-allotment made by Settlement Collector could not be challenged before the Civil Court but could only be challenged by filing an appeal.

Title: Jarmej Singh son of Shri Rasila Singh and others Vs. Raghubir Singh S/o Mangtu Page-1046

Specific Relief Act, 1963- Section 34- Suit land was recorded in the name of respondents No. 7 to 11- A sale deed was executed by respondents No. 7 to 9 in favour of defendants No. 3 to 5- plaintiffs claimed that earlier a suit was filed by defendants No. 7 to 9 against them regarding the cultivation of the land- a compromise was arrived in the appeal and as per compromise, plaintiff and defendants No. 1 and 2 paid money to the previous owner and became owners of their share in the suit land- defendants became the owners to the extent of half share, whereas plaintiffs became owners of remaining half share – entries in favour of defendants are wrong- defendants denied the possession as well as the compromise- held, that once it was determined that plaintiffs are entitled to half share and defendants no. 1 & 2 are entitled to half share, the same question cannot be re-agitated.

Title: Bakshi Ram and others Vs. Julfi Ram since deceased through his LR's and others Page-970

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Yerumalla Latchaiah vs. State of A.P. (2006) 9 SCC 713

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

Praveen Bharti and another. ...Petitioners.

Versus

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

CWP No. 6864 of 2014
Reserved on: 27.11.2014
Decided on: 3.12. 2014

Constitution of India, 1950- Article 226- Respondent No. 3 issued an advertisement inviting an applications for filling up the post of Junior Engineers- petitioners, members of the scheduled castes, participated in the selection process - they qualified the test and were called for interviews - Petitioners were successful but the appointment letters were not issued to them on the basis of instructions dated 9.6.2014- held, that selection process had commenced on 20.5.2014- test was held on 10.1.2014- Interviews were held on 24.3.2014 and 25.3.2014 and the result was declared on 20.4.2014- selection process had commenced and the instructions would only apply prospectively- further held that the reservation of the ex-servicemen is horizontal in nature- the persons have to be first selected against the respective quotas in favour of Ex-servicemen, physically handicapped persons and thereafter depending upon the fact as to which of the reserved categories under Article 16(4) or the residuary general category, they belong to, they have to be adjusted against those categories- Writ petition allowed and respondent directed to fill up the posts of Junior Engineer from the category of scheduled caste ex-servicemen (unreserved) and if the candidates of ex-servicemen scheduled caste are not available, the posts are permitted to be filled up from the candidates belonging to scheduled caste category. (Para-5 to 7)

For the Petitioners: Mr. Adarsh K. Vashishta, Advocate.
For the Respondents: Mr. M.A. Khan, Addl. A.G. with
Mr. P.M. Negi, Dy. A.G. for respondents No.1 and 2.
Ms. Archana Dutt, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Respondent No.3 issued an advertisement No. 25/2013 dated 20.5.2013 whereby applications were invited for filling up the posts of Junior Engineers in IPH/HIMUDA. The last date of receipt of applications was 20.6.2013. Petitioners also participated in the selection process. They belonged to scheduled caste category. Written test was held on 10.1.2014. They qualified the written test and were called for interviews on 24.3.2014 and 25.3.2014, respectively. The result was declared on 20.4.2014. Petitioners were declared successful/suitable by respondent No.3. However, fact of the matter is that

appointment letters were not issued to the petitioners purportedly on the basis of instructions issued on 9.6.2014.

2. Mr. Adarsh Vashistha, learned counsel for the petitioners, has drawn the attention of the Court to page 228 of the *Handbook on Personnel Matters Volume-II (Second Edition).* It reads as under:

> **"From 8.11.1994 there is Vertical Reservation in favour of Scheduled Castes, Scheduled Tribes and the Other Backward Classes under Article 16 (4) of the Constitution. The reservation provided to Ex-servicemen, children/grand children of freedom fighters, physically handicapped persons, antodaya/IRDP and outstanding sportsmen under Article 16 (1) of the Constitution is treated as Horizontal Reservation. The Horizontal Reservation is to be dove tailed with vertical reservation in the following manner:-**
>
> **"The persons concerned have to be first selected against the respective quotas in favour of Ex-servicemen, physically handicapped persons etc. provided by Horizontal reservations under Article 16 (1) and thereafter depending upon the fact as to which of the reserved categories under Article 16(4) (whether scheduled castes, scheduled tribes or other backward classes) or the residuary general category, they belong to, they have to be suitably adjusted against the said categories."**

3. In continuation to this, the State Government has also issued suitable instructions on 23.10.2010. The text of instructions dated 23.10.2010 read as under:

> **"I am directed to refer to your letter No.H.P.SSSB-B(2)-392/06-17:86 dated 7th September, 2010 on the subject cited above and to say that the horizontal reservation is dove-tailed with the vertical reservation. In the event of non-availability of suitable candidate(s) for appointment against the vacancy under horizontal reservation, the said vacancy can be filled up from the candidate of respective category to whom this vacancy/post originally belong/earmarked by following proper procedure. This Department (Appointment-III) has issued detailed instructions on the subject from time to time and case to case viz. Per (AP.II) B (19)-3/85 dated 14.7.1988 (appearing at page 802 of HB on personnel Matter Vol-II), No. Per (AP) C-F (4)-4/96 dated 12.5.1997 and No. 2-11/72-DP (A.II) dated 28.5.1999 vide letter dated 28th May, 1999, a photocopy each of these letters is annexed. It is requested that the matter may please be examined and decided accordingly."**

4. Mr. M.A. Khan, learned Additional Advocate General has drawn the attention of the Court to instructions Annexure R-II. These instructions are dated 14.7.1998. The crux of the instructions is that in cases where it is obvious that ex-servicemen will not at all be available for appointment to any category of posts, the posts so reserved for ex-servicemen may be filled by dependent sons, daughters and wives of ex-servicemen in the first attempt with the prior concurrence of the ex-servicemen cell in the Labour and Employment Department, Himachal Pradesh, Shimla. In case, sons, daughters and wives of ex-servicemen for posts authorized to be filled in the first attempt are not available then the reservation would be carried forward to four calendar years, as at present.

5. We have gone through these instructions quoted hereinabove. Petitioners have been declared successful/ suitable as per result declared on 20.4.2014. The instructions on the basis of which petitioners have been denied the appointment are dated 9.6.2014. The selection process has commenced vide advertisement No.25/2013 dated 20.5.2013. Written test was held on 10.1.2014. Interviews were held on 24.3.2014 and 25.3.2014. The result was

declared on 20.4.2014. The reservation of the ex-servicemen is horizontal in nature. From 8.11.1994 onwards, the persons concerned have to be first selected against the respective quotas in favour of Ex-servicemen, physically handicapped persons etc. provided by horizontal reservations under Article 16 (1) and thereafter depending upon the fact as to which of the reserved categories under Article 16(4) (whether scheduled castes, scheduled tribes or other backward classes) or the residuary general category, they belong to, they have to be suitably adjusted against those categories.

6. Similarly, as per instructions dated 23.10.2010, in the event of non-availability of suitable candidate(s) for appointment against the vacancy, under horizontal reservation, that vacancy can be filled up from the candidate of respective category to whom the post originally belonged/earmarked by following proper procedure. According to advertisement, six posts of scheduled caste (wards of ex-serviceman) were advertised. No ward of scheduled caste ex-serviceman was available. In the event of non-availability of candidate belonging to scheduled caste (wards of ex-servicemen), the post was to be filled up from the respective category, i.e. ex-servicemen scheduled caste (unreserved) and if candidates of ex-servicemen scheduled caste (unreserved category) were not available, then from scheduled caste category. The primary reservation as stipulated under Article 16 (4) to scheduled caste, scheduled tribe and other backward classes is vertical in nature whereas the reservation provided to ex-servicemen, physically handicapped persons, sportsmen etc. is horizontal reservation. In the present case, there was no need to carry forward the posts reserved for wards of ex-servicemen. The posts were to revert back in the eventuality the candidates belonging to scheduled caste (wards of ex-servicemen) were not available to scheduled caste ex-servicemen (unreserved) and if this category was not available to scheduled caste category. The general principle is that the horizontal reservation is required to be dove-tailed with the vertical reservation. The action of the respondents not to offer appointment letters to the petitioners is legal. Moreover, the selection process has commenced vide advertisement No. 25/2013 on 20.5.2013 and Annexure R-III was issued on 9.6.2014. This would apply prospectively.

7. Accordingly, in view of the analysis and discussion made hereinabove, the writ petition is disposed of. Respondents are directed to fill up the posts of Junior Engineer from the category of scheduled caste ex-servicemen (unreserved) within a period of four weeks from today as per advertisement No. 25/2013 dated 20.5.2013 and if the ex-servicemen scheduled caste candidates are not available, the posts are permitted to be filled up from the candidates belonging to scheduled caste category. 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 DHARAM CHAND CHAUDHARY, J.

Seeta Ram and others. .....Appellants

Versus

Ashok Kumar and others. ...Respondents

RSA No. 610 of 2007
Decided on: 5th December, 2014

Code of Civil Procedure, 1908- Order 22 Rule 4- One of the proforma defendants died on 9.12.2006 during the pendency of the appeal- this fact was not brought to the notice of the Court- when the notice of the appeal was issued by High Court it was found that one of the defendants had already died- held, that question

regarding the abatement can only be decided by the Court where the lis is pending at the time of death- judgment passed in favour or against the dead person is a nullity - matter remanded to the Trial Court with the direction to decide the question of the substitution or abatement. (Para- 2 to 9)

Cases referred:

Jagan Nath and others versus Ishwari Devi, 1988(2) Shim.L.C. 273

Karam Chand and others versus Bakshi Ram and others, 2002(1) Shim.L.C. 9.

Kishun @ Ram Kishun (dead) versus Bihari (D), AIR 2005 Supreme Court, 3799

For the appellants:	Mr. K.D. Sood, Senior Advocate with Mr. Naresh. K. Sharma, Advocate.
For the respondents:	Mr. N.K. Thakur, Senior Advocate with Mr. Surender Sharma, Advocate for respondents No. 1, 2, 6 & 9 to 11. Mr. Virender Verma, Addl. A.G with Mr. Pushpinder Jaswal, Dy. A.G for respondent No. 46.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge. (Oral)

CMP No. 3122 of 2014 & RSA No. 610 of 2007

Defendants are in second appeal before this Court. They are aggrieved by the judgment and decree dated 8.10.2007 passed by learned Additional District Judge, Fast Track Court, Una in Civil Appeal No. 61/2K RBT 65/04/2000. The appellants-defendants suffer the decree passed by learned Sub Judge 1st Class, Court No. (I), Amb, District Una, whereby the plaintiffs and proforma defendants, (respondents herein) have been declared owner in possession of the suit land measuring 48 kanals 3 marlas entered in Khewat No. 418min, Khatoni No. 1813, Khasra Nos. 6281, 10899/6283 and 6284, situate in Village Lohara, Tehsil Amb, District Una. Learned lower appellate Court has dismissed the appeal and affirmed the judgment and decree passed by the trial Court.

2. One of the respondents-proforma defendants Harnam Singh (respondent No. 21) had expired on 09.12.2006 during the pendency of the appeal in the lower appellate Court. The appellants-defendants and respondents-plaintiffs failed to report the factum of the death of respondent-defendant Harnam Singh in the lower appellate Court nor consequential steps taken and to the contrary the appeal came to be decided by learned lower appellate Court without taking notice of his death and substituting his legal representatives. It is when notice of this appeal issued to respondent-defendant Harnam Singh, it transpired that he has already expired. Initially, the appellants-defendants have filed application CMP(M) No. 867 of 2008, with a prayer to delete his name from the array of parties. The same, however, was allowed to be withdrawn with liberty reserved to file fresh one vide order passed on 24.02.2014.

3. It is in this backdrop, the application (CMP No. 3122 of 2014) aforesaid came to be filed on behalf of the appellants-defendants with a prayer that the name of deceased respondent Harnam Singh may be ordered to be deleted from the array of parties and the question of abatement of the appeal on account of his death is ordered to be determined in accordance with law.

4. The application has been contested and resisted on various grounds, however, mainly that the deceased was a proforma defendant and there being no clash of interest inter-se the respondents-plaintiffs and the deceased and also that in view of his brother Baldev Singh is on record as respondent No. 24, coupled with the factum of their rights in the suit land joint and indivisible his estate was sufficiently represented and, as such, there is no question of abatement of the appeal. It has also been pointed out that the appellants-defendants cannot be allowed to take benefit of their own wrongs, as it was an obligation on their part to bring on record the legal representatives of deceased respondent in the lower appellate Court. The name of deceased respondent has, therefore, been sought to be deleted from the array of parties.

5. Admittedly, Harnam Singh, respondent No. 21 in the lower appellate Court had died during the pendency of the appeal in the lower appellate Court. There is again no quarrel so as to his predecessor was ex-parte in the lower appellate Court and he did not contest the suit. Similarly, on substitution of deceased respondent No. 21 Harnam Singh, he also opted for not putting appearance and contest the suit. In the lower appellate Court also he was ex-parte. The fact, however, remains that the suit has not only been decreed in favour of plaintiffs-respondents No. 1 to 11 but also in favour of deceased respondent Harnam Singh along with other proforma defendants-respondents. Meaning thereby that irrespective of his brother Baldev Singh is there on record, the right to sue survives in favour of legal representatives, if any, of the deceased respondent Harnam Singh. The appeal stands abated on his death or not, is also a question, which cannot be gone into by this Court and rather the Court where the lis was pending at the time of his death. Otherwise also, in view of the constant legal position settled by this Court and also the apex Court in various judicial pronouncements, as and when the question of abatement of the suit or appeal arises, such question can only be gone into and decided by the Court where the suit or appeal was pending at the time of death of a party. It has been held so by a Co-ordinate Bench of this Court in ***Jagan Nath and others*** versus ***Ishwari Devi, 1988(2) Shim.L.C. 273*** and in ***Karam Chand and others*** versus ***Bakshi Ram and others, 2002(1) Shim.L.C. 9***.

6. Even the decree passed in favour of a dead person is also nullity. It has been held so by the apex Court in ***Kishun @ Ram Kishun (dead)*** versus ***Bihari (D), AIR 2005 Supreme Court, 3799***, which reads as follows:

> "5. As rightly pointed out by learned counsel for the appellants and fairly agreed to by learned senior counsel for the respondent, the decree passed by the High Court against a party who was dead, is obviously a nullity. It is conceded that the legal representatives of neither of the parties were brought on record in the second appeal and the second appeal stood abated. On this short ground this appeal is liable to be allowed and the decision of the High Court set aside.
>
> 7. We think that in this case, a proper enquiry as to whether there was a compromise or an adjustment of the dispute, in terms of the proviso to order XXIII, Rule 3 of the Code is warranted. The decision in the Second Appeal is also a nullity since it was passed in favour of a deceased appellant against a deceased respondent."

7. On the death of a party to a suit or appeal and for want of consequential steps, suit/appeal abates because abatement is automatic after the expiry of limitation prescribed for substitution of LRs of deceased party and setting aside the abatement. In the case in hand, respondent No. 21 had expired on 09.12.2006 during the pendency of the appeal in the lower appellate Court. The limitation prescribed for taking consequential steps and setting

aside the abatement has expired long back. In view of the judgment and decree under challenge is in favour of deceased respondent Harnam Singh also, the right to sue survives in favour of his legal representatives. The appeal, for want of consequential steps within the period of limitation stood dismissed having been abated qua deceased Harnam Singh in the lower appellate Court, whereas, vide judgment and decree under challenge, the suit has been decreed in favour of respondents-plaintiffs and surviving proforma respondents-defendants. There cannot be two judgments in one case.

8. In view of the legal as well as factual position discussed supra, this Court is left with no other and further option except to hold that the judgment and decree under challenge being in favour of a dead person is nullity, hence not legally sustainable.

9. Consequently, the judgment and decree under challenge in this appeal, being in favour of a dead person is nullity and is hereby quashed and set aside. The case is remanded to the lower appellate Court with a direction to the appellants-defendants herein to take consequential steps on the death of deceased respondent Harnam Singh and thereafter to decide the question of substitution of legal representatives and also the question of abatement of the appeal, if any, after affording the parties an opportunity of being heard. The parties through learned counsel representing them are directed to appear before learned lower appellate Court on ***23rd December, 2014***. Record be sent back so as to reach in the lower appellate Court well before the date fixed. Learned lower appellate Court is directed to dispose of the appeal as expeditiously as possible as but not later than the quarter ending ***31st March, 2015***.

10. The appeal stands disposed of accordingly. Pending application(s), if any, shall also stand disposed of.

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

Bias Dev ...Appellant.

Versus

Munshi Ram and others. ...Respondents.

RSA No. 419/2010
Reserved on: 25.11.2014
Decided on: 9.12. 2014

Limitation Act, 1963- Article 65- Plaintiff filed a civil suit stating that he is owner in possession of suit land and the defendants have no concern with the same- entries in favour of defendants were wrong and illegal- defendants claimed that they are in open, peaceful and continuous possession of the suit land since time immemorial- they have become owners by way of adverse possession- jamabandi showed that suit land was recorded in possession of defendant since 1987-1988- entries were repeated in the subsequent jamabandies – land was earlier cultivated by the father of the defendant and the house was constructed over a portion of the land- there is no entry of payment of rent by the predecessor-in-interest of the defendants to the plaintiff – held, that in these circumstances the plea of the adverse possession is duly proved. (Para-11)

For the Appellant: Mr. Sanjeev Bhushan, Advocate.

For the Respondents: None for respondents.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is directed against the judgment and decree dated 21.7.2005 rendered by the Presiding Officer, Fast Track Court, Mandi in Civil Appeal No. 84/99, 104/2004.

2. "Key facts" necessary for the adjudication of this appeal are that predecessor-in-interest of the appellant-plaintiff (herein after referred to as 'plaintiff ' for convenience sake), Sh. Janardhan filed a suit for declaration with consequential relief of possession against the respondents-defendants (hereinafter referred to as 'defendants' for convenience sake). According to the plaintiff, he was recorded owner in possession of the suit land and the defendants have no right, title and interest in the same. The entries showing the defendants in possession were wrong and illegal and not binding on the plaintiff. Defendants have raised construction over the suit land as stated in para 3 of the plaint without his consent and permission in the year 1990-91 whereas the remaining land was in possession of the plaintiff. Defendants have got themselves recorded as encroacher over the Government land during the settlement and rights to cut the grass have been conferred upon the defendants under the garb of wrong revenue entries.

3. The suit was contested by the defendants. According to the defendants, the suit land was in open, peaceful and continuous possession of the defendants since the time immemorial. The revenue entries in the revenue record were correct. Defendants have admitted that they have constructed a house over a portion of the suit land. However, it is stated that no objection was raised by the plaintiff at the time of raising construction. It was denied that the plaintiff was in possession of the suit land, but stated that the suit land was earlier Government land and the fore-father of the defendants occupied the suit land and since then he remained in continuous possession of the same. Father of the defendants died in the year 1965.

4. The replication was filed by the plaintiff. Issues were framed by the Sub Judge 1st Class on 20.4.1996. He dismissed the suit on 24.4.1999. Plaintiff preferred an appeal before the Presiding Officer, Fast Track Court, Mandi. He dismissed the same on 21.7.2005. Hence, the present Regular Second Appeal.

5. Mr. Sanjeev Bhushan, on the basis of substantial questions of law framed, has vehemently argued that both the courts below have not correctly appreciated the oral as well as documentary evidence led by the parties. According to him, defendants have not proved the ingredients of adverse possession.

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

7. Plaintiff has appeared as PW-1. According to him, defendants have raised the construction prior to 1992-93. They were asked not to raise the construction. The demarcation was obtained. He has proved copy of Jamabandi for the year 1987-88 Ex.PA.

8. DW-1 Nathu Ram has deposed that the suit land was in joint possession of the defendants since the time of their ancestor. Earlier their father was in possession of the suit land. His father has made the land cultivable. They have raised the construction about 10-11 years back. No one had objected when they raised the construction. DW-1 Nathu Ram was not

cross-examined regarding the fact that the suit land was in possession of the defendants since the time of their father.

9. DW-2 Bansi Ram and DW-3 Sohan Singh have deposed that the suit land was previously in possession of Daya Ram. He has made it cultivable. The house was constructed 8-9 years back.

10. DW-4 Kali Dass has deposed that he has carved out a plot on the suit land 9-10 years back.

11. The settlement, as per the record, has taken place in the year 1968. According to Jamabandi for the year 1987-88 Ex.P-1, the suit land was owned by Janardhan, predecessor-in-interest of the plaintiff and the same was recorded in possession of the defendants. Same entries were repeated in Missal Haquiat Bandobast Jadid Ex. DA and Ex. DD and also in the copies of jamabandis for the year 1992-93 Ex.DB and Ex.DC. Thus, it is amply proved that the suit land was recorded to be in possession of the defendants. It is duly established that defendants have been shown in possession of the suit land even 30 years back. The land was earlier cultivated by the father of the defendants and the house was constructed over a portion of the suit land. It was in the knowledge of the predecessor-in-interest of the plaintiff. The plaintiff has not led any tangible evidence on record to establish that his father has delivered the possession of the suit land to the predecessor-in-interest of the defendants. There is no corresponding entry of payment of rent by the predecessor-in-interest of the defendants to the plaintiff or his predecessor-in-interest.

12. Mr. Sanjeev Bhushan has vehemently argued that the defendants have admitted the title of the plaintiff over the suit land. Defendants have admitted the description of the suit land. They have admitted that according to Jamabandi, plaintiff's father was shown in ownership and the predecessor-in-interest was shown in possession of the suit land. It does not establish that defendants have admitted the title of the plaintiff. Defendants have pleaded that they have acquired their title by way of adverse possession being in open, peaceful, continuous and hostile possession. Defendants have led sufficient evidence that they are in adverse possession of the suit land for more than 12 years. Both the courts below have correctly appreciated the oral as well as documentary evidence led by the parties. There is no need to interfere with the well reasoned judgments rendered by both the courts below.

13. In view of the analysis and discussion made hereinabove, there are no substantial questions of law much less to say substantial question of law involved in the present Regular Second Appeal and the same is dismissed. 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.

Rajinder Singh and others. ...Petitioners.

Versus

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

CWP No. 4037 of 2014
Reserved on: 5.12.2014
Decided on: 9.12. 2014

Constitution of India, 1950- Article 226- An advertisement was issued for 25 posts of unskilled workers on contract basis- petitioner participated in the selection process- however, selection

process was cancelled- held, that selection process once commenced cannot be stopped - no cogent reasons were given for cancelling the selection process- respondent directed to continue and conclude the selection process. (Para- 4 to 10)

Cases referred:
Shankarsan Dash versus Union of India, (1991) 3 SCC 47

A.P. Aggarwal Vs. Government of NCT of Delhi and another, (2000) 1 SCC 600

Food Corporation o India and others Vs. Bhanu Lodh and others, (2005) 3 SCC 618

K.M. Babu Vs. Election Commission of India and others, AIR 2006 Kerala 226

For the Petitioners:	Mr. Vijender Katoch, Advocate.
For the Respondents:	Mr. M.A. Khan, Addl. A.G. with Mr. P.M. Negi, Dy. A.G. for respondent No.1. Mr. Rajinder Singh Thakur, Advocate for respondents No.2 and 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

25 posts of unskilled workers on contract basis in Resin and Turpentine Factory, Nahan were advertised in newspapers, i.e. The Tribune and Amar Ujala on 2.6.2012. Petitioners also participated in the selection process. Petitioners participated in 25 KMs walk test and physical test on 21.82012 and 22.8.2012. Call letters were issued to the petitioners and similarly situate persons on 21.7.2012 to appear in the interview/viva voce for the post of unskilled workers on 16.10.2012 and 17.10.2012 in R&T Factory, Nahan. However, fact of the matter is that respondent-corporation vide letter dated 30.8.2014 has cancelled the selection process initiated on the basis of advertisement dated 2.6.2012. The Model Code of Conduct was imposed on 30.10.2012. Respondent-corporation requested the Principal Secretary (Forests) to the Government of Himachal Pradesh to clarify whether the interview could be conducted on the scheduled date or not. The matter remained under consideration. The Principal Secretary (Finance) to the Government of Himachal Pradesh asked the respondent-corporation to internally locate the surplus staff. The text of letter dated 17.6.2014 reads as under:

> **"I am directed to refer to your office letter No.HPSFDC/Estt-3618 dated 19th May 2014 on the subject cited above and to say that the above matter was referred to the Finance Department for their concurrence and the Finance Department has opined as under:**
>
> **"Examined. Finance Department regrets its inability to concur in the Department's proposal for filling up of vacant posts in R&T factory Nahan and Bilaspur. However, the Department may consider locating surplus staff from Forest Corporation to do the job."**

2. A meeting of Board of Directors of the respondent-corporation was held on 11.7.2014. The Board of Directors directed that the requirement be got assessed by the administrative department first and then the matter be referred to the Service Committee. The General Manager of R&T Factory was

informed on 26.7.2014 that no action with regard to filling up of unskilled workers on contract basis be taken up and fresh process will be started as soon as the instructions are received from A.D. The Managing Director sent a communication to the Principal Secretary (Forests) to the Government of Himachal Pradesh on 1.8.2014. Letter dated 1.8.2014 reads as under:

> **"Kindly refer to your office letter No.FFE-A(B)15-02/2011-Part dated 17.6.2014 on the subject cited above.**
>
> **2. In this connection, it is submitted that the matter was again placed before the Board of Directors of the corporation in its meeting held on 11.7.2014 vide memo No.16/183 (Copy enclosed as Annexure-A) and the Board of Directors have decided as under.**
>
> > **"The Board directed that the need be assessed by the Administrative Department first and then matter be referred to the Service Committee."**
>
> **3. Since 63 vacant posts of unskilled workers in R&T Factories, Nahan and Bilaspur are urgently required to be filled up as they are directly linked with production, therefore, necessary approval to fill up at least 25 posts of unskilled workers in R&T Factory, Nahan and 19 posts in R&T Factory, Bilaspur under first phase as already requested vide this office letter No.HPSFDC/Estt./3618 dated 19.5.2014 may kindly be accorded at the earliest convenience so that the matter may then be placed before the Service Committee and Board of Directors for approval."**

3. The Managing Director informed the General Managers of R&T Factory, Nahan and Bilaspur not to fill up the posts of unskilled workers on contract basis on 30.8.2014.

4. The process was initiated on the basis of advertisement dated 2.6.2012. Petitioners have participated in the selection process. They have undertaken 25 KMs walk and endurance test. In fact, they were also issued interview letters on 21.7.2012. The process once commenced could not be stopped merely after coming into force of Model Code of Conduct on 30.10.2012. The respondent-corporation could only defer the issuance of appointment letters, but could not keep the entire selection process at abeyance. The Finance Department has regretted its inability to concur in the department's proposal for filling up of vacant posts in R&T Factory Nahan and Bilaspur. No cogent reasons have been assigned for not giving consent for filling up the posts. Since the process had commenced, the posts of unskilled workers were required to be filled up on contract basis. The Managing Director of the respondent-corporation has informed the Principal Secretary (Forests) vide letter dated 1.8.2014 that 63 posts of unskilled workers in R&T Factories, Nahan and Bilaspur were urgently required to be filled up as these were directly linked with the production and he had sought approval to fill up at least 25 posts of unskilled workers in R&T Factory, Nahan and 19 posts in R&T Factory, Bilaspur under first phase. It is amply proved on the basis of communications placed on record that at least 25 posts of unskilled workers in R&T Factory, Nahan and 19 posts in R&T Factory, Bilaspur were urgently required to be filled up on contract basis in order to maintain production in R&T Factories, Nahan and Bilaspur. In fact the requirement was for 63 posts.

5. It is true that selection process could be cancelled, but there has to be cogent and convincing reasons for doing the same. The respondent-corporation firstly deferred the selection process only on the ground that Model Code of Conduct has come into force as on 30.10.2012 and thereafter has waited for two long years to get the permission.

6. Their Lordships of the Hon'ble Supreme Court in ***Shankarsan Dash*** versus ***Union of India,*** (1991) 3 SCC 47 have held that unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in any arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. Their Lordships have held as under:

> **"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash Chander Marwaha, (1974) 1 SCR 165: (AIR 1973 SC 2216), Miss Neelima Shangla v. State of Haryana, (1986) 4 SCC 268: (AIR 1987 SC 169), or Jitendra Kumar v. State of Punjab, (1985) 1SCR 899 : (AIR 1984 SC 1850)."**

7. Their Lordships of the Hon'ble Supreme Court in ***A.P. Aggarwal*** vs. ***Government of NCT of Delhi and another***, (2000) 1 SCC 600 have held that State action, in order to survive, must not be susceptible to the vice of arbitrariness. This is the crux of Article 14 and basic to the rule of law, the system which governs this country. Their Lordships have held as under:

> **"12. It is well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. (vide Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212 : (AIR 1991 SC 537)."**

8. Their Lordships of the Hon'ble Supreme Court in ***Food Corporation o India and others*** vs. ***Bhanu Lodh and others***, (2005) 3 SCC 618 have held that the decision not to fill up the vacancies has to be taken bona fide and must pass the test of reasonableness so as not to fail on the touchstone of Article 14 of the Constitution of India. Their Lordships have held as under:

> **"14. Merely because vacancies are notified, the State is not obliged to fill up all the vacancies unless there is some provision to the contrary in the applicable rules. However, there is no doubt that the decision not to fill up the vacancies, has to be taken bona fide and must pass the test of reasonableness so as not to fail on the touchstone of Article 14 of the Constitution. Again, if the vacancies are proposed to be filled, then the State is obliged to fill them in accordance with merit from the list of the selected candidates. Whether to fill up or not to fill up a post, is a policy decision, and unless it is infected with the vice of arbitrariness, there is no scope for interference in judicial review. (See in this connection Govt. of Orissa v. Haraprasad Das and State of Orissa v. Bhikari Charon Khuntia.)"**

9. The Division Bench of Kerala High Court in ***K.M. Babu*** Vs ***Election Commission of India and others***, AIR 2006 Kerala 226 has held as under:

> **"3. There is also force in the submission of the petitioner that pay revision granted as per the Pay Commission report is not a financial grant and, therefore, implementation of the Pay Commission report as announced in the budget speech on 10.2.2006 will not amount to a financial grant coming under paragraph VII, clause (vi) (a) of the Model Code of Conduct. Salary revision to be given in implementation of the pay commission report are expected by the Government employees for long time and it cannot be stated that implementation of the Pay Commission report and pay revision is a financial grant so as to offend the Model Code of Conduct. Above all, it is not the ruling party alone, but opposition also wanted immediate implementation of the Pay Commission report. In this connection, the learned Advocate General produced before us a copy of the resolution unanimously adopted by the Kerala Legislative Assembly on 15.3.2006. The above resolution is quoted below.**
>
> **"This Legislative Assembly request to the Central Election Commission to grant permission to implement immediately the recommendations of Pay Revision Commission in the circumstance that, it has been declared in the Budget Speech of the Finance Minister in the Legislative Assembly on 10.2.2006 in respect of the pay revision, which was to be given on 1.3.2002 in Kerala where the principle of implementation of pay revision once in every 5 years is accepted, and the required amount is allocated in 2006-2007 Budget.**
>
> **The Cabinet meeting held on 1st March, 2006 accepted the recommendations of the Pay Revision Commission in principle and deferred it for the consideration of the Special Cabinet meeting of 2nd March.**
>
> **This Legislative Assembly unanimously request to the Election Commission to grant approval for the decision of the Government that, the recommendations of the Pay Revision Commission submitted on 22.2.2006 to the Government alone need be implemented, in the circumstance that the declaration of election has been issued."**
>
> **This shows that all the parties (whether ruling or opposition) including independent MLAs are in favour of implementation of the Pay Commission report itself. Therefore, it cannot be stated, on the facts of this case that implementation of the same was intended for influencing the voters in favour of the party in power.**
>
> **4. In the above circumstances, we are of the view that the restriction imposed in implementation of the Pay Commission report by the Election Commission on the basis of Model Code of Conduct will not stand. There is no necessity for the employees to wait till the elections are over to receive the pay revision benefits merely because an election came in between and direction to the contrary by the Election Commission are set aside. Both the writ petitions are allowed."**

10. Accordingly, the writ petition is allowed. Letter dated 1.8.2014 is quashed and set aside. Respondents are directed to continue and conclude the selection process commenced on the basis of advertisement dated 6.2.2012 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 RAJIV SHARMA, J.

Deemanu Ram and others. ...Appellants.

Versus

Bilwa Mangal. ...Respondent.

RSA No. 71 of 2002
Reserved on : 8.12.2014
Decided on: 10.12. 2014

Himachal Pradesh Tenancy and Land Reforms Act, 1972- Section 2 (10)- Plaintiff claimed that land was mortgaged – the mortgage was redeemed and the possession was delivered on 18.9.1992- defendants or their predecessor-in-interest were never inducted as tenants- defendants claimed that they were in possession prior to the mortgage- evidence showed that land was mortgaged by the predecessor-in-interest with Sardar of Shamirpur – it was proved that defendants were inducted as tenant by mortgagee or not by mortgagor- held, that tenant of a mortgagee does not acquire any right of ownership- tenants of the mortgagee do not become the tenants of the mortgagor.

(Para-19 to 21)

Cases referred:

Kanta Devi versus Khushia, 1996 (2) Sim.L.C.

Thakar Singh (D) by LRs and another vs. Sh. Mula Singh (D) through LR and others, 2014 (2) RCR 371

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 27.9.2001 rendered by the District Judge Kangra at Dharmashala in Civil Appeal No. 94-K/XIII/1999.

2. According to the plaintiff, he was owner in possession of the suit land bearing Khata No.54 min, Khatauni No. 124, Khasra No.89 measuring 0-33-29 hectares situated in Mohal Jogiballa, Mauza Shamirpur, Tehsil and District Kangra, as per Jamabandi for the year 1987-88 and the entry of defendants in column of tenancy existing in the revenue record was illegal and unauthorized. Defendants or their predecessor-in-interest were never inducted as tenants by the plaintiff or his predecessor-in-interest since the land was under mortgage with the mortgagees and the same was redeemed vide civil suit No. 158/1974. The possession was delivered on 18.9.1992 on the basis of judgment rendered in Civil Suit No. 158 of 1974.

3. Suit was contested by the defendants. According to the defendants, plaintiff was not in possession of the suit land and the defendants were tenants prior to the mortgage.

4. Suit was decreed by the Sub Judge 1st Class on 21.4.1999. An appeal was filed by the defendants. Suit was remanded for fresh trial by framing additional issues by the first appellate court. The appeal was preferred before this Court. Learned District Judge passed the following order on 24.4.2001:

"24.4.2001

Present : Shri Sunder Aggarwal, Adv. Ld. Counsel for the appellants.

Sh. Rakesh Soni, Ad. Vice counsel for the respondent.

In view of the remand of the case by Hon'ble High Court, following additional issues are framed:-

2-B If issue No.2-A is not proved, whether the tenancy was created by the mortgagees in favour of the predecessor-in-interest of the defendants, as an act of good management, as alleged? If so, its effect? OPD.

2-C Whether the tenancy was created by the mortagees with the knowledge and consent of the mortgagors, in favour of the predecessor-in-interest of the defendants, as alleged? If so, its effect? OPD

2-D Whether the defendant has become owner of the land in dispute by operation of the H.P. Tenancy and Land Reforms Act. OPD"

5. Newly framed issues were decided by the Sub Judge 1st Class on 25.6.2001. Thereafter, the matter came up before the learned District Judge, Kangra at Dharamshala. He dismissed the appeal on 27.9.2001. Hence, the present Regular Second Appeal. It was admitted without framing the substantial questions of law on 8.3.2002. This appeal now deemed to have been admitted on the substantial questions of law framed alongwith grounds of appeal.

6. Mr. R.K. Gautam, learned Senior Counsel for the appellants, on the basis of the substantial questions of law framed, has vehemently argued that both the courts below have misconstrued the evidence led by the parties. According to him, the findings given by the courts below that defendants have ceased to be tenants after redemption of the suit land are wrong and illegal.

7. Mr. Ajay Sharma, has supported the judgments and decrees passed by both the courts below.

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

9. Since all the substantial questions of law are interconnected and interlinked, the same are taken up together for determination to avoid repetition of discussion of evidence.

10. PW-1 Amar Chand has produced copy of power of attorney. According to him, the suit land was 8-11 kanals. It was owned by Sandhya Devi. The land was under mortgage with Kuldeep etc. A suit for redemption of the mortgage was filed. It was decreed. The possession of the suit land was taken. Entries in the name of defendants were wrong. Defendants have no right, title or interest over the suit land. Sandhya Devi has become owner in the year 1960-61 as the land was purchased by her and at that time the land was under mortgage. The preliminary decree was passed in the year 1980. The final decree was passed in the year 1981.

11. Dumanu Ram has appeared as DW-1. According to him, the land was cultivated by his father. They started cultivating the suit land after the death of their father. The land was owned by Hardyal. It was given to his father by Hardyal. They were paying rent for the cultivation of the suit land and the tenancy was never surrendered. No suit was filed by Sandhya Devi against them. The last ***Galla*** was paid to Kulbhushan and Kuldeep etc. He has admitted that the land was under mortgage with Kuldeep and Kulbhushan etc. He was not aware that since the year 1965, plaintiff was in litigation with Kulbhushan and Kuldeep. He was also not aware that the land was got redeemed by Sandhya. He has denied the suggestion land was under cultivation of Sandhya. According to him, tenancy was being claimed to have been created by Hardyal in favour of his father, but he did not disclose as to what were the terms of the tenancy. He did not disclose when the last ***Galla*** was paid. He has deposed that they were paying ***Galla*** to Kuldeep etc. The amount of ***Galla*** has not been stated.

12. DW-2 Bihari Lal has deposed that for the last 50 years, the land was in cultivatory possession of defendants. Earlier the land was owned by Chaudhary Hardyal. Chaudhary Hardyal had mortgaged the land with Sardars who were Rajput by caste. They were residents of Shamirpur. They used to pay ***Galla*** to Hardyal. He was not aware about the month and year of the mortgage. According to him also, the ***Galla*** was paid in the year 1992 to Kulbhushan and Kuldeep. Receipt was prepared, though DW-1 could not produce the receipt. If the receipt had been obtained, the same should have been produced before the Court.

13. According to Rapat Rojnamcha Ex.P-2, the possession of suit land was handed over to plaintiff. The mutation was also attested. The land was in possession of the mortgagee as per judgment Ex.P-4. Defendants have failed to prove that they were tenants of the suit land and they were entitled to be conferred with proprietary rights.

14. Dumnu has appeared twice. According to him, his father Mali was inducted as tenant by Chaudhary Hardyal. However, he has omitted to depose that Mali or he used to pay rent. According to him, the rent was paid to Sardars regularly.

15. DW-2 Bihari has also appeared twice. He has also admitted that land was mortgaged by Hardyal with Sardars and Mali and after his death his sons were paying rent to Sardars.

16. DW-5 Jagdish has deposed that the land was owned by Hardyal and was cultivated by Mali. He has also stated that the land was mortgaged by Hardyal with Sardars of Shamirpur but Mali's cultivation remained uninterrupted. In the copies of jamabandis for the year 1917-18 and 1890-91, name of the persons cultivating the land has not been disclosed. According to Jamabandi for the year 1959-60 Ex.P-4, land was under mortgage with Kuldeep Singh, Kulbhushan Singh, Kuljeet Singh etc. and Mali has been described as "Gair Maurusi" tenant. It is not stated therein whether he was tenant under the mortgagor or tenant inducted by mortgagee.

17. The entire evidence only proves that defendants were inducted as tenants by the mortgagee and not by the mortgagor.

18. Mr. R.K. Gautam, learned Senior counsel has vehemently argued that plaintiff was never in possession of the suit land. The person, who had gone to execute the warrant, has not been examined. According to Ex.P-6, the possession was delivered on the spot. The parties were informed at the time of delivery of possession as per Ex.P-2. Defendants have thus failed to prove that they were inducted as tenants prior to mortgage. The entries have come into effect after 1980-81. There is no material on record that defendants were tenants before this period.

19. 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."**

20. It is reiterated that defendants were the tenants of mortgagee and not of the mortgagor. Thus, they have not acquired any rights. The suit land was purchased by the plaintiff. The suit land was redeemed by filing a civil suit. The possession was handed over to the plaintiff.

21. Their Lordships of the Hon'ble Supreme Court in ***Thakar Singh (D) by LRs and another*** vs. ***Sh. Mula Singh (D) through LR and others***, 2014 (2) RCR 371 have held that when mortgagor authorized the mortgagee to induct tenants, after redemption tenants of mortgagee do not become tenants of mortgagor even though mortgagor received rent from tenants. Their Lordships have delivered this judgment while interpreting sections 60, 62, 73 and 111 of Transfer of Property Act. Their Lordships have held as under:

> **"8. On the facts of this case, it will be seen that the mortgagees were entitled to create tenancies by virtue of the mortgage deed dated 9th March 1942. However, there is nothing in the language of the mortgage deed to indicate clearly that the tenancies created by the mortgagees would be binding on the mortgagors. At the highest, after redemption, and after possession is taken, the mortgagor or mortgagors will also be entitled to receive rent in future. It will be seen that the mortgagor's right to get back possession is expressly recognized by the mortgage deed without any clear and unambiguous language entitling tenants created by the mortgagees to become tenants of the mortgagors. The entitlement to receive**

rent in future can by no stretch be held to create a tenancy between the mortgagor and the tenants of the mortgagees. This phrase has to be reconciled with the expression immediately preceding it namely "on taking possession". It is clear that taking of possession from the mortgagees and his tenants is completely antithetical to recognizing the mortgagees' tenants as the mortgagors' tenants. If the clause is to be read in the manner that the High Court has read it, the mortgagors would not be able to get back possession on redemption which would in fact be a serious interference with their right to redeem the property inasmuch as the mortgagors would have to evict such tenants after making out a ground for eviction under the Rent Act. Such ground can only be bonafide requirement of the landlord or some ground based on a fault committed by the tenant such as non-payment of rent or unlawful subletting etc. Further, such ground may never become available to the mortgagor/landlord or may become available only after many years. It has already been seen that a mortgagee continuing in possession after redemption as tenant of the mortgagor is regarded as a clog on redemption. The position is not different if the mortgagee's tenants continue in possession after redemption. This would necessarily have to be disregarded as a clog on redemption as the right to redeem would in substance be rendered illusory. In the circumstances, the judgment of the Punjab and Haryana High Court dated 31st March 2004 is set aside. All other issues are left open and can be agitated before the High Court. It will be open to all parties to raise such pleas as are available to them in law. Considering that the cause of action in the suit arose in 1969, the High Court is requested to take up RFA No.238/1979 to decide the other issues as early as possible and preferably within six months from the date of delivery of this judgment."

CMP No. 323/2011

22. 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.

23. 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)."

24. Therefore, the present application is dismissed.

25. The substantial questions of law are answered accordingly.

26. 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.

Sh. Kanahya Lal & ors. .....Appellants.

Versus

Sh. Kirpa Ram & ors. .....Respondents.

RSA No. 10 of 2004.
Reserved on: 08.12.2014.
Decided on: 10.12.2014.

Specific Relief Act, 1963- Section 34- Plaintiffs claimed that they are joint owner in possession of the suit land with defendant No. 1 to the extent of half share and that the land was never partitioned – predecessor-in-interest of the defendants had sold the suit land exceeding his share vide sale deed dated 1.3.1983- defendant claimed that land was mortgaged prior to the sale- plaintiff had no right, title or interest over the suit land- according to recital in the sale deed, vendor had half share over the suit land, however, he had sold the entire suit land- held, that only half share could have been sold and not the whole. (Para-9 to 11)

For the appellant(s): Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. K.D.Sood, Sr. Advocate, with Mr. Mukul Sood, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Solan, dated 14.11.2003, passed in Civil Appeal No. 31-S/13 of 2003.

2. Key facts, necessary for the adjudication of this regular second appeal are that the appellants-plaintiffs (hereinafter referred to as the plaintiffs, for the convenience sake), have instituted a suit against the predecessor-in-interest Sh. Nathu Ram of respondents-defendants (hereinafter referred to as the defendants), Beli Ram, Kala, Shalu and Gorkhu. The predecessor-in-interest died during the pendency of the suit before the learned Senior Sub Judge, Solan, thus his legal representatives, namely, Beli Ram, Kala, Shalu and Gorkhu were brought on record. According to the plaintiffs, the suit land comprised in Kh. No. 92 measuring 2-15 bighas situated in Mauja Dehal, Pargana Haripur, Tehsil and Distt. Solan, H.P. The plaintiffs have claimed to be the joint owners in possession of the suit land with defendant No. 1 Nathu Ram

to the extent of ½ share of land. The land was never partitioned, however, defendant Nathu Ram predecessor-in-interest of defendants, namely, Beli Ram, Kala, Shalu and Gorkhu, in connivance with the revenue staff have sold the suit land exceeding to his share to defendant No. 2 Sh. Kirpa Ram, vide sale deed No. 100 dated 1.3.1983. The mutation was attested on 28.4.1983. The plaintiffs have also pleaded and claimed that the defendants have no right, title to change the nature of the suit land and claimed joint possession with defendant No. 2, to the extent of his share.

3. The suit was contested by defendant No. 2. According to him, Nathu Ram had mortgaged the suit land with possession prior to the sale thereby the plaintiffs have no right, title or interest over the suit land. The defendant has denied any interference with the suit land. According to him, the plaintiffs have no right to sale proceeds of '*Khair"* tree.

4. The replication was filed by the plaintiffs. The learned Senior Sub Judge, Solan, framed the issues on 2.5.1997. The learned Senior Sub Judge, Solan, decreed the suit on 26.9.2002. The defendant Kirpa Ram preferred an appeal against the judgment and decree dated 26.9.2002 before the learned District Judge, Solan. The learned District Judge, Solan, allowed the appeal and set aside the impugned judgment and decree vide judgment dated 14.11.2003. Hence, this regular second appeal.

5. This regular second appeal was admitted on the following substantial question of law on 12.10.2004:

> "Whether a co-sharer even if found in exclusive possession of the whole of the land can validly sell the area more than his share in such land?

6. Mr. Neeraj Gupta, Advocate, has supported the judgment and decree of the learned trial Court dated 26.9.2002. According to him, defendant Nathu Ram could only sell the land falling to his share to defendant Kirpa Ram. On the other hand Mr. K.D. Sood, learned Senior Advocate, alongwith Mr. Mukul Sood, has supported the judgment passed by the learned first Appellate Court dated 14.11.2003.

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

8. One of the plaintiffs Sh. Kanhaya Ram has appeared as PW-1. According to him, Sh. Bhagat Ram and Sh. Bharat Ram were his real brothers. The suit land was joint. The ½ share of the land is owned by defendant No. 1. They have joint ownership and possession. The land was never partitioned. The defendant No. 1 has sold this land to defendant No. 2. He had only right to sell his share. The defendant No. 1 has only ½ share in Kh. No. 92. The entry/classification of the land was '*Ghasni*'. The registration was illegal. The mutation attested on the basis of the registration was also bad in law. They came to know about the sale in the year 1995. Thereafter, he collected the documents. He proved copy of mutation Ext. PW-1/B and copy of the sale deed as Mark-A. He has denied the suggestion in the cross-examination that Nathu Ram was in possession of entire Kh. No. 92.

9. Kirpa Ram has appeared as DW-1. According to him, he was owner of the suit land. He has purchased this land from Nathu vide Ext. PX. The possession was handed over to him by Nathu Ram. Before that, the land was in possession of Nathu Ram. The suit land adjoins his land. He has verified the status of the land from Patwari. Nathu Ram was in exclusive possession of the suit land. In his cross-examination, he deposed that he has purchased Kh. No. 92. He has seen the revenue papers. He admitted in his cross-examination that Nathu Ram was owner of ½ share of the land and thus, he could only sell his share. Volunteered that since he was in possession of the entire suit land, he could sell the entire suit land. He did not know the nature

of the joint ownership of the land between the parties. Volunteered that it could be 34-35 bighas which would be in joint ownership. He did not know of which khasra number, plaintiff and defendant Nathu Ram were in possession.

10. A copy of the sale deed dated 1.3.1983 is Ext. PX. The defendants have placed on record copy of Jamabandi for the year 1976-77 Ext. D-1, copy of Jamabandi for the year 1985-86 Ext. D-2, copy of Jamabandi for the year 1990-91 Ext. D-3, copy of Jamabandi for the year 1981-82 Ext. D-4, copy of Jamabandi for the year 1985-86 Ext. D-5. According to the recital in the Sale deed Ext. PX, the vendor was having ½ share over the suit land but having possession in the family partition. He sold the entire suit land. According to the defendant- Kirpa Ram, he is a bonafide purchaser. He has got the status of the land verified from the Patwari. The defendant has neither pleaded nor proved that there was any family arrangement/partition of the suit land at the time of effecting sale deed on 1.3.1983. The plaintiffs and defendant No. 1 Nathu Ram have been shown as co-sharers having ½ share and remaining the plaintiffs have been shown owner to the extent of ½ share, as per Jamabandi for the year 1976-77. However, the fact of the matter is that the sale deed has been executed qua the entire suit land. The share of Nathu Ram was only 1 bigha 7 biswas.

11. PW-1 Kanhaya Ram has categorically deposed that the land was in joint ownership and he alongwith the defendant Nathu Ram was co-sharers. The land was never partitioned. DW-1 Kirpa Ram has admitted in his cross-examination that since the defendant No. 1 was in possession of ½ share, he could sell his share only. He was not aware as to whether Kh. No. 92 was ever partitioned, as per the revenue papers. He has not seen the revenue papers to ensure that Kh. No. 92 was ever partitioned. He has also admitted that at the time of registration, he has not sought the permission of the plaintiff nor he has apprised him of this fact. The defendants have failed to prove that the land was ever partitioned. The learned first Appellate Court has taken into consideration the revenue record i.e. Jamabandis Ext. D-1 to D-5. According to these entries, the plaintiffs have been shown as co-sharers with Sh. Nathu Ram in the column of ownership. According to the learned first Appellate Court, it appeared that the family arrangement has taken place, whereby the parties came into separate possession of the joint holding. There is no contemporaneous material placed on record to establish the partition or family arrangement qua the suit land. The defendant Nathu Ram was never in exclusive possession of the whole of the suit land. Thus, he could sell only ½ share of the suit land and not the entire suit land. The substantial question of law is answered accordingly.

12. Consequently, the regular second appeal is allowed. The judgment and decree passed by the learned first Appellate Court dated 14.11.2003 is set aside. Judgment and decree of the learned Senior Sub Judge, Solan, dated 26.9.2002, is affirmed.

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

Gilja Ram .....Appellant.
Versus
Barfi Devi & Others ...Respondent.

RSA No. 359 of 2003.
Decided on: 11th November, 2014

Indian Succession Act, 1925- Section 63- Defendant No.1 claimed that deceased had executed a Will in his favour- he was looking after the deceased during his life time- the trial Court and

the Appellate Court held that the Will was shrouded in suspicious circumstances – it was proved on record that defendant No. 2 was looking after the deceased during his life time- deceased was residing alone and defendant No. 2 was married at a walk able distance of 5 minutes from the house of the deceased- version of the witnesses regarding the visit to Sub Registrar by deceased was also contradictory- scribe stated that the Will was earlier written in favour of all real brothers- 3-4 persons came who quarreled with the deceased on which the deceased tore the earlier Will and executed a fresh Will in the name of the defendant No.1 – the fact that deceased had got the Will executed in favour of all brothers showed that she never executed the Will in favour of the defendant No.1- defendant No.1 is the client of DW-1- DW-3 is his clerk, therefore, their testimonies cannot be relied upon- in these circumstances, Will was rightly held to be not proved.

(Para-9 to 18)

Case referred:
Krishan versus Tulki Devi, 2013 (1) Him.L.R, 338

For the appellant	:	Mr. Dushyant Dadwal, Advocate.
For the respondents	:	Mr. K. D. Sood, Senior Advocate with Mr. Rajneesh K. Lall, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Defendant No.1 Gilja Ram is in second appeal before this Court. He is aggrieved by the judgment and decree dated 7.6.2003 passed by learned District Judge, Kangra at Dharamshala in civil appeal No. 25-G/XIII/2001, whereby the trial Court judgment and decree dated 29.12.2000 passed in civil suit No.60/99/94, has been affirmed and the appeal dismissed.

2. Plaintiffs and defendant No.2 are real sisters. They are daughters of deceased Relo born to her from the loins of Masadi. Defendant No.1 Gilja Ram is step brother of plaintiffs and defendant No.2, born to one Rani with whom the deceased Masadi had solemnized customary marriage. The deceased Relo was owner-in-possession of the land to the extent of ½ share comprised in Khata No.28, Khatauni No.69 to 76, Khasra Nos. 54, 178, 321, 324, 364, 369, 1052, 1054, 1069, 53, 60, 168, 169, 175, 359, 461, 500, 1070 to 1072, 1079, 1081, 1087, 1122, 52, 172 179, 459, 1038, 1039, 1049, 1073, 1077, 1083, 1124, 51, 59, 61, 173, 361, 458, 1034, 1035, 1048, 1050, 1074, 1076, 1082, 1025, 501, 507, 55, 63, 174, 176, 362, 460, 1036, 1037, 1045, 1051, 1078 1080, 1123, 170, 171, 49, 50, 56, 58, 64, 177, 499, 5.5, 1019, 1020, 1044, 1054 Kitta 78 area 0-03-19 Hectares, situated in Mohal Jee, Mauza Kathog, Tehsil Dehra, District Kangra, H.P. Plaintiffs claimed that they were entitled to succeed the suit land in the share of their mother Relo along with defendant No.2 in equal shares on the basis of natural succession, however, defendant No.1 managed to execute a false, fictitious and frivolous Will (Ex.DW-1/A) from her on 7.4.1988. He even managed to get the mutation of the suit land attested in his favour vide mutation No.118 and 92 on 8.1.1994. They allegedly asked him to admit their claim so far as the suit land is concerned, but of no avail. Hence the suit.

3 The stand of the contesting defendant No.1 Gilja in a nut shell is that Relo was being looked after by him during her life time, therefore in lieu of

the services he rendered to her, she bequeathed the suit land to him by executing the Will on 7.4.1988, which according to him, is genuine and authentic document.

4 Learned Trial Judge framed the following issues:-

"1. Whether deceased Smt. Relo has executed a valid 'Will' in favour of defendant No.1? OPD-1

2. Whether the plaintiffs are entitled to the relief of declaration? OPP

3. Whether the plaintiffs are estopped by their act and conduct from filing the present suit? OPD

4. Whether the plaintiffs are entitled for permanent injunction? OPP

5. Relief."

5 The parties were put to trial on the issues so framed and after recording the evidence on both sides as well as affording due opportunity of being heard to the parties on both sides dismissed the suit vide judgment and decree dated 29.12.2000.

6 Learned lower appellate Court in appeal preferred by defendant No.1 against the judgment and decree passed by learned trial Court, has affirmed the same and dismissed the appeal.

7 Defendant No.1 is now before this Court with the submissions that Will Ex.DW1/A is valid and genuine document having been duly proved so, from the evidence available on record, however, both the Courts below allegedly failed to appreciate the evidence available on record in its right perspective, on account of which the judgment and decree under challenge has vitiated and even perverse also and as such has been sought to be quashed being not legally and factually sustainable.

8 The appeal has been admitted on the following substantial question of law:-

"1. Whether the Courts below erred in holding that the will was surrounding by suspicious circumstances simply because other natural heirs have been excluded and that the beneficiary of the will was present at the time of execution of the will?

2. Whether the findings of the courts below that the attestator was not in sound disposing mind are perverse and not supportable by evidence on record."

9. It is seen from the record that both the Courts below have not declared the Will Ex.DW-1/A as illegal, null and void only on account of the same excludes the natural heirs of the testatrix deceased Relo, but also on account of shrouded by suspicious circumstances. Both the Courts below have formulated such opinion on appreciation of the oral as well as documentary evidence available on record. The present, as a matter of fact, is a case of concurrent findings. It is well settled at this stage, if both Courts below have recorded concurrent findings on appreciation of the evidence available on record the same should normally be not interfered with by the High Court in second appeal unless and until perverse or not based upon proper appreciation of the evidence.

10. This Court in ***Krishan*** versus ***Tulki Devi, 2013 (1) Him.L.R, 338***, has discussed in detail as to what constitutes the execution of a legal and valid Will.

11 It is thus crystal clear that in terms of the provisions contained under Section 63 of the Indian Succession Act, the Will, a solemn document, the conditions precedent to constitute legal and valid execution thereof are that the testator while in sound disposing mind must get the Will scribed into writing and admit the contents thereof to be true and correct as well as the sign the same in token thereof in the presence of two marginal witnesses. The marginal witnesses must see the testator while putting his signature on the Will whereas he should see the marginal witnesses while putting their signatures thereon. The propounder should not take any part in execution of the Will. The other factors such as the integrity of the marginal witnesses, veracity of the evidence having come on record by way of their statements, reasons for exclusion of natural heirs, if any, and the quality of other and further evidence available on record also weigh in the mind of the Court while considering the question of authenticity and genuineness of a document like Will.

12. As noticed hereinabove, it is urged that the declaration of the Will Ex. DW-1/A as illegal, null and void on account of exclusion of natural heirs i.e. plaintiffs and defendant No.2 and that the testatrix was not in sound disposing mind, is not supported by any legal and acceptable evidence and on account of that the judgment and decree is vitiated and being perverse is not legally sustainable. Such grounds raised to challenge the legality and validity of the impugned judgment and decree are, however, without any substance for the reason that both Courts below on appreciation of the evidence available on record in its right perspective have arrived at a conclusion that the Will is not a valid and genuine document and rather forged, fictitious and shrouded by suspicious circumstances. The manner in which the Will in dispute has been executed is doubtful right from the very beginning for the reason that cogent and reliable evidence suggesting that it is defendant No.2 alone, who used to look after the deceased during her life time is not proved on record beyond all reasonable doubt because one of the plaintiffs i.e. plaintiff No. 2 Misan Devi, while in the witness box as PW-2 tells us that it is she, who used to look after her mother deceased Relo during her life time, who according to her was living alone. It has come in her statement that she has been married nearby, at a walkable distance of five minutes from the house of deceased Relo. Therefore, it can reasonably be believed that the testatrix was not being looked after by the propounder defendant No.1, but by her daughter. PW-2 has further deposed that two of them were married by Masadi during his life time and the expenses incurred upon the marriage of remaining two sisters were born out by deceased Relo and by the two married sisters including herself.

13. The manner in which deceased Relo went to Tehsil for getting the Will executed in favour of defendant No.1 is also highly doubtful because it is difficult to believe that she went to Tehsil alone and was not accompanied by the propounder i.e. the defendant-appellant as he himself and Shri R.C. Dhiman have stated while in the witness-box as DW-4 and DW-1, respectively for the reason that Shri Lekh Raj DW-3, clerk of Shri R.C. Dhiman, Advocate in his cross-examination has stated that Relo came to them on foot with Gilja (defendant No.1). This discards the testimony of defendant No.1 and also Shri R.C. Dhiman, Advocate DW-1 that she had come alone to Tehsil.

14 On the other hand, PW-5 Ram Prakash a taxi driver, tells us that Gilja hired his taxi on 7.4.1988 by representing that he had to take his mother to Hospital. His mother was brought by Kaur Chand, the brother of Gilja on his back. She was not able to move here and there being paralytic. Her eyesight was also not good. She was also not in her senses. She was made to board his taxi which was got parked adjoining to the building of Tehsil, where some green papers were brought by Gilja and Kaur Chand. Something was got written therein from one person having beard. Relo remained seated throughout in the vehicle. Her thumb impressions were taken on those documents and she was not apprised anything about the contents of the documents. Shri Balbir Singh

is a registered medical practitioner. Though he is not having any diploma or degree in medical side, however, practicing since 1982. He has disclosed his licence No.11849/84. As per his version also Relo was paralytic, hence she was not in sound disposing mind. The evidence, therefore, produced by the plaintiffs reveals that the Will Ex.DW-1/A is not the last Will of deceased Relo being shrouded by suspicious circumstances.

15. True it is that the defendant, in order to prove the execution of the Will by Relo, has examined the scribe Shri Jagan Nath DW-2 and the attesting witnesses S/Shri R.C. Dhiman, Advocate DW-1 and his clerk Lekh Raj, DW-3. The scribe DW-2, while in the witnesses box, had disclosed an altogether different story as according to him, the Will initially was reduced into writing in the names of Ami Chand, Gilja (Defendant No.1), Kaur Chand and Gian Chand, all real brothers, however, 3-4 persons came there and they quarreled with Relo. She on being annoyed, torn out the earlier scribed Will and executed the Will Ex.DW-1/A in the name of defendant No.1. The scribing of Will in the names of all the four brothers including defendant No.1 and the same thereafter torn out, itself is a circumstance, which reveals that the testatrix had no intention to bequeath her property to defendant No.1 alone. It remained unexplained as to who were the 3-4 persons quarreled with Relo. Such evidence rather leads to the only conclusion that the testatrix never executed any Will in the name of defendant No.1 on 7.4.1988.

16. Interestingly, defendant No. 1 is the client of Shri R.C. Dhiman, Advocate, DW-1. Not only in some previously instituted litigation, but represented the defendant in this case also. DW-3 Lekh Raj is his clerk. They both, in my considered opinion, are interested witnesses and as such both Courts below have rightly refused to rely upon their testimony. It cannot be believed that the testatrix during her life time used to come to the Court with defendant No.1 to defend the cases pertaining to him. When DW-3 admits that Relo had nothing to do with the cases pertaining to defendant therefore, it is highly unbelievable that Relo used to come to DW-1 or for that matter his Clerk DW-3. The story has been invented to give a colour to the whole issue and pursue the Court to believe that the Will Ex.DW-1/A being executed in their presence is legal and valid document. The execution of the Will, therefore, has not been proved, in accordance with law, at all. Both Courts below have not committed any illegality and irregularity in belying the stand of defendant No.1.

17. True it is that the exclusion of the legal heirs by the testatrix is not a valid ground to declare the Will as illegal, null and void, however, in the case in hand when it is not proved beyond all reasonable doubt that it is the propounder i.e. defendant No.1 alone was looking after and maintaining the testatrix during her life time and it is on account of the services he rendered to her, she bequeathed her entire property in his name by way of Will Ex.DW-1/A. The exclusion of four daughters, i.e. plaintiffs and defendant No.2 by deceased Relo is not at all supported by the record. As a matter of fact, it is not the exclusion of the natural heirs alone, which weigh in the minds of both Courts below while holding the Will as illegal, null and void, but also the other circumstances, such as active participation of the propounder in the execution of the Will, association of interested persons as marginal witnesses to the will and at the apex the execution of Will initially not only in the name of defendant No.1, but also in the names of his real brothers namely Ami Chand, Kaur Chand and Gian Chand.

18. The reappraisal of the given facts and circumstances and also the oral as well as documentary evidence available on record leads to the only conclusion that the Courts below have not committed any illegality and irregularity in decreeing the suit against the appellant-defendant. The impugned judgment and decree is neither perverse nor vitiated on account of misreading of the oral as well as documentary evidence available on record and rather deserves to be upheld.

19. In view of the above this appeal fails and the same is accordingly dismissed. Pending application(s), if any, shall also stand disposed of. No order so as to costs.

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

CWP No. 536 of 2013 & COPC No. 176 of 2013
Date of decision: 11.12.2014

CWP No. 536 of 2013

Satish Dadwal ...Petitioner

Versus

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

CPC No. 176 of 2013

Smt. Satish Dadwal ....Petitioner

Versus

Shri P.C. Dhiman and others ....Respondents

Constitution of India, 1950- Article 226- Petitioner joined as Manager with respondent No. 3, a Society- her pay was ordered to be reduced in view of the orders passed by the Deputy Registrar, Cooperative Societies- she filed a writ petition in which a statement was made that a reduction will not be applicable to the petitioner- when new Director joined, he passed various resolution reducing the salary of the petitioner-record showed that resolutions enhancing the salary were passed without seeking approval of the Registrar- it was stated in the writ petition that petitioner need not refund the enhanced salary received by her-no statement was made regarding the future salary- income of the society was Rs. 28,000/- and the petitioner claimed salary of Rs. 40,000/- held, that no fault can be found with the resolution reducing the salary of the petitioner. (Para-5 to 8)

Constitution of India, 1950- Article 226- A Writ Petition is not maintainable against a co-operative society. (Para-9)

Cases referred:

Chandresh Kumar Malhotra Vs. H.P. State Cooperative Bank and others, (1993(2 SLC 243

Vikram Chauhan Vs. Managing Director, Latest H.L.J 2013 (HP) 742 (FB)

S.S. Rana Vs. Registrar Co-operative Societies and Another, (2006) 11 SCC 634

Laxmi Narain and others Vs. Kuldeep Singh and othes, LPA No. 236 of 2011

Sanjeev Kumar and others Vs. State of H.P. and others, CWP No. 6709 of 2013

For the Petitioner: Mr. Ajay Sharma, Advocate.

For the Respondents: Mr.V.K. Verma, Mr. Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondents No. 1 and 2.

Mr. N.K. Thakur, Senior Advocate with Mr. Surinder Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

By medium of this petition, the writ petitioner has claimed the following reliefs:-

> *"(i) The impugned resolutions dt. 10.7.2012, 28.7.2012, 11.8.2012, 28.8.2012 and 10.9.2012 and further orders dt. 10.9.2012, available in annexure P-2, may very kindly be quashed and set aside having been passed by overstepping the jurisdiction vested in respondent and further being in violation of the orders passed in CWP No. 266 of 2004 with directions to the respondents to allow the petitioner to continue in service drawing enhanced salary and taking as if there is no suspension orders and chargesheet against the petitioner.*
>
> *(ii) That Board of Directors of respondent No. 3 may very kindly be proceeded against as per sections 11 and 12 of Contempt of Courts Act to upkeep the majesty of law in highest esteem."*

2. The case of the petitioner as set out in the writ petition is that, she joined as Manager with the respondent No. 3, Society in the year 1992. In the year 2004 her pay was ordered to be reduced in view of the orders passed by the Deputy Registrar, Cooperative Societies, Kangra, which order was challenged by her by way of CWP No. 266 of 2004. This Court on the basis of statement made by the learned Additional Advocate General on the instructions of the Registrar Cooperative Societies held the impugned reduction in pay to be not applicable to the petitioner and therefore, petitioner was entitled to enhanced salary which she continued to draw till 31.5.2012. It is then claimed that new Director assumed office in the month of June, 2012 and for reasons best known to him began harassing the petitioner. The respondents passed various resolutions, which were in disobedience to the judgment passed in CWP No. 266 of 2004. These illegal actions of the Society were challenged before the Deputy Registrar, Cooperative Societies, but the said petition was dismissed. It is on the basis of such allegations that the petitioner has sought the reliefs as set out herein above.

3. The respondent Society filed its reply, wherein it was submitted that the services of the petitioner were initially engaged as Assistant Secretary on lump sum wages of Rs.1000/- per month. The petitioner misguided the then Management of the Society in the year 2002 and got her salary enhanced to Rs.3000/- and thereafter Rs.6000/-, knowing fully well that this salary is only available to the persons working in category 'AA' society, while the respondent Society did not fall under the said category. It is averred that in the year 2004 on her own adopting the Rules of 'AA' class Society, she again got her wages increased from Rs.6,000/- to Rs.16,000/-. Not only this, thereafter she got her wages fixed at Rs.40,000/- per month, beside Rs.2500/- PPF, whereas the income of the Society was not equivalent to the wages drawn by the petitioner. In so far as the order passed by this Court in CWP No. 266 of 2004 is concerned, it is submitted that it was on the statement of the Registrar that the order came to be passed by this Court providing therein that the recovery would not be affected from the petitioner. Lastly, it is submitted that in the Society 51% share is of the Ex-servicemen, who have not been paid even a penny for the last 40 years and the sole income of the Society is from the rent of the godown, which is about Rs.28,000/- per month and no other activity is being carried out by the Society.

4. The respondent No. 1 also contested the petition by filing reply, wherein this respondent has raised the question of jurisdiction in view of the judgment passed by Division Bench of this Court in ***Chandresh Kumar Malhotra Vs. H.P. State Cooperative Bank and others, (1993(2 SLC 243,*** as

upheld by the Full Bench of this Court in ***Vikram Chauhan Vs. Managing Director, Latest H.L.J 2013 (HP) 742 (FB),*** as well as decision of Hon'ble Supreme Court in ***S.S. Rana Vs. Registrar Co-operative Societies and Another, (2006) 11 SCC 634.***

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

5. Undisputedly, the entire case of the petitioner hinges around the order passed by this Court on 18.11.2006, therefore, the said order is being reproduced in extenso and reads as follows:-

> *"18.11.2008: Present: Mr. Ajay Sharma, Advocate for the petitioner.*
>
> *Mr. R.K. Sharma, Sr. Addl. A.G. with Mr.Rajinder Dogra, Additional A.G. for respondents No. 1 to 3.*
>
> *Mr. Ramakant Sharma, Advocate for respondent No. 4.*
>
> *It is not disputed by the parties that the Rules relating to terms of the working conditions of the Shivalik Cooperative Rosin and General Mills Limited, Gagret, Tehsil Amb, District Una have been framed during the pendency of this writ petition. It is also not disputed by the parties that the petitioner was granted higher salary on the basis of resolutions dated 26.6.2001 and 11.1.2003. The only controversy involved is whether this hike could be given to the petitioner without seeking permission of the State Government under rule 56 (3) of the Himachal Pradesh Cooperative Societies Rules, 1971. In order to mitigate the hardship of the petitioner, on the previous date of hearing, the Court observed that the learned Senior Additional Advocate General may seek instructions whether the salary which has already been enhanced on the basis of two resolutions dated 26.6.2001 and 11.1.2003 could be regularized or not. The learned Senior Additional Advocate General on the basis of the instructions imparted to him by the Registrar, Cooperative Societies, Himachal Pradesh submits that the enhanced/hiked salary on the basis of two resolutions dated 26.6.2001 and 11.1.2003 need not be refunded by the petitioner. In other words, the petitioner has been held entitled to this enhanced salary.*
>
> *Accordingly, in view of the observation made hereinabove, the present writ petition has become infructuous and the same is dismissed having become infructuous. However, if the petitioner is still aggrieved, in any manner, she has absolute liberty to approach the appropriate forum for the redressal of her grievances. There will, however, be no order as to costs."*

The contention of the petitioner is that once this Court had adjudicated upon the resolutions dated 26.6.2001 and 11.1.2003, the respondent-Society could not have withdrawn these resolutions and this amounts to willful disobedience of the orders passed by this Court.

6. I have perused the order and find that this Court has in no manner adjudicated upon the validity of resolutions dated 26.6.2001 and 11.1.2003. It appears that these resolutions which proposed the hike in salary had been passed without seeking the prior approval of the Registrar as

contemplated under Rule 56 (3) of the Himachal Pradesh Co-operative Societies Rules, 1971, which reads as follows:-

> *"56 (3) No Co-operative society shall employ a salaried officer or servant with total monthly emoluments exceeding rupees 'one hundred' without the previous permission of the Registrar. The promotion of an employee to a higher post shall be deemed to be an appointment under this sub-rule."*

7. It was in order to mitigate the hardship of the petitioner at that time the Registrar had been asked as to whether the two resolutions aforesaid could be regularized or not. The Registrar had categorically stated that the enhanced/hiked salary on the basis of the aforesaid two resolutions need not be refunded by the petitioner and consequently for this period the petitioner had been held entitled to this enhanced salary.

8. This is a classical example of *"fence eating the crop"*. The order passed by this Court has been totally misread by the petitioner to claim enhanced salary. The petitioner knowing fully well that the total income of the Society is only Rs.28,000/-, would still claim continuity of the enhanced salary of Rs.40,000/-, that too by misinterpreting the order passed by this Court. How the society runs its affairs is best left to do the Society to decide and the Courts would loathe to interfere in such matters. Even while passing order on 18.11.2008 (supra), the Registrar had only informed that the salary paid to the petitioner need not be refunded by her for the period she had been paid enhanced salary but nowhere had this Court upheld her claim for enhanced salary for the future.

9. That apart, the present petition would not be maintainable in view of the reliefs sought by the petitioner, which are primarily directed against the respondent No. 3-Cooperative Society, in view of the ratio laid down by the Hon'ble Supreme Court and this Court not only in the judgments referred to by respondent No. 1 in its reply, (as quoted herein above) but also in view of the subsequent judgment delivered by Division Bench of this Court in ***Laxmi Narain and others Vs. Kuldeep Singh and othes, LPA No. 236 of 2011*** and ***Sanjeev Kumar and others Vs. State of H.P. and others, CWP No. 6709 of 2013.***

Accordingly, I find no merit in this petition and the same is dismissed leaving the parties to bear their costs.

COPC No. 1076 of 2013

10. By way of this petition, the petitioner has sought to initiate proceedings of contempt against the respondents on the strength of the following observations made by this Court while adjudicating CWP No. 266 of 2004, decided on 18.11.2008:-

> *"In other words, the petitioner has been held entitled to this enhanced salary."*

11. It is claimed that the respondent No. 3 by passing the resolutions on 10.7.2012, 18.7.2012, 11.8.2012, 28.8.2012 and order dated 10.9.2012 has set at naught the order passed by this Court on 18.4.2008, thereby denied the due and admissible salary to the petitioner.

12. I have already held above that the order passed by this Court on 18.11.2008 only states that no recovery shall be made from the petitioner for the period she has worked on the enhanced salary, but the said order in no manner adjudicates upon the rights of the petitioner to claim the said salary after the passing of the order. In other words, it only adjudicates upon the rights of the petitioner for the salary already received by her, which was sought to be recovered. In fact the petitioner by quoting a stray sentence has tried to mislead this Court to claim the enhanced salary. The entire order dated

18.11.2008 has already quoted in extenso (herein above) does not support the claim of the petitioner. Accordingly there is no merit in this petition also and the same is dismissed.

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

Vikas Kumar ..... Petitioner
Vs.
State of H.P. & ors. ..... Respondents

CWP No. 7214 of 2010.
Date of decision: 11.12.2014.

Constitution of India, 1950- Article 226- Petitioner applied for the post of Constable under OBC category- respondent No. 4 and 5 applied for the post under the category of OBC reserved for Antyodya and IRDP categories- respondent No. 4 secured higher marks than the petitioner and he was considered against the IRDP (general) OBC category – respondent No. 4 was appointed against the OBC (IRDP) category- petitioner contended that respondent No. 5 could not have been considered against the post of OBC (IRDP) category because this post was already filled up by respondent No. 4- State contended that both respondents No. 4 and 5 belong to the OBC (IRDP) category and because the respondent No. 4 had secured higher marks, his case was considered against the OBC un-reserved post as per rules and instructions of the government- petitioner had secured less marks than respondent No. 4- therefore, he could not be selected against the OBC (unreserved) category- respondent No. 5 had secured less marks than the petitioner but he was selected against the OBC (IRDP) category and not against OBC (unreserved) category – held, that reservation in favour of OBC is under Article 16 (4) of the Constitution and would be termed as vertical reservation, whereas the reservation thereafter in favour of other categories like Ex-serviceman, IRDP and Home Guard within the OBC category would be considered as horizontal reservation- horizontal reservations cut across the vertical reservations - therefore, even after providing for the horizontal reservations, the percentage of reservations in favour of OBC would still remain the same - proper course for the respondents was to fill up all the vacancies on the basis of merit and thereafter to fill up special reservations like Ex-serviceman, IRDP and Home Guard - if the quota fixed for horizontal reservation was already satisfied, no question would arise further but in case there was a shortfall – the number of special reservation candidates were required to be taken and adjusted/ accommodated against their respective categories- name of the respondent No. 4 could not have been considered against the OBC un-reserved category- the seat vacated by him could not have been offered to respondent No. 5- respondent No. 5 could not have been considered against the post of OBC (IRDP) - the seat vacated

by respondent No. 4 was to be filled up from OBC (unreserved) category – since, petitioner was next in merit, therefore, he was required to be appointed in place of respondent No. 5.

(Para-9 to 11)

Cases referred:

Indra Sawhney vs. Union of India 1992 Supp (3) SCC 217

Anil Kumar Gupta vs. State of U.P. (1995) 5 SCC 173,

Rajesh Kumar Daria vs. Rajasthan Public Service Commission and others (2007) 8 SCC 785

Public Service Commission, Uttaranchal vs. Mamta Bisht and others (2010) 12 SCC 204

V. Balasubramaniam and others vs. Tamil Nadu Housing Board and others (1987) 4 SCC 738

N.T. Devin Katti and others vs. Karnataka Public Service Commission and others (1990) 3 SCC 157

S.B.Sarkar and others vs. Union of India and others (1990)3 SCC 168

Ram Sewak Prasad vs. State of U.P. and others AIR 1991 SC 1818

For the petitioner : Mr. Vijay Bhatia, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with M/s Virender Kumar Verma, Rupinder Singh, Additional Advocate Generals and Ms. Parul Negi, Dy. Advocate General, for respondents No. 1 to 3.

Mr. V.D.Khidtta, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner applied for the post of constable under the OBC category, while the respondents No. 4 and 5, who too belonged to OBC category, applied under the category of OBC reserved for Antodaya and IRDP categories. The relative marks obtained by the parties are as under:-

Petitioner = 71.33%

Respondent No.4 = 71.83%

Respondent No.5 = 68.67%

The total number of posts and their break up is as under:-

Category	Break up of posts as per vertical reservation	Ex-Service man	IRDP	Sportsman	Wards of Freedom fighter	Home Guard	Other
General	33	4	5	1	-	6	17
SC	11	2	1	-	-	1	7
ST	1	-	-	-	-	-	1
OBC	10	1	1	-	-	1	7
Total	55	7	7	1	-	8	32

2 It appears that respondent No. 4, who admittedly, had secured higher marks than the petitioner was considered for the post of OBC (IRDP) category, but then in view of his higher percentage, he was considered against the IRDP in general OBC category and respondent No. 5 who had obtained only 68.67% marks came to be appointed in the OBC (IRDP) category. The grievance of the petitioner is that the candidature of respondent No. 5 could not have been considered against the post of OBC (IRDP) category because that slot had already been occupied by respondent No. 4, as admittedly respondent No. 4 had applied under the OBC (IRDP) category and not in OBC (Un-reserved) category.

3 The official respondents in their reply filed to the petition contended that both the respondents No. 4 and 5 belong to the OBC (IRDP) category and because the respondent No. 4 secured 71.83 marks, his candidature was considered against OBC (Un-reserved) post as per the rules of reservation and instructions of the government. The rules provide that in case a person from the reserved category secures more marks from the candidates of unreserved category, the candidature of such candidate could be considered against the unreserved post. The petitioner had secured 71.33% marks, which was less than the marks secured by respondent No. 4 and therefore he could not be selected against the OBC (unreserved) category, whereas the respondent No. 5 though had secured less marks than the petitioner, but he was selected against the OBC (IRDP) category and not against OBC (unreserved) category.

4 I have heard Mr. Vijay Bhatia, learned counsel for the petitioner and Mr. Shrawan Dogra, learned Advocate General assisted by S/Sh. Virender Kumar Verma, Rupinder Singh, learned Additional Advocate Generals and Ms. Parul Negi, learned Deputy Advocate General for respondents No. 1 to 3, and Mr. V.D.Khidtta, learned counsel for respondent No. 5.

5 At the very out set this court has no hesitation to observe that respondents have totally misconstrued and misinterpreted the very concept of horizontal and vertical reservation. The principle of horizontal reservation was explained by the Hon'ble Supreme Court in the celebrated case of **Indra Sawhney** vs. **Union of India 1992 Supp (3) SCC 217** in the following terms:-

> *"All reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes [(under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations - what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against the quota will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains - and should remain - the same."*

6 The method of implementing the special reservation, which is a horizontal reservation, cutting across vertical reservations, was explained by the Hon'ble Supreme Court in **Anil Kumar Gupta** vs. **State of U.P. (1995) 5 SCC 173,** in the following terms:-

> *"The proper and correct course is to first fill up the Open Competition quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; the third step would be to find*

out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied - in case it is an overall horizontal reservation - no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalized horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.).

[Emphasis supplied]"

7 Now what would be the difference between the nature of vertical reservation and horizontal reservation has been succinctly dealt with by the Hon'ble Supreme Court in **Rajesh Kumar Daria** vs. **Rajasthan Public Service Commission and others (2007) 8 SCC 785,** in the following terms:-

"9. The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Article 16(4) are 'vertical reservations'. Special reservations in favour of physically handicapped, women etc., under Articles 16(1) or 15(3) are 'horizontal reservations'. Where a vertical reservation is made in favour of a backward class under Article 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for the respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. [Vide - Indira Sawhney (Supra), R. K. Sabharwal vs. State of Punjab [(1995 (2) SCC 745]), Union of India vs. Virpal Singh Chauvan [(1995 (6) SCC 684] and Ritesh R. Sah vs. Dr. Y. L. Yamul [(1996 (3) SCC 253)]. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is first to fill up the quota for scheduled castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of 'Scheduled Castes-Women'. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of scheduled caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women. Let us illustrate by an example :

If 19 posts are reserved for SCs (of which the quota for women is four), 19 SC candidates shall have to be first listed in accordance with merit, from out of the successful eligible candidates. If such list of 19 candidates contains four SC women candidates, then there is no need to disturb the list by including any further SC women candidate. On the other hand, if the list of 19 SC candidates contains only two woman candidates, then the next two SC woman candidates in accordance with merit, will

have to be included in the list and corresponding number of candidates from the bottom of such list shall have to be deleted, so as to ensure that the final 19 selected SC candidates contain four women SC candidates. [But if the list of 19 SC candidates contains more than four women candidates, selected on own merit, all of them will continue in the list and there is no question of deleting the excess women candidate on the ground that 'SC-women' have been selected in excess of the prescribed internal quota of four.]"

8 The controversy regarding vertical and horizontal reservation again came up for consideration before Hon'ble Supreme Court in **Public Service Commission, Uttaranchal** vs. **Mamta Bisht and others (2010) 12 SCC 204,** wherein 35 posts of Civil Judge (Junior Division) had been advertised with the stipulation that number of vacancies may be increased or decreased. It was clarified that reservation policy adopted by the State in favour of SC/ST/OBCs and horizontal reservation in favour of physically handicapped and women etc. belonging to Uttaranchal would be applicable. Respondent Mamta Bisht applied and sought benefit of reservation in favour of Uttaranchal women. She qualified the written examination and faced interview held by the Commission. The final result of the selection was declared on 31.7.2003 and respondent No.1 was not selected. Instead of filling up 35 vacancies, the recommendation to fill up 42 vacancies was made as the decision had been taken in this regard prior to the declaration of the result. Out of 42 posts, 26 were filled up by general category and 16 by reserved category candidates, some women candidates stood selected in the general category while the other was given the benefit of horizontal reservation being residents of Uttaranchal. Respondent Mamta Bisht being aggrieved, preferred writ petition before the High Court of Uttaranchal seeking quashment of select list mainly on the ground that women candidates belonging to Uttaranchal had secured marks making them eligible to be selected in the general category and had it been done so she would have been selected in the reserved category being woman of Uttaranchal. The High Court accepted her submission and came to the conclusion that the last selected woman candidate who was given the benefit of horizontal reservation for Uttaranchal woman had secured marks higher than the last selected candidate in the general category. Thus the said candidate ought to have been appointed against the general category vacancy while the respondent Mamta Bisht ought to have been offered the appointment giving her the benefit of horizontal reservation for Uttaranchal woman. In appeal, the Hon'ble Supreme Court held as follows:

"11. All the 42 vacancies had been filled up, implementing the reservation policy. All the women candidates selected from reserved category indisputably belong to Uttaranchal and none of them is from another State.

12. The High Court decided the case on the sole ground that as the last selected candidate, receiving the benefit of horizontal reservation had secured marks more than the last selected general category candidate, she ought to have been appointed against the vacancy in general category in view of the judgment of this Court in Indra Sawhney Vs. Union of India, AIR 1993 SC 477, and the Division Bench judgment of High Court of Uttaranchal in Writ Petition No.816/2002 (M/B) (Km. Sikha Agarwal Vs. State of Uttaranchal & Ors.) decided on 16.4.2003, and respondent no.1 ought to have appointed giving benefit of reservation thus, allowed the writ petition filed by respondent No.1.

13. In fact, the High Court allowed the writ petition only on the ground that the horizontal reservation is also to be applied as vertical reservation in favour of reserved category candidates (social) as it held as under:

"In view of above, Neetu Joshi (Sl.No.9, Roll No.12320) has wrongly been counted by the respondent No.3/Commission against five seats reserved for Uttaranchal Women General Category as she has competed on her own merit as general candidate and as 5th candidate the petitioner should have been counted for Uttaranchal Women General Category seats."

Admittedly, the said Neetu Joshi has not been impleaded as a respondent. It has been stated at the Bar that an application for impleadment had been filed but there is nothing on record to show that the said application had ever been allowed. Attempt had been made to implead some successful candidates before this Court but those applications stood rejected by this Court."

9 The reservation in favour of OBC classes is under Article 16(4) of the Constitution and would be termed as vertical reservation, whereas the reservation thereafter in favour of other categories like Ex-serviceman, IRDP and Home Guard within the OBC category would be considered as horizontal reservation. The horizontal reservations cut across the vertical reservations- what is called as interlocking reservations. The persons selected against the quota will be placed in that quota by making necessary adjustment. Therefore, even after providing for these horizontal reservations, the percentage of reservations in favour of OBC would still remain the same and should remain the same.

10 The proper and correct course for the respondents in this case was to have first filled up all the ten vacancies on the basis of merit and then fill up the special reservations i.e. Ex-serviceman, IRDP and Home Guard. If the quota fixed for horizontal reservation was already satisfied, no further question would arise. But in case there was a shortfall and the reservation had not been satisfied, the requisite number of special reservation candidates were required to be taken and adjusted/ accommodated against their respective categories i.e. Ex-serviceman, IRDP and Home Guard by deleting the corresponding number of candidates therefrom.

11 This admittedly having not been done, it can safely be concluded that respondents have not correctly applied the vertical and horizontal reservations. The name of respondent No. 4 could not have been considered against the OBC (unreserved) category and consequently the seat so vacated by him could not have been offered to respondent No.5. The respondent No. 4 had already occupied the slot reserved for OBC (IRDP) and his case thereafter could not have been considered for the post of OBC (unreserved). Likewise respondent No. 5 could not have been considered against the post of OBC (IRDP) by pushing up and considering the case of respondent No. 4 in the category of OBC (unreserved). After respondent No.4 had been appointed to the post of OBC (IRDP) then the seat vacated by him was essentially required to be filled up from OBC (unreserved) category. Indisputably the petitioner was next in merit and was therefore required to be appointed in place of respondent No.5.

12 In view of the aforesaid discussion, there is merit in this petition and the same is allowed and official respondents are directed to consider and appoint the petitioner to the post of police constable against OBC (unreserved) category. Accordingly, the appointment of respondent No. 5 to the post of OBC (IRDP) is quashed and set-aside. Similarly, the appointment of respondent No. 4 to the post of OBC (General) is also quashed and set-aside and he will be considered to have been appointed to the post of OBC (IRDP). This order be complied with within six weeks and needless to say that petitioner shall be entitled to all consequential benefits.

13 At this stage, it may be noticed that there has been no misrepresentation on the part of respondent No.4 and even otherwise no fault

can be attributed to him as he came to be appointed by the official respondents by wrongly applying the principle of horizontal and vertical reservations. The petitioner has been working with the respondents for the last more than four years. The Hon'ble Supreme Court in **V. Balasubramaniam and others** vs. **Tamil Nadu Housing Board and others (1987) 4 SCC 738** in similar circumstances while allowing a claim for promotion which would have resulted in the reversion of the promoted candidate had directed that instead of reverting the candidate a supernumerary post, if necessary, be created till such time he becomes eligible to be promoted to the said post. It will be apt to reproduce para-18 of the judgement, which reads thus:-

> *"18. We, however, make it clear that if in the process of reviewing the promotions already made in accordance with the directions issued by the learned single Judge it becomes necessary to revert any Junior Engineer from the post which he is now holding we direct that he shall not be so reverted but he shall be continued in the post which he is now holding by creating a supernumerary post, if necessary, until such time he becomes again eligible to be promoted to the said post. The continuance of such Junior Engineer in the post which he is now holding as per this direction shall not, however, come in the way of the petitioners in the writ petitions or any other employee of the Board getting the promotion due to him and the seniority to which he is entitled in accordance with law. These appeals are accordingly allowed. There shall, however, be no order as to costs."*

14 In **N.T. Devin Katti and others** vs. **Karnataka Public Service Commission and others (1990) 3 SCC 157** the Hon'ble Supreme Court in similar circumstances after setting aside the appointment of respondent had directed the State government to create a supernumerary post, as would be clear from the following observations:-

> *"15. During the pendency of the writ petition before the High Court, appointments were made to the posts of Tehsildars on the basis of the revised list prepared by the Commission in accordance with the directions of the State Government dated 23rd of the High Court the appointment orders contained a specific term that the appointments would be subject to the result of the writ petition filed by the appellants. Since the appellants have succeeded, the respondents' appointment is liable to be set aside. The respondents have been working for a period of about 14 years, it would cause great hardship to them if their appointment is quashed, and they are directed to vacate the office which they have been holding during all these years. At the same time the appellants have been wrongly denied their right to the posts of Tehsildars. Having regard to these facts and circumstances, we are of the opinion that. it would be expedient in the interest of justice not to interfere with the respondents' appointment but at the same time steps should be taken to enforce the appellants' right to the posts of Tehsildars. In this view, we direct the State Government to appoint the appellants on the posts of Tehsildars with retrospective effect, but if no vacancies are available the State Government will create supernumerary posts of Tehsildars for appointing the appellants against those Posts. We further direct that for purposes of seniority the appellants should. be placed below the last candidate appointed in l976 but they will not be entitled to any backwages. The appellants will be entitled to promotion if otherwise found suitable."*

15 Similarly in **S.B.Sarkar and others** vs. **Union of India and others (1990)3 SCC 168,** the promotions already made were not disturbed by the Hon'ble Supreme Court and it was further held that in case there was any short-fall, the adequate number of additional posts be created, as would be clear from the following observations:-

"11. In the result this appeal is disposed of by directing that the respondent authorities shall grant promotional benefit to those 204 SMs- who had exercised option before 1983 in the same manner as it would have been if option had not been abolished in accordance with the earlier procedure provided they fulfilled the other requirements. While doing so those who had been promoted shall not be disturbed as directed by this Court on 30th July, 1987. Further if as a result of this exercise posts in higher grade fall short, the respondents shall create adequate number of additional posts to overcome the difficulty. The respondents are further directed to complete all this exercise within six months. Persons promoted in pursuance of this order shall be entitled to all consequential benefits from the due dates. Appellants shall be entitled to consolidated costs which are assessed at Rs. 5,000 to be payable by respondent No. 2."

16 In **Ram Sewak Prasad** vs. **State of U.P. and others AIR 1991 SC 1818** the promotions of the candidates who otherwise were required to be reverted were protected and the State government was directed to create additional post to accommodate the petitioner and other similar persons, as would be clear from the following observations:-

"12. We make it clear that none of the respondents who have already been promoted to the higher rank of Excise Superintendents or Assistant Excise Commissioners be reverted to accommodate the petitioner or any other person similarly situated. The State Government shall create additional posts in the cadre of Excise Superintendents and Assistant Excise Commissioners to accommodate the petitioner and other similar persons, if necessary."

17 Though this court has quashed and set-aside the appointment of respondent No.5, however, the official respondents may consider the desirability of not dispensing with his services and may consider his case by creating a supernumerary post or adjust the said respondent against some future vacancy.

The writ petition is allowed in the aforesaid terms, leaving the parties to bear their own costs.

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

Smt. Anjna Kumari ...Petitioner

Versus

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

CWP No. 6777 of 2012
Date of decision: 12.12.2014

Constitution of India, 1950- Article 226- Petitioner claimed that she belongs to a BPL family – she is landless and has a preferential right to be appointed- interview committee had wrongly awarded 6 marks to respondent No. 4 and one mark to petitioner- it was further claimed that respondent No. 4 is a member of joint family and is getting pension- family income of the respondent No. 4 is more than Rs. 12,000/- per month- respondent No. 4 claimed that she is widow and has five children- she is residing separately from her mother-in-law- held, that no allegation of favoritism or malafide were made in the petition- it was for the Selection Committee to award the marks- merely because less marks were awarded to the petitioner cannot lead to an inference that process

of assessment is unfair- further, the petitioner had taken a chance and was not selected, hence, she cannot question the selection – petition dismissed. (Para- 5 to 7)

Case referred:
Madan Lal and others Vs. State of J & K and others, (1995) 3 SCC 486

For the Petitioner:	Mr. Ashwani Pathak, Advocate.
For the Respondents:	Mr.V.K. Verma, Mr. Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General, for respondents No. 1 to 3. Mr. Vivek Singh Thakur, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (Oral).

By medium of this petition, the petitioner has claimed the following reliefs:-

> *"(i) That the appointment of respondent No. 4 as part time Water Carrier in Govt. Primary School, Samtehan, Tehsil Dasra, Distt. Bilaspur, H.P. may kindly be quashed/set aside and the petitioner may kindly be appointed as such in the said school being eligible as part time Water Carrier."*

2. Interview for the post of part time Water Carrier in Government Primary School, Samtehan in District Bilaspur was to be held on 18.2.2012 and the Selection Committee was to comprise of the following members:-

Elementary Education Department

1. SDO (C) concerned Area, Chairman
2. Centre Head Teacher of the concerned school, member
3. President, School Management Committee of the concerned school, member.

It was further provided that the interview marks shall be awarded to the candidates out of 30 and the distribution of marks was as under:-

1.	For candidates of village/town at distance:	
	(a) Up to 1.5 KMs from school	10 Marks
	(b) Up to 2 KMs from school	8 Marks
	(c) Up to 3 KMs from school	6 Marks
	(d) Up to 4 KMs from school	4 Marks
	(e) Up to 5 KMs from school	2 Marks
2.	For candidates whose families have donated land for school.	5 Marks
3.	Candidates belonging to SC/ST/ OBC/BPL	3 Marks
4.	Candidates belonging to unemployed families	5 Marks

5.	Interview/Viva	7 Marks

Interview for the post in question was conducted by the Selection Committee, headed by the SDM as the Chairman, in which six candidates appeared in the interview and respondent No. 4 having been awarded the highest marks was ordered to be selected and was consequently appointed.

3. Petitioner claims to be belonging to BPL family and that apart being landless and therefore, had a preferential right to be appointed. It is claimed that the interview committee had illegally awarded 6 marks in the interview to respondent No. 4 in order to defeat the legal and genuine claim of the petitioner, who was only awarded only 1 mark. It is further claimed that respondent No. 4 is a member of joint family, which is headed by her mother-in-law, who is in receipt of pension, since her husband was in service of BBMB. The family income of respondent No. 4 is more than Rs.12000/- per annum and therefore, she was not entitled to be appointed.

4. The official respondents have filed their reply, wherein it has been specifically averred that the selection of respondent No. 4 has been made with the prior approval of the Government by a duly constituted committee, wherein the selection was made purely on merits.

5. Respondent No. 4 on the other hand has filed separate reply, wherein she has claimed herself to be a widow and having five children (3 daughters, 2 sons) and it is further claimed that she has been separated by her mother-in-law after death of her husband and there is none to support her children. While the petitioner on the other hand at least has her husband by her side, therefore, she is better placed. It is further claimed that she is not possessed of any agricultural land, as she had been ousted from the joint family in the year 2009. Thereafter she had applied to Gram Panchayat, Tarsooh for separation in record on 2.3.2011, however, the proceedings culminated only in the year 2012. This respondent has further re-iterated that her income is far less than Rs.12,000/- per annum and therefore, apart from having selected on merits, she is entitled to the post after taking into consideration her insecurity.

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

6. The only contention raised by the petitioner during the course of arguments is that the petitioner had been awarded only 1 mark in the interview, while respondent No. 4 had been awarded 6 marks just to defeat the legal and genuine claim of the petitioner. At this stage, it may be notice that there are no allegations of favoritism or malafide and therefore, the said allegations cannot be declared to be bad as this Court is not likely to interfere in the selection process. Now in so far the question of awarding marks in the interview is concerned, the same was in the realm of assessment of the relative merits of candidates concerned by the Selection Committee before whom the candidates appeared for the viva voce. Merely on the basis of petitioner's apprehension or suspicion that she was deliberately given less mark in the oral interview as compared to the rival candidates, it could not be said that the process of assessment is vitiated.

7. As already noticed above, there is no whisper in the entire petition about any favoritism, bias or malafide. Therefore, this contention of the petitioner cannot be countenanced. Moreover, the petitioner has already taken a chance and having not been selected, cannot question the selection. Both the aforesaid contentions are squarely answered by the Hon'ble Supreme Court in ***Madan Lal and others Vs. State of J & K and others, (1995) 3 SCC 486*** in the following terms***:-***

> "10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be

unsuccessful. It is also to be kept in view that in this petition we cannot sit as a court of appeal and try to reassess the relative merits of the candidates concerned who had been assessed at the oral interview nor can the petitioners successfully urge before us that they were given less marks though their performance was better. It is for the Interview Committee which amongst others consisted of a sitting High Court Judge to judge the relative merits of the candidates who were orally interviewed, in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly nor acting as a court of appeal over the assessment made by such an expert committee."

8. In view of the aforesaid discussion, this Court finds no merit in this petition and the same is dismissed, leaving the parties to bear their costs.

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

Union of India & Others .....Petitioners.
Versus
Tej Ram ....Respondent.

CWP No. 7097 of 2014
Reserved on : 5.12.2014
Decide on : 12.12.2014

Constitution of India 1950- Article 226- Petitioner claimed promotion as JE as per Military Engineering Services (Superintendents (Electrical Mechanical) Grade I and Grade II) Recruitment Rules , 1983- petitioner had appeared in the diploma Course, the result of which was declared on 6.2.2001 after the cut-off date for promotion- however, examination was conducted in the month of December, 2000 prior to cut-off date for promotion- held, that petitioner was eligible to be considered for promotion and relevant date is the date of taking of the examination and not the date of pronouncement of the result. (Para-2 and 3)

For the Petitioners: Mr. Ashok Sharma, ASGI.
For the Respondent: Mr. Vinod Kumar Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The respondent herein claimed promotion as JE (Electrical/Mechanical) against the vacancies of 2001-2002, as per Recruitment Rules, issued vide notification No. S.R.O 302 of 17.11.1983, nomenclatured as Military Engineering Services (Superintendents (Electrical Mechanical) Grade I and Grade II) Recruitment Rules , 1983.

2. The deterrent which beset the petitioner herein to not consider the claim of the respondent herein for being promoted to the post of J.E

(Electrical/ Mechanical) was the purported factum of the respondent herein having not acquired the germane eligibility criteria, inasmuch, as, his having not at the apposite stage acquired the relevant diploma on or before 1st Jan, 2001 as was enjoined to be possessed by him. On the anvil of the respondent herein having not acquired the germane eligibility criteria on or before 1.1.2001, hence, the petitioner herein considered the claim of the respondent herein, for promotion to the post of JE (Electrical/Mechanical), to be untenable. The substratum of the projection by the petitioner herein of the respondent herein having not acquired the germane educational qualification, inasmuch, as, his having not passed his diploma in December, 2000 is anchored upon the factum of the result of the examination in which the respondent herein had participated having come to be declared after the cut off date inasmuch as on 6.2.2001. A perusal of Annexure P-4 which is the diploma awarded in favour of the respondent herein proclaiming the fact of his having completed the part time Diploma in Electrical Engineering magnifies the fact of the respondent herein having acquired the germane, relevant educational qualification in December, 2000. Consequently, when Annexure P-4 makes an amplifying disclosure of the respondent herein having successfully passed the examination in which he participated in December, 2000. Therefore, his having fulfilled the germane educational criteria before 1.1.2001, hence was eligible to be considered for promotion to the post of JE (Electrical/Mechanical) for the vacancies which occurred for the year 2001-2002. Even though, the counsel for the petitioner contends that the reckonable, computable date for gauging the time/period of acquisition of the germane educational qualification by the respondent herein is comprised in the date of declaration of the result of the examination in which he participated. However the said contention has no force in face of a judgment reported in 2004 (6) SLR 803: 2005(1) S.C.T 289, titled as State of Karnataka vs. T. Chandrashekhar, the relevant para of which is extracted hereinafter and which upsurges an inference that the relevant date/time for construing whether the aspirant successfully cleared/passed the departmental examination is the date on which he takes the examination and not the date when the result of the examination is announced.

> "*The dictum that a Govt. Servant passes the departmental examination on the date when he takes up the exam and not on the date when the result of the examination is announced stems from the fact that the person's knowledge over a particular subject is tested on the date of the examination and not on the date of the announcement of the result. It would be a travesty to state otherwise and even where the results are announced after a long period of time, for one reason or the other, the date of passing of the examination is always construed and mentioned in the result sheet as the date of examination. We answer the issue accordingly."*

3. Consequently, even when the result of the examination in which the respondent herein had participated was declared on 6.2.2001, hence, subsequent to 1.1.2001, the factum of declaration of result would not either impinge upon or detract from the efficacy of Annexure P-4, which declares the respondent herein to have successfully passed his diploma in December, 2000, hence, prior to 1.1.2001, rendering him, as such, eligible to be considered for promotion to the vacancies which occurred in 2001-2002. In sequel, the contention of the petitioner herein that the reckonable or computable date for construing the time/period of acquisition of the germane educational criteria is fathomable or gaugeable from date of declaration of result of examination in which the respondent had participated, is to be discountenanced. Further more the learned Central Administrative Tribunal having considered the entire factual matrix in a wholesome manner and it also having accurately applied to it the apposite law, its order hence cannot be faulted on any score. Consequently, there is no merit in the petition, the same is accordingly dismissed and the

impugned order rendered by the learned Central Administrative Tribunal is maintained and affirmed.

All pending applications stand disposed of accordingly.

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

Bakshi Ram and others ...Appellants/defendants.

Vs.

Julfi Ram since deceased through his LR's and others

.....Respondents/Plaintiffs.

RSA No. 55 of 2002.
Reserved on: 3rd December, 2014.
Decided on: 15th December, 2014.

Specific Relief Act, 1963- Section 34- Suit land was recorded in the name of respondents No. 7 to 11- A sale deed was executed by respondents No. 7 to 9 in favour of defendants No. 3 to 5- plaintiffs claimed that earlier a suit was filed by defendants No. 7 to 9 against them regarding the cultivation of the land- a compromise was arrived in the appeal and as per compromise, plaintiff and defendants No. 1 and 2 paid money to the previous owner and became owners of their share in the suit land- defendants became the owners to the extent of half share, whereas plaintiffs became owners of remaining half share – entries in favour of defendants are wrong- defendants denied the possession as well as the compromise- held, that once it was determined that plaintiffs are entitled to half share and defendants no. 1 & 2 are entitled to half share, the same question cannot be re-agitated. (Para-9 to 10)

For the Appellants: Mr. K.D. Sood, Senior Advocate with Mr. Sanjeev Sood, Advocate.

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

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

This appeal is directed against the impugned judgment and decree, rendered on 21.12.2001 by the learned District Judge, Hamirpur, H.P., in Civil Appeal No. 17 of 1993, whereby, the learned District Judge allowed the appeal preferred by the plaintiffs/respondents and reversed the findings of the learned trial Court rendered on 19.12.1992 in Civil Suit No. 41 of 1988.

2. Briefly stated the facts of the case are that the suit land comprised in khata No.3 min, Khatauni No.4 min, khasra No.181 and 193, measuring 7 Kanals and 9 Marlas is stated to shown in the names of defendants No.7 to 11 and as per the further entries, mutation No.192 thereof has been shown to be entered on the basis of the sale thereof by defendants No.7 to 9 in favour of defendants No.3 to 5. According to the plaintiffs, previously, a civil suit was filed by defendants No.7 to 9 against them. The dispute therein was so as to the cultivation of the suit land. The suit was decreed in favour of the defendants No.7 to 9. The plaintiffs, however, filed Civil Appeal No.64 of 1983 in the Court of learned District Judge, Hamirpur and the same was decided on

20.8.1984. As a matter of fact, it is the plaintiffs and defendants No.1 and 2, who were stated to be cultivating the suit land as tenant-at-will under the previous owners Mansha Ram and others in equal shares. During the pendency of Civil Appeal No.64 of 1983 in the Court of District Judge, Hamirpur, a compromise was arrived at in between the parties. The statements of the previous owners Bihari Lal, Suresh Kumar, Asha Devi, Mansha Ram and Khazana Ram etc., were recorded. The statements of the plaintiffs as well as that of defendants No.1 and 2 were also recorded regarding the compromise. As per the compromise, the plaintiffs and defendants No.1 and 2 have paid money to the previous owners Mansha Ram etc. The defendants No.1 and 2 thus because owners qua their share in the suit land which was in their possession i.e. half of the suit land, whereas the plaintiffs came to be in possession of the remaining half share i.e. measuring 3 Kanal and 15 Marlas till date, to the knowledge of the defendants. The plaintiffs came to know for the first time in the month of May, 1987 that their names have not been entered in the revenue record and that there exists an entry with respect to Mutation No. 192 qua the suit land. It is in the month of June, 1987, the defendants No.1 to 6 started causing interference in the possession of the plaintiffs over the suit land at the pretext that the same was purchased by them from defendants No.7 to 11. As per further case of the plaintiffs, as a matter of fact, the said defendants had left with no title in the suit land after the decision of Civil Appeal No.64 of 1983 vide judgment dated 20.8.1984. The said judgment was binding on the defendants. Thus, any sale of the suit land after the decision of the aforesaid appeal, according to them, is null and void and not binding on the plaintiffs. Mutation No.192 entered on the basis thereof is also claimed to be void. It has also been submitted that no interference in their possession has been caused by defendants No.7 to 11, however, it is defendants No.1 to 6 who are interfering in the suit land. The plaintiffs even requested the said defendants to get the entries with respect to the suit land corrected and even notices were also served upon them, but of no avail. It has been submitted that the plaintiffs have also paid the money in lieu of the price of the suit land in their share. The defendants have thus no legal right to cause any sort of interference therein. In view of this back drop, the plaintiffs have sought a decree for declaration to the effect that they are owners in possession of the suit land with consequential relief of permanent prohibitory injunction restraining defendants No.1 to 6 from causing any sort of interference over the suit land.

3. The defendants No.1 to 5 and 7 to 11 have contested the suit. They filed the written statement and raised preliminary objections that the suit is not maintainable in the present form, suit is bad for non joinder of necessary parties, no cause of action exists in favour of the plaintiffs to file the suit and that they are estopped from instituting the same by their act and conduct. On merits, it is admitted that a Civil Suit was filed by defendants No.7 to 9 and that the same was decreed in their favour. It is, however, submitted that the suit land was never in possession of the plaintiffs. No compromise is also stated to be arrived at between them and the plaintiffs in the Court of District Judge, Hamirpur. The plaintiffs were stated to be never in possession of the suit land and as such, there is no question of causing any interference in their possession by the defendants. The defendants No.1 to 6 are stated to be not bound by the result of previous litigation qua the suit land, if any, because of they purchased the same for consideration. The suit has thus been sought to be dismissed.

4. Defendant No.6 in his separate written statement has also raised the preliminary objections so as to the suit is not maintainable, barred by limitation, there exists no cause of action in favour of the plaintiffs to file the suit and that since he as well as his brothers are bona fide purchaser under registered sale deed dated 22.8.1983 in respect of the suit land and as such, the compromise, if any, arrived at between the plaintiffs and previous owner, is not binding upon them. Also that he as well as his two brothers have spent a sum of Rs.9000/- for the improvement of the suit land. It has also been submitted that

the plaintiff is estopped by his acts, deeds and conduct from filing the present suit. On merits, defendant No.6 has offered denial to the averments in the plaint.

5. The plaintiffs/respondents filed replications to the written statements of the defendants/appellants, wherein, they denied the contents of the written statements and re-affirmed and re-asserted the averments, made in the plaint.

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

1. Whether the plaintiffs are entitled to the relief of permanent injunction, as prayed for? .....OPP
2. Whether the plaintiffs are owner in possession of the suit land, as alleged? .....OPP
3. Whether the suit is not maintainable in the present from, as alleged in preliminary objections No.1 and 2? ....OPD
4. Whether the suit is bad for non-joinder of necessary parties?.....OPD
5. Whether the suit is time barred? ...OPD
6. Whether the plaintiffs have no cause of action, as alleged? OPD
7. Whether the alleged compromise decree is based on fraud as alleged? OPD 1 to 5,7.
8. Whether the plaintiffs are estopped by their act and conduct from filing this suit? OPD
9. Whether defendant No.6 along with his two brothers is a bonafide purchaser of the suit land as alleged, if so, its effect?OPD-6
10. Whether the defendants have made any improvement over the suit land as alleged, if so, to what extent and effect? OPD

10.A. Whether the compromise has no legal force, as alleged? OPD.

11. Relief.

7. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/respondents. In appeal, preferred against the judgment and decree of the learned trial Court by the plaintiffs/respondents before the learned first Appellate Court, the learned first Appellate Court allowed the appeal and reversed the findings recorded by the learned trial Court.

8. Now the defendants/appellants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 18.6.2002, this Court, admitted the appeal instituted by the defendants/appellants against the judgment and decree rendered by the learned first Appellate Court on the hereinafter extracted substantial questions of law:-

1. Whether the unsigned compromise can be held to be a valid compromise and the judgment passed on such compromise not confirming the mandatory requirements of Order 23 is illegal and invalid?
2. Whether the appellants No.3 to 5 are the bonafide purchasers as per sale deed dated 22.8.1983 and are not bound by the alleged

compromise which was arrived in the year 1994 when such persons had left with no interest?

3. Whether the impugned judgment and decree is vitiated for mis construction and misinterpretation of sale deed Ex.DW1/A and the Ex.P-4 judgment dated 20.8.1994?

Substantial questions of Law No.1 to 3.

9. The plaintiffs herein were defendants in a previous suit whereas the defendants herein were plaintiffs therein. In an appeal bearing Civil Appeal No.64 of 1983, preferred by the plaintiffs herein against the judgment and decree of 11.4.1983 of the learned Sub Judge, Hamirpur, the learned District Judge in his judgment comprised in Ex. P-3 on the strength of the statements of the parties, dismissed the suit of the plaintiffs, defendants herein. The previous suit inter se the parties at lis before this Court, though in contradistinct capacities, aforesaid, was also qua the suit land analogous to the suit land in the instant suit. Even though, the learned trial Court in its judgment and decree had answered issue No. 10 (A) in favour of the defendants, however, the learned District Judge, Hamirpur in his judgment and decree impugned before this Court reversed the findings recorded by the learned trial Court. The learned counsel for the appellants contends with force and vigour that the strength and sinew of the previous judgment recorded by the District Judge, Hamirpur in a lis inter se the parties at lis before this Court though in contradistinct capacities aforesaid anvilled purportedly on the statements of the parties stands eroded, in the face of their being no demonstrative evidence on record to portray that the previous judgment and decree comprised in Ex. P-3 for lending it legal force and tenacity within the meaning of Order 23, was preceded by statements of the contesting parties therein. The above argument is highly fallacious and is bereft of legal vigour. Consequently, it ought to stand disapprobation from this Court for the following reasons:-

(a) The factum of PW-1 Shri B.D Rattan who at the relevant time was the Reader of the learned District Judge, Hamirpur as well as the deposition of PW-2 Shri Subhash Chand, who was posted as translator in the Court of the learned District Judge, Una and who was on tour to Hamirpur along with the then learned District Judge while the latter having the charge of Hamirpur Civil and Sessions Division having both unanimously deposed that the statements of the parties were recorded at the dictation of the Presiding Officer besides their having proceeded to also depose that the statements of the parties to the lis in an appeal before the learned District Judge, Hamiprur who thereupon rendered his judgment and decree are comprised in Ex. P3, bear Exts. PW-1/A, 1/B, 2/A and 2/B, which aforesaid exhibits comprise certified copies thereof. In face thereof when there is dearth of evidence or in fact abysmal lack of evidence to portray that the certified copies of the statements of the parties to the lis are shorn of their authenticity, therefore, it is to be concluded as aptly done by the learned First Appellate Court that it was on the strength of the statements of the parties to the lis in the previous litigation that the learned District Judge rendered a compromise decree comprised in Ex.P3. In sequel and also in face of the fact that even if assuming that any taint of illegality was, as such, acquired by the judgment and decree of the then learned District Judge, Hamirpur while rendering a compromise decree comprised in Ex.P3, the validity thereof was impeachable at the instance of the aggrieved by resorting to file an appeal or petition under Order 23, Rule 3 CPC. However, the aggrieved has omitted to take recourse to the aforesaid provisions of law for assailing or impeaching the legality of the decree rendered by the learned District Judge, Hamirpur comprised in Ex.P3. Consequently, for omission on the part of the aggrieved to assail it by taking recourse to the legally ordained measures, they are now estopped as well as barred from assailing

the validity of the judgment and decree rendered by the learned District Judge, Hamirpur comprised in Ex.P-3.

10. In aftermath, the judgment and decree, rendered by the learned District Judge, Hamirpur comprised in Ex.P-3 qua analogous suit land inter partes, the parties at lis before this Court acquires finality as well as conclusiveness. It having determined the plaintiffs herein, who were defendants therein to be entitled to the ½ share i.e. 3 kanals and 15 marlas in the suit land in their capacity as tenants in possession, is too a clinching factum which precludes its reopening or re-determination. Though, during the pendency of the civil appeal, a sale deed comprised in Ex.DW1/A was executed qua the suit land inter se the defendants No.4 to 6 as vendees under defendants No.7 to 11, however, the factum of execution of sale deed comprised in Ex.DW1/A does not either abrogate, detract or dilute the effect of a previous conclusive determination comprised in Ex.P3, inter se the parties at lis herein, who previously were therein in inter se contradistinct capacities aforesaid. Preponderantly further more the effect of EX.DW1/A in not begetting any dilution of the verdict comprised in Ex.P-3 in the previous litigation inter se the parties at lis wherein the rights of the plaintiffs herein, who were defendants therein were left intact to the extent of ½ share in the suit land gets aggravated strength from the factum of the Ex.DW1/A having been executed inter se the defendants No. 4 to 6 and 7 to 11 preceding the rendition of the compromise decree comprised in Ex.P3 by the learned District Judge, Hamirpur. Its having been hence executed during the pendency of the appeal inter se the parties at lis, though in contradistinct capacities therein, is obviously hit by the doctrine of *lis pendens*. In aftermath as aptly concluded by the learned first Appellate Court in its impugned judgment and decree it vests no right, title or interest in the vendees qua the suit land. 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/appellants and in favour of the plaintiffs/respondents.

11. The result of the above discussion is that the appeal preferred by the defendants/appellants 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 SANJAY KAROL, J. AND HON'BLE MR. JUSTICE P.S.RANA, J.

1. Cr. Appeal No.706 of 2008.
2. Cr. Appeal No. 740 of 2008.

Judgment reserved on: 16.9.2014.
Date of Decision: December 15, 2014

1.Cr.A. No. 706 of 2008.

Nikhil Soni son of
Sh. Pardeep Soni. .....Appellant.

Vs.

State of H.P. .....Respondent.

For the Appellant: Mr. Satyen Vaidya, Advocate.
For the respondent: Mr.B.S.Parmar, Addl. Advocate General with Mr. Ashok Chaudhary, Addl. AG, Mr. Vikram Thakur,

Dy. AG and Mr. J.S.Guleria, Asstt. Advocate General.

2. Cr.A. No. 740 of 2008.

Sanjiv Soni son of
Sh Santosh Kumar. ....Appellant

Vs.

State of H.P. .....Respondent.

Indian Penal Code, 1860- Section 302 read with Section 34- As per prosecution case, accused caused the death of Rajesh Kumar in the shop at Sujanpur- PW-1 heard the cries and ran towards the place- she found that accused were giving beatings to Rajesh Kumar with kicks and fist blows and he was lying on the ground with face towards the sky- she raised hue and cries on which the accused ran away -she made inquiry from the deceased on which deceased told her that accused had called the deceased a drunkard on which deceased had called the accused blind- deceased was taken to hospital for treatment to CHC, Sujanpur from where he was referred to Dr. Rajinder Prasad Medical College, Tanda- he died on the way to the Hospital- prosecution version was duly proved by the testimony of PW-1 and was corroborated by PW-3, PW-4 and PW-5 - PW-9, a medical officer proved that deceased was brought to the hospital in unconscious condition- PW-18 found ante mortem injuries on the person of the deceased near left side area of spleen and small intestines caused with fist blows- held that in these circumstances, prosecution case was proved beyond reasonable doubt. (Para- 10 to 21)

Code of Criminal Procedure, 1973- Section 154- Investigating Officer sought information from the medical officer, whether the injured was in a position to make statement or not- Medical Officer certified that the injured was not fit to make the statement- Investigating Officer recorded the statement of PW-1 which was treated as FIR – held, that in these circumstances, there was no delay in recording the FIR. (Para-26)

Indian Evidence Act- 1872- Section 134- No particular number of witnesses are required for proof of any fact- when the testimony of a witness is wholly reliable, there is no need for corroboration. (Para-36)

Indian Evidence Act- 1872- Section 3- Testimony of relative witness cannot be equated to interested witnesses- conviction can be based on the testimony of related witnesses, if the same is found to be reliable and trustworthy. (Para-38)

For the Appellant: Mr. C.N.Singh, Advocate.

For the respondent: Mr.B.S.Parmar, Addl. Advocate General with Mr. Ashok Chaudhary, Addl. AG, Mr. Vikram Thakur, Dy. AG and Mr. J.S.Guleria, Asstt. Advocate General.

Cases referred:
Lalu Manjhi and another Vs. State of Jharkhand AIR 2003 SC 854
Jose Vs. the State of Kerala AIR 1973 SC 944
Masalti and others Vs. State of Uttar Pradesh AIR 1965 SC 202
Vadivelu Thevar Vs The State of Madras AIR 1957 SC 614
Chakko Vs. State of Kerala AIR 2004 SC 2688
State of Rajasthan Vs. Kalki AIR 1981 SC 1390
Hari Obula Reddi and others Vs. The State of Andhra Pradesh 1980 Cr.L.J. 1330
State of UP Vs. Iftikhar Khan and others AIR 1973 SC 863
Bhanuprasad Hariprasad Dave and another Vs. The State of Gujarat AIR 1968 SC 1323
Gurcharan Singh and another Vs. State of Punjab AIR 1956 SC 460
The State of Punjab Vs. Hari Singh and another AIR 1974 SC 1168
Bhupendra Singh Vs. State of Punjab AIR 1968 SC 1438
Mst. Balbir Kaur and others Vs. State of Punjab AIR 1977 SC 472
Molu and others Vs. State of Haryana AIR 1976 SC 2499
Sarwan Singh and others Vs. State of Punjab AIR 1976 SC 2304

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 Hamirpur in sessions Trial No. 12 of 2008 titled State of HP Vs. Nikhil Soni and another decided on 25.10.2008. Hence both appeals are consolidated and dispose of by way of same judgment in order to avoid repetition.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by the prosecution that on dated 16.4.2008 at about 8.30 PM at Sujanpur near Post Office the accused persons intentionally and knowingly caused the death of Rajesh Kumar son of Sh Hari Chand resident of Ward No. 2 Baba Swarup Gir locality Sujanpur District Hamirpur HP. It is alleged by prosecution that deceased Rajesh Kumar @ Kaku was working along with his father in the tea shop at Sidhu Chowk Sujanpur and on dated 16.4.2008 he had gone to the market at Sujanpur at about 8.15 PM and sister of deceased Seema Kumari had gone to the shop for cleaning utensils and was sitting on a bench outside the shop and her parents were sitting inside the shop. It is alleged by prosecution that accused persons came on a bike from post office side towards the shop of deceased Rajesh Kumar. It is alleged by prosecution that PW1 Seema Kumari heard the cries of quarrel and on hearing such cries she ran towards the place from where the cries were coming and when she reached near post office Tyala (Small platform) she found that accused persons were giving beating to deceased Rajesh Kumar with kick and fist blows and deceased was lying on the ground with face upward the sky. It is alleged by prosecution that PW1 Seema Kumari asked accused persons as to why the accused persons were beatings her brother deceased Rajesh Kumar and thereafter she cried for help and when she raised alarm accused persons driven the bike on the road by pushing PW1 Seema Kumari and fled away towards Hamirpur side. It is alleged by prosecution that PW1 Seema Kumari asked her deceased brother Rajesh Kumar about the reason of beating by accused persons and thereafter deceased told his sister PW1 Seema Kumari that accused persons had called the deceased a drunkard and in reply the deceased called accused persons as blind thereupon quarrel took place. It is alleged by prosecution that thereafter deceased Rajesh Kumar became unconscious. It is alleged by prosecution that thereafter PW1 Seema Kumari came back to the shop and she called her mother. It is alleged by prosecution that thereafter mother and father of deceased Rajesh Kumar also came at the spot. It is alleged by prosecution

that thereafter PW1 Seema Kumari also called her brother Raj Kumar and her sister Sunita Devi to the spot and thereafter deceased was lifted from the spot to the shop where he was laid on a bench. It is alleged by prosecution that thereafter Sh Surjit Singh medical practitioner was called to the shop who checked deceased Rajesh Kumar and advised them to take the deceased to hospital for medical treatment and thereafter deceased Rajesh Kumar was took to CHC Sujanpur. It is alleged by prosecution that thereafter medical officer CHC Sujanpur informed the police by way of telephone and thereafter daily diary report Ext PW5/A was recorded and ASI Karam Singh along with other police officials were deputed to visit the hospital. It is alleged by prosecution that thereafter ASI moved an application Ext PW11/A for conducting medical examination of deceased Rajesh Kumar and also sought the opinion of the medical officer whether the deceased was fit to make the statement or not. It is alleged by prosecution that medical officer had given the opinion that deceased was not fit to make the statement. It is alleged by prosecution that thereafter medical officer referred deceased Rajesh Kumar to Rajinder Prasad Medical College and Hospital Tanda. It is alleged by prosecution that thereafter statement of PW1 Seema Kumari Ext PW1/A was recorded and thereafter FIR Ext PW20/A was registered against accused persons at Police Station Sujanpur. It is alleged by prosecution that deceased Rajesh Kumar died in the way to Tanda hospital and inquest papers Ext PW8/A and Ext PW21/A were prepared and an application Ext PW18/A was filed for conducting autopsy on the body of deceased Rajesh Kumar. It is alleged by prosecution that post mortem of deceased Ext PW18/B was conducted and final opinion Ext PW18/D was obtained. It is alleged by prosecution that thereafter Investigating Officer visited at the spot on dated 17.4.2008 and prepared spot map Ext PW22/B. It is alleged by prosecution that dead body of the deceased was got photographed vide Ext PW6/A-1 to A-5 and negatives are Ext PW6/A-6 to A/10. It is alleged by prosecution that MHC sent the viscera of deceased Rajesh Kumar along with relevant papers to Forensic Science Laboratory Junga vide road certificate Ext PW13/C. It is alleged by prosecution that thereafter application Ext PW16/A was moved to Tehsildar for obtaining tatima and jamabandi and thereafter tatima Ext PW16/B and jamabandi Ext PW16/C obtained from halqua Patwari namely Prabhat Chand. Charge was framed against the accused persons by learned Sessions Judge Hamirpur on dated 7.8.2008 under Section 302 read with Section 34 IPC. Accused persons did not plead guilty and claimed trial.

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

Sr.No.	Name of Witnesses
PW1	Smt. Seema Kumari
PW2	Smt. Reshma Devi
PW3	Vinod Kumar
PW4	Pankaj
PW5	Kuldeep Kumar
PW6	Surinder Kumar
PW7	Sunil Kumar
PW8	Sanjay Kumar
PW9	Dr. Surjit Singh
PW10	Vipan Kumar @ Vikku
PW11	Dr. Gopal Beri
PW12	Dr. Renu Sharma
PW13	HC Ranjit Singh
PW14	Constable Malkiat Singh
PW15	Constable Suresh Kumar

PW16	Parbhat Chand
PW17	Jiwan Rishi
PW18	Dr. D.P.Swami
PW19	Raj Kumar
PW20	SI Anil Kumar Verma
PW21	ASI Shamsher Singh
PW22	ASI Karan Singh

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

Sr.No.	*Description.*
Ext.PW1/A	*State of Smt. Seema Devi under Section 154 Cr PC*
Ext.PW3/A	*Statement of Vinod Kumar under Section 161 Cr PC*
Ext.PW4/A	*Statement of Pankaj under Section 161 Cr PC*
Ext.PW5/A	*Statement of Kuldeep Kumar under Section 161 Cr PC*
Ext PW6/A-1 to A5	*Photographs of dead body*
Ext. PW6/A-6 to A-10	*Negatives*
Ext.PW7/A-1 to A-10	*Photographs of the spot*
Ext PW8/A & PW21/A	*Inquest papers*
Ext PW11/A	*Application address to Medical Officer*
Ext PW11/B	*MLC*
Ext PW12/A	*Application address to Medical Officer*
Ext PW12/B&C	*MLCs.*
Ext PW13/A&B	*Abstracts of Register No.19*
Ext PW13/C	*Road Certificate*
Ext.PW15/A	*Copy of rapat No.34*
Ext PW16/A	*Letter addressed to Tehsildar*
Ext PW16/B	*Shajra Latha*
Ext PW16/C	*Copy of jamabandi*
Ext PW17/A	*Recovery memo qua motorcycle*
Ext PW18/A	*Application for postmortem*
Ext PW18/B	*Postmortem report*
Ext PW18/C	*FSL Report*
Ext PW19/A	*Statement of Raj Kumar under Section 161 Cr PC*

Ext PW20/A	*Copy of FIR*
Ext PW22/B	*Spot map*
Ext. DA & DB	*Copy of statements of Sanjay Kumar*

5. Learned trial Court convicted both the appellants under Section 302 IPC read with Section 34 IPC and sentenced both the accused persons to undergo rigorous imprisonment for life and to pay fine of Rs.25,000/- (Twenty five thousand) each under Section 302 IPC read with Section 34 IPC. Learned trial Court further directed that in default of payment of fine both accused persons would undergo further simple imprisonment for one year.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court convicted persons filed present appeals.

7. We have heard learned Advocate appearing on behalf of the appellants and learned Addl. Advocate General appearing on behalf of the State and also perused entire record carefully.

8. Points for determination in both present appeals are whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and caused miscarriage of justice to the appellants as alleged in the grounds of appeal.

ORAL EVIDENCE ADDUCED BY PROSECUTION:

9 PW1 Seema Kumari has stated that she was married on dated 21.4.2008. She has stated that her father is running a tea shop at Sidhu Chowk at Sujanpur and her younger brother deceased Rajesh Kumar @ Kaku was working along with her father. She has stated that when she was unmarried she used to go to shop for cleaning utensils. She has stated that on dated 16.4.2008 at about 6 PM she went to the shop. She has stated that her parents were present inside the shop. She has stated that she inquired about her deceased brother and her parents told that deceased had gone to market and would come after some time. She has stated that at about 8.15 PM when she was sitting on a bench outside the shop accused persons came on a bike from post office side and she heard cries of quarrel. She has stated that thereafter she ran towards the place from where the cries came and she saw that both accused persons were giving beating with kick and fist blows to deceased Rajesh Kumar who was lying on the ground with face upwards the sky. She has stated that she asked the accused persons as to why they were beating her deceased brother and thereafter accused persons did not stop beatings and when she raised alarm accused persons went back by pushing her upon a bike. She has stated that accused persons fled towards Hamirpur road and thereafter she asked deceased Rajesh Kumar as to why the accused persons have beaten him. She has stated that deceased told her that accused persons had called him a drunkard and deceased Rajesh Kumar called the accused persons as blind and thereafter accused persons beaten the deceased. She has stated that thereafter deceased Rajesh Kumar fell unconscious and thereafter she called her mother and her mother came at the spot. She has stated that thereafter her brother Raj Kumar also came at the spot and she sent her brother Raj Kumar to call her father from the shop. She has stated that thereafter her sister Sunita Devi, Viku and Hunny also came at the spot and they lifted deceased Rajesh Kumar and took him to the shop. She has stated that thereafter one Sh Surjit Singh medical practitioner was called who checked deceased Rajesh Kumar and advised them to take the deceased to hospital. She has stated that thereafter they took the deceased in a vehicle to CHC Sujanpur. She has stated that thereafter medical officer informed the investigating agency and investigating agency came to the hospital. She has stated that she gave statement Ext PW1/A to the police. She has stated that thereafter deceased was referred to Dharamshala for medical treatment from

CHC Sujanpur. She has stated that deceased had sustained injuries on his forehead, face and on his eye. She has stated that deceased had died on the way to hospital. She has stated that investigating agency also inspected the spot in her presence. She has stated that she is the only eye witness of the incident of beating. She has denied suggestion that no talk took place between deceased Rajesh Kumar and herself. She denied suggestion that deceased Rajesh Kumar had died due to fall after intake of excessive alcohol.

9.1. PW2 Reshma Devi has stated that deceased Rajesh Kumar was her son. She has stated that deceased Rajesh Kumar was working in the shop along with her husband. She has stated that in the evening she and her daughter PW1 Seema Kumari used to visit the shop for cleaning utensil. She has stated that on dated 16.4.2008 she went to the shop at about 5 PM and her husband and deceased Rajesh Kumar were present in the shop. She has stated that after some time deceased Rajesh Kumar left towards the local market from shop. She has stated that PW1 Seema Kumari came at the shop at about 6 PM. She has stated that Seema Kumari was sitting on a bench outside the shop and she and her husband were sitting inside the shop. She has stated that at about 8 PM PW1 Seema Kumari went towards the place of incident and told that accused persons were beating deceased Rajesh Kumar. She has stated that thereafter she went to the spot. She has stated that her deceased son was lying unconscious. She has stated that thereafter her son Raj Kumar and daughter Sunila also came at the spot. She has stated that Hunny and Vikku also came at the spot. She has stated that thereafter deceased Rajesh Kumar was lifted and brought to the shop and thereafter deceased Rajesh Kumar was checked by Surjit Singh medical practitioner who advised them to take deceased Rajesh Kumar to government hospital. She has stated that thereafter deceased Rajesh Kumar was shifted to Sujanpur hospital and thereafter he was shifted to medical college Tanda. She has stated that investigating agency recorded her statement in the hospital. She has stated that her husband, son Raj Kumar and other persons accompanied deceased Rajesh Kumar to Tanda hospital where he was declared brought dead. She has stated that deceased Rajesh Kumar had sustained injuries on eye, head and other parts of the body. She has stated that her son Rajesh Kumar died due to beating given by accused persons. She has stated that no quarrel between accused persons and her son Rajesh Kumar took place in her presence. She has stated that she did not talk with deceased Rajesh Kumar at the spot because he was unconscious. She has denied suggestion that people present at the spot were saying that deceased Rajesh Kumar had fallen from Tyala (Small platform) on the stones due to intake of liquor. She denied suggestion that accused persons have not assaulted deceased Rajesh Kumar. She denied suggestion that being mother of deceased Rajesh Kumar she deposed falsely before the Court.

9.2. PW3 Vinod Kumar has stated that he is running a shop at Sujanpur. He has stated that on dated 16.4.2008 at about 7.30 PM he was at his shop. He has stated that deceased Rajesh Kumar and co-accused Nikhil Soni had caught hold of the collars of shirt of each other. He has stated that co-accused Chhotu @ Sanjiv was standing near a bike at some distance. He has stated that Raj Kumar has separated them. He has stated that he told them to go away to their houses. He has stated that he asked Chhotu @ Sanjiv to take co-accused Nikhil Soni to his house and deceased Rajesh Kumar went away with Raj Kumar towards his house. He has stated that thereafter he did not know what happened. Witness was declared hostile. He denied suggestion that co-accused Nikhil Soni gave fist blows to deceased Rajesh Kumar near Tyala (Small platform). He denied suggestion that thereafter he and Pankaj went to the spot. He denied suggestion that he, Pankaj and Raj Kumar rescued deceased Rajesh Kumar from the clutches of co-accused Nikhil Soni. He has stated that during night he received a telephone call from the brother of deceased Rajesh Kumar that Rajesh Kumar was serious and he died during that night. He has stated that he is familiar with accused persons since childhood because they are

residing at the same locality. He has stated that deceased Rajesh Kumar was also known to him from childhood. He has denied suggestion that he deposed falsely intentionally to save accused persons. He has stated that both the parties were abusing to each other. He has stated that Raj Kumar brother of deceased Rajesh Kumar is posted in Home Guard department.

9.3. PW4 Pankaj has stated that he is running a hotel near Venu Gate Sujanpur along with his father. He has stated that about 3/4 months back deceased Rajesh Kumar and co-accused Nikhil Soni were quarrelling amongst themselves in front of the shop of Vinod Kumar at Sujanpur. He has stated that co-accused Chhotu @ Sanjiv was also standing at one side with a motor cycle. He has stated that he, Bhola and Raj Kumar separated them. He has stated that deceased Rajesh Kumar and Raj Kumar went towards Sidhu Chowk and thereafter he returned to his shop. He has stated that he did not go near Tyala (Small platform). Witness was declared hostile. He has admitted that accused persons are familiar with him since his childhood. He has denied suggestion that he deposed falsely to help accused persons. He has stated that he called co-accused Chhotu @ Sanjeev and asked him to take away co-accused Nikhil Soni.

9.4. PW5 Kuldip Kumar has stated that he is working as labourer with Rana Trading Company at Sujanpur. He has stated that on dated 16.4.2008 at about 7.40 PM he was coming from the market with vegetables. He has stated that he came to the Venu Gate from the market and there were 5/7 persons present near Tyala (Small platform) near the post office. He has stated that co-accused Nikhil Soni was quarrelling with deceased Rajesh Kumar and co-accused Sanjiv Soni was at a distance with his motorcycle and thereafter he went away towards his residence. He has denied suggestion that he deposed falsely to help the accused persons. He has admitted that deceased Rajesh Kumar was of heavy weight and healthy person.

9.5. PW6 Surender Kumar has stated that he is running a shop for the last five years. He has stated that on dated 17.4.2008 he was called by the investigating agency to Tanda hospital for taking photographs of the dead body. He has stated that he took the photographs of dead body in the dead house. He has stated that positive photographs are Ext PW6/A-1 to Ext PW6/A-5 and its negatives are Ext. PW6/A-6 to Ext PW6/A-10 and the same were handed over to police.

9.6. PW7 Sunil Kumar has stated that he is running a shop of photograph at Sujanpur in the name of Jagriti Digital studio for the last seven years. He has stated that on dated 17.4.2008 in the morning he was called by police to post office near Tyala (Small platform) at Sujanpur. He has stated that he took photographs of the spot by digital camera. He has stated that photographs are Ext PW7/A-1 to Ext PW7/A-10. He has stated that photographs were handed over to the police.

9.7. PW8 Sanjay Kumar has stated that on dated 16.4.2008 at about 8.45 PM while he was at home he came to know that deceased Rajesh Kumar who was his cousin was beaten by accused persons. He has stated that he also went to post office near Tyala (Small platform) where he found that deceased Rajesh Kumar was lying unconscious and his cousin sister Seema Kumari, uncle Hari Chand, aunt Reshma Devi and other people were present at the spot. He has stated that thereafter deceased Rajesh Kumar was lifted to the shop of the father of deceased where he was laid on a bench and Dr. Surjit Singh was called who advised them to take deceased Rajesh Kumar to CHC Sujanpur. He has stated that thereafter deceased Rajesh Kumar was referred to Tanda hospital. He has stated that he reached at Tanda hospital at about 11.30 PM where deceased Rajesh Kumar was declared dead. He has stated that he also identified dead body of deceased Rajesh Kumar before the medical officer. He

has denied suggestion that he did not go to the spot. He denied suggestion that being a cousin of deceased Rajesh Kumar he deposed falsely.

9.8. PW9 Dr. Surjit Singh has stated that he is B.A M.S and running a private clinic near Sidhu Chowk Sujanpur. He has stated that on dated 16.4.2008 at about 8.45 PM he was called to the house of father of deceased Rajesh Kumar by a relative of deceased Rajesh Kumar. He has stated that deceased Rajesh Kumar was lying unconscious. He has stated that he advised his family members to take deceased Rajesh Kumar to government hospital. He has stated that rigor mortis was not present on the body of deceased Rajesh Kumar when he checked him. He has stated that pulse was alive. He has stated that he did not give first aid to deceased Rajesh Kumar.

9.9. PW10 Vipan Kumar has stated that on dated 16.4.2008 at about 8.45 PM he and Kapish were returning to home. He has stated that when they reached near post office deceased Rajesh Kumar was lying unconscious. He has stated that his mother was also present at the spot. He has stated that mother of deceased Rajesh Kumar asked them to lift him up to the shop. He has stated that they tried to lift deceased Rajesh Kumar but they could not do so. He has stated that thereafter his father and sisters Seema Devi and Sunita of deceased Rajesh Kumar also came at the spot. He has stated that all of them lifted deceased Rajesh Kumar and made him lie on a bench outside the shop. He has stated that thereafter he and Kapish left to their house.

9.10. PW11 Dr.Gopal Beri has stated that he remained posted as Medical Office in CHC Sujanpur Tihri w.e.f. April 2006 to September 2008. He has stated that on dated 16.4.2008 on the request of investigating agency vide application Ext PW11/A he examined deceased Rajesh Kumar son of Sh Hari Chand at about 9 PM. He has stated that deceased Rajesh Kumar was very serious. He has stated that B.P and pulse of deceased Rajesh Kumar was not recordable but the heart auscultation was 96 and pupils on both sides were normal and he noticed the following injuries. He has stated that there was a diffused swelling bluish pinkish in colour about 10 inch in diameter with a pinkish abrasion over it of the size of 5cm x 4cm in the left lower half of back on upper part of gluteal region. He has stated that there was another diffuse swelling of the size of about 5 cm diameter in the right parieto occipital region of the scalp. He has stated that another bluish pink abraded contusion over the posterior aspect of the middle of right forearm was found. He has stated that left eye was black and the patient was stuperous and irritable and was unable to speak. He has stated that for these injuries X-ray of skull, C.T.Scan of skull and then ultra-sound of abdomen and CT scan of abdomen was advised. He has stated that weapon used for the above injuries was blunt and probable duration of the injuries was within 24 hours. He has stated that he issued MLC Ext PW11/B and bears his signature. He has stated that above stated injury was caused with fist and kick blows. He has stated that deceased Rajesh Kumar was referred to medical college Tanda as his condition was serious. He has stated that he could not state that injured was under the influence of liquor at the time of examination. He has stated that he did not collect blood or urine sample of the injured as there was no facility for taking out blood or other investigation therefore patient was referred to Medical College Tanda.

9.11. PW12 Dr. Renu Sharma has stated that PW12 was posted as Medical Officer CHC Sujanpur on dated 17.4.2008. PW12 has stated that on application Ext PW17/A co-accused Nikhil Soni was medically examined. PW12 has stated that co-accused Nikhil Soni was complaining pain and tenderness at the root of nose and nasal bridge and there was no swelling or external sign of any injury. PW12 has stated that co-accused Nikhil Soni also complaining of pain on the left temporal region and no external signs of injury were found. PW12 has stated that there was abrasion of the size of 1x5 cm over distal phalanx of left middle finger and swab was not formed movements of phalanx were normal. PW12 has stated that there was an abrasion of the size of 3 x.5cm

over upper 1/3rd of left shin and scab was not formed and movements of knee joint were normal. PW12 has stated that patient was referred for expert Radiologist opinion and management and final opinion was kept reserved. PW12 has stated that weapon used was hard blunt. PW12 has stated that probable duration of the injuries was less than 12 to 24 hours. PW12 has stated that he issued MLC of co-accused Nikhil Soni Ext PW12/B and also issued MLC of co-accused Sanjiv Kumar Ext PW12/C.

9.12. PW13 Ranjit Singh has stated that he was posted at Police Station Sujanpur w.e.f. 2008. He has stated that on dated 17.4.2008 ASI Shamsher Singh deposited with him three parcels duly sealed with seal impression DHD. He has stated that the entry was made in rapat roznamcha register vide entry Ext PW13/A. He has stated that on dated 19.4.2008 ASI Karam Singh had deposited with him motor cycle No. HP-22B-2000 which was entered in rapat roznamcha Ext PW13/B. He has stated that one parcel containing viscera of deceased Rajesh Kumar along with one sealed envelop containing copy of FIR, copy of MLC, post mortem report and sample seal DHD were sent to FSL Junga through constable Malkiat Singh vide RC No. 43 of 2008 on dated 22.4.2008. He has stated that after depositing the above case property he handed over RC to him. He has stated that case property was not tampered with in any manner.

9.13. PW14 Malkiat Singh has stated that he was posted at Police Station Sujanpur for the last six months. He has stated that MHC Ranjit Singh handed over to him three sealed parcels on dated 22.4.2007 vide RC No. 43 of 2008 for handing over the same at FSL Junga. He has stated that seals of the samples were not tampered. He has stated that rukka Ext PW1/A was also brought by him on dated 16.4.2008 from Sujanpur hospital and he handed over the same to Station House Officer on the basis of which FIR was registered. He has stated that thereafter he took the file to hospital and handed over to ASI Karan Singh. He has stated that his statement under Section 161 Cr PC was recorded on dated 16.6.2008.

9.14. PW15 Suresh Kumar has stated that he brought original rapat roznamcha register on dated 16.4.2008 and Ext PW15/A which is correct copy of rapat No.34 dated 18.4.2008.

9.15. PW16 Prabhat Chand has stated that on the request of Investigating Officer vide application Ext PW16/A he prepared tatima Ext PW16/B and copy of jambandi Ext. PW16/C of the spot and thereafter he handed over the same to police.

9.16. PW17 Jeevan Rishi has stated that on dated 19.4.2008 police took into possession motor cycle No.HP-22B-2000 vide memo Ext PW17/A.

9.17. PW18 Dr. D.P Swami has stated that he was lecturer in Medical College since August 1998. He has stated that on dated 17.4.2008 on the application Ext PW18/A along with inquest form Ext PW8/A he had conducted post mortem on the body of deceased Rajesh Kumar. He has stated that body of deceased Rajesh Kumar was brought by police officials and was identified by one Sanjay Kumar. He has stated that there was a history of beating by Nishu son of Pradeep Kumar and Chhotu son of Sant Ram on dated 16.4.2008 at 8.30 PM and injured had undergone unconscious at the spot. He has stated that injured was declared dead on dated 16.4.2008 at 11.45 PM. He has stated that rigor mortis were fully developed. He has stated that injuries were anti mortem. He has stated that he observed the following injuries. He has stated that there was a black eye left side 2x1 reddish in colour and there was a bruise 2x2 inches on left temporal area and reddish irregular. He has stated that there was bruise on right mid forearm, irregular reddish 1.75 x 1 inches with grazed irregular abrasion on outer side. He has stated that there was bruises 2x1 inches on right upper arm outer side reddish and grazed abrasion on right side of elbow outer

side and irregular 2x1 inches reddish. He has stated that scratch on right mid, upper inguinal region was one inch long and reddish oblique. He has stated that there was bruise with abrasion, irregular on left lower mid back 2 x 1.1/2 inches reddish and bruise 1.1/2x1/2 inch reddish on lower right back and the brain was congested. He has stated that in his opinion deceased Rajesh Kumar died by hemorrhagic shock due to anti mortem injuries to mesenteric vessels near left side area of spleen and small intestines caused with fist blows. He has stated that probable time between injury and death was 1-2 hours and between death and post mortem was 12-24 hours. He has stated that shirt, trousers and under wear were handed over to the police after sealing the same with seal mark DHD. He has stated that body was handed over to police with original post mortem report. He has stated that he also handed over to police three sample seals, cloths packet, viscera packet and forwarding letter addressed to FSL Junga. He has stated that he issued post mortem report Ext PW18/B which bears his signature. He has stated that after going through FSL report Ext PW18/C dated 2.6.2008 in his final opinion deceased Rajesh Kumar died by hemorrhagic shock and due to anti mortem injuries caused near left side area of spleen and small intestines caused with fist blows. He has stated that contribution towards death is approximately 20% due to consumption of alcohol and 80% due to injury. He has stated that injuries were caused by fist and kick blows. He has stated that injuries were sufficient to cause death in the ordinary course of nature. He has stated that in the present case the quantity of alcohol consumed by deceased Rajesh Kumar was mild. He has denied suggestion that injury could be caused due to fall on stones. He has stated that he could not state that injury could be caused by other than kick and fist blows. He has denied suggestion that a person having injury on spleen area, liver or cranium could survive if immediate medical treatment is provided. He has admitted that if spleen and liver parts are damaged including intestines then timely medical help would save the person subject to the condition of injured and standard of treatment given to the injured.

9.18. PW19 Raj Kumar has stated that he is a labourer. He has stated that on dated 16.4.2008 there was a Jagrata (Religious function) at Sujanpur and he had gone to bring vegetables from the market. He has stated that when he reached 'Venu Gate' deceased Rajesh Kumar was abusing co-accused Nikhil Soni. He has stated that he requested both of them to go to their houses but they did not accept his request. He has stated that co-accused Nikhil Soni was also accompanied by co-accused Sanjiv Soni. He has identified both accused persons in Court. He has stated that he took deceased Rajesh Kumar up to the shop of Vinod Kumar @ Bhola. He has stated that in the meantime both accused persons again came at the place of incident. He has stated that both parties again grappled with each other. He has stated that in the meantime Vinod Kumar @ Bhola arrived at the spot and he separated the parties. He has stated that thereafter deceased Rajesh Kumar went away from the place of incident. He has stated that thereafter shoes of co-accused Nikhil Soni were misplaced and they searched for the shoes. He has stated that thereafter co-accused Nikhil Soni kept on standing near the shop. He has stated that after some time accused persons found the shoes and thereafter both accused persons again followed deceased Rajesh Kumar on the motor cycle. He has stated that when accused persons reached nearby deceased Rajesh Kumar he slapped co-accused Nikhil Soni and his spectacles were broken. He has stated that thereafter deceased Rajesh Kumar and co-accused Nikhil Soni again started physical quarreling. He has stated that thereafter he and Vinod Kumar @ Bhola again went at the spot and separated them. He has stated that thereafter both accused persons went from place of incident on a motor cycle. He has stated that he requested deceased Rajesh Kumar to go to his house but deceased Rajesh Kumar kept standing at the place of incident. He has stated that the shop of the father of deceased Rajesh Kumar was nearby the place of incident. He has stated that thereafter he informed the parents of deceased Rajesh Kumar

thereafter his parents came to Tyala (Small platform) where deceased Rajesh Kumar was present. He has stated that thereafter sister of deceased Rajesh Kumar also came at the place of incident. He has stated that thereafter he went to his house. He has stated that thereafter the parents of deceased Rajesh Kumar called him to help them to lift injured Rajesh Kumar from the place of incident. He has stated that in the meantime other local boys also came at the spot. He has stated that deceased Rajesh Kumar was not in a position to walk and he was made to lie on a bench outside the shop.

9.19 PW20 Anil Kumar has stated that he was posted as SHO in Police Station Sujanpur since 2007. He has stated that on dated 16.4.2008 at about 4 PM telephonic information was received by him from Medical Officer CHC Sujanpur that deceased Rajesh Kumar was brought to hospital in an injured condition. He has stated that he entered information in daily diary Ext PW15/A and thereafter he sent ASI Karan Singh to hospital along with other police officials to look into the matter. He has stated that thereafter he received rukka Ext PW1/A. He has stated that FIR Ext. PW20/A was registered. He has stated that on completion of investigation he prepared challan.

9.20. PW21 Shamsher Singh has stated that he accompanied injured Rajesh Kumar to Tanda hospital. He has stated that Rajesh Kumar was declared dead in the hospital. He has stated that thereafter he moved application Ext PW18/A for conducting post mortem and also filed inquest reports Ext PW8/A and Ext PW21/A. He has stated that he recorded the statements of Sanjay Kumar, Rajneesh and photographer Surinder Kumar. He has stated that he also brought parcels of the case property from the hospital and deposited the same with MHC.

9.21. PW22 Karan Singh has stated that he was posted as Investigating Officer in Police Station Sujanpur since April 2008. He has stated that on dated 16.4.2008 he was deputed by SHO Anil Verma to CHC Sujanpur along with other police officials. He has stated that when he went to hospital deceased Rajesh Kumar was in the hospital. He has stated that he moved application Ext PW1/A to the Medical Officer and sought opinion whether deceased Rajesh Kumar was fit to make the statement. He has stated that thereafter he recorded the statement of Seema Devi Ext PW1/A and sent the same through Constable Malkiat Singh after making endorsement Ext PW22/A for registration of FIR. He has stated that injured was referred to Tanda hospital for further medical treatment. He has stated that statement of Reshma Devi was also recorded in the hospital. He has stated that thereafter spot was inspected. He has stated that thereafter accused persons were arrested and interrogated. He has stated that information was received that deceased Rajesh Kumar had died during the night and thereafter the case was converted into under Section 302 IPC. He has stated that on the next day he prepared site plan Ext PW22/B and also recorded supplementary statement of PW1 Seema Kumari. He has stated that on dated 19.4.2008 one Pradeep produced motor cycle along with its documents which was took into possession vide Ext PW17/A. He has stated that on dated 16.4.2008 deceased Rajesh Kumar and co-accused Nikhil Soni had indulged in a quarrel at about 7.30 PM near Veno Gate. He has stated that again quarrel took place between deceased Rajesh Kumar and co-accused Nikhil Soni near the shop of Vinod Kumar. He has stated that thereafter both accused persons went away and returned after some time. He has stated that thereafter accused persons gave beatings to deceased Rajesh Kumar. He has stated that thereafter PW1 Seema Kumari and accused persons left from the place of incident. He has stated that quarrel took place several times between deceased and accused persons hence incident was pre planned by accused persons.

Findings in Criminal Appeal No. 706 of 2008 titled Nikhil Soni Vs. State of HP

Testimony of PW1 Seema Kumari is fatal to appellant Nikhil Soni

10. In the present case eye witness PW1 Seema Kumari who is the sister of deceased Rajesh Kumar has specifically stated that accused persons have given beatings to her deceased brother Rajesh Kumar in her presence by way of kick and fist blows. PW1 Seema Kumari eye witness has specifically stated in positive manner that deceased Rajesh Kumar had sustained injury upon his body. Testimony of PW1 Seema Kumari is trust worthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1 Seema Kumari.

Testimony of PW3 Vinod Kumar another eye witness of the incident is fatal to appellant Nikhil Soni_

11. PW3 Vinod Kumar eye witness of the incident has specifically stated in positive manner that deceased Rajesh Kumar and appellant Nikhil Soni have caught hold the collars of shirt of each other in his presence. Testimony of PW3 Vinod Kumar that appellant Nikhil Soni had caught hold the collars of shirt of deceased Rajesh Kumar in his presence is fatal to the appellant. Hence the testimony of PW3 is trustworthy, reliable and inspires confidence of Court and there is no reason to disbelieve the testimony of PW3.

Testimony of PW4 Pankaj eye witness also fatal to appellant Nikhil Soni

12. PW4 Pankaj has specifically stated in positive manner that deceased Rajesh Kumar and appellant Nikhil Soni were quarrelling in front of the shop of PW3 Vinod Kumar at Sujanpur. Testimony of PW4 Pankaj is trust worthy, reliable and inspires confidence of Court and there is no reason to disbelieve the testimony of PW4.

Testimony of PW5 Kuldeep Kumar eye witness is also fatal to appellant Nikhil Soni

13. PW5 Kuldeep Kumar has specifically stated in positive manner that appellant Nikhil Soni was quarreling with deceased Rajesh Kumar and there is no reason to disbelieve the testimony of PW5.

Testimony of PW9 Dr. Surjit Singh is fatal to appellant Nikhil Soni

14. PW9 Dr. Surjit Singh has specifically stated in positive manner that immediately after the incident on dated 16.4.2014 at about 8.45 PM he examined deceased Rajesh Kumar. He has stated that deceased Rajesh Kumar was lying unconscious and he advised the family members of deceased to take deceased Rajesh Kumar to government hospital for his medical treatment. Testimony of PW9 Dr. Surjit Singh that he examined deceased Rajesh Kumar in unconscious condition immediately after the incident on dated 16.4.2008 at 8.45 PM is also trusty worthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW9. There is no evidence on record in order to prove that PW9 Dr. Surjit Singh has hostile animus against appellant Nikhil Soni.

Testimony of PW11 Dr. Gopal Beri is fatal to appellant Nikhil Soni

15. PW11 Dr. Gopal Berri has specifically stated in positive manner that on dated 16.4.2008 he examined deceased Rajesh Kumar immediately after the incident. He has stated that deceased Rajesh Kumar was in very very serious condition. Testimony of PW11 Dr. Gopal Beri is also trust worthy, reliable and inspires confidence of Court and there is no reason to disbelieve the testimony of PW11 who examined deceased Rajesh Kumar in very very serious condition due to injury inflicted by appellant Nikhil Soni.

Testimony of PW18 Dr.D.P.Swami is also fatal to appellant Nikhil Soni_

16. PW18 Dr.D.P.Swami has specifically stated in positive manner that he conducted post mortem of deceased Rajesh Kumar. He has stated that injured had undergone unconscious at the spot and injured was declared dead

on dated 16.4.2008 at about 11.45 PM. PW18 has specifically stated in positive manner that injuries were anti mortem. PW18 has specifically stated that deceased Rajesh Kumar had died by hemorrhagic shock due to anti mortem injuries sustained by deceased Rajesh Kumar near left side area of spleen and small intestines caused with fist blows. PW18 has specifically stated in positive manner that probable time between injury and death was within 1 to 2 hours and between death and post mortem was 12 to 24 hours. PW18 has specifically stated in positive manner that contribution of injuries towards death was 80% and he has specifically stated in positive manner that injuries were sufficient in ordinary course to cause death.

Testimony of PW19 Raj Kumar is also fatal to appellant Nikhil Soni

17. PW19 Raj Kumar eye witness has specifically stated that deceased Rajesh Kumar and appellant Nikhil Soni physically started quarrelling in his presence. The factum of quarrel between deceased Rajesh Kumar and appellant Nikhil Soni is proved on record as per testimony of PW19 Raj Kumar.

Testimony of corroborative witness is also fatal to appellant Nikhil Soni

18. PW8 Sanjay Kumar has specifically stated that on dated 16.4.2008 at about 8.45 PM deceased Rajesh Kumar was lying unconscious at the spot and thereafter he was brought to medical hospital. Even PW10 Vipan Kumar corroborative witness has stated in positive manner that deceased Rajesh Kumar was unconscious at the spot and deceased was initially laid down upon a bench and thereafter he was brought to hospital for medical treatment. PW13 Ranjit Singh has specifically stated in positive manner that parcels were deposited containing viscera, post mortem report and sample of seals in Forensic Science Laboratory Junga. PW14 Malkiat Singh has specifically stated in positive manner that he deposited parcels in the office of chemical examiner Forensic Science Laboratory Junga. As per testimony of PW15 Suresh Kumar rapat roznamcha Ext.PW15/A is also proved on record beyond reasonable doubt. As per testimony of PW16 Prabhat Chand tatima Ext PW16/B and copy of jamabandi Ext PW16/C are also proved on record beyond reasonable doubt. It is held that testimonies of corroborative witnesses are also fatal to appellant Nikhil Soni.

Post mortem report Ext PW18/D is fatal to appellant Nikhil Soni

19. As per post mortem report deceased Rajesh Kumar died due to hemorrhagic shock and due to anti mortem injuries sustained by deceased Rajesh Kumar near left side of spleen and small intestines. As per post mortem report the probable time lapsed between injury and death was 1 to 2 hours. Hence as per post mortem report the deceased had died due to injuries given by appellant Nikhil Soni with kick and fist blows upon spleen and small intestines of deceased Rajesh Kumar.

Time gap between death and injuries are fatal to appellant Nikhil Soni

20. As per testimony of medical officer and as per post mortem report time gap between injuries sustained by deceased and death was between 1-2 hours only. It is held that deceased had died due to direct effects of injuries given by appellant.

80% contribution of injuries to death is fatal to appellant Nikhil Soni

21. As per medical officer testimony there was 80% effects of injuries for death and same fact is fatal to appellant.

22. Submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that learned trial Court has wrongly believed the testimony of PW1 Seema Kumari and failed to appreciate the statement of PW3 Vinod Kumar, PW4 Pankaj, PW5 Kuldeep and PW19 Raj Kumar and on this ground

appeal be accepted is rejected being devoid of any force for the reason hereinafter mentioned. In the present case it is proved on record that quarrel took place four times after short intervals. Initially the quarrel took place at 7.35 PM in the presence of different witnesses and last quarrel took place in the presence of PW1 Seema Kumari. Hence it is held that testimony of PW1 Seema Kumari could not be disbelieved in view of the testimony of PW3 Vinod Kumar, PW4 Pankaj, PW5 Kuldeep Kumar and PW19 Raj Kumar because when last quarrel took place between deceased Rajesh Kumar and appellant Nikhil Soni at that time only PW1 Seema Kumari was present at the place of incident.

23. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that it was the mother of deceased Rajesh Kumar who reached first at the place of incident followed by the father of deceased and thereafter PW1 Seema Kumari reached at the spot and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is proved beyond reasonable doubt that in the last fight PW1 Seema Kumari reached at the spot and thereafter she went back to call her mother and other relatives and thereafter when the deceased was lying unconscious after the incident the mother of deceased followed by the father of deceased reached at the spot. It is proved on record that when father and mother of deceased Rajesh Kumar reached at the spot by that time appellant has left the place of incident after committing criminal offence and after causing fatal injuries upon deceased Rajesh Kumar who died due to fatal injuries caused by the appellant within 1 and 2 hours as per testimony of post mortem report placed on record.

24. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that learned trial Court has illegally disbelieved the testimony of PW3 Vinod Kumar, PW4 Pankaj and PW19 Raj Kumar and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case it is proved on record that quarrel took place between deceased Rajesh Kumar and appellant four times after short intervals and when the last quarrel took place between deceased Rajesh Kumar and appellant Nikhil Soni at that time PW3 Vinod Kumar, PW4 Pankaj and PW19 Raj Kumar were not present and at that time only PW1 Seema Kumari was present who had witnessed the last quarrel between deceased Rajesh Kumar and appellant.

25. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that PW1 Seema Kumari has improved her statement and her testimony is not trust worthy is also rejected being devoid of any force for the reason hereinafter mentioned. There is no material improvement in the testimony of prosecution witness. It is well settled law that minor contradictions are bound to come in a criminal case when testimony of the witnesses recorded after a gap of lapse of sufficient time. In the present case incident took place on dated 16.4.2008 and testimony of the prosecution witnesses were recorded on 4.9.2008 after a gap of four months.

26. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that statement of PW1 Seema Kumari under Section 154 Cr PC was recorded after due deliberation and consultation is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case first Investigating Officer tried to record the statement of injured but injured was in unconscious condition and medical officer had reported that injured was not in a position to give his statement and thereafter Investigating Officer under compelling circumstances recorded the statement of PW1 Seema Kumari who was the eye witness of last quarrel which took place between deceased Rajesh Kumar and appellant.

27. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that PW1 Seema Kumari is not eye witness of the

incident and prosecution has suppressed the genesis of the incident and on this ground the appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. The plea of the appellant that prosecution has suppressed the genesis of the incident is not proved on record and the same is defeated on the concept of ipse dixit (Assertion made without proof)

28. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that finding of the learned trial Court that PW1 Seema Kumari eye witness was first to reach at the spot is contrary to the evidence on record and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that fight took place between deceased Rajesh Kumar and appellant four times after short intervals and it is also proved on record that earlier three fight took place between the deceased and appellant in the presence of other witnesses but last fight took place between deceased Rajesh Kumar and appellant in the presence of PW1 Seema Kumari. It is proved beyond reasonable doubt that in the last fight other prosecution witnesses were not present as they have gone to their houses due to night period i.e. 8.30 PM.

29. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that as per testimony of PW19 Raj Kumar appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of PW19 Raj Kumar. It is well settled law that testimony of witness should not be read in isolation but it should be read as a whole. It is well settled law that Court is under legal obligation to take grain from chaff and court is not under legal obligation to take chaff from the grain. PW19 has specifically stated in positive manner that deceased Rajesh Kumar and appellant Nikhil Soni started practically quarrelling with each other in his presence and thereafter he and PW3 Vinod Kumar @ Bhola separated deceased Rajesh Kumar and appellant Nikhil Soni. PW19 has specifically stated in positive manner that thereafter both the accused persons went away from the place of incident upon a motor cycle. PW19 has specifically stated in positive manner that deceased Rajesh Kumar was not in a position to walk so he was made to lie on a bench outside the shop. There is no evidence on record in order to prove that thereafter any third person inflicted injury upon deceased Rajesh Kumar. It is proved on record that deceased died within 1 and 2 hours after the incident due to hemorrhage shock and anti mortem injury caused upon spleen and intestines of deceased Rajesh Kumar. There is no explanation as to how the deceased had sustained anti mortem injury upon the spleen and small intestines. There is proximity of death and anti mortem injury sustained by deceased Rajesh Kumar. There is no evidence on record in order to prove that some other persons have inflicted injury upon deceased Rajesh Kumar because at the spot the deceased became unconscious and thereafter he died within 1 and 2 hours due to anti mortem injuries sustained by deceased Rajesh Kumar upon his spleen and small intestines.

30. Another submission of learned Advocate appearing on behalf of the co-appellant Nikhil Soni that medical evidence of PW18 Dr. D.P.Swami qua the number of injuries and evidence of PW11 Dr. Gopal Beri qua injuries are contrary and on this ground appeal filed by appellant Nikhil Soni be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of PW11 Dr. Gopal Beri and PW18 Dr. D.P.Swami. PW11 Dr. Gopal Beri has specifically stated that on dated 16.4.2008 at about 9 PM he examined injured Rajesh Kumar and the condition of injured Rajesh Kumar was very very serious. PW18 Dr. D.P.Swami has specifically stated that all the injuries were anti mortem. Hence both PW11 Dr. Gopal Beri and PW18 Dr. D.P.Swami have proved the fact that deceased Rajesh Kumar died immediately after the incident due to anti mortem injuries. Deceased Rajesh Kumar was medically examined by Dr. Gopal Beri when he was unconscious condition. PW11 Dr. Gopal Beri has stated that condition of deceased Rajesh

Kumar was very very serious when he examined deceased immediately after the incident. We are of the opinion that minor contradiction is not fatal to the prosecution in the present case because it is proved on record that deceased was unconscious and he did not regain consciousness after the incident. It is proved on record beyond reasonable doubt that deceased had died within 1 and 2 hours after the incident due to anti mortem injuries sustained by deceased Rajesh Kumar upon his spleen and small intestines caused by the appellant.

31. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that even if the prosecution is believed in the manner as urged by the prosecution the present case is not a case of culpable homicide amounting to murder because there was no pre plan evidence to kill deceased Rajesh Kumar and there is no evidence on record that appellant intended to kill the deceased or intended to cause bodily injury and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case it is proved on record that quarrel took place between deceased Rajesh Kumar and appellant Nikhil Soni four times after short intervals and appellant came on motor cycle No. HP-22B-2000 four times after short intervals and thereafter caused fatal injuries with kick and fist blows upon spleen and small intestines of deceased Rajesh Kumar. The fact that appellant came four times after short intervals upon his motor cycle No. HP-22B-2000 proves the fact of culpable homicide amounting to murder on the part of appellant Nikhil Soni. Even PW18 Dr.D.P.Swami has specifically stated in positive manner that injuries were sufficient in ordinary course to cause death. The kick blows with hard sole shoes and fist blows with force upon spleen and small intestines upon deceased Rajesh Kumar were sufficient to cause death in the ordinary course of nature. It is held that appellant had knowledge that fist blow and kick blow with hard sole shoes upon spleen and small intestines would cause death of deceased Rajesh Kumar. Hence it is held that present case is the case of culpable homicide amounting to murder on the part of appellant Nikhil Soni.

32. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that deceased Rajesh Kumar had consumed wine and he felled upon the stone and thereafter he died and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. As per testimony of PW18 Dr. D.P Swami contribution of death due to alcohol was 20% and contribution of death due to injury was 80%. PW18 Dr D.P Swami has specifically stated in positive manner that deceased had died due to 80% injuries caused by appellant Nikhil Soni upon the body of deceased Rajesh Kumar. Hence it is held that 80% injuries were caused by appellant Nikhil Soni with fist and kick blows upon spleen and small intestines of deceased Rajesh Kumar which were fatal to deceased and caused death of deceased

33. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that learned trial Court has illegally held that accused persons have common intention of causing bodily injury upon deceased Rajesh Kumar which was sufficient in the ordinary course of nature to cause death and on this ground appeal be accepted is rejected being devoid of any force for the reason hereinafter mentioned. All the prosecution witnesses have stated in positive manner that both accused persons came at the spot on motor cycle No. HP-22B-2000 four times after short intervals. The fact that both accused persons came at the spot in four times upon motor cycle No. HP-22B-2000 after short intervals, the fact that deceased Rajesh Kumar became unconscious at the spot due to fatal anti mortem injuries and the fact that deceased had died within 1 and 2 hours after the incident and the fact that co-accused Sanjiv Soni did not try to rescue deceased Rajesh Kumar prove common intention to commit culpable homicide amounting to murder on the part of both accused persons.

34. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that there is material contradiction and improvement in the prosecution case and on this ground appeal filed by the appellant be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Learned Advocate appearing on behalf of the appellant did not point out any material contradiction which goes to the root of the case. It is well settled law that principle of falsus in uno falsus in omnibus is not applicable in criminal trial. See AIR 1980 SC Bhe Ram Vs. State of Haryana. Also see AIR 1971 SC 2505 titled Rai Singh Vs. State of Haryana. 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.

35. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that learned trial Court took into account inadmissible evidence and failed to appreciate the oral as well as documentary evidence in a proper manner is also rejected being devoid any force for the reason hereinafter mentioned. We have carefully perused the judgment and sentence passed by learned trial Court. Learned trial Court has properly appreciated the oral as well as documentary evidence adduced by the parties in accordance with law with cogent, positive and reliable reason.

36. Another submission of learned Advocate appearing on behalf of co-appellant Nikhil Soni that conviction could not be sustained on the testimony of the prosecution witnesses in the present case is also rejected for the reason hereinafter mentioned. As per Section 134 of the Indian Evidence Act 1872 no particular number of witnesses shall be required for the proof of any act. It was held in case reported in ***AIR 2003 SC 854 titled Lalu Manjhi and another Vs. State of Jharkhand*** that court may classify the oral testimony into three categories (1) Wholly reliable (2) Wholly un-reliable (3) Neither wholly reliable nor wholly unreliable. It was held that in the first two categories there would be no difficulty in accepting or discarding the testimony of single witness. It was held in case reported in ***AIR 1973 SC 944 Jose Vs. the State of Kerala*** that conviction could be given on the testimony of single witness in criminal case if testimony of single witness is trust worthy, reliable and inspires confidence of the Court. Also See ***AIR 1965 SC 202 titled Masalti and others Vs. State of Uttar Pradesh*** and also see ***AIR 1957 SC 614 titled Vadivelu Thevar Vs The State of Madras***. It was held in case reported in ***AIR 2004 SC 2688 titled Chakko Vs. State of Kerala*** that conviction could be given on testimony of single witness if the testimony of single witness is reliable. It was held that culpable homicides are of three degrees (1) Culpable homicides of the first degree is the gravest form of culpable homicide which is defined in Section 300 IPC as 'murder'. (2) Culpable homicide of the second degree is punishable under the first part of Section 304 IPC. (3) Culpable homicide of the third degree is lowest type of culpable homicide punishable under second part of Section 304 IPC. It is held that learned trial Court had properly appreciated oral as well as documentary evidence against appellant Nikhil Soni. It is held that there is no illegality and no miscarriage of justice in the judgment and sentence passed by learned trial Court qua appellant Nikhil Soni.

<u>Findings in Criminal Appeal No. 740 of 2008 titled Sanjiv Soni Vs. State of HP</u>

37. Submission of learned Advocate appearing on behalf of the co-appellant Sanjiv Soni that in view of the testimony of independent witnesses PW3 Vinod Kumar, PW4 Pankaj, PW5 Kuldip Kumar and PW19 Raj Kumar appeal filed by appellant Sanjiv Soni be accepted is rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of PW3 Vinod Kumar, PW4 Pankaj, PW5 Kuldip Kumar and PW19 Raj Kumar. PW3, PW4, PW5 and PW19 have specifically stated in positive manner that both accused persons came on motor cycle No HP-22B-2000 at the place of incident after short intervals continuously for four times. It is proved on record

beyond reasonable doubt that quarrel took place four times between deceased Rajesh Kumar and co-appellant Nikhil Soni after short intervals continuously. It is also proved on record that after first quarrel accused persons left the place of incident and thereafter again they came upon motor cycle No HP 22B-2000 after short interval at the place of incident continuously and committed quarrel with deceased Rajesh Kumar. It is also proved on record that thereafter deceased Rajesh Kumar had sustained fatal injury upon his spleen and small intestines caused with kick and fist blows. It is proved on record that thereafter at the place of incident deceased became unconscious and he did not regain consciousness till his death. It is proved on record that deceased died within 1 and 2 hours after the incident. It is also proved on record that injuries were sufficient in the ordinary course to cause death. It is proved beyond reasonable doubt that all the injuries were anti mortem in nature. Appellant Sanjiv Soni has been charged for offence punishable under Section 302 IPC read with Section 34 IPC. PW1 Seema kumari who is the eye witness of the last quarrel has specifically stated in positive manner that accused persons have inflicted injuries upon deceased Rajesh Kumar with kick and fist blows in her presence. She has specifically stated in positive manner that thereafter deceased Rajesh Kumar became unconscious and he did not regain consciousness and died after 1 and 2 hours after the incident due to anti mortem injuries sustained upon spleen and small intestines of deceased Rajesh Kumar. Hence we are of the opinion that in view of the above stated facts it is not expedient in the ends of justice to acquit co-appellant Sanjiv Soni on the testimony of PW3, PW4, PW5 and PW19 because co-appellant Sanjiv Soni had actively participated in commission of crime by way of coming along with co-accused Nikhil Soni four times after short intervals upon motor cycle. Testimony of PW1 Seema Kumari is trust worthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW1 Seema Kumari. There is no evidence on record in order to prove that PW1 Seema Kumari has hostile animus prior to the incident or after the incident against co-appellant Sanjiv Soni.

38. Another submission of learned Advocate appearing on behalf of the co-appellant Sanjiv Soni that PW1 Seema Kumari and PW2 Reshma Devi are interested witnesses being sister and mother of deceased Rajesh Kumar is also rejected being devoid of any force for the reason hereinafter mentioned. We are of the opinion that testimony of PW1 Seema Kumari and PW2 Reshma Devi are corroborated by the testimony of PW9 Dr. Surjit Singh, PW11 Dr. Gopal Beri and PW18 Dr. D.P Swami. It was held in case reported in ***AIR 1981 SC 1390 titled State of Rajasthan Vs. Kalki*** and another that relative witnesses are not equivalent to interested witnesses. It was held in case reported in ***1980 Cr.L.J. 1330 titled Hari Obula Reddi and others Vs. The State of Andhra Pradesh*** that testimony of relative could be the basis of conviction if the testimony of relative witness is reliable and trustworthy. It was held in case reported in ***AIR 1973 SC 863 titled State of UP Vs. Iftikhar Khan and others*** that evidence of relative witness need not necessarily be disbelieved and it was held that merely because the witnesses are partisan or interested their evidence is not liable to be discredited. Also see ***AIR 1968 SC 1323 titled Bhanuprasad Hariprasad Dave and another Vs. The State of Gujarat***. Also see ***AIR 1965 SC 202 titled Masalti and others Vs. State of Uttar Pradesh***. Also see ***AIR 1956 SC 460 titled Gurcharan Singh and another Vs. State of Punjab***. Also see ***AIR 1974 SC 1168 titled The State of Punjab Vs. Hari Singh and another***. Also see ***AIR 1968 SC 1438 titled Bhupendra Singh Vs. State of Punjab***. See ***AIR 1977 SC 472 titled Mst. Balbir Kaur and others Vs. State of Punjab***. Also see ***AIR 1976 SC 2499 titled Molu and others Vs. State of Haryana***. Also See ***AIR 1976 SC 2304 titled Sarwan Singh and others Vs. State of Punjab***.

39. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that deceased Rajesh Kumar had consumed alcohol at the time of incident and he was not in a position to state anything and on this

ground appeal be accepted is also rejected being devoid of any force the reason hereinafter mentioned. PW18 Dr. D.P Swami has specifically stated that contribution of death was 20% due to alcohol and 80% was due to injuries inflicted by accused persons. The testimony of PW18 Dr. D.P Swami to this effect is also trust worthy, reliable and inspires confidence of Court. In the present case it is proved on record that contribution of death was 80% due to fatal injuries sustained by deceased Rajesh Kumar in his left side spleen and small intestines caused with kick and fist blows by accused persons.

40. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that benefit of doubt be given to the appellant in the present case is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that appellant has been charged for the offence culpable homicide amounting to murder with common intention as defined under Section 34 IPC. It is proved on record that accused persons came four times at the place of incident after short intervals upon motor cycle No. HP-22B-2000 on dated 16.4.2008 between 7.30 PM to 8.30 PM. Hence common intention of both accused persons to commit culpable homicide amounting to murder is proved on record when they came at the place of incident four times after short intervals. It is well settled law that to attract Section 34 IPC it is not necessary that each one of the accused must assault injured. In the present case it is proved on record that motor cycle No. HP-22B-2000 after short intervals was used for the commission of culpable homicide amounting to murder by accused persons. It is proved on record that appellant Sanjiv Soni came along with appellant Nikhil Soni four times at the place of incident upon motor cycle No.HP-22B-2000 after short intervals. Hence common intention of both accused persons to cause fatal injury to deceased Rajesh Kumar is proved beyond reasonable doubt in the present case. It is proved on record that co-accused Sanjiv Soni had took active part in the commission of offence when he came along with co-accused Nikhil Soni four times at the place of incident upon motor cycle No. HP-22B-2000 after short intervals. It was held in case reported in AIR 2004 SC 2764 titled State of M.P. Vs. Deshraj and others that a direct proof of common intention is not available and therefore such intention could only be inferred from the circumstances appearing from the proved facts of the case. In the present case it is proved beyond reasonable doubt that appellant Sanjiv Soni came along with appellant Nikhil Soni on motor cycle No. HP-22B-2000 in four times at the place of incident after short intervals and thereafter injuries were inflicted upon deceased Rajesh Kumar and thereafter deceased Rajesh Kumar became unconscious and he died due to anti mortem injury within 1 and 2 hours of injuries given by accused persons. It is well settled law that Section 34 IPC imposes vicarious liability upon the co-accused persons.

41. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that there was no motive on behalf of the appellant to commit the crime and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that motive to commit criminal offence is not material in the presence of eye witness. In the present case PW1 Seema Kumari has specifically stated in positive manner that accused persons have inflicted injuries upon deceased Rajesh Kumar in her presence with kick and fist blows and immediately thereafter deceased became unconscious. It is proved on record that after the incident deceased did not regain consciousness and he died within 1 and 2 hours due to anti mortem injuries sustained by deceased Rajesh Kumar on the left side of spleen and small intestines.

42. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that there is difference in number of injuries in the MLC report and post mortem report and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. In the present case the MLC of deceased Rajesh Kumar was issued by PW11

Dr.Gopal Beri and post mortem report of deceased Rajesh Kumar was prepared by PW18 Dr. D.P Swami. PW11 Dr. Gopal Beri has specifically stated in positive manner that deceased Rajesh Kumar was in very very serious condition when he was brought to hospital on dated 16.4.2008 at about 9 PM. PW18 Dr. D.P Swami has specifically stated in positive manner that deceased Rajesh Kumar had died due to anti mortem injuries sustained by deceased upon spleen and small intestines caused with kick and fist blows.

43. Another submission of learned Advocate appearing on behalf of the co-appellant Sanjiv Soni that witnesses Hari Chand, Sunita Devi, Raj Kumar, Kuldip Singh, Kapish Chaudhry, Rajneesh Kumar and Pradeep Soni have not been examined and adverse inference be drawn against the prosecution is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that in order to prove the fact number of witness is not required as per Section 134 of the Indian Evidence Act. Appellant was at liberty to examine the witness in defence but appellant has stated before the learned trial Court that he does not want to lead any evidence in defence despite opportunity granted by learned trial Court to adduce evidence in defence.

44. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that deceased Rajesh Kumar was himself aggressor and deceased was abusing appellant Nikhil Soni and deceased has slapped appellant Nikhil Soni and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the medical certificate of appellant Nikhil Soni placed on record. Appellant Nikhil Soni was not medically examined on dated 16.4.2008 on the date of incident. Appellant Nikhil Soni was examined on dated 17.4.2008 at 10.30 AM after the death of deceased Rajesh Kumar. As per medical certificate appellant Nikhil Soni did not sustain any external injury and had sustained only abrasion. On the contrary deceased Rajesh Kumar had sustained fatal injury upon his spleen and small intestines and death of deceased Rajesh Kumar took place within 1 and 2 hours of the incident and deceased did not regain consciousness after incident. Even appellant did not took the plea of self defence during cross examination and the plea of self defence is not proved on record in the present case as required under law. It is well settled law that in right of private defence injury which is inflicted by a person exercising the right of private defence should be commensurate with the injury with which accused was threatened. See AIR 2012 SC 2181 titled Arjun Vs. State of Maharashtra.

45. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that learned trial Court did not examine the father of the deceased as a Court witness and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. Appellant did not file any application before learned trial Court to examine the father of deceased Rajesh Kumar. On the contrary the appellant has stated in positive manner before the learned trial Court that he does not want to lead any defence evidence.

46. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that appellant Sanjiv Soni took away appellant Nikhil Soni from the spot and acted as a saviour and he could not be convicted with the aid of Section 34 IPC is also rejected being devoid of any force for the reason hereinafter mentioned. It is proved on record that both accused persons came at the spot for four times continuously after short intervals. No reason has been assigned by accused persons as to why they came four times upon motor cycle No.HP-22B-2000 at the place of incident continuously after short intervals. The fact that accused persons came at the place of incident for four times continuously after short intervals proves common intention on the part of co-appellant Sanjiv Soni for the commission of criminal offence i.e. culpable homicide amounting to murder because deceased died within 1-2 hours after sustained ante mortem injuries upon his body .

47. Another submission of learned Advocate appearing on behalf of the co-appellant Sanjiv Soni that deceased Rajesh Kumar was healthy and well built man of heavy weight and he had fallen down on the road due to intoxication and sustained injuries is also rejected being devoid of any force for the reason hereinafter mentioned. The plea of the appellant that deceased Rajesh Kumar himself fallen on the road in intoxication condition and sustained injuries is defeated on the concept of ipsi dixit (An assertion made without proof). In the present case criminal case is proved against accused persons as per trustworthy and reliable testimony of eye witnesses.

48. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that learned Sessions Judge did not frame issues for consideration and on this ground appeal be accepted is also rejected for the reason hereinafter mentioned. Learned trial Court has framed point for determination in para-25 of the judgment and thereafter learned trial Court has given findings in the judgment. It is held that in criminal law issues are not framed but points are framed for determination. Learned trial Court has framed the points as required under criminal law. Issues are framed only in civil cases and issues are not framed in criminal cases and in criminal cases points are framed for determination by the criminal Courts.

49. Another submission of learned Advocate appearing on behalf of the co-appellant Sanjiv Soni that learned trial Court has failed to frame proper and necessary charge against co-appellant Sanjiv Soni and on this ground appeal be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the charge framed by learned trial Court against co-appellant Sanjiv Soni. We are of the opinion that there is no infirmity in framing the charges against co-appellant Sanjiv Soni. Even as per Section 215 of the Code of Criminal Procedure 1973 there is no effect of errors in the charge in criminal trial unless the accused was in fact misled by such error or omission and unless it occasion failure of justice. In the present case we are of the opinion that appellant is not misled by any error or omission in framing the charge and we are of the opinion that no failure of justice is caused to co-appellant Sanjiv Soni in framing the charge. Even co-appellant Sanjiv Soni during the trial did not file any application before learned trial Court for amendment of charge. No reason has been assigned by the co-appellant Sanjiv Soni as to why he did not file application before learned trial Court for amendment of criminal charge.

50. Another submission of learned Advocate appearing on behalf of co-appellant Sanjiv Soni that all incriminating circumstances have not been put to the co-appellant Sanjiv Soni under Section 313 Cr PC and the same have caused prejudice to the co-appellant Sanjiv Soni in his defence is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that if accused has well understood all circumstances appearing against him and had met them squarely in cross examination then failure of putting any question to the accused under Section 313 would not entail any irregularity. In the present case co-appellant Sanjiv Soni did not point out any failure of justice by way of not putting any question to co-appellant Sanjiv Soni. It is held that co-appellant Sanjiv Soni had understood all circumstances appearing against him and had met them in cross examination. It is held that no failure of justice has been caused to the co-appellant Sanjiv Soni by way of non-putting any question under Section 313 Cr PC.

51. In view of the above stated facts it is held that learned trial Court has properly appreciated oral as well as documentary evidence placed on record. It is held that learned trial Court did not cause any miscarriage of justice to both appellants. Both appeals i.e. Criminal Appeal No. 706 of 2008 titled Nikhil Soni Vs. State of HP and Criminal Appeal No. 740 of 2008 titled Sanjiv Soni Vs. State of HP are dismissed. Judgment and sentence passed by learned trial Court are affirmed. Pending miscellaneous application(s) if any also stands disposed of.

Certified copy of this judgment be placed in Criminal Appeal No. 740 of 2008 titled Sanjiv Soni Vs. State of HP. Record of learned trial Court along with certified copy of judgment be sent back forthwith.

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

Pawan Kumar ...Appellants/Defendants.
VERSUS
Sh. Rajinder Lal and others ...Respondents.

RSA No. 50 of 2003.
Reserved on: 8th December, 2014.
Decided on: 15th December, 2014.

Specific Relief Act, 1963- Section 34- Plaintiff claimed that he and defendants No. 4 and 8 are owners in possession of suit land- order passed by Settlement Officer, Dharamshala and consequent mutation attested in favour of defendants No. 1 and 3 are wrong- defendants claimed that suit land was the subject matter of consolidation – the predecessor-in-interest of the plaintiff and defendants No. 4 and 5 and others had filed a revision petition before the State Government- Khasra Nos. 221 and 222 were re-allotted- order is binding upon the plaintiff- record showed that only Khasra Nos. 221, 222 and 223 were re-allotted- thus the order would not apply to the other Khasra numbers- plaintiff claimed that order was passed by settlement Officer without hearing him- trial Court held that in absence of the file, the version of the plaintiff could not be relied upon- held, that in absence of file, version of the plaintiff that he was not heard prior to passing of the order cannot be brushed aside – further, the fact that suit land was allotted to defendants No. 1 to 3 beyond entitlement would show that plaintiff was not heard, otherwise, plaintiff would have pointed out this fact to the Settlement Officer.

(Para- 9 to 10)

For the Appellants: Mr. O.P. Sharma, Senior Advocate with Mr. J.P. Sharma, Advocate .
For Respondent No.1: Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

This appeal is directed against the impugned judgment and decree, rendered on 3.12.2002 by the learned Additional District Judge-II, Kangra at Dharamshala, H.P., in Civil Appeal No. 85-K/99 whereby, the learned District Judge allowed the appeal preferred by the respondent/plaintiff and reversed the judgment and decree of the learned trial Court rendered on 24.8.1999 in Civil Suit No. 278/91/98.

2. Briefly stated the facts of the case are that the plaintiff and defendants No.4 and 8 are the owners in possession of the land comprising in khata No.24 min, Khatoni No.37 min, khasra Nos. 505/189, 506/189 and 508/193, kita 3 measuring 0-01-08 hectares, situated in Mohal Ustehar, Mauza Kothi Jhikli, Tehsil and District Kangra (hereinafter referred to as the suit land) and are entitled to remain so in future as well, therefore, the order of Settlement Officer, Dharamshala, passed in file No.516/SO, dated 31.1.1976 and on its basis mutation No.22, dated 5.10.1976 attested in favour of defendants No.1 to 3 is wrong, null and void as well as without jurisdiction, therefore, is liable to be set aside. The plaintiff has prayed for the relief of permanent prohibitory injunction against defendants No.1 to 3 for restraining them from interfering in his possession over the suit land. In the alternative, the plaintiff has sought the relief of possession of the suit land, in case the defendants No.4 to 8 are found in possession of the suit land or defendants No.1 to 3 are found in possession or they succeed in taking possession of the suit land during the pendency of the suit. It has been averred that the suit land was in the recorded ownership and possession of Dina Nath, the predecessor-in-interest of plaintiff and defendants No.4 and 5 and Tulsi Ram, the predecessor-in-interest of defendants No.7 and 8 and One Mohan Lal, who sold his share to the plaintiff and defendant No.4. During the settlement took place in the year 1973-74, the suit land comprised in khasra No.189/1, measuring 0.00.55 hectares, khasra No.189/2 measuring 0-00-10 hectares and Khasra No. 192/1 measuring 0-00-43 hectares, total are measuring 0-01-08 hectares, was wrongly ordered to be included in the ownership of defendants No.1 to 3 vide mutation No.22 attested on 5.10.1976. It has been further averred that this mutation was attested in pursuant to the order of the Settlement Officer dated 31.1.1976 which was rendered without hearing the plaintiff and defendants No.4 to 8, as such, the same is not binding upon them and the same deserves dismissal. The suit land is the Agwahra and Pichwarha of the plaintiff and defendant No.4 and the same is in their possession since long.

3. The defendants contested the suit and filed separate written statements. Defendant No.1 to 3 in their written statement have taken preliminary objections inter alia estoppel, maintainability, cause of action, non-joinder of parties etc. On merits, it has been pleaded that the suit land was the subject matter of consolidation. The predecessor-in-interest of the plaintiff and defendants No.4 and 5 and others, filed a revision before the State Government, as provided under the said Act and there, re-allotment of the land comprising in khasra No.221 and 222 was ordered vide order dated 13.1.1970. It has been further pleaded that the order dated 13.1.1970 of State Government was executed and implemented, therefore, the same is also binding upon the plaintiff. It has been further averred that in the meanwhile, the settlement also started in the area and Settlement Officer gave effect to the already existing order passed by the consolidation authorities and the mutation No.22, has been attested in pursuance of the order passed by the consolidation authorities. It has been averred that no new order has been passed by the Settlement Officer. Defendants No.1 to 3 have claimed possession over the suit land and have denied the right, interest and title of the plaintiff and defendants No.4 to 8 over the suit land.

4. Defendants No.4 and 5 by filing their joint separate written statement have admitted the case of the plaintiff as set out in the plaint and they have prayed that a decree be passed in his favour.

5. The plaintiff/respondent filed replication to the written statement of the defendants/appellants, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

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

12. Whether the land in suit is owned by the plaintiff and defendants No.4 to 8 and is possessed by plaintiff and defendant No.4, as alleged? OPP
13. Whether the mutation No.22 sanctioned on 5.10.1976 is wrong illegal and not binding on the plaintiff and defendants No.4 to 8, as alleged , if so its effect? OPP
14. Whether the order passed by Settlement Officer dated 31.1.1970 in file NO.516, is illegal as have been passed behind the back of the plaintiff and other interested parties, as alleged, if so, its effect? OPP
15. Whether the plaintiff is entitled to a relief of injunction, as claimed? OPP
16. In case the plaintiff is not found entitled to a relief as prayed for in prayer 'A" whether the plaintiff is entitled to a decree for possession, as prayed for in prayer 'B"?OPP
17. Whether the suit is within time? OPP
18. Whether the act and conduct of the plaintiff is a bar to the present suit? OPD
19. Whether the suit is not maintainable in the present form? OPD
20. Whether the plaintiff has no locus standi and cause of action to file the present suit? OPD
21. Whether the suit is bad for non joinder of necessary and proper parties? OPD
22. Whether the suit has no jurisdiction to try and decide the present suit? OPD
23. Whether the suit is property valued for the purpose of court fee and jurisdiction? OPP
24. Whether the sale made by Mohan Lal to defendant No.4 is illegal, invalid and not binding as alleged? OPD
25. Whether the plaintiff, defendants No.4 to 8 and other have got no share in the suit land, as alleged? OPD
26. Whether the defendants No.1 to 3 are owners and in possession of the suit land? OPD
27. Whether the land in suit has been allotted to the defendants No.1 to 3 in consolidation (Prevention of Fragmentation of Holdings), if so, its effect? OPD
28. Relief.

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

8. Now the defendants/appellants have instituted the instant Regular Second Appeal before this Court assailing the findings recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 07.11.2003, this Court, admitted the appeal instituted by the defendants/appellants, against the judgment and decree, rendered by the learned first Appellate Court on the hereinafter extracted substantial question of law:-

4. Whether the judgment and decree of the first appellate Court is result of mis reading of the documentary and oral evidence which vitiated the findings?

Substantial question of Law No.1:

9. Under Ex. D-9, the Deputy Commissioner, Bilaspur, who while exercising the powers of the State Government for the purpose of Section 42 of the Consolidation of Holding and Prevention of Fragmentation Act (hereinafter referred to as the Act) ordered the re-allotment of the land comprised in khasra Nos. 221 and 222. The order comprised in Ex.D-9 was rendered on 13.01.1970. Uncontrovertedly, the orders comprised in Ex.D-9 remained un-assailed at the instance of the aggrieved in the higher echelons of the hierarchy of revenue officers constituted under the Act aforesaid. Consequently, with the orders comprised in Ex.D-9 having remained un-assailed in the higher echelons of the hierarchy of revenue officers constituted under the Act aforesaid, they attained conclusiveness and finality. The finality, hence, garnered by Ex.D-9 would seal the fate of the plaintiff to claim any right, title or interest over and upon the suit land, in case, it is also further established that the order comprised in EX.D-9 is qua khasra numbers analogous to the khasra numbers in the instant suit. In the face of revelation in Ex. D-9 of khasra numbers therein being not khasra numbers analogous to the khasra numbers comprising the suit land in the instant suit, obviously then the force and effect of Ex. D-9 in whittling down, abrogating or extinguishing the rights of the plaintiff qua the suit land stands dwindled. Rather a perusal of Ex. D-9 reveals that it was rendered qua khasra numbers 221, 222 and 223. The khasra numbers aforesaid comprised in Ex. D-9 manifestly are as apparent on a reading of khasra numbers comprising the suit land in the instant suit, not analogous khasra numbers. For reiteration, in face of incongruity of khasra numbers qua the suit land in the instant suit and of the khasra numbers comprised in Ex. D-9 rather leaves open room for an apt conclusion that, even if, Ex. D-9 , acquires a clinching force, finality as well as conclusiveness for lack of its being not assailed in the higher echelons of the hierarchy of revenue officers constituted under the Act aforesaid, the factum of its having acquired clinching force and finality as well as conclusiveness is only qua khasra numbers 221, 222 and 223 and not qua other khasra numbers which are the khasra numbers of the suit land in the instant suit. In after math, the ensuing, concomitant and invincible inference which is to be marshaled as well as mobilized by this Court is that the effect of Ex. D-9 is that it does not erode or dwindle or extinguish the rights of the plaintiff/respondent qua the suit land.

10. The plaintiff anvilled his claim on the score of an order rendered in File No.516/SO of 31.1.1976 and consequent mutation anchored thereupon comprised in mutation No.22 of 5.10.1976 acquiring no legal force so as to impinge upon the rights of the plaintiff/respondent herein over and upon the suit land, inasmuch as it having been rendered behind the back of the predecessor-in-interest of the plaintiff/respondent besides per se it garnering vitiation on the score of it in dire derogation of the openly proclaimed rights of the plaintiff in the suit land, having ordered the recording of defendants No.1 to 3 to be owners to the extent of 6 marlas of land, even when they were not entitled to the same. The claim of the plaintiff was dislodged by the learned trial Court on the score of non-adduction of the original file whose adduction would have propelled succor to the inference that the order of the Settlement Officer in file No. 516/SO of 31.1.1976 was vitiated on the score of it having infracted the principles of natural justice, inasmuch as it having come to be rendered even when the aggrieved/plaintiff in the suit were not heard prior to its rendition. However, the said reasoning as adopted by the learned trial Court to non-suit the plaintiff is per se perverse as non-adduction of file No. 516/SO of 31.1.1976 especially when it stood destroyed could not stand in the way of facilitating an inference in favour of the plaintiffs in the instant suit to claim a right over the suit land. More so, when its non-adduction was not within his reach. Even

otherwise the deposition of PW-1 voices the factum of the order rendered by the Settlement Officer in file No. 516/SO of 31.1.1976 have been rendered behind his back, even if the said file came to be destroyed and, hence, its non-adduction may facilitate an inference that the Settlement Officer while rendering orders in the file aforesaid in favour of the defendants herein qua the suit land may have adhered to or complied with the principles of natural justice. However the said inference cannot be stretched ahead to abrogate or prejudice the rights of the plaintiffs in the instant suit qua the suit land especially when the plaintiff PW-1 has in his deposition on oath deposed that in the Settlement Officer rendering orders in favour of the defendants in file No. 516/SO of 31.1.1976 had condemned him unheard which factum deposed on oath does, hence, acquire tenacity. Consequently, the non suiting or dislodging of the claim of the plaintiff in the instant suit by the learned trial Court on the score of the plaintiff having omitted to adduce into evidence the orders rendered in file No. 516/SO of 31.1.1976 for under scoring the factum of it while displaying the fact that in its rendition it was not preceded by a notice served upon the plaintiff in the suit, hence, was in infraction of the principles of natural justice appears to have been done by the learned trial Court in a slip shod manner in open conflict to the deposition of PW-1 who on oath deposed that preceding its rendition, the Settlement Officer had not either issued or served notice upon them. As such, when obviously, the plaintiff in the proceedings preceding its rendition did not participate therein, the orders rendered in file No. 516/SO of 31.1.1976 were in conflict with and were rendered in infraction of the principles of natural justice, naturally they acquire the taint of illegality and are void ab initio necessitating their reversal. Moreover, a reading of mutation comprised in Ex. D-2 attested on strength thereof does also per se prove that title qua six marlas of land comprised in the suit land stood vested in favour of defendants No.1 to 3, who as apparent on a reading of the oral as well as documentary evidence on record as aptly concluded by the learned first Appellate Court were not entitled to the said area of land mutated in their favour as owners, rather when evidence has come on record that the plaintiff has a right to the said area of six marlas of land, hence, also it appears that the orders rendered in file No. 516/SO of 31.1.1976 were rendered behind the back of the plaintiff in the instant suit, for in case he was heard, the factum of it having beyond the entitlement of defendants No.1 to 3 in the suit land held them so would not have occurred. Concomitantly, the findings of the learned first Appellate Court do not suffer from any perversity or absurdity and do not warrant any interference from this Court. The substantial question of law is answered in favour of the plaintiff/respondent and against the defendants/appellants.

11. The result of the above discussion is that the appeal, preferred by the defendants/appellants 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.

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

Italian Thai Development Public Company Ltd. ...Non-applicant/plaintiff

Versus

Shri Jala Ram, Engineering Enterprises ...Applicant/Defendant

OMP No. 58 of 2014 IN
Civil Suit No. 76 of 2012
Reserved on 12.12.2014
Date of decision:16.12.2014

Code of Civil Procedure, 1908- Section 10- Defendant contended that he had already instituted a civil suit for recovery of Rs.

27,14,302.60 along with interest @ 18% in the Court of learned Civil Judge (S.D.) at Vadodara- matter in issue in the suit pending before the High Court and the previous suit is substantially the same-record showed that suit filed at Vadodara relates to spare parts supplied by defendant to the plaintiff for which no sale consideration was paid- suit was filed before the High Court on the premises that the spare parts were not genuine- this shows that cause of action in the two suits is not identical- application dismissed. (Para-3 to 6)

Cases referred:

Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor (2013) 4 SCC 333
Pukhraj D. Jain and Others Vs. G. Gopalakrishna (2004) 7 SCC 251

For the Non applicant :	Mr. C.N. Singh, Advocate.
For the Applicant :	Mr.Karan Singh Kanwar, Advocate, for applicant/defendant No. 1. Ms. Godawari, Advocate, vice Mr.Vijay Arora, Advocate, for defendant No. 2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This application under Section 10 of the Code of Civil Procedure has been filed by the defendant for staying the present proceedings on the ground that the defendant has already instituted a suit for recovery of Rs.27,14,302.60 along with interest @ 18% in the Court of learned Civil Judge (S.D.) at Vadodara, which suit was presented on 3.8.2009 and was registered as special summary suit No. 451/2009. It is further submitted that on receipt of summons by the plaintiff, it filed an application for grant of leave to defend the suit and therefore, the plaintiff cannot feign ignorance regarding the said suit. It is lastly submitted that the matter in issue in the present suit is directly and substantially in issue in the aforesaid suit, because the controversy involved in both the suits is same, as ultimately what is to be judged is the genuineness of the spare parts.

2. The plaintiff/non-applicant has filed reply raising therein preliminary objections that the suit under adjudication before this Court and the summary suit pending trial at Vadodara is not identical and therefore, the application is not maintainable. It is also pleaded that the plaintiff has initiated the present proceedings for recovery of money for unused substandard spare parts lying in stock, for which parts, the entire sale consideration had been paid, whereas, the lis at Vadodara is for the spare parts received by the plaintiff, for which the sale consideration has not been paid. It is further pleaded that there is no identity of matter in issue and whole of the subject matter in both these proceedings are not identical and therefore, the application deserves to be dismissed. On merits, it is claimed that the initiation of recovery suit at Vadodara by the applicant/defendant is for an ulterior and malafide motive simply in order to harass, humiliate and blackmail the plaintiff, who has no dealing with the applicant in the State of Gujrat. The suit is abuse of process of law and an act to pressurize and illegally extract money from the non-applicant. The applicant/defendant despite knowing fully well that the Courts at Gujarat have no jurisdiction to deal with the issue in hand has still opted to file a suit at Gujarat.

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

3. The essential ingredients of Section 10 of the Code of Civil Procedure are as follows:-

Firstly, the matter in issue in the suit is directly and substantially in issue in a previously instituted suit between the same parties;

Secondly, the previously instituted suit is pending-

i) in the same Court in which the subsequent suit is brought; or

ii)in any other Court in India (whether superior, inferior or co-ordinate); or

iii) in any Court beyond the limits of India established or continued by the Central Government; or

iv) before the Supreme Court; and

Thirdly, where previously instituted suit is pending in any of the Courts mentioned in clause (b) or clause (c), such Court is a Court of jurisdiction competent to grant the relief claimed in the subsequent suit.

4. Section 10 of the Code of Civil Procedure envisages that no Court will proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between the parties under whom they or any one of them claim litigating under the same title where such suit is pending in the same or any other court in India having jurisdiction to grant the relief.

5. The parties are not at variance that in so far as the suit pending in the Court at Vadodara is concerned, the same relates to the spare parts supplied by the defendant to the plaintiff, for which sale consideration has not been paid. Whereas, the suit pending before this Court has been filed on the premise that the spare parts supplied by the defendant were not genuine, therefore, it can be safely concluded that the cause of action in both the suits is entirely distinct and different, though there is some common issue directly or substantially in issue in both the suits. But, then the mere fact that only some common issue arises for consideration would not be sufficient because the entire subject matter of the two suits must be the same, in view of the judgment of Hon'ble Supreme Court in ***Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor (2013) 4 SCC 333***, wherein the Hon'ble Supreme Court has observed as under:-

"9. Section 10 of the Code which is relevant for the purpose reads as follows:

> *"**10. Stay of suit**.- **No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.***
>
> *Explanation.- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."*
>
> *From a plain reading of the aforesaid provision, it is evident that where a suit is instituted in a Court to which provisions of the Code apply, it shall not proceed with the trial of another suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit*

between the same parties. For application of the provisions of Section 10 of the Code, it is further required that the Court in which the previous suit is pending is competent to grant the relief claimed. The use of negative expression in Section 10, i.e. "no court shall proceed with the trial of any suit" makes the provision mandatory and the Court in which the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 of the Code are satisfied. The basic purpose and the underlying object of Section 10 of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding.

10. *The view which we have taken finds support from a decision of this Court in National Institute of Mental Health & Neuro Sciences vrs. C. Parameshwara, (2005) 2 SCC 256 in which it has been held as follows:*

> *"8. The object underlying Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying Section 10 is to avoid two parallel trials on the same issue by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. The language of Section 10 suggests that it is referable to a suit instituted in the civil court and it cannot apply to proceedings of other nature instituted under any other statute. The object of Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res-judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject-matter in both the suits is identical. The key words in Section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical."*

11. *In the present case, the parties in all the three suits are one and the same and the court in which the first two suits have been instituted is competent to grant the relief claimed in the third suit. The only question which invites our adjudication is as to whether "the matter in issue is also directly and substantially in issue in previously instituted suits". The key words in Section 10 are "the matter in issue is directly and substantially in issue in the previously instituted suit". The test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. To put it differently one may ask, can the plaintiff get the same relief in the subsequent suit, if the earlier suit has been dismissed? In our opinion, if the answer is in affirmative, the subsequent suit is not fit to be stayed. However, we hasten to add then when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.*

12*. As observed earlier, for application of Section 10 of the Code, the matter in issue in both the suits have to be directly and substantially in*

issue in the previous suit but the question is what "the matter in issue" exactly means? As in the present case, many of the matters in issue are common, including the issue as to whether the plaintiffs are entitled to recovery of possession of the suit premises, but for application of Section 10 of the Code, the entire subject-matter of the two suits must be the same. This provision will not apply where few of the matters in issue are common and will apply only when the entire subject matter in controversy is same. In other words, the matter in issue is not equivalent to any of the questions in issue. As stated earlier, the eviction in the third suit has been sought on the ground of non-user for six months prior to the institution of that suit. It has also been sought in the earlier two suits on the same ground of non-user but for a different period. Though the ground of eviction in the two suits was similar, the same were based on different causes. The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them the decree for eviction. Therefore, in our opinion, the provisions of Section 10 of the Code is not attracted in the facts and circumstances of the case.

13. *Reference in this connection can be made to a decision of this Court in Dunlop India Limited vrs. A.A.Rahna & Anr. (2011) 5 SCC 778 in which it has been held as follows:*

> *"35. The arguments of Shri Nariman that the second set of rent control petitions should have been dismissed as barred by res judicata because the issue raised therein was directly and substantially similar to the one raised in the first set of rent control petitions does not merit acceptance for the simple reason that while in the first set of petitions, the respondents had sought eviction on the ground that the appellant had ceased to occupy the premises from June 1998, in the second set of petitions, the period of non-occupation commenced from September 2001 and continued till the filing of the eviction petitions. That apart, the evidence produced in the first set of petitions was not found acceptable by the appellate authority because till 2-8- 1999, the premises were found kept open and alive for operation, The appellate authority also found that in spite of extreme financial crisis, the management had kept the business premises open for operation till 1999. In the second round, the appellant did not adduce any evidence worth the name to show that the premises were kept open or used from September 2001 onwards. The Rent Controller took cognizance of the notice fixed on the front shutter of the building by A.K.Agarwal on 1-10-2001 that the Company is a sick industrial company under the 1985 Act and operation has been suspended with effect from 1-10-2001; that no activity had been done in the premises with effect from 1- 10-2001 and no evidence was produced to show attendance of the staff, payment of salary to the employees, payment of electricity bills from September, 2001 or that any commercial transaction was done from the suit premises. It is, thus, evident that even though the ground of eviction in the two sets of petitions was similar, the same were based on different causes. Therefore, the evidence produced by the parties in the second round was rightly treated as sufficient by the Rent Control Court and the appellate authority for recording a finding that the appellant had ceased to occupy the suit premises continuously for six months without any reasonable cause."*
>
> *(emphasis supplied)*

There is yet another reason why the present suit cannot be stayed.

6. It is the specific contention of the plaintiff that the suit at Vadodara has been filed simply to harass the plaintiff, who otherwise has no

business dealings at Gujarat. The defendant on the other hand, has moved this application for stay of the proceedings. The mere filing of an application under Section 10 CPC, does not in any manner put an embargo on the power of the Court to examine the merits of the matter. The object of this Section is only to prevent the Courts concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The Section inacts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. It is not for a litigant to dictate to the Court as to how the proceedings should be conducted, it is for the Court to decide what will be the best course to be adopted for expeditious disposal of the case. It was always open to the Court to decide the relevant issues and not to keep the suit pending which has been instituted with an oblique motive and to cause harassment to the other side. In taking this view, I am supported by the judgment of the Hon'ble Supreme Court in ***Pukhraj D. Jain and Others Vs. G. Gopalakrishna (2004) 7 SCC 251:-***

> *"4. We have heard learned counsel for the parties and have perused the records. In our opinion, the view taken by the High Court is wholly erroneous in law and must be set aside. The proceedings in the trial of a suit have to be conducted in accordance with provisions of the Code of Civil Procedure. Section 10 CPC no doubt lays down that no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed. However, mere filing of an application under Section 10 CPC does not in any manner put an embargo on the power of the Court to examine the merits of the matter. The object of the section is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The section enacts merely a rule of procedure and a decree passed in contravention thereof is not a nullity. It is not for a litigant to dictate to the Court as to how the proceedings should be conducted, it is for the Court to decide what will be the best course to be adopted for expeditious disposal of the case. In a given case the stay of proceedings of later suit may be necessary in order to avoid multiplicity of proceedings and harassment of parties. However, where subsequently instituted suit can be decided on purely legal points without taking evidence, it is always open to the Court to decide the relevant issues and not to keep the suit pending which has been instituted with an oblique motive and to cause harassment to the other side.*

7. In view of the aforesaid discussion, there is no merit in this application and accordingly the same is dismissed, leaving the parties to bear their costs.

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

Jyoti Gautam .....Appellant.

versus

State of Himachal Pradesh and others .....Respondents.

LPA No.162 of 2014.
Decided on: December 16, 2014.

Constitution of India, 1950- Article 226- Petitioner appeared for the post of Physiotherapist – she was not offered appointment on the ground that the veracity of her certificates was to be verified- petitioner had obtained the diploma in physiotherapy from

Allahabad Agricultural Institute which was recognized till 2005- petitioner appeared in examination during the academic session 2005-2006 and 2006-2007- no document was placed on record to show that recognition was extended to sessions 2005-2006 and 2006-2007- course in Physiotherapy is technical one which cannot be undergone in a distant mode- held, that in these circumstances, petition was rightly dismissed. (Para- 3 to 9)

Case referred:
Annamalai University represented by Registrar vs. Secretary to Government, Information and Tourism Department and others, (2009) 4 SCC 590

For the Appellant: Mr.Ashwani K. Sharma, Advocate.
For the Respondents: Mr.Romesh Verma & Mr.Anup Rattan, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No.1 and 2.
Mr.S.K. Banyal, Advocate, for respondent No.3.
Ms.Archana Dutt, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Challenge in this Letters Patent Appeal is to the judgment and order, dated 17th June, 2013, passed by a learned Single Judge of this Court, in CWP No.8917 of 2012, titled Jyoti Gautam vs. State of H.P. and others, whereby the writ petition of the appellant/writ petitioner came to be dismissed, (for short, the impugned judgment).

2. Facts of the case, in brief, are that the respondents issued advertisement notice, dated 3rd June, 2011, whereby applications were invited for filling up the posts of Physiotherapist on contract basis through Rogi Kalyan Samiti. The qualification prescribed was 10+2 with Medical Science or its equivalent from a recognized University/Board and diploma in Physiotherapy from an institute, duly recognized by the Central/State Government. Candidates, including the writ petitioner applied and the selection process was taken to its logical end. However, the petitioner was not offered appointment on the ground that the veracity of her certificates was to be verified.

3. Admittedly, the petitioner had obtained the diploma in Physiotherapy from Allahabad Agricultural Institute (Deemed University), which was recognized in terms of Annexure P-15 upto the year 2005 and thereafter provisional recognition was granted for the academic year 2007-08. The petitioner appeared in the said examination during the academic session 2005-06 and 2006-07. The petitioner has not placed any document on record supporting her claim that the recognition was granted by Indira Gandhi National Open University to the said Institute for the session 2005-06 and 2006-07.

4. It is also moot question whether course in Physiotherapy can be gone through by distant mode, which, of course, is a para medical course and technical one.

5. The Apex Court in **Annamalai University represented by Registrar vs. Secretary to Government, Information and Tourism Department and others, (2009) 4 SCC 590,** has dilated on the issue, which decision has been discussed in paragraph 12 of the impugned judgment.

6. The course in Physiotherapy is a technical one and such a course cannot be undergone by the distant mode.

7. This Court in CWP No.1771 of 2012, decided on 31st December, 2012, has taken the similar view.

8. The Writ Court has gone into all these aspects, including the judgments made by this Court and by the Apex Court, in paragraphs 11 and 12 of the impugned judgment and has rightly dismissed the writ petition.

9. Having said so, no case for interference is made out. Accordingly, the appeal is dismissed and the impugned judgment is upheld.

10. Pending CMPs, if any, also stand disposed of.

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

Rattan Chand (deceased) through his LRs Smt. Kunti Devi and others
...Appellants/Defendants.

Versus

Pawan Kumar and others ...Respondents/Plaintiffs

R.S.A. No. 89 of 2003
Judgment reserved on: 11.12.2014.
Date of decision: December 16th, 2014

H.P. Town and Country Planning Act, 1977- Section 16 (c)- Plaintiff filed a civil suit seeking specific performance of the contract entered into between the predecessor-in-interest of the plaintiffs and defendants regarding the land situated within the jurisdiction of Town and Country Planner – held that there is no blanket bar in the planning area to sell, gift, exchange, lease or mortgage with possession any land if its Sub-Division is duly approved by the Director – further, held that separate khasra can be alienated without seeking permission from Town and Country Planning Department. (Para-11)

Limitation Act, 1963- Section 54- where the purchasers had stated that they were ready to perform their part of the contract and had kept the money for registration expenses- seller admitted that sale consideration was received by him and contract did not provide that time was the essence of the contract, suit cannot be said to be barred by limitation. (Para-13 to 19)

Code of Civil Procedure, 1908- Order 1 Rule 13- A plea of misjoinder of necessary parties has to be taken at the earliest possible opportunity and in any case prior to the settlement of issues- where such plea was not taken or no issue was raised regarding non-joinder of necessary party, plea is deemed to have been waived. (Para-20 and 21)

Cases referred:

Chand Rani (Smt.) (dead) by LRs vs. Kamal Rani (Smt.) (dead) by LRs (1993) 1 SCC 519

Hind Construction Contractors vs State of Maharashtra (1979) 2 SCC 70

Swarnam Ramachandran (Smt.) and another vs. Aravacode Chakungal Jayapalan (2004) 8 SCC 689

Gomathinayagam Pillai and others vs. Palaniswami Nadar AIR 1967 SC 868
Bibi Jaibunisha vs. Jagdish Pandit and others (1997) 4 SCC 481

For the Appellants	:	Mr. K.D.Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate.
For the Respondents	:	Mr. Sameer Thakur, Advocate, for respondents No. 1 to 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellants are the defendants, who are aggrieved by the judgment and decree dated 2.9.2002 passed by learned District Judge, Hamirpur, H.P. in Civil Appeal No. 139 of 1995 whereby he reversed the judgment and decree dated 15.9.1995 passed by learned Senior Sub Judge, Hamirpur, H.P. in Civil Suit No. 360-I of 1991.

2. The facts, in brief, are that the plaintiffs filed a suit for specific performance of the agreement dated 11.4.1986 on the ground that the land comprised in Khata No.6 min, Khatauni No. 15 min, Khasra No. 174 measuring 121.67 sq. mtrs. situated in Tika Up Mahal, Choula Khurd, Tappa Bajuri, Tehsil and District Hamirpur, H.P. (hereinafter referred to as the suit land) has been shown in the ownership and possession of the defendants in the revenue record. It was averred in the plaint that the defendants agreed to sell 51.67 sq. mtrs. land out of the suit land shown as Khasra No. 174/1 in favour of deceased Sh. Jagar Nath, predecessor in interest of the plaintiffs vide agreement dated 11.4.1986. However, the said Jagar Nath died in the year 1990. It was averred that as per the agreement it was agreed upon that the defendants would get the exchange entered in the revenue record and in case it is not accepted or mutation is not sanctioned then the deceased Jagar Nath would be entitled to get the sale deed executed. Further case of the plaintiffs is that at the time of execution of the agreement, a sum of Rs.8456/- was paid by their predecessor-in-interest to the defendants in cash. The mutation of exchange was rejected somewhere in 1988-89. Thereafter, they were always ready and willing to perform their part of agreement as they kept the money required for registration expenses and stamps etc., but it is the defendants, particularly defendant No.1, who was not ready and willing to perform their part of the contract. The plaintiffs had to serve the defendants with the notice in the year 1987 to get the mutation attested but they failed to do so. The defendant No.3 was also requested time and again to execute the sale deed but he paid no heed to the requests of the plaintiffs. It was averred that the plaintiffs got the knowledge of the said agreement after the death of Jagar Nath in the month of October, 1991 when the defendant No.3 refused to execute the sale deed, hence the suit.

3. The defendants contested the suit by filing separate written statements. The defendants No.1 and 2 averred that the agreement to sell was executed and the other averments were denied. The defendant No.3 contested the suit of the plaintiffs and submitted that the suit is time barred and as such not maintainable. It is averred that the defendant No.3 is in possession over the suit land since the time when the defendants No. 1 and 2 were not owners thereof. It is admitted that the agreement was executed by defendant No.3 with the deceased Jagar Nath in the year 1986 but the aforesaid deceased never tried to enforce the agreement during his life time and hence the agreement has no force in the eye of law. The exchange as alleged is admitted. It is alleged that the plaintiffs are trying to take forcible possession of the suit land by taking advantage of the aforesaid agreement. It is admitted that a sum of Rs. 8456/-

was handed over to the defendants by the deceased but lateron the deceased refused to exchange the land as per the agreement. It is also submitted that the defendant was never served with any notice by the plaintiffs in the year 1987.

4. The plaintiffs filed the replication to the written statements filed by the defendants and denied all the allegations made in the written statements and reaffirmed the averments made in the plaint.

5. On 25.9.1992 the learned trial Court framed the following issues:

1. Whether the plaintiffs are estopped by their act and conduct from filing this suit? OPD
2. Whether no cause of action accrued to the plaintiffs? OPD
3. Whether the suit in present form is not maintainable? OPD
4. Whether the suit is within limitation? OPP
5. Whether the plaintiffs are entitled to the specific enforcement of the contract? OPP
6. Relief.

6. After recording the evidence and evaluating the same, the learned trial Court dismissed the suit of the plaintiffs. Aggrieved by the judgment and decree dated 15.9.1995, the plaintiffs filed an appeal before the learned lower Appellate Court. The learned lower Appellate Court vide judgment and decree dated 2.9.2002 set-aside the judgment and decree passed by the learned trial Court.

7. Aggrieved by the judgment and decree passed by the learned lower appellate Court, the appellants have come up before this Court in second appeal.

8. This Court on 20.3.2003 admitted the appeal on the following substantial questions of law:

1. *Whether alleged agreement in sale (Ex.PW-3/A) can be executed in violation of mandatory provisions of law contained under Section 16 (c) of the H.P. Town & Country Planning Act, 1977, if not, whether the judgment and decree passed by the learned Appellate Court below is unsustainable in the eyes of law being contrary to law?*
2. *Whether the suit is time barred whereby the specific performance of the agreement dated 11.4.86 (Ex. PW-3/A) has been instituted on 28.11.1991?*
3. *Whether the suit is maintainable when there has been mis-nonjoinder of necessary parties, when PW-1 himself has admitted that the part of the suit land is in the possession of one Smt. Koshalaya Devi?*

9. I have heard learned counsel for the parties and have also gone through the records carefully and meticulously.

10. Section 16 (c) of the Himachal Pradesh Town and Country Planning Act, 1977 (for short 'Act') reads as follows:

> *"16.* ***Freezing of land use*** *–* ***On the publication of the existing land use map under Section 15 (C) No Registrar or the Sub-Registrar, appointed under the Indian Registration Act, 1908, shall in any planning area constituted under Section 13, register any deed or document of transfer of any sub-division of land by way of sale,***

gift, exchange, lease or mortgage with possession unless the sub division of land is duly approved by the Director subject to such rules as may be framed in this behalf by the State Government.

Provided that the Registrar or the Sub Registrar may register any transfer.-

(i) Where the land is owned by a person and the transfer is made without involving any further divisions,

(ii) Where the partition/sub-division of land is made in a Joint Hindu Family,

(iii) Where the lease is made in relation to a part of whole of a building;

(iv) Where the mortgage is made for procuring the loans for construction or improvements ever the land either from the Government or from any other financial institution constituted or established under any law for the time being in force or recognized by the State Government."

11. Notably the point regarding jurisdiction was only raised for the first time by the defendant when he stepped into the witness box and there was no plea whatsoever raised by him to this effect in the written statement nor any issue in this behalf had been framed. Anyhow, irrespective of there being any pleadings in this behalf in the written statement, the learned lower Appellate Court dealt with this question and concluded that there was no blanket bar even in the planning area qua sale, gift, exchange, lease or mortgage with possession of land. It is further held that as in case the sub division of any such land is duly approved by the Director, Town and Country Planning, the same can be alienated by way of sale, gift, exchange or mortgage with possession. The learned lower Appellate Court further came to the conclusion that since the land had been denoted by separate khasra number as per Tatima Ex.P-2, the same was covered under proviso (i) to Section 16 (c) as no further division thereof was required as all the co-owners were ready and willing to execute the sale deed in favour of the plaintiffs and it was only the defendant No.3 who had refused to do so.

12. Learned counsel for the appellants could not convince this Court as to how and in what manner the findings recorded by the learned lower Appellate Court regarding interpretation of Section 16 (c) of the Act, is in any manner erroneous or faulty. Therefore, this substantial question of law is decided against the appellants.

Substantial question of law No.2:

13. Article 54 of the Limitation Act prescribes as under:

Description of suit	Period of limitation	Time from which period begins to run
54. For Specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

Whether in a contract the time is the essence of the contract has been the subject matter of interpretation in number of cases, but the proposition can be said to have been settled by the decision of the Constitution Bench of the Hon'ble Supreme Court in case titled ***Chand Rani (Smt.) (dead) by LRs*** vs.

Kamal Rani (Smt.) (dead) by LRs (1993) 1 SCC 519 wherein the Hon'ble Court outlined the principle thus:

> ***"19. It is a well-accepted principle that in case of sale of immoveable property, time is never regarded as the essence of the contract. As, in fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language.***

14. In ***Hind Construction Contractors*** vs ***State of Maharashtra (1979) 2 SCC 70*** the Hon'ble Supreme Court while discussing the question as to whether the time would be the essence of the contract, held as follows:

> ***"7....that question whether or not time was of the essence of the contract would essentially be a question of the intention of the parties to be gathered from the terms of the contract....(See Halsbury's Laws of England, 4th Edn., Vol.4, para 1179.)"***
>
> ***8.... even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read alongwith other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental;...(See Lamprell v. Billericay Union (1849) 3 Exch 283, Exch at p. 308; Webb v. Hughes (1870) LR 10 Eq 281 ; Charles Rickards Ltd. v. Oppenheim (1950) 1 KB 616.)"***

15. The respondents had specifically stated that they were ready and willing to perform their part of the contract and had kept the money for registration expenses and stamp expenses and for other expenses in connection with execution of sale deed ready, but the defendants are not ready to do so. The defendant No.3, who was the sole contesting defendants, had admitted the agreement but had claimed that deceased Jagar Nath during his life time never tried to enforce that agreement, therefore, this agreement had no force under law. He also admitted the receipt of ` 8456/- and further claimed that deceased Jagar Nath, who refused to exchange the land as per the agreement. He also denied the receipt of notice in the year 1987. However, in the entire length and breath of the written statement never was the plea of time being the essence of the contract ever raised. Though, an omnibus preliminary objection was taken to the effect that the '*suit is time barred'* and accordingly even an issue to this effect was framed.

16. It was incumbent upon the appellants to have pleaded and proved that time the essence of the contract and in taking this view, I am supported by the following observations of the Hon'ble Supreme Court in ***Swarnam Ramachandran (Smt.) and another*** vs. ***Aravacode Chakungal Jayapalan (2004) 8 SCC 689*** wherein it was observed as under:

> *"12. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of reconveyance or renewal of lease. <u>The onus to plead and prove</u> that time was the essence of the contract is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence...."*

17. A perusal of the issues framed at the time of trial of the suit would show that there is no issue framed with respect to the time being the essence of the contract. Though, the learned counsel for the appellants would strenuously argued that the same was covered under issue No.4 – *Whether the suit is within limitation*. But I am afraid that this plea of the appellants cannot be accepted in view of the judgment passed in ***Swarnam Ramachandran*** case (supra).

18. That apart, the Hon'ble Supreme Court in ***Gomathinayagam Pillai and others*** vs. ***Palaniswami Nadar AIR 1967 SC 868*** has categorically held that in absence of specific pleadings or issues raised before the trial Court, question whether the time is of the essence of the contract or not, cannot be raised before the High Court.

19. The question as to whether the plea that the suit was time barred would lead to an inference as containing the plea of time being the essence of the contract was specifically dealt with by the Hon'ble Supreme Court in ***Bibi Jaibunisha vs. Jagdish Pandit and others (1997) 4 SCC 481*** and it was held that the plea having not been specifically raised cannot be construed to be inclusive or contained in the objection that the party had not performed its terms of the contract within time as there has to be specific pleadings and issues framed to this effect. This would be clear from the following observations:

> "4. *The question, therefore, is : whether the view taken by the trial Court and the High Court that the time is the essence of the contract is correct in law? No doubt, the High Court has framed the point in paragraph 8 of the judgment and recorded the finding that the time was the essence of the contract. It is an admitted position that the plea was not specifically raised, though it was stated in the written statement that the appellant had not performed his terms of the contract within time. Admittedly, no issue was raised in this behalf. The question, therefore, is: whether the High Court would be justified in coming to the conclusion that the time was the essence of the contract? It is now well settled legal position that in the matter of enforcement of the agreement or agreement of reconveyance, time is not always the essence of the contract unless the agreement specifically stipulates and there are special facts and circumstances in support thereof. It must be specifically pleaded and issue raised so that the other party has a right to lead evidence. There is no express plea in in the written statement nor any issue raised in that behalf. Consequently, there was no opportunity to the appellant to aduce rebuttal evidence that time was not the essence of the contract.*
>
> *5. This Court in Smt. Indira Kaur & Ors. vs. Sheo Lal Kapoor [(1988) 2 SCC 488] in paragraph 6 held as under: (SCC p.496).*
>
> > *"On the question whether the time is of the essence of the contract or not we are satisfied that the High Court was in error in allowing the respondents to raise this question in the absence of specific pleadings or issues raised before the trial court and when the case of time being the essence of the contract was not put forward by the respondent in the trial court. Apart from the absence of pleadings we do not find any basis for the plea of the respondents in the trial court. Apart from the absence of pleadings we don not find any basis for the plea of the respondents that the time was of the essence of the contract."*
>
> *6. This Court held that the plea cannot be raised, for the first time, in the High Court when it is not a matter of pleading or issue in that behalf. We find that the same ratio applies to the facts in this case. Accordingly, the finding that the time was the essence of the contract and non-suiting the appellant on that finding is clearly in error."*

Therefore, in absence of pleadings or issue in this behalf, this Court cannot go into the question and accordingly the substantial question of law No.2 is answered against the appellants/defendants.

Substantial question of law No.3:

20. It is settled law that plea of misjoinder of necessary parties has to be taken at the earliest possible opportunity and in case where the issues are settled at or before such settlement, otherwise such objection is deemed to have been waived. Merely raising a plea of non-joinder of parties without making any effort to prove the said plea is not sufficient. Order 1 Rule 9 of the Code provides that no suit shall be defeated by reasons of misjoinder or non-joinder of parties and the Court may in every suit deal with the matter in controversy so far as it relates to the rights and interests of the parties actually before it.

Order 1 Rule 13 CPC reads as under:

"13. Objections as to non-joinder or misjoinder.- All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived."

21. Now, reverting to the facts of the case, it would be seen that the appellants have raised the objection regarding mis-joinder and non-joinder of parties only for the sake of objection because at no stage did they seriously pursue this objection. This would be borne out from the fact that even an issue to this effect had not been framed. Therefore, this objection is deemed to have been waived. The Court at this stage would loath to interfere unless there is a total violation of justice. This being the position, this substantial question of law is also answered against the appellants.

22. Inconsequenti, there is no merit in this appeal and the same is dismissed, so also the pending applications, if any. The parties are left to bear their own costs.

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

Dharam Sain .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 28 of 2011.
Reserved on: December 17, 2014.
Decided on: December 18, 2014.

Indian Penal Code, 1860 - Section 376 and 506 IPC- Accused committed rape upon the prosecutrix- she narrated this fact to her parents who lodged the FIR – incident had taken place on 31.3.2007- FIR was lodged on 4.4.2007- no satisfactory explanation was given for delay- medical evidence did not corroborate the prosecution version-it was stated that as per forensic report and examination of the victim, there was no sign of recent sexual intercourse- prosecutrix was minor and in case of forcible intercourse with her, there was every possibility of swelling of labia majora/labia minora- held, that in these circumstances,

prosecution version was not proved beyond reasonable doubt- accused acquitted. (Para- 21 to 30)

Cases referred:

Aman Kumar and another vs. State of Haryana, (2004) 4 SCC 379
Tarkeshwar Sahu vs. State of Bihar (now Jharkhand), (2006) 8 SCC 560
Yerumalla Latchaiah vs. State of A.P. (2006) 9 SCC 713
Narender Kumar vs State (NCT of Delhi), (2012) 7 SCC 171
K. Venkateshwarlu vs. State of Andhra Pradesh (2012) 8 SCC 73

For the appellant: Mr. Satyen Vaidya, Advocate.
For the respondent: Mr. P.M.Negi, Dy. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 23.12.2010, rendered by the learned Addl. Sessions Judge, Kinnaur at Rampur, H.P., in Sessions Trial No. 25-AP/7 of 2008/2010, whereby the appellant-accused (hereinafter referred to as the accused) who was charged with and tried for offences under Sections 376 & 506 of the IPC, was convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 10,000/- and in default to further undergo simple imprisonment for one year under Section 376 IPC. He was further sentenced to rigorous imprisonment for 2 years and to pay fine of Rs. 5,000/- and in default to further undergo simple imprisonment for 6 months under Section 506 IPC. The amount realized from the accused was ordered to be paid to the prosecutrix as compensation.

2. The case of the prosecution, in a nut shell, is that on 4.4.2007, complainant Sohan Lal visited Police Station Nirmand alongwith the prosecutrix, his daughter aged 11 years. He lodged the report. He had been living in a rented house at Village Thachwa alongwith his family for the last two years. On 3.4.2007, when he came back to his quarter at 7/8 PM after doing labour work at Jagatkhana, his wife Kamla Devi told him that the prosecutrix had told her during day time that she was feeling pain in her private part and on inquiry she told her that on 31.3.2007, during day time, when no family member was present in the quarter, the accused person came there and committed rape on her and threatened to do away with her life in case she disclosed this incident to any other person. The complainant also made inquiry from the prosecutrix, who narrated him the same story. Thereafter, he alongwith the prosecutrix visited Police Station Nirmand and reported the matter to the police, on the basis of which, FIR No. 35 of 2007 under Sections 376 and 506 IPC was registered. The prosecutrix was got medically examined. The case property was sent to FSL, Junga. The investigation was completed and challan was put up against the accused after completing all the codal formalities.

3. The prosecution has examined as many as 16 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. Satyen Vaidya, 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. P.M.Negi, Dy. Advocate General, has

supported the judgment of the learned Addl. Sessions Judge, Kinnaur at Rampur, H.P. dated 23.12.2010.

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

6. PW-1, Mohinder Singh deposed that on 5.4.2007, police moved an application Ext. PW-1/A for obtaining the birth certificate of the prosecutrix. He issued certificate Ext. PW-1/B and copy of Nakal Parivar Register Ext. PW-1/C & Ext. PW-1/D. The date of birth of the prosecutrix was 17.9.1995.

7. PW-2 Dr. Yashoda Anand, deposed that on 4.4.2007 Lady Constable brought the prosecutrix with the alleged history of sexual intercourse with her on 31.3.2007 at about 1:30 PM. She was aged about 11 years and 4 months. According to her opinion, there were no signs of recent sexual intercourse and she reserved the final opinion to be given after examining the samples. On 12.6.2007, after perusing the forensic report, she opined that there were no signs of sexual intercourse. The police again took her opinion on 25.6.2007 regarding point No. 3. She opined that hymen was partially ruptured and healed. She also gave opinion that rupture of hymen could also occur due to sudden stretching like due to fall and sport injury. She gave another opinion on 18.7.2007 at the request of the police. She opined that hymen was ruptured and healed. The pain could be due to some other causes. Exact period of injury could not be given. The redness and tenderness could be due to uncleanness of the external genitalia or due to some other reason. According to her, it could not be clearly stated that there was penetration/partial penetration. She has given the opinions on 12.6.2007 vide Ext. PW-2/D, on 25.6.2007 vide Ext. PW-2/E and on 18.7.2007 vide Ext. PW-2/F. She had given the final opinion Ext. PW-2/D on 12.6.2007 on the basis of the FSL report, Mark "XY". In her cross-examination, she admitted that in case the victim is minor or virgin and she is subjected to forcible sexual intercourse by an adult male, in that event, there is every possibility of injuries to the labia majora/labia minora. She did not notice any injuries on labia majora/labia minora. She did not notice any tear on the edges of hymen.

8. PW-3 Dr. D.S.Billawria, has examined the accused. He has issued MLC Ext. PW-3/B.

9. PW-4 Uma Sharma has issued the date of birth certificate vide Ext. PW-4/B. The date of birth of the prosecutrix was 17.9.1995.

10. PW-5 Sh. Devender Sahani has issued date of birth certificate of the accused Ext. PW-2/B. The date of birth of the accused was 2.5.1983.

11. PW-6 Sohan Lal is the father o the prosecutrix. According to him on 3.4.2007, he had gone to Jagatkhana for doing labour work and after finishing his work, he returned to his quarter at about 7-8 PM. His wife told him that the prosecutrix had complained of pain in her vagina. On asking by her mother, the prosecutrix told her mother that on 31.3.2007 at about 1-1:30 PM, the accused came to their quarter and he had committed sexual intercourse with the prosecutrix in the bath room. He also inquired from the prosecutrix in the presence of his wife. The prosecutrix disclosed him that the accused had committed rape upon her and also threatened her. The FIR could not be lodged due to night time. He went to the Police Station next day. FIR Ext. PW-6/A was registered. In his cross-examination, he deposed that accused was his immediate neighbourer. The mother of Dharam Sain used to reside with him in his house. He has not informed anyone after the alleged occurrence as there was none who should have been informed by him. His elder brother was residing at Tunan village and he has no telephone facility. He has told the mother of the accused regarding the occurrence but mother of the accused alongwith accused and younger brother of the accused had assembled to beat him and his family members. The younger brother of the accused was having

danda in his hand but he and his family was not given beatings by the younger brother of the accused. He has told this fact to the police. However, he did not know why the police has not recorded this fact in FIR. The distance between Thachwa and Jagatkahana is about one kilometer and it takes 15 minutes to reach Jagatkahana on foot. The contents of the FIR were read over to him.

12. PW-7 is the prosecutrix. She deposed that on 31.3.2007, she was alone in her house. She had gone to fetch water from the tank. She kept the same in the bath-room. The accused was already present in the bath-room. He gagged her mouth with cloth. He caught hold of her from her both arms and laid her on the floor of the house in the bathroom. She tried to raise alarm. Accused opened the string of her salwar forcibly and committed sexual intercourse with her and blood started oozing out of her vagina which spread over the salwar. The accused thereafter threatened her to do away with her life in case she disclosed about the incident to her parents. The quarter of the accused was adjoining to their rented accommodation. She was not feeling well after 3.4.2007 and her mother asked her as to why she was not feeling well. On this she started crying and narrated the incident to her mother. Her mother further disclosed this incident to her father. Her father in the presence of her mother also inquired from her about the incident. On next day i.e. on 4.4.2007, she alongwith her father and mother came to the Police Station Nirmand and lodged the FIR Ext. PW-1/A. Her date of birth was 17.9.1995. In her cross-examination, she deposed that she kept on sleeping w.e.f. 31.3.2007 to 3.4.2007. She also admitted categorically in her cross-examination that she did not sustain any injury when accused committed sexual intercourse with her.

13. PW-8 Kamla is the mother o the prosecutrix. According to her on 3.4.2007, she inquired from the prosecutrix as to what had happened to her and why she was not feeling well. She disclosed that she was having pain in her private part. She further disclosed to her that on 31.3.2007 when the prosecutrix was alone and she was in school and in the day time when she brought water from tank and came to bathroom the accused was already in bath room who gagged the mouth of the prosecutrix with cloth and caught hold of her from both arms and forcibly laid her down on the floor. Thereafter, after removing the string of the salwar, he committed sexual intercourse with her daughter. He also threatened her to do away with her life in case she disclosed the incident to her parents. On 3.4.2007, she disclosed the entire incident to her husband. Her husband also inquired about the incident from the prosecutrix in her presence and she narrated the incident to her husband also. Due to night hours, they could not lodge the FIR. On 4.4.2007, she alongwith the prosecutrix and her husband went to Nirmand and FIR was lodged and medical examination of the prosecutrix was got conducted in CHC Hospital Nirmand. In her cross-examination, she deposed that she alongwith her mother called mother of accused to their house but she threatened to give beatings to all her family members. Dharam Sain and his younger brother who was having *danda* in their hands came to attack them. The accused and his family members did not beat them. They had also disclosed this to the police at the time of recording FIR against the accused. The salwar of the prosecutrix was handed over to the police on the same day in the police station. The prosecutrix was given another salwar for wearing after the salwar was taken into possession by the doctor. The prosecutrix was having injuries on the private part.

14. PW-9 Dr. Kapil Malhotra deposed that he was posted as Medical Officer MGMSC Hospital Khaneri. On 27.7.2007, on the request of the police, he has opined that penetration can lead to the partial rupture of hymen. Hymenal tags may be present even after full intercourse. He gave his opinion Ext. PW-9/A.

15. PW-10 LC Reema Devi deposed that after medical examination of the prosecutrix, the MO handed over one sealed cloth parcel stated to be containing vaginal slides, vaginal swab, one printed salwar, one envelope and

sample of seal. He handed over the sealed parcel, envelope and sample of seal to MHC Mohar Singh.

16. PW-11 Const. Mohar Singh deposed that MHC Mohar Singh handed over to him the case property and he deposited the same at FSL Junga on the same day vide RC No. 24/2007.

17. Statements of PW-12 Ravinder Kumar and PW-13 Binu Ram are formal in nature.

18. PW-14 SI Harish Chand Thakur has investigated the case. He arrested the accused and collected the birth certificate and extract of Parivar register from Panchayat Secretary which are Ext. PW-1/B and PW-1/C. He also procured the extract of admission register from the Principal Govt. Girls Sr. Secondary School, Rampur Bushahr vide letter Ext. PW-4/A and the certificate issued by the Principal is Ext. PW-4/B. He also collected the birth certificate of accused vide letter Ext. PW-5/A and PW-5/B.

19. PW-15 SI Brij Lal has got medically examined the prosecutrix at CHC Nirmand. He went alongwith the prosecutrix and her father to the spot. He prepared the spot map Ext. PW-15/A. He recorded the statement of the witnesses. He obtained birth certificate of the prosecutrix Ext. PW-1/B.

20. PW-16 ASI Mohar Singh deposed that on 4.4.2007, complainant Sohan Lal had visited PS Nirmand alongwith his daughter and lodged FIR Ext. PW-6/A. He scribed application Ext. PW-2/A for conducting medical examination of the prosecutrix and sent her to PHC Nirmand under the supervision of Const. Reema. He sent the case property to FSL Junga through Const. Mohar Singh on 16.4.2007. In his cross-examination, he admitted that at the time of lodging the FIR, the mother was not accompanying the prosecutrix. At the time of lodging the FIR or thereafter, the prosecutrix or her parents did not present the salwar of the prosecutrix to the police in his presence.

21. According to the prosecution case, the incident has happened between 1-1:30 PM on 31.3.2007. The FIR was registered on 4.4.2007. According to PW-8 Kamla, the mother of the prosecutrix, she inquired from the prosecutrix on 3.4.2007 as to what had happened to her. The prosecutrix narrated her the entire incident. Thereafter, she disclosed this fact to her husband on 3.4.2007 at 7-8:00 PM. The FIR could not be registered since it was night time. The FIR was registered on 4.4.2007. Similarly, PW-6 Sohan Lal deposed that her wife PW-8 Kamla had told him how the incident has happened. According to PW-8 Kamla, she has also gone to the Police Station with the prosecutrix. However, PW-16 ASI Mohar Singh has categorically admitted that at the time of lodging the FIR, the mother was not accompanying the prosecutrix. According to the prosecutrix, she remained sleeping w.e.f. 31.3.2007 to 3.4.2007. It is not believable that the prosecutrix would remain sleeping w.e.f. 31.3.2007 to 3.4.2007. The Police Station was not at a very far off place. It is well settled by now that the delay in registration of the FIR cannot be fatal in every case. The prosecution can always explain the delay. In the instant case, the delay has not been satisfactorily explained for lodging the FIR belatedly.

22. The prosecution version is also not corroborated by the medical evidence. The prosecutrix was examined by PW-2 Dr. Yashoda Anand on 4.4.2007. PW-2 Dr. Yashoda Anand, has given the opinion after examining the victim. According to her, there were no signs of recent sexual intercourse and final opinion was given after chemical examination of the samples. The FSL report is Ext. PW-14/B. No semen was found on the parcels. PW-2 Dr. Yashoda Anand gave the final opinion on 12.6.2007. It reads as under:

> "After seeing the forensic report of the samples sent for chemical examination, I am of the opinion that there are no signs of sexual intercourse."

23. The police has again sought for her opinion after the final opinion. She gave the opinion on 25.6.2007. According to her, the rupture of the hymen could occur due to sudden stretching like due to fall, sport injury etc. She has mentioned that hymen was partially ruptured and healed. It was not suggestive of pre-existing traumatic cause. The police again sought her another opinion and she gave the same on 18.7.2007. She had given the opinion that hymen was ruptured and healed. The pain could be due to some other cause. The exact duration of injury could not be given. The redness and tenderness could be due to uncleanness of the external genitalia or due to some other reason. According to her, it could not be clearly stated that there was penetration/partial penetration. In her cross-examination, PW-2 Dr. Yashoda Anand has admitted, as noticed hereinabove, that she has not noticed injuries on labia majora/labia minora. She has not noticed any tear on the edges of hymen. The prosecutrix had appeared as PW-7 and in her cross-examination also, she has admitted that she did not sustain any injury when the accused committed forcible intercourse with her.

24. The prosecution has also sought the opinion of PW-9 Dr. Kapil Malhotra. He has given the opinion vide Ext. PW-9/A. PW-9 Dr. Kapil Malhotra was never shown the MLC Ext. PW-2/C. His opinion is dated 27.7.2007. The incident has taken place on 31.3.2007. The prosecutrix was minor. In case, there was forcible intercourse with her, there was every possibility of swelling of labia majora/labia minora. According to PW-2 Dr. Yashoda Anand, as noticed by us hereinabove, has specifically opined that there was no recent sexual intercourse. Moreover, no semen was found on the clothes of the prosecutrix.

25. Their Lordships of the Hon'ble Supreme Court in ***Aman Kumar and another*** vs. ***State of Haryana***, (2004) 4 SCC 379 have held that it is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Their Lordships have further held that penetration is the sine qua non for an offence of rape and in order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. Their Lordships have further held that in examination of genital organs, state of hymen offers the most reliable clue. Their Lordships have held as under:

> "5. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would suffice.

> 7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (See Joseph Lines IC & K 893). It is well-known in the medical world that the examination of smegma loses all importance after twenty four hours of the performance of the sexual intercourse. (See Dr. S.P. Kholi, Civil Surgeon, Ferozepur v. High Court of Punjab and Haryana thr. Registrar (1979) 1 SCC 212). In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma round the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC."

26. Their Lordships of the Hon'ble Supreme Court in ***Tarkeshwar Sahu*** vs. ***State of Bihar (now Jharkhand),*** (2006) 8 SCC 560 have held no offence under Section 376 IPC can be made out unless there was penetration to some extent and in absence of penetration to any extent would not bring the offence within the four corners of Section 375 of the Indian Penal Code. Their Lordships have held as under:

> "10. Under Section 375 IPC, six categories indicated above are the basic ingredients of the offence. In the facts and circumstances of this case, the prosecutrix was about 12 years of age, therefore, her consent was irrelevant. The appellant had forcibly taken her to his Gumti with the intention of committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case.

> No offence under Section 376 IPC can be made out unless there was penetration to some extent. In absence of penetration to any extent would not bring the offence of the appellant within the four corners of Section 375 of the Indian Penal Code. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC. This Court had an occasion to deal with the basic ingredients of this offence in the case of State of U.P. v. Babul Nath. In this case, this Court dealt with the basic ingredients of the offence under Section 375 in the following words:- "8. It may here be noticed that Section 375 of the IPC defines rape and the Explanation to Section 375 reads as follows:
>
> "Explanation:Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."
>
> From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

27. Their Lordships of the Hon'ble Supreme Court in ***Yerumalla Latchaiah vs. State of A.P.*** (2006) 9 SCC 713 have held that when the prosecutrix aged 8 years at the time of alleged occurrence and according to evidence of the doctor who examined the prosecutrix immediately after the occurrence, there was no sign of rape, the evidence of prosecutrix belied by medical evidence. Their Lordships have held as under:

> 3. In the present case, age of the victim was only eight years at the time of alleged occurrence. Immediately after the occurrence, she was examined by Dr. K. Sucheritha (PW-7) who has stated in her evidence that no injury was found on any part of the body of the victim, much less on private part. Hymen was found intact and the doctor has specifically stated that there was no sign of rape at all. In the medical report, it has been stated that vaginal smears collected and examined under the microscope but no sperm detected. The evidence of the prosecutrix is belied by the medical evidence. In our view, in the facts and circumstances of the present case, the High Court was not justified in upholding the conviction."

28. Their Lordships of the Hon'ble Supreme Court in ***Narender Kumar vs State (NCT of Delhi),*** (2012) 7 SCC 171 have held that it is for the prosecution to establish each ingredient of the offence beyond reasonable doubt

on basis of cogent evidence and material on record and the prosecution cannot establish its case merely on basis of suspicion and moral belief, howsoever strong it may be or by taking support from weaknesses of defence case. Their Lordships have held as under:

> 29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: Tukaram & Anr. v. The State of Maharashtra,, AIR 1979 SC 185; and Uday v. State of Karnataka, AIR 2003 SC 1639).
>
> 30 . Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected."

29. Their Lordships of the Hon'ble Supreme Court in ***K. Venkateshwarlu vs. State of Andhra Pradesh*** (2012) 8 SCC 73 have held that a child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. His statement can be accepted only if court comes to conclusion that child understands questions put to him and he is capable of giving rational answers and that child is not tutored and his evidence has a ring of truth. Their Lordships have held as under:

> "5. The High Court has set aside order of acquittal. This court has repeatedly stated what should be the approach of the High Court while dealing with an appeal against acquittal. If the view taken by the trial court is a reasonably possible view, the High Court cannot set it aside and substitute it by its own view merely because that view is also possible on the facts of the case. The High Court has to bear in mind that presumption of innocence of an accused is strengthened by his acquittal and unless there are strong and compelling circumstances which rebut that presumption and conclusively establish the guilt of the accused, the order of acquittal cannot be set aside. Unless the order of acquittal is perverse, totally against the weight of evidence and rendered in complete breach of settled principles underlying criminal jurisprudence, no interference is called for with it. Crime may be heinous, morally repulsive and extremely shocking, but moral considerations cannot be a substitute for legal evidence and the accused cannot be convicted on moral considerations. The present appeal needs to be examined in light of above principles.
>
> 9. Several child witnesses have been relied upon in this case. The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving

rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pliable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court. Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it.

11. Having perused the evidence of all the witnesses, we find it difficult to rely on them. We feel that the trial court had rightly discarded their evidence as unworthy of reliance and the High Court erred in taking it into consideration. This, in our opinion, is a case where neither the evidence of parents of victim PW-2 Aruna nor the evidence of PW- 2 Aruna, nor the evidence of child witnesses, who claim to have witnessed the incident, nor the medical evidence supports the prosecution case. Besides, all the pancha witnesses have turned hostile, a fact which we have noted with some anguish. A needle of suspicion does point out to the appellant because he is a police constable and in a small village where the incident took place, witnesses may be scared to depose against him because of his clout. There are certain circumstances which do raise suspicion about the appellant's involvement in the crime. The children were playing on the terrace of the appellant. The appellant was not arrested by police till 4.9.1998. The demeanour of PW-2 Aruna, the tears in her eyes, her walking out of the court after looking at the appellant, pricks the judicial conscience. But convictions cannot be based on suspicion, conjectures and surmises. We are unable to come to a conclusion that the trial court's judgment is perverse. For want of legal evidence we will have to set aside the appellant's conviction and sentence. But we make it clear that we are doing so only by giving him benefit of doubt."

30. Consequently, in view of the analysis and discussion made hereinabove, the prosecution has failed to prove its case conclusively that the accused had raped the prosecutrix. The circumstances noticed by us hereinabove creates reasonable doubt in the version of the prosecution. The lodging of the FIR belatedly has not been explained in view of the attendant circumstances, as stated hereinabove. The version of the prosecution is also not supported by the medical evidence.

31. Accordingly, the appeal is allowed. Judgment of conviction and sentence dated 23.12.2010, rendered by the learned Addl. Sessions Judge, Kinnaur at Rampur, Distt. Shimla, in Sessions trial No. 25-AP/7 of 2008/2010, is set aside. The accused is acquitted of the charges framed under Sections 376 and 506 IPC, by giving him benefit of doubt. 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.

32. 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. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Om Prakash ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Cr. Appeal No. 34/2011
Reserved on: 17.12.2014
Decided on: 18.12.2014

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 3.5 kg of charas- according to prosecution witnesses, there were 5-7 shops on the roadside and about 15/20 residential houses in the village- it was admitted that no person from locality was associated nor any vehicle was stopped to associate its occupant as a witness while carrying out search- person carrying the ruqqa left to police station but never returned- held, that the police had not made any serious effort to associate independent witnesses- accused acquitted.

For the Appellant: Mr. Bimal Gupta, Advocate.
For the Respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against judgment rendered by learned Special Judge Kinnaur at Rampur Bushahr, District Shimla, HP in Case No. 25-AR/3 of 09/10 dated 6.12.2010, whereby appellant-accused (hereinafter 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 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1.00 Lac and in default to further undergo rigorous imprisonment for two years.

2. Prosecution case, in a nutshell, is that on 14.2.2009, Head Constable Govind Singh alongwith C. Pyare Lal No. 429 and C. Kam Raj No. 872 was present at Chil Mod near Khekhar Village at National Highway No. 22. At about 5.45 pm, they found one person standing near the parapet. On seeing the police party said person got scared and tried to run away. He was carrying a bag on his shoulder. On suspicion HC Govind Singh overpowered and apprehended him with the assistance of accompanying police officials. On suspicion of possession of some contraband in the bag, he was given option to be searched either in the presence of a Magistrate or a Gazetted Officer but the accused opted to be searched by the police. Upon this, HC Govind Singh gave his personal search to the accused person and thereafter he conducted the search of the bag of accused and found one cushion of cloth in the bag, in which one polythene envelope having four polythene envelopes containing Charas was found. Charas weighed 3.500 kg. Thereafter two samples weighing 25 grams each were separated and put into separate parcels and the bulk was also put back into same polythene envelope and then put into the same bag which was put into a parcel. All three parcels were sealed with seal impression 'V'. NCB form in triplicate was filled in and after obtaining specimen of seal, the same

was handed over to C. Jia Lal. The contraband article recovered from the possession of accused person was taken into possession vide seizure memo, which was witnessed by C. Jia Lal and C. Kam Raj. Rukka was scribed by HC Govind Singh, on the basis of which FIR No. 24 dated 14.2.2009 was registered in Police Station Kumarsain. The accused person was arrested. Samples and bulk were sent to Chemical Examiner FSL Junga who confirmed that the contents of the same were that of Charas. Investigation was completed and challan was put up after completing all the codal formalities.

3. Prosecution has examined as many as ten witnesses to prove its case against the accused. Statement of accused was recorded under Section 313 of the Criminal Procedure Code. He pleaded innocence. Accused was convicted and sentenced as noticed above. Hence, this appeal.

4. Mr. Bimal Gupta, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Ramesh Thakur, Assistant Advocate General has supported the judgment passed by the learned trial Court.

6. We have heard the learned counsel for the parties and also gone through the judgment carefully.

7. PW-1 C. Kam Raj deposed that he accompanied Head Constable Govind Singh and C. Jia Lal on patrolling duty and when they reached near Khekhar, Chil Mod at about 5.45 pm, a person was found at National Highway on the parapet. He tried to run away. He was overpowered. HC Govind Singh sought option of the accused for his personal search after disclosing his right to be searched either before a Magistrate or a Gazetted Officer. Accused opted to be searched by the police vide Memorandum Ext. PW-1/A. HC Govind Singh gave his personal search to the accused vide memorandum Ext. PW-1/B. Search of the bag of the accused was carried out. Charas was recovered from the bag, which weighed 3.500 kg, out of which two samples of 25 gms each were drawn and put into a different packet duly sealed with seal 'V' and remaining charas including the polythene packet was duly sealed with seal 'V' and specimen impression of the seal was drawn and thereafter it was handed over to C. Jia Lal and the sample part alongwith the packet of remaining Charas was taken into possession vide Ext. PW-1/E. Specimen impression of the seal was drawn vide Ext. PW-1/D and handed over to him by HC Govind Singh to be carried to the Police Station. He admitted in his cross-examination that there were 5/7 shops on the roadside and there are about 15/20 residential houses in Khekhar village. He admitted that at normal speed it takes 45 minutes on foot to reach Chil Mod from Khekhar village through national highway. He admitted further that national highway remains busy with vehicular traffic. No person from nearby locality was associated nor any person from moving vehicles while effecting search of the accused. He came back from the spot alongwith rukka at 7.15 pm. He went back to the police station in bus. He did not return to the spot after reaching the police station.

8. PW-2 C. Gopal Singh deposed that on 15.2.2009, MHC Vinod Kumar handed over to him one sealed sample duly sealed with seal 'C' vide RC No. 105/08-09 alongwith NCB form and the same was delivered on the same day and receipt was brought.

9. PW-3 C. Kamlesh Kumar is a formal witness.

10. PW-4 HC Vinod Kumar deposed that he was officiating SHO in addition to MHC police station. C. Kam Raj has brought Rukka at 8.30 pm. He registered FIR Ext. PW-4/A. Endorsement was made on Rukka vide mark 'A'. He handed over the file to C. Kam Raj. At about 9.45 pm HC Govind Singh produced one sealed sample containing bulk charas and two sealed samples duly sealed with seal 'V' alongwith NCB form and specimen impression of the

seal and thereafter he resealed all the sealed packets with seal 'C' and filled up NCB form. Sealed exhibits alongwith specimen impression of the seal and reseal were deposited in the Malkhana and entry was incorporated in the Malkhana registered vide Ext. PW-4/E. Special report was also sent with C. Gopal Singh to be delivered in the office of SDPO Rampur. He handed over one sample alongwith specimen of seal impression vide RC No. 105/08-09 and NCB form to be delivered at SFSL on 16.2.2009.

11. PW-5 ASI Swaroop Ram is a formal witness.

12. PW-6 SI Neel Chand is also a formal witness.

13. PW-7 SI Purshottam Dutt is also a formal witness.

14. PW-8 C. Bharat Bhushan deposed that on 22.3.2010 MHC Vinod Kumar had handed over one large and one small parcel which were sealed with six seals each of impression 'V' and 'C', respectively. Alongwith NCB form docket and specimen of seal to him vide RC No. 115/09-10 dated 22.3.2010. He deposited the parcel alongwith accompanying documents and specimen of seal with FSL Junga on the same day.

15. PW-9 C. Parmodh Kumar testified that on 5.5.2010, he received two parcels sealed with seven seals and two seals respectively of FSL alongwith report Ex. PW-4/K. He handed over the same to MHC in PS Kumarsain on the same day.

16. PW-10 HC Govind Singh deposed the manner in which accused was apprehended and seizure and sampling process was completed. Rukka was sent through PW-1 C. Kam Raj to the police station. According to him, case property alongwith NCB form and specimen of seal was presented by him before officiating SHO HC Vinod Kumar, who resealed the case property and filled up remaining columns of the NCB form. In his cross-examination, he has admitted that distance of Chil Mod from the police post Sainj is about 1.5 kms. Distance from Sainj to Khekhar is 1 km and from Khekhar to Chil Mod is ½ km. They reached at the spot while patrolling on the way. It took them 1 hour and 45 minutes to reach the spot. There were 3-4 shops on the NH. Main village is below the road. He admitted that National Highway is a busy road, on which vehicles cross frequently. He also admitted that a foot path goes from Chil Mod to Luhri. At the time of conducting proceedings at the spot, he tried to stop vehicles to procure independent witnesses, however, no vehicle stopped there. No action was taken by him against the occupants of the vehicles, who did not stop and he did not send any person to procure independent witnesses He also admitted that C. Kam Raj had taken Rukka but he did not come back to the spot where he handed over the case file to him.

17. According to PW-1, there were 5-7 shops on the road side and 15-20 residential houses at Khekhar village. He also admitted that no person from nearby locality was associated nor any person from vehicles on the road was associated while carrying out search of the accused. He left the spot alongwith Rukka at 7.15 pm. He went to the police station, however, never came back from the police station to the spot. PW-10 Govind Singh has also admitted that there were 3-4 shops at National Highway at Khekhar and main village was below road at some distance. He had tried to stop vehicles however, vehicles did not stop. He has not taken any action against the occupants of the vehicles nor has he sent any person to procure independent witnesses from the village.

18. It is not a case where recovery was effected from a secluded and isolated place. There were shops near the place from where accused was nabbed. Residential houses were also nearby and despite that police has not joined any independent witnesses. According to PW-1, Kam Raj, they have not associated occupants of the vehicles plying on the National Highway. It has come on record that there remains heavy vehicular traffic on the road. Version of

PW-10 Govind Singh that they signaled the vehicles to stop but they did not stop, can not be believed. The police can always invoke provisions of Section 160 and 176 of the Criminal Procedure Code in case persons were not ready and willing to be associated during the course of investigation. It is true that the conviction can be made on the basis of statements made by the official witnesses, if the statements are true and inspire confidence, without associating independent witnesses. However, in the instant case, independent witnesses, though available at nearby place, were not associated by the police. Thus, the recovery of contraband from the accused is not proved in accordance with law. Prosecution has failed to prove its case against the accused beyond reasonable doubt.

19. In view of discussion and analysis made hereinabove, the appeal is allowed. Judgment of conviction passed by learned Special Judge, Kinnaur at Rampur on 6.12.2010 in Case No. 25-AR/3 of 09/10 is set aside. Accused is acquitted of the offence under Section 20 of Narcotic Drugs & Psychotropic Substances Act, 1985. He be released forthwith, if not required in any other case by the Police. Registry is directed to prepare release warrant of the accused and send the same to the Superintendent Jail concerned.

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

Tara Kaushal & ors. ..... Appellants.

Vs.

Bal Raj & ors. ..... Respondents

OSA No. 4003 of 2013.
Judgement reserved on: 24.11.2014.
Date of decision: 18.12.2014.

Code of Civil Procedure, 1908- Order 14 Rule 2- Court recorded finding only on issue No.1 and thereafter remaining issues were disposed of on the basis of this finding- held, that the matter ought to have been disposed of on all points and should not have been allowed to rest merely on consideration of a single point- Provisions of Order 20 requires the judgment to contain all the issues and findings or decisions thereon with reasons- the courts should not adopt a shortcut method of adjudicating upon a claim by resting its decision on one single point but should give a reasoned judgment of the dispute on all the issues. (Para-12 to 21)

Cases referred:

M/s Fomento Resorts and Hotels Ltd. vs. Gustavo Ranato da Cruz Pinto and others AIR 1985 SC 736

Om Prakash and others vs. State of Himachal Pradesh and others AIR 2001 HP 18

Lakshmi Ram Bhuyan vs. Hari Prasad Bhuyan and others (2003) 1 SCC 197

Income Tax Officer vs. M/s Murlidhar Bhagwan Dass AIR 1965 SC 342

Swaran Lata Ghosh vs. Harendra Kumar Banerjee and another AIR 1969 SC 1167

Prithvi Raj Jhingta & anr. vs. Gopal Singh & anr. AIR 2007 HP 11

For the appellants : Mr. K.D. Sood, Senior Advocate with Mr. Sandeep Pandey, Advocate.

For the respondents : Mr. Bhupender Gupta, Senior Advocate with Mr. Ajit Jaswal, Advocate, for respondents No. 1, 4 and 5.
Respondents No. 2, 3, 6 to 11 already ex-parte.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The appellants are the plaintiffs and have filed the present original side appeal against the judgement and decree dated 27.9.2013 passed by the learned Single Judge of this court in Civil Suit No. 65 of 2000.

2. Plaintiffs- appellants filed the suit seeking a decree for the following reliefs:-

(i) That the plaintiffs and defendant Nos. 1 to 3 have 1/8th share each in the following properties:-

(a) Shop situated on Khasra No. 496/1 Khata Khatauni No. 44 min/144, measuring 0-00-52 hectares on which single storey shop is standing, according to the jamabandi for 1984-85 of mauza Sarkaghat Distt. Mandi. The shop is on area measuring 0-00-25 hectares;

(b) Double storeyed shops on Khasra No. 564 and 502 in khata khatauni No. 205/460 min in Abadi measuring 0-00-65 and 0-00-63 hectares, in all measuring 0-01-28 hectares according to jamabandi for 1984-85 of mauza Sarkaghat, Distt. Mandi;

(c) House standing on Khasra No. 497/1 which is three storeyed on area measuring 0-00-22 hectares in Khata Khatauni No. 474-426 according to the Jamabandi for the year 1984-85 of mauza Sarkaghat, Distt. Mandi.

(d) Shop-cum-house on Khasra No. 501/1 measuring 0-00-12 hectares, Khata Khatauni No. 174/426 according to Jamabandi for 1984-85 of mauza Sarkaghat, Distt. Mandi.

(e) Three storyed house on Khasra No. 503/1 measuring 0-00-16 hectares in Khata Khatauni No. 174/426 according to Jamabandi for 1984-85 of mauza Sarkaghat, Distt. Mandi.

(f) Shop standing on Khasra No. 506/1, measuring 0-00-10 hectares in Khata Khatauni No. 175/427 according to Jamabandi for the year 1984-85 of Muaza Sarkaghat Distt. Mandi.

(g) Three storeyed shop-cum-house on khasra No.570, khata khatauni No. 100/262 min measuring 0-00-90 hectares according to Misal Hakiat Bandobasat Jadid of Sarkaghat, Distt. Mandi.

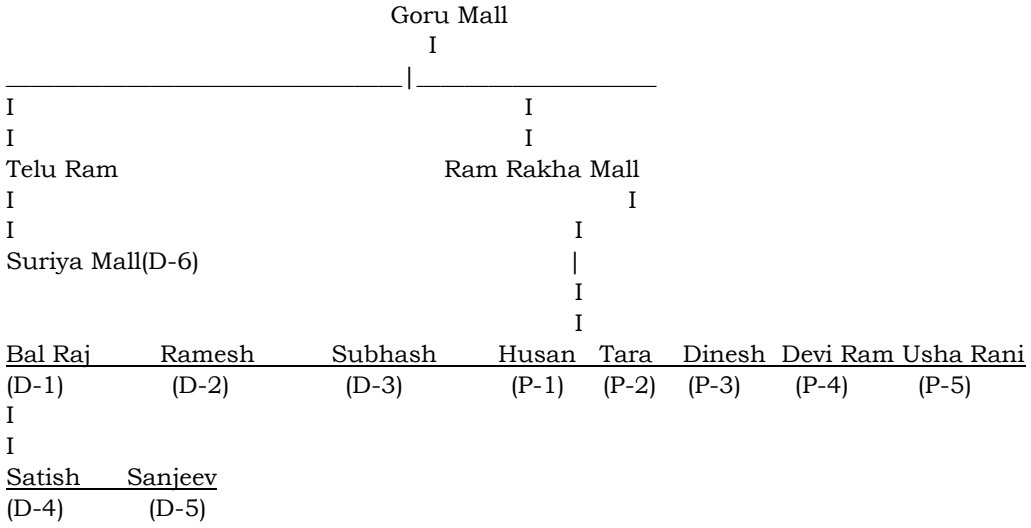
(h) Double storeyed shop-cum-residence on Khasra No. 563 Khata Khatauni No. 174/426 measuring 0-00-36 hectares according to Jamabandi for 1984-85 mauza Sarkaghat, Distt. Mandi.

(i) Two plots of land, compromised in Khasra No. 465 measuring 47-05 Sq. yards and 1191 measuring 22-08 Sq. yards in Mauja Una, Tehsil and District Una according to the jamabandi for the year 1976-77 and the joint Hindu Family M/s Ram Rakha Mall Kaushal and Sons, Sarkaghat and a decree for partition and separate possession of their 5/8th share in the said properties by metes and bounds, be passed in their favour.

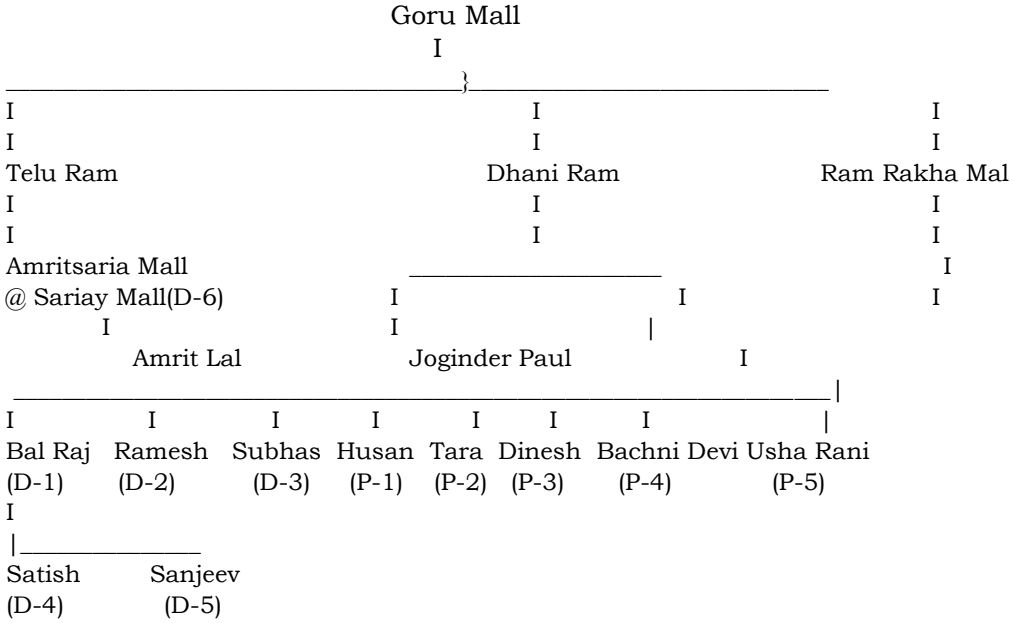
(ii) That the plaintiffs be also granted a decree for rendition of accounts of the Joint Hindu Family business M/s Ram Rakha Mall Kaushal and sons and entitled to their 5/8th share in the said business.

(iii) That for partition and separate possession and for rendition of accounts local commissioner may be appointed to go into the rendition of accounts and divide their property by metes and bounds.

3. According to the appellants, the pedigree table of the parties is as follows:-



4. Though the aforesaid pedigree table has been admitted in part, but according to the defendants-respondents, this pedigree table is incomplete and the same is as follows:-



5. The plaintiffs pleaded that the common ancestor of the parties was one Shri Goru Mall, who had two sons Telu Ram and Ram Rakha Mall. This fact has been disputed by the defendants and submitted that there is third son also namely Dhani Ram and that the parties to the suit constitute a Joint Hindu Family and carried on the business of Kariana, cloth, iron and hardware etc.

under the name and style of M/s Telu Ram Ram Rakha Mall at Sarkaghat, District Mandi. In 1970, two brothers Telu Ram and Ram Rakha Mall separated. Telu Ram started his business in the name and style of M/s Telu Ram Amritsaria Mall at Sarkaghat while Ram Rakha Mall Kaushal started his business in the name and style of M/s Ram Rakha Mall Kaushal and sons at Sarkaghat. Shri Ram Rakha Mall constituted a Joint Hindu Family of the plaintiffs namely Hushan Kaushal, Tara Kaushal, Dinesh Kaushal, Bachni Devi and Usha Rani and defendant Nos. 1 to 3 namely Bal Raj, Ramesh and Subhash, who continued the business of Karyana, cloth and later on added sale of cement etc. The Joint Hindu Family business was run as a partnership business between Ram Rakha Mall, Bal Raj, Husan and Tara Chand under deed of partnership Ext.DW1/A, which was executed on 2.9.1970. It is further pleaded that plaintiffs and defendant Nos. 1 to 3 and Shri Ram Rakha Mal had a joint mess and common residence at that relevant point of time and Shri Ram Rakha Mall was the head of the family. Ram Rakha Mall died on 12.8.1983. Since he was not keeping good health, he retired from the Hindu Undivided Family firm namely Ram Rakha Mall Kaushal and Sons and Shri Satish Kumar son of Bal Raj was inducted as partner in the ancestral business, but the Joint Hindu Family continued as such. There is no dispute about the death of Ram Rakha Mall. On the death of Ram Rakha Mall, his estate devolved upon the plaintiffs and defendant Nos. 1 to 3 in equal shares and the Joint Hindu Family business M/s Ram Rakha Mall Kaushal and sons continued as such. Defendant No.1 Bal Raj was eldest brother and head of the family, he became Karta of HUF in place of Shri Ram Rakha Mall. It has been further pleaded that Shri Telu Ram had separated himself from his brother Shri Ram Rakha Mal and had also started his separate business. He died in the year 1975 and his estate devolved upon Shri Suriya Mall @ Amritsaria Mall, defendant No. 6 who is in possession of the estate. The plaintiffs or defendant Nos. 1 to 5 have no common concern in the estate of Shri Telu Ram which has been inherited by Shri Amritsaria Mall. The plaintiffs pleaded that partition took place between Telu Ram and Ram Rakha Mall. The share of Ram Rakha Mall is jointly held by the plaintiffs and defendant Nos. 1 to 5 in the following manner:

1. *Shop situated in Khasra No. 496/1, Khata Khatauni No. 44 min.144, measuring 0-00-52 hectares on which single storey shop is standing, according to the jamabandi for 1984-85 of mauza Sarkaghat, District Mandi. The shop is on area measuring 0-00-25 hectares;*

2. *Double storeyed shops on Khasra No. 564 and 502 in Khata Khatauni No. 205/460 min in Abadi measuring 0-00-65 and 0-00-63 hectares in all measuring 0-01-28 hectares according to Jamabandi for 1984-85 of mauza Sarkaghat, District Mandi;*

3. *House standing on Khasra No. 497/1 which is three storeyed on area measuring 0-00-22 hectares in Khata Khatauni No. 474-426 according to the Jamabandi for the year 1984-85 of mauza Sarkaghat, Distt. Mandi.*

4. *Shop-cum-house on Khasra No. 501/1 measuring 0-00-12 hectares, Khata Khatauni No. 174/426 according to Jamabandi for 1984-85 of mauza Sarkaghat, Distt. Mandi.*

5. *Three storyed house on Khasra No. 503/1 measuring 0-00-16 hectares in Khata Khatauni No. 174/426 according to Jamabandi for 1984-85 of mauza Sarkaghat, Distt. Mandi.*

6. *Shop standing on Khasra No. 506/1, measuring 0-00-10 hectares in Khata Khatauni No. 175/427 according to Jamabandi for the year 1984-85 of Muaza Sarkaghat Distt. Mandi.*

7. *Three storeyed shop-cum-house on khasra No. 570, khata khatauni No. 100/262 min measuring 0-00-90 hectares according to Misal Hakiat Bandobasat Jadid of Sarkaghat, Distt. Mandi.*

8. *Double storeyed shop-cum-residence on Khasra No. 563 Khata Khatauni No. 174/426 measuring 0-00-36 hectares according to Jamabandi for 1984-85 mauza Sarkaghat, Distt. Mandi.*

9. *Land comprised in Khasra No. 1165, 34, 36, and 2339 measuring 47.05 sq. yards in mauza Kotla Khurd, Tehsil and District Una according to Jamabandi for the year 1976-77.*

6. The aforesaid properties were inherited by Shri Ram Rakha Mall and after his death, the plaintiffs and defendant Nos. 1 to 3 have 1/8th share each in the same. The plaintiffs are in possession of shops and residential houses situated over khasra No. 570. All other properties except two plots in Una, which are lying vacant, are in possession of defendant No. 1 and his sons, defendant Nos. 4 and 5. The properties are liable to be partitioned by metes and bounds and the plaintiff and defendants No. 1 to 3 are entitled to separate possession of the properties, as mentioned above.

7. On partition of the properties between Telu Ram and Ram Rakha Mall, Shri Ram Rakha Mall continued the business in the name and style of M/s Ram Rakha Mall Kaushal and Sons. The business was of kariana, cloth etc. and cement was later on added to it. The business was carried on in partnership, the terms of which were reduced into writing vide partnership deed Ext.D1 dated 2.9.1970, vide which Ram Rakha Mall had 40% share, Bal Raj 40%, Husan Chand and Tara Chand 10% each share. Defendant No. 1 Bal Raj was the Karta and managing the whole affairs. Shri Ram Rakha Mall because of his ill health, had retired from the partnership on 1.4.1983 and the business continued in the name and style of M/s Ram Rakha Mall Kaushal and Sons with Bal Raj having 40% share, Satish Kumar with 25% share, Husan Chand 25% and Tara Chand 10% share. This partnership business was Joint Hindu Family Business and continued till 15.3.1990 when Bal Raj defendant converted the business into another partnership business with three partners namely Bal Raj defendant No. 1 and his two sons Satish Kumar and Sanjeev Kumar. In this business, Bal Raj has 40% and Satish Kumar and Sanjeev Kumar 30% shares each. The business was being run in the name and style of the original firm i.e. M/s Ram Rakha Mal Kaushal and Sons at Sarkaghat with all stock, assets, trade and goodwill etc. The plaintiffs and defendants No. 1 to 3 have 1/8th share each in the said business. Therefore, the appellants prayed for decree of rendition of accounts and share in the properties and assets of the firm.

8. The defendants-respondents contested the suit. It has been pleaded that defendant No.1 and his two sons, defendant Nos. 4 and 5, have started separate business by forming a separate partnership. It was pleaded that the pedigree table is incorrect. Before 1950 there was a firm in the name and style of Telu Ram Dhani Ram but after 1950 Shri Dhani Ram separated himself from the family and started his own business. Thereafter the business was run in the name and style of Ram Rakha Mall. After 1970, there was partnership between Telu Ram and Ram Rakha Mall and Telu Ram started business in the name of M/s Telu Ram Amritsarai Mall and Ram Rakha Mall Kaushal and Sons. Prior to 1962, the earlier firm also used to deal in medicines under the name of Shakti Medical Store and after partition in 1970, the said Shakti Medical Store also fell to the share of Ram Rakha Mall. Further, it was pleaded that after 1970 Shri Ram Rakha Mall was doing separate business and Telu Ram and Sons were doing separate business and there was no Joint Hindu Family business as pleaded. After 1970, the sons of Ram Rakha Mall were carrying on business separately under different partnerships. Partnership deed was entered into between Ram Rakha Mall, Bal Raj, Husan Chand Tara Chand on 2nd September, 1970 and a firm under the name and style of M/s Ram Rakha Mall Kaushal and

Sons was constituted which was a partnership at will. The business of the firm was to deal in retail and wholesale business of karyana, cloth and such other items. By another deed of partnership dated 17.3.1970 Ext.D-5 Shri Husan Chand and Tara Chand constituted another firm in the name and style of Shakti Medical Store in which they had equal shares. Defendant No. 2 Ramesh Kumar had renounced the world and has not been seen/heard of after 1965 and was not associated in any of the businesses run by different firms. Defendant No. 3 Subhash Kaushal after completion his MA.LLB also did not take interest in any of the partnership businesses and therefore, he is also not partner of any of the firms. In the year 1980, there was again partition of the properties between Ram Rakha Mall and his sons in a family settlement. This settlement was not reduced into writing but the parties acted upon the partition by taking possession of the respective properties which fell to their shares. The respondents- defendants then proceed that there was no Joint Hindu Family as pleaded by the appellants- plaintiffs because:

(a) Husan Lal (plaintiff No.1) purchased Jeep in the year 1972 and registration certificate was also in his own name and then sold the same in the year 1985 and the sale price was pocketed by him alone;

(b) In the year 1981 Dinesh Kumar (plaintiff No. 3) purchased Truck No. HPM-5335 and after plying the same for 3-4 years sold the same and pocketed the earnings and sale amount himself;

(c) Tara Chand (plaintiff No. 2) purchased van in the year 1989 bearing registration No. DNB-1283 and sold the same after about one year. The said purchase and sale was from his own account and had nothing to do with the alleged Joint Hindu Family;

(d) The income tax returns of Shakti Medical Store are submitted on behalf of two partners only namely Husan Chand and Tara Chand;

(e) The income tax return of M/s Ram Rakha Mall and Sons are submitted on behalf of four parties prior to financial year 1988-89 and thereafter on behalf of three partners due to change in the constitution of partnership;

(f) A partnership under the name and style of Tara Cloth House is doing separate business and the partners in the said concern are Dinesh Kumar (plaintiff No. 3), Smt. Neelam (wife of Tara Chand, plaintiff No.2) and Sh. Prem Krishan Thapar (father-in-law of Tara Chand plaintiff No. 2). The alleged Joint Hindu Family has nothing to do with this business of M/s Tara Cloth House;

(g) After family settlement in 1980 Bal Raj (defendant No.1) constructed three-storey pucca house over Khasra No. 497/1 and 503/1, which had fallen to his share and no person had any objection on the said construction;

(h) Tara Chand and Dinesh Kaushal have raised third storey in 1984 over a two storey house constructed over khasra No. 570 which fell in their share in family settle in the year 1980;

(i) Out of a share in the partnership firm M/s Ram Rakha Mall Kaushal and Sons a shop was constructed over khasra No. 496/1 which fell in the share of Husan Chand;

(j) Over Khasra No. 570 there were two shops and prior to 1985 in one shop was Shakti Medical Store and the other shop was used as store by M/s Ram Rakha Mall Kaushal and Sons, but in the year 1985 Sh. Dinesh Kumar (plaintiff No. 3) got vacated the said store from M/s Ram Rakha Mall Kaushal and Sons as the said

shop had fallen in his share. Thereafter, M/s Tara Cloth House was opened in the said shop wherein Dinesh is also one of the partners.

(k) Orchard situated at Galyog (Karsog) measuring about 26 bigha (owner of ½ share out of this 26 bighas is Amritsaria Mall) was given to Sh. Hussan Chand in the family settlement in the year 1980 but the amount for the development of the said orchard and construction of house in the said orchard was spent by M/s Ram Rakha Mall and Sons as Husan Chand had some share in the said partnership. But in the year 1990 out of total sale proceeds of about Rs.45,000/- it was the first income from the said orchard. Sh. Husan Chand had pocketed Rs. 35,000/- out of which Amritsaria Mall is entitled to ½ of the amount. From 1990 onward Sh. Husan Chand is looking after the said orchard himself, which goes to suggest that he is acting on the family settlement of the year 1980.

(l) Out of capital share of Tara Chand in the firm M/s Ram Rakha Mall Kaushal and Sons existing prior to 15th March, 1990, Sh. Tara Chand had asked to pay his share capital to the extent of Rs. 50,000/- to Sh. Dinesh Kumar along with whom his wife and his father-in-law were doing business under the name and style of M/s Tara Cloth House.

(m) Shri Tara Chand and Dinesh Kumar (plaintiffs Nos. 2 and 3 respectively) are negotiating at their own levels for grant of Bata Agency with which the alleged Joint Hindu Family had nothing to do.

(n) Sh. Husan Chand had also been carrying business of money lender and it was his own business which had nothing to do with the alleged Joint Family business.

(o) That Sh. Husan Chand used to spend most of his time in the development and maintenance of RIUR DEVI Temple as he is chairman of the management committee of the said temple and due to this he did not take any interest even in the partnership business.

9. The defendants admitted the death of Ram Rakha and denied that the plaintiffs and defendant Nos. 1 to 5 are in joint possession of the aforesaid properties on which the plaintiffs claimed their right by virtue of being members of a Joint Hindu Family. They submitted that in the partnership business of M/s Ram Rakha Mall and Sons, Bal Raj defendant No.1 and his sons defendant Nos. 4 and 5 were conducting the business after 1980, therefore, there was necessity of change in the partnership deed executed on 1.4.1983 and on 15.3.1990 fresh partnership deed between defendant No. 1 and his sons was executed. There are two more partnership concerns which are carrying on their own business. M/s Shakti Medical Store is a partnership concern of Husan Chand and Tara Chand and Tara Cloth House is a partnership concern of Dinesh Kumar and his wife and father-in-law of Tara Chand. Both these businesses had been started by their own independent assets and goodwill.

10. On the pleadings of the parties, the following issues were framed by the learned single Judge:-

1. Whether the sons of Goru Mall constituted a Joint Hindu Family and carried on joint family business, as alleged? .....OPP

2. Whether during partition in 1970 of the Joint Hindu Family constituting of sons of Goru Mall, Ram Rakha Mal got the properties mentioned at serial No. 1 to 9 in para 3 of the plaint? .....OPP

3. Whether the properties described at serial No. 1 to 9 are the properties of plaintiffs and defendants Nos.1 to 3? .....OPP

4. Whether after partition, in the year 1970, business of Ram Rakha Mal Kaushal and Sons was a Joint Hindu Family business, as alleged in para 1 of the plaint? .....OPP

5. Whether on retirement of Ram Rakha Mal from the aforementioned JHF business and on induction of Satish Kumar, business of M/s Ram Rakha Mal Kaushal and Sons continued to be joint, as alleged in para 4 of the plaint? .....OPP

6. Whether the properties mentioned in para 3 of the plaint are required to be partitioned. If so, what are the shares of the parties? .....OPP

7. Whether the plaintiffs are entitled for rendition of accounts. If so, with regard to what business/property and who is the accounting part? .....OPP

8. Whether the suit has not been properly valued for the purpose of court fee and jurisdiction. If so, what is the correct valuation? .....OPD 1,4&5.

9. Whether the suit is not within the period of limitation? ...OPD 1,4&5.

10. Whether the business carried on in the name and style of M/s Ram Rakha Mal Kaushal was a partnership business, as alleged and the said partnership stood dissolved on 1.4.1983, if so, its effect?.....OPD 1,4 & 5.

11. Relief.

11. Thereafter following two additional issues were framed on 14.5.2007:-

10-A Whether there had been a family settlement in March, 1980 and in that settlement, the properties mentioned at Sr. No. 1 to 9 in para 3 of the plaint, had been divided amongst the joint owners? .....OPD 1, 4&5.

10-B. If issue No. 10-A is proved, whether the alleged family settlement had been acted upon and the parties have developed the properties that were allotted to them as per that settlement, if so, its effect? .....OPD 1,4&5.

12. The learned single Judge gave findings only on issue No. 1, while the remaining issues were dealt with in the following manner:-

"**Issue Nos. 2 to 5.**

30. In view of what I hold on issue No.1, these issues are also decided against the plaintiff.

Issue Nos. 6, 7 & 10

31. I find that evidence is tenuous as I have considered the evidence of all witnesses supra. Therefore, all these issues are also held against the plaintiff and in favour of the defendant.

Issue Nos. 8, 9,10 and 10-B

32. In view of the findings on above issues, these issues have become redundant.

Relief

33. I find no merit in this suit, which is accordingly dismissed. Decree sheet be drawn accordingly."

13. The appellants have assailed the decree on a number of grounds as taken in the memorandum of appeal, which we need not advert to, since the moot question required to be determined in this appeal is as to whether it was incumbent upon the learned single Judge to have recorded findings on all issues or could the suit have been dismissed by simply recording findings on one issue.

Order 14 Rule 2 CPC reads as follows:-

*"**14. 2. Court to pronounce judgment on all issues**.---(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.*

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

Order 20 Rule 4(2) and Order 20 Rule 5 reads as under:-

*"**4. (2) Judgment of other Courts**.----Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.*

***5. Court to state its decision on each issue**.---In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the findings upon any one or more of the issue is sufficient for the decision of the suit."*

14. A combined reading of aforesaid provisions would reveal that the mandate of the Code is that the judgement shall contain a concise statement of the case, points for determination, the decision thereon and the reasons for such decision. Further Order 20 Rule 5 CPC re-strengths the requirement contained in Order 20 Rule 4(2) CPC requiring that in suits, in which issues have been framed, the court shall state its finding or decision with the reasons therefore, upon each separate issue, unless the finding upon any one or more of the issue is sufficient for the decision of the suit. Therefore, despite mandate of deciding the issue separately, if the court comes to the conclusion that certain issues need to be decided together, there is no bar to do the same.

15. Undisputedly, in the present case, the issues were primarily both of law as well as facts and there was scope of an appeal from the decision of the learned single Judge. This being the position, it was desirable that the matter ought to have been disposed of on all points and should not have merely rested on consideration of a single point. In taking this view we are supported by the Hon'ble Supreme Court in **M/s Fomento Resorts and Hotels Ltd.** vs. **Gustavo Ranato da Cruz Pinto and others AIR 1985 SC 736** wherein it was held:-

"27. In a matter of this nature where several contentions factual and legal are urged and when there is scope of an, appeal from the decision of the Court, it is desirable as was observed by the Privy Council long time ago to avoid delay and protraction of litigation that the court should, when dealing with any matter dispose of all the points and not merely rest its decision on one single point."

16. A Division Bench of this court while dealing with the provisions of Rule 5 of Order 20 in **Om Prakash and others** vs. **State of Himachal Pradesh and others AIR 2001 HP 18** held as follows:-

> "*12. In the present case, trial Court has framed all the issues and was supposed to give separate findings on each issue, as admittedly the findings upon any one or more of them are not sufficient for the decision of the suit. By simply enumerating the evidence and law and thereafter giving conclusion whereby the case of one party is accepted and the other party is rejected, is no judgment in the eyes of law. In other words, the judgment which does not contain the reasons or grounds on the basis of which the Judge has come to his conclusion/decision for passing a Judgment and decree on the points in issue or controversy, is vitiated. It is all the more necessary, when the judgment is by the Court of fact and is appealable, to avoid unnecessary delay and protracted litigation..."*

17. The provisions of Order 20 CPC came up for consideration before the Hon'ble Supreme Court in **Lakshmi Ram Bhuyan** vs. **Hari Prasad Bhuyan and others (2003) 1 SCC 197,** and it was held that the provisions of Order 20 requires a judgement to contain all the issues and findings or decisions thereon with reasons therefore. It would be apt to reproduce para-10 of the report, which reads as follows:-

> "10. Certain provisions of the Code of Civil Procedure, 1908 may be noticed. Order VII Rule 1 of the CPC requires the plaintiff to give sufficient particulars of the relief, which the plaintiff claims. Order XX requires a judgment to contain all the issues and findings or decision thereon with the reasons therefor. The judgment has to state the relief allowed to a party. The preparation of decree follows the judgment. The decree shall agree with the judgment. The decree shall contain, inter alia, particulars of the claim and shall specify clearly the relief granted or other determination of the suit. The decree shall also state the amount of costs incurred in the suit and by whom or out of what property and in what proportions such costs are to be paid. Rules 9 to 19 of Order XX are illustrative of contents of decrees in certain specified categories of suits. The very obligation cast by the Code that the decree shall agree with the judgment spells out an obligation on the part of the author of the judgment to clearly indicate the relief or reliefs to which a party, in his opinion, has been found entitled to enable decree being framed in such a manner that it agrees with the judgment and specifies clearly the relief granted or other determination of the suit. The operative part of the judgment should be so clear and precise that in the event of an objection being laid, it should not be difficult to find out by a bare reading of the judgment and decree whether the latter agrees with the former and is in conformity therewith. A self-contained decree drawn up in conformity with the judgment would exclude objections and complexities arising at the stage of execution. "

18. A clear distinction has to be drawn between the findings and the reasons, which is apparent from the language of Order 20 Rule 5 CPC, which clearly provides that the court is required to state its findings and record reasons. Therefore, unquestionably the findings and reasons are totally two different aspects. Whereas, the findings would be the conclusions drawn, the reasons are as to why such a conclusion has been arrived at and in absence of reasons recorded by the court and jumping on to findings would be contrary to the express requirement of Order 20 Rule 5 CPC and would clearly vitiate the judgement.

19. The Hon'ble Supreme Court in **Income Tax Officer** vs. **M/s Murlidhar Bhagwan Dass AIR 1965 SC 342,** considered the above aspect and observed as under: -

"9. .....Under this Order, a "finding " is therefore, a decision on an issue framed in a suit. The second part of the rule shows that such a finding shall be one which by its own force or in combination with findings on other issues should lead to the decision of the suit itself. That is to say, the finding shall be one which is necessary for the disposal of the suit. The scope of the meaning of the expression "finding" is considered by a Division Bench of the Allahabad High Court in Pt. Hazari Lal v. Income-tax Officer, Kanpur, 1960 -39 ITR 265 at P. 272: (AIR 1960 All 97 at p. 99). There, the learned Judges pointed out:

> "The word "finding" interpreted in the sense indicated by us above, will only cover material questions which arise in a particular case for decision by the authority hearing the case or the appeal which, being necessary for passing the final order or giving the final decision in the appeal, had been the subject of controversy between the interested parties or on which the parties concerned have been given a hearing."

20. It has to be remembered that while deciding issues, the courts should not adopt a shortcut method of adjudicating upon a claim by resting its decision on one single point. The adjudication is essentially required to be made by way of reasoned judgement of the dispute upon a finding on the facts in controversy and application of law to the facts found which are essential attributes of a judicial trial. In a judicial trial the Judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the court or by law, he must record the ultimate mental process leading from the dispute to its solution. Here it would be apt to reproduce the following passage from the judgement passed by the Hon'ble Supreme Court in **Smt. Swaran Lata Ghosh** vs. **Harendra Kumar Banerjee and another AIR 1969 SC 1167:-**

> **"**6. Trial of a civil dispute in Court is intended to achieve, according to law and the procedure of the Court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on questions of law as well as fact, ascertainment of facts by means of evidence tendered by the parties, and adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial the Judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the Court or by law, he must record the ultimate mental process leading from the dispute to its solution. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge; a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest : it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the Court has decided against him, and more so, when the judgment is subject to appeal. The Appellate Court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just. It is unfortunate that the learned Trial Judge has recorded no reasons in support of his conclusion, and the High Court in appeal merely recorded that they thought that the plaintiff had sufficiently proved the case in the plaint."

21. The mode and manner in which issues have to be answered in terms of Rule 2 of Order 14 has been dealt with in detail by a Full Bench of this court in **Prithvi Raj Jhingta & anr.** vs. **Gopal Singh & anr. AIR 2007 HP 11** in the following manner:-

> *"2. Rule 2 of Order 14 C.P.C. as it presently stands reads as under:*
>
> *2. Court to pronounce judgment on all issues. - (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues.*
>
> *(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-*
>
> *(a) the jurisdiction of the Court, or*
>
> *(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.*
>
> *3. The present structure of Rule 2 was brought about by the Civil Procedure Code (Amendment) Act, 1976. Before its amendment by the aforesaid amending Act of 1976, Rule 2 read as under:*
>
> *Order XIV, Rule 2 - Issues of law and of fact. - Where the issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.*
>
> *4. When one draws a comparison between the earlier Rule 2 and the amended Rule 2, the comparison immediately leads to a conclusion that whereas under the old Rule 2 it was mandatory for a Court to try the issues of law in the first instance and to postpone the settlement of issues of fact until after findings had been arrived at with respect to the issues of law, under the new, amended Rule 2, as has been spelt out and clearly stipulated in Sub-rule (1) thereof, the legislature has mandated that a Court shall pronounce judgment on all issues, both of law as well as facts, notwithstanding that a case may be disposed of only on a preliminary issue. Under the new Rule 2 the only exception is contained in Sub-rule (2) thereof which, in a manner of speaking relaxes the aforesaid legislative mandate to a limited extent by conferring a discretion upon the Court that if it is of the opinion that the case or any part thereof may be disposed of on a issue of law only, it may try that issue first, in the process postponing the settlement of other issues until the issue of law has been determined. This discretion even though conferred by the aforesaid legislative amendment has however been circumscribed and limited, specifically and explicitly only to two situations and these are that the issue or issues of law only upon which the case or any part of the case may be disposed of must relate to either the jurisdiction of the Court or a bar to the suit created by any law for the time being in force. By a combined reading of Sub-rule (1) and Sub-rule (2) of Rule 2 what therefore emerges is that, except in situations covered by Sub-rule (2) a Court must dispose of a suit as a whole, try all issues of law and fact together and accordingly pronounce judgment on all such issues even though the case may be disposed of on a preliminary issue. More importantly, and for the purposes of our case, in the light of the specific reference on the formulated question of law, Rule 2 as it presently stands caters to and creates two sets of situations in a suit. One situation is where, at the stage of framing of issues the Court*

exercises its discretion conferred upon it under Sub-rule (2) and frames, in the first instance issues of law only and passes an order specifically and explicitly proposing to try issues of law only, in the process postponing the settlement of other issues until after it has decided the issue of law only. In this situation, at the stage of determining or deciding the issues of law only the Court may either dispose of the suit based on such determination of the issues of law only, of course these issues of law relating to the jurisdiction of the Court or a bar to the maintenance of the suit created by law for the time being in force, or upon determination of issues of law only the Court may hold that the suit is maintainable and/or that it has jurisdiction also to try the suit and thus, consequently to proceed to settle other issues for trial and determination. Such a situation is contemplated by Sub-rule (2) and there is no manner of doubt that in taking recourse to such a situation the Court has the mandate as well as the sanction from the legislature.

5. The second, other situation which may arise is that the Court does not exercise its discretion, for any reason whatsoever, valid or otherwise, and at the stage of framing of the issues frames all the issues, of law as well as fact and proceeds to decide all such issues together. This course of action is contemplated by an explicit mandate of the legislature in Sub-rule (1). The question which has fallen for our consideration in this reference is that if a suit falls under the second situation where the Court has not exercised its discretion under Sub-rule (2) and it has not only framed all the issues, of law as well as fact and has also tried all such issues together, is it open to the Court, after the conclusion of the trial on all the issues to take up issues of law only and by adopting this principle of severability to proceed to dispose of the suit on the issues of law only, without at the same time according its consideration to other issues.

6. While examining the repercussions of the unamended Rule 2 and the ramifications arising therefrom, the Law Commission of India had opined as under:

> *"This rule has led to one difficulty. Where a case can be disposed of on a preliminary point (issue) of law, often the Courts do not inquire into the merits, with the result that when, on an appeal against the finding on the preliminary issue the decision of the Court on that issue is reversed, the case has to be remanded to the Court of first instance for trial on the other issues. This causes delay. It is considered that this delay should be eliminated, by providing that a Court must give judgment on all issues, excepting, of course, where the Court finds that it has no jurisdiction or where the suit is barred by any law for the time being in force".*

7. The Statement of Objects and Reasons accompanying the amending Act of 1976 whereby Rule 2 was amended read thus:

> *"Clause 67 - Sub-clause (ii). - Rule 2 is being substituted to provide that although a suit can be disposed of on a preliminary issue, the Court shall ordinarily pronounce judgment on all issues; but where any issue relating to the jurisdiction of the Court or a bar created by any law for the time being in force, the Court may postpone settlement of the other issues until the preliminary issue with regard to the jurisdiction of the Court or such bar has been determined and the Court may deal with the suit in accordance with the determination of such preliminary issue".*

8. The legislative mandate is very clear and unambiguous. In the light of the past experience that the old Rule 2 whereby, in the fact situation of the trial Court deciding only preliminary issues and neither trying nor deciding other issues, whenever an appeal against the judgment

was filed before the Appeal Court and the Appeal Court on finding that the decision of the trial Court on preliminary issues deserved to be reversed, the case per force had to be remanded to the trial Court for trial on other issues. This resulted in delay in the disposal of the cases. To eliminate this delay and to ensure the expeditious disposal of the suits, both at the stage of the trial as well as at the appeal stage, the legislature decided to provide for a mechanism whereby, subject to the exception created under Sub-rule (2), all issues, both of law and fact were required to be decided together and the suit had to be disposed of as a whole, of course based upon the findings of the trial Court on all the issues, both of law and fact.

9. Based upon the aforesaid reasons therefore, and in the light of legislative background of Rule 2 and the legislative intent as well as mandate based upon such background, as well as on its plain reading, we have no doubt in our minds that except in situations perceived or warranted under Sub-rule (2) where a Court in fact frames only issues of law in the first instance and postpones settlement of other issues, under Sub-rule (1), clearly and explicitly in situations where the Court has framed all issues together, both of law as well as facts and has also tried all these issues together, it is not open to the Court in such a situation to adopt the principle of severability and proceed to decide issues of law first, without taking up simultaneously other issues for decision. This course of action is not available to a Court because Sub-rule (1) does not permit the Court to adopt any such principle of severability and to dispose of a suit only on preliminary issues, or what can be termed as issues of law. Sub-rule (1) clearly mandates that in a situation contemplated under it, where all the issues have been framed together and have also been taken up for adjudication during the course of the trial, these must be decided together and the judgment in the suit as a whole must be pronounced by the Court covering all the issues framed in the suit."

22. While answering issue No. 1, the learned single Judge concluded that plaintiff had failed to prove that sons of Goru Mall constituted a Joint Hindu Family and carried on joint business and on basis of such findings dismissed the suit without answering the other issues. Now in case the other issues more particularly issue No. 3 is seen, it would be apparent that the same was in no manner connected with issue No.1 and was therefore, required to be answered separately irrespective of the findings recorded while answering issue No. 1. Even otherwise issues not only of fact but even of law, like valuation (issue No.8) and limitation (issue No.9) had been framed and therefore, also it was incumbent that separate findings qua each of the issue should have been recorded.

23. The main object of a judgement after all is to support by the most cogent reasons that suggest themselves, the final conclusion at which the Judge has conscientiously arrived. It is the mandate of Orders 14 and 20 of the Code that the court shall state its finding or decision and reasons thereof upon each separate issue and all the distinct issues have to be answered by findings supported by reasons, unless of course the finding upon one or more of the issue is sufficient for the decision of the suit. Despite this mandate of deciding the issues separately, if the court comes to the conclusion that certain issues need to be decided together, there is no bar to do the same. The impugned judgement does not in any manner confirm or comply with the provisions of either Order 14 or Order 20 CPC.

24. In view of the aforesaid discussion, we are of the considered view that the judgement passed by the learned single Judge does not comply with the mandate of law and the learned single Judge could not have dismissed the suit by deciding only issue No.1 and was required to decide all the issues.

Accordingly, the appeal is allowed and the judgement and decree passed by the learned single Judge are set-aside and the matter is remanded to the learned single Judge to decide the case afresh in accordance with law.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Jarmej Singh son of Shri Rasila Singh and others ....Appellants/Plaintiffs
Versus
Hazauro son of Shri Mangtu ....Respondent/Defendant

RSA No. 117 of 2003
Judgment Reserved on 12th December,2014
Date of Judgment 19th December, 2014

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be the co-owners in possession of the suit land and the defendant to be a stranger- defendant claimed that suit land was allotted to him by Government under H.P. Village Common Land and Utilization Scheme- the copy of revenue record showed that suit land was recorded in ownership of Shamlat Deh Hasab Rasad Malguzari- the name of the defendant was recorded to be in possession of suit land- remarks column showed that ownership was transferred in the name of the Government and that the govt. had allotted the land in favour of the defendant- mutation was attested-Settlement collector reviewed and cancelled it - held, that certificate of allotment of land is a substantial piece of evidence- allotment made by Settlement Collector could not be challenged before the Civil Court but could only be challenged by filing an appeal.

(Para-11 and 12)

Cases referred:

Guru Amarjeet Singh vs. Rattan Chand and others AIR 1994 SC 227
Mohammad Iqbal vs. Government of Indian and others 1996(4) SLJ 2982
Thakur Kishan Singh (dead) vs. Arvind Kumar 1994) 6 SCC 591
P.T. Munichikkanna Reddy and others vs. Revamma and others (2007)6 SCC 59
Gurdwara Sahib vs. Gram Panchayat Village Sirthala and another (2014)1 SCC 669
State of Haryana vs. Mukesh Kumar and others 2011(10) SCC 404
L.N. Aswathama and another vs. P.Prakash (2009) 13 SCC 229
Babu Ram vs. Ganpat Ram and others Latest HLJ 2014 HP 1261

For the Appellants: Mr. Rahul Mahajan, Advocate.
For the Respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present Regular Second Appeal is filed under Section 100 of the Code of Civil Procedure by the appellants against the judgment and decree dated 5.8.2002 passed by learned Additional District Judge–I Kangra at Dharamshala in Civil Appeal No. 23-N/2000 titled Jarmej Singh vs. Hazauro whereby learned

Additional District Judge-I Kangra at Dharamshala had affirmed the judgment and decree passed by learned trial Court i.e. Civil Judge Court No. II Nurpur District Kangra in Civil Suit No. 61 of 1995 titled Jarmet Singh and others vs. Hazauro.

2. Brief facts of the case as pleaded are that Jarmej Singh and other plaintiffs filed a suit for possession of land comprised in Khata No. 85, Khatauni No. 274 min Khasra No. 18, 25 plots 2 measuring 0-34-99 HM situated in Tikka mauja Thapkaur Tehsil Nurpur District Kangra. It is pleaded that plaintiffs are co-sharers along with other co-sharers and defendant is stranger to the suit land. It is further pleaded that defendant is also trespasser of suit land and defendant has no right title or interest over the suit land. It is also pleaded that neither the defendant is tenant over the suit land nor defendant was inducted as tenant over the suit land by the plaintiffs. It is pleaded that plaintiffs have asked the defendant to admit the claim of the plaintiffs but defendant refused to do so. Decree for possession in favour of plaintiffs and against defendant sought

3. Per contra written statement filed on behalf of defendant pleaded therein that suit is not maintainable in present form and suit is bad for non-joinder of necessary parties. It is also pleaded that plaintiffs are estopped by their act and conduct from filing the present suit and plaintiffs have no cause of action to file the present suit. It is further pleaded that plaintiffs have no locus standi to file the present suit and plaintiffs have also not come to Court with clean hands. It is denied that suit land is Shamlat deh and it is also denied that plaintiffs are co-owners over the suit land. Title of plaintiffs over the suit land is also denied. It is pleaded that other co-owners are necessary parties. It is pleaded that suit land has been allotted to the defendant by H.P. Government under the H.P. Village Common Land and Utilization Scheme 1975 and plaintiffs have no right title or interest over the suit land as same was allotted to the defendant. It is pleaded that mutation of suit land was illegally rejected by Settlement Collector. In alternative, defendant also pleaded right of adverse possession over the suit land. It is pleaded that plaintiffs have no cause of action and prayer for dismissal of suit is sought.

4. As per the pleadings of parties learned trial Court framed following issues on dated 9.9.1996:-

1. Whether the plaintiffs are entitled for the possession of the suit land? OPP
2. Whether the suit is not maintainable in the present form? OPD
3. Whether the suit is bad for non-joinder of necessary parties if so who is necessary party? OPD
4. Whether the plaintiffs are estopped by their act and conduct to file this suit? OPD
5. Whether the plaintiffs have no locus standi to file the present suit? OPD
6. Whether the plaintiffs have got no enforceable cause of action against the defendant? OPD
7. Whether the suit land had been allotted to the defendant by the H.P. Government under H.P. Village Common Land Vesting and Utilization Scheme 1975 if so its effect? OPD
8. Whether the defendant in the alternative has become owner of the suit land by way of adverse possession? OPD
9. Relief.

5. Parties examined following oral witnesses in supported of their case:-

Sr. No.	Name of witness
PW1	Dhian Singh Patwari

PW2	Angrez Singh
DW1	Hazauro Singh
DW2	Gian Singh

6. Parties produced following documentary evidence in support of their case:-

Sr. No.	Description
Ext.P1	List of owners of suit property
Ext.P2	Misal Hakiyat for the year 1983-84
Ext.P3	Jamabandi for the year 1978-79
Ext.P4	Jamabandi for the year 1978-79
Ext.D1	Jamabandi for the year 1990-91
Ext.D2	Jamabandi for the year 1983-84
Ext.D3	Jamabandi for the year 1972-73
Ext.D4	Jamabandi for the year 1978-79
Ext.D5	Copy of mutation No. 322
Ext.D6	Copy of allotment certificate of land in favour of defendant by Collector Nurpur District Kangra HP

7. Findings of learned trial Court on issues Nos. 1 to 6 were in negative and learned trial Court held that issue No. 7 became redundant. Learned trial Court decided issue No. 8 in favour of defendant and held that defendant has become owner of suit land by way of right of adverse possession. Learned trial Court dismissed the suit filed by the plaintiffs.

8. Feeling aggrieved against the judgment and decree passed by learned trial Court appellants filed first appeal before learned Ad ditional District Judge Kangra at Dharamshala which was registered as Civil Appeal No. 23-N of 2000 titled Jarmej Singh and others vs. Hazauro. Learned first Appellate Court held that respondent could not be said to have become owner of suit land by way of adverse possession. Learned first Appellate Court despite holding that defendant did not acquire right of adverse possession in para No. 14 of judgment did not set aside findings of issue No. 8 and affirmed the impugned judgment and decree passed by learned trial Court dated 26.11.1999. Learned Additional District Judge-1 Kangra at Dharamshala H.P. dismissed appeal filed by appellants.

9. Thereafter feeling aggrieved by judgments and decrees passed by learned trial Court and affirmed by learned first Appellate Court appellants have filed present Regular Second Appeal No. 117 of 2003 titled Jarmej Singh and others vs. Hazauro. Hon'ble High Court admitted the present appeal on the following substantial question of law on dated 31.3.2003:

> Whether first appellate Court has wrongly read and inferred the oral and documentary evidence on record to come to the conclusion that the plaintiffs-appellants have no locus standi to file their suit in individual capacity as the land in dispute is recorded in the ownership of SHAMLAT DEH HASAB RASAD MALGUZARI?

10. Court heard learned Advocates appearing on behalf of the parties and also perused the entire record carefully.

Oral Evidence adduced by parties

10.1 PW1 Dhian Singh Patwari has stated that he has brought the summoned record. He has stated that he has also brought list of proprietors of suit land Ext.P1. He has stated that he is posted as Patwari since 13 years. He has denied suggestion that he has prepared list of proprietors of suit land contrary to record.

10.2 PW2 Angrej Singh has stated that plaintiffs are owners of suit land and further stated that there are 15 co-sharers of suit land. He has stated that he is also owner of other immovable property in village and he used to pay the land revenue. He has stated that defendant did not own any immovable property in the village. He has stated that possession of defendant is illegal. He has further stated that defendant did not accept the request of plaintiffs to vacate the suit land. He has denied suggestion that defendant is in settled possession since 1975. He has denied suggestion that defendant is owner in possession of suit land. He has denied suggestion that he has no title in suit property.

10.3 DW1 Hazauro has stated that suit land is 10 kanals and 11 marlas and he is in possession since 1975. He has stated that suit land was allotted to him as a landless person. He has stated that possession was also delivered to him. He has stated that plaintiff has no title in suit property. He has denied suggestion that he has no right title or interest in suit property i.e. Shamlat deh land.

10.4 DW2 Gian Chand has stated that parties are known to him and further stated that suit land is 10 kanals and 11 marlas. He has stated that suit land was allotted to defendant in the year 1975 by way of allotment order. He has stated that initially suit land was barren and grassy land. He has stated that plaintiff has no interest in suit property. He has denied suggestion that defendant is in illegal possession of suit property.

Findings upon Substantial Question of law framed by Hon'ble High Court:-

11. Court has also perused documentary evidence placed on record. As per document Ext.P2 suit land comprised in Khata No 85/59 Khatauni No. 274 is in ownership of Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per payment of land revenue). In the possession column name of defendant has been recorded. Old Khasra number has been mentioned as 1 min and new Khasra number have been mentioned as 18 and 25. Area of Khasra No. 18 is mentioned as 0-25-97 Kuhli Awal (Irrigated land) and area of Khasra No. 25 has been shown as 0-09-02 barren land. As per document Ext.P1 which is Fehrist Malkan (List of proprietors of village) 155 persons have been shown as owners of suit land in the capacity of Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per payment of land revenue). As per jamabandi Ext.P3 for the year 1978-79 old khasra number of land has been shown as 1 and area of suit land has been shown as 137 kanals and nature of suit land has been shown as Gair Mumkin Khud (River) and in ownership column name of Shamlat Deh Hasab Rasad land revenue mentioned. As per jamabandi Ext.P4 for the year 1978-79 in the ownership column Shamlat Deh Hasab Rasad Malguzari mentioned and area shown as 137 Kanals. Nature mentioned as river. In jamabandi Ext.D3 jamabandi for the year 1972-73 old Khasra number of suit land mentioned as 1 and area mentioned as 137 Kanals. Nature mentioned as river. In the remarks column it has been specifically mentioned that on dated 4.11.1973 ownership of land was transferred from Gram Panchayat Deh to Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per payment of land revenue). There is further recital in remarks column that vide mutation No.

316 ownership of land was transferred in the name of H.P. Government and mutation was sanctioned on dated 9.6.1978. There is further recital in remarks column that thereafter mutation was reviewed and ownership of suit land was again recorded in the name of Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per payment of land revenue) and mutation of suit land in the name of H.P. Government was cancelled. There is further recital in remarks column that vide mutation No. 322 suit land measuring 10 Kanals and 12 marlas was allotted in favour of defendant and mutation was sanctioned on dated 27.3.1981. There is further recital in remarks column that thereafter mutation of suit land in favour of defendant was also reviewed by Settlement Collector and mutation in favour of defendant was cancelled.

12. It is proved on record that vide document Ext.D6 land measuring 10 Kanals 12 Marlas of land was allotted to defendant in Khasra No. 1/3 in mauja Thapkaur Tehsil Nurpur District Kanga. It is proved on record that old Khasra number of suit land was 1 and entire area of Khasra No. 1 was 137 Kanals. It is also proved on record that out of total land i.e. 137 Kanals land measuring 10 Kanals and 12 Marlas was allotted to the defendant and Khasra No. 1/3 was mentioned. It is also proved on record that Khasra No. 1/3 is a part of old Khasra No. 1 and suit land i.e. Khasra Nos. 18 and 25 are also part of old Khasra No.1 and thereafter min numbers were allotted to the suit land and old Khasra number was mentioned as 1 min and new Khasra Number has been shown as Khasra Nos. 18 and 25. Plaintiffs and defendant did not place on record Tatima (Field map) to show the location of land measuring 10 Kanals and 12 Marlas which was allotted to defendant by way of allotment measuring 10 Kanals 12 Marlas. It is well settled law that immovable property is located only through Khata Khatauni number, Khasra number and Tatima (Field map). It is well settled law that mutation did not confer or extinguish any title in suit property. It was held in case reported in ***AIR 1994 SC 227 titled Guru Amarjeet Singh vs. Rattan Chand and others*** that mutation does not confer or extinguish any title in immovable property. ***(Also see 1996(4) SLJ 2982 titled Mohammad Iqbal vs. Government of Indian and others)*** It is proved on record that 10 Kanals 12 Malras of land was allotted to the defendant from Khasra No. 1/3 situated in mauja Thapkaur Tehsil Nurpur District Kangra by the Collector Nurpur. Certificate of allotment of land to defendant who is landless person is substantive piece of evidence. There is no documentary evidence on record in order to prove that Collector has reviewed the allotment order in favour of defendant qua 10 Kanals 12 Marlas of land. Even as per Section 10 of H.P. Village Common Lands Vesting and Utilization Act 1974 order of allotment by the Collector could not be challenged before the Civil Court but could be challenged by way of appeal as mentioned in Section 9 of H.P. Village Common Lands Vesting and Utilization Act 1974.

13. Submission of learned Advocate appearing on behalf of appellants that learned trial Court had granted right of adverse possession to defendant in issue No. 8 over the suit property and learned first Appellate Court has held in positive manner in para 14 of judgment announced in Civil Appeal No. 23-N/2000 titled Jarmej Singh and others vs. Hazauro that defendant could not be said to have become owner of suit land by way of adverse possession due to non-impleadment of other co-owners and right of adverse possession could not be granted to the defendant in the suit property but despite above stated findings learned first Appellate Court affirmed entire judgment and decree of learned trial Court in toto contrary to its own findings is accepted for the reasons hereinafter mentioned. It is proved on record that right of adverse possession could not be granted in favour of defendant unless all co-owners of immovable property are not impleaded as co-party in civil suit. In present case it is proved on record as per document Ext.P1 that there are more than 150 owners of suit property because nature of suit land is shown as Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per

payment of land revenue) and it is well settled law that right of adverse possession could not be granted to the defendant unless all other co-owners of suit property are not impleaded as co-party in Shamlat Deh Hasab Rasad Malgujari land. It was held in case reported in ***1994)6 SCC 591 titled Thakur Kishan Singh (dead) vs. Arvind Kumar*** that long possession does not prove adverse possession and it was further held that even permissive possession could not be adverse. ***(See: (2007)6 SCC 59 titled P.T. Munichikkanna Reddy and others vs. Revamma and others (2014)1 SCC 669 titled Gurdwara Sahib vs. Gram Panchayat Village Sirthala and another).*** It was held in case reported in ***2011(10) SCC 404 State of Haryana vs. Mukesh Kumar and others*** that person claiming adverse possession has no equities in his favour. ***(See: (2009) 13 SCC 229 titled L.N. Aswathama and another vs. P.Prakash, Latest HLJ 2014 HP 1261 titled Babu Ram vs. Ganpat Ram and others.)*** Therefore it is held that learned first Appellate Court was under legal obligation to set aside the findings of adverse possession which were granted by learned trial Court in favour of the defendant. In para 14 of judgment learned first Appellate Court itself held that no right of adverse possession accrued in favour of defendant over the suit property. But despite holding by learned first Appellate Court that no right of adverse possession accrued in favour of the defendant over suit property learned first Appellate Court affirmed the entire judgment and decree passed by learned trial Court in toto wherein learned trial Court had granted right of adverse possession to defendant over suit land. It is held that judgment and decree of learned first Appellate Court are itself prima facie contradictory in nature keeping in view the findings in para Nos. 14 and 15 of judgment. It is well settled law that contradictory findings of same Court should not be allowed to sustain as per law. Even it is proved on record that present suit has been filed by plaintiffs in the individual capacity qua suit property owned by other co-sharers of village. Plaintiffs have themselves pleaded in para No. 1 of plaint that present suit is filed for benefit of all co-sharers. Plaintiffs did not seek the leave of Court to file the present suit in representative capacity as required under Order 1 Rule 8 of Code of Civil Procedure 1908. Suit property is in ownership of Shamlat Deh Hasab Rasad Malguzari (All owners of village are proprietors of suit land as per payment of land revenue). In view of above stated facts it is held that plaintiffs were under legal obligation to obtain leave of Court under Order 1 Rule 8 of CPC for institution of suit. Suit property is owned by public at large who are residents of village and who use to pay the land revenue. Court has carefully perused the entire order sheets of learned trial Court and it is proved on record that plaintiffs did not seek leave of Court as required under Order 1 Rule 8 of Code of Civil Procedure 1908. As per Order 1 Rule 8 of CPC whenever any civil suit is filed for the benefit of other co-owners then prior permission of Court is essential to file the suit in representative capacity. Hence it is held that no relief could be granted in favour of plaintiffs in view of provision of Order 1 Rule 8 of CPC. Even it is proved on record that present suit has been filed by plaintiffs in personal capacity but personal names of plaintiffs did not record in ownership column of suit property. On the contrary in the ownership column it is recorded that suit land is owned by all proprietors of village who use to pay land revenue i.e. Shamlat Deh Hasab Rasad Malgujari. Jamabandis entries have been prepared by public official in discharge of their official duties and are relevant facts under Section 35 of Indian Evidence Act 1872. In view of above stated facts substantial question of law framed by Hon'ble High Court is decided accordingly.

14. In view of above findings appeal is partly allowed. Findings of learned trial Court qua issue No. 8 relating to findings of title of adverse possession in favour of defendant over suit land and affirmation of findings of learned first Appellate Court qua issue No. 8 relating to right of adverse possession in favour of defendant are set aside and it is held that defendant did not acquire any right of adverse possession over suit property. Issue No. 8 framed by learned trial Court is decided against defendant. Other findings of

learned trial Court upon other issues No. 1 to 6 are affirmed. Issue No. 7 is decided in favour of defendant. It is held that land measuring 10 Kanals 12 Marlas situated in village Thapkaur Mauja Thapkaur Tehsil Nurpur District Kangra (HP) comprised in Khasra No. 1/3 allotted to defendant as per H.P. Village Common Lands Vesting and Utilization Scheme 1975. Certificate of allotment Ext.D6 placed on record will form part and parcel of decree sheet. Judgment and decree passed by learned trial Court and judgment and decree passed by learned first Appellate Court are modified to this extent only. Parties are left to bear their own costs. Decree sheet be prepared as mentioned under Section 100 of CPC forthwith. File of learned trial Court and learned first Appellate Court along with certified copy of this judgment and decree passed under Section 100 CPC 1908 be transmitted forthwith. Pending applications if any also disposed of. Appeal stands disposed of.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Jarmej Singh S/o Rasila Singh and others. ....Appellants/Plaintiffs

Versus

Raghubir Singh S/o Mangtu ....Respondent/Defendant

RSA No. 118 of 2003
Judgment Reserved on 12th December,2014
Date of Judgment 19th December, 2014

Specific Relief Act, 1963- Section 34- Plaintiffs claimed to be the co-owners in possession of the suit land and the defendant to be a stranger- defendant claimed that suit land was allotted to him by Government under H.P. Village Common Land and Utilization Scheme- the copy of revenue record showed that suit land was recorded in ownership of Shamlat Deh Hasab Rasad Malguzari- the name of the defendant was recorded to be in possession of suit land- remarks column showed that ownership was transferred in the name of the Government and that the govt. had allotted the land in favour of the defendant- mutation was attested-Settlement collector reviewed and cancelled it - held, that certificate of allotment of land is a substantial piece of evidence- allotment made by Settlement Collector could not be challenged before the Civil Court but could only be challenged by filing an appeal.

(Para-11 and 12)

Cases referred:

Guru Amarjeet Singh vs. Rattan Chand and others AIR 1994 SC 227
Mohammad Iqbal vs. Government of India and others 1996(4) SLJ 2982

For the Appellant: Mr. Rahul Mahajan, Advocate.
For the Respondents: Mr. Ajay Sharma, 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 appellants against the judgment and decree dated 5.8.2002 passed by learned Additional District Judge–I Kangra at Dharamshala in Civil Appeal No. 24-N/2000 titled Jarmej Singh vs. Raghubir Singh whereby

learned Additional District Judge Kangra at Dharamshala had affirmed the judgment and decree passed by learned trial Court i.e. Civil Judge Court No. II Nurpur District Kangra in Civil Suit No. 67 of 1995 titled Jarmej Singh and others vs. Raghubir Singh.

2. Brief facts of the case as pleaded are that Jarmej Singh and others plaintiffs filed suit for possession of suit land comprised in Khata No. 85 Khatauni No. 271 min Khasra No. 19, 20 and 27 measuring 0-31-42 situated in Tikka mauja Thapkaur Tehsil Nurpur District Kangra H.P. It is pleaded that suit land is Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) and plaintiffs are co-sharers along with other co-sharers. It is pleaded that present suit has been filed for the benefit of other co-sharers also. It is pleaded that defendant was not inducted as tenant over the suit land at any point of time and defendant has also not any immovable property in the village. It is pleaded that defendant is trespasser over the suit land and plaintiffs have asked the defendant to vacate the suit land but defendant did not vacate the suit land despite request. Prayer for decree of possession as mentioned in relief clause of plaint is sought.

3. Per contra written statement filed on behalf of defendant pleaded therein that suit is not maintainable in present form and suit is bad for non-joinder of necessary parties and further pleaded that plaintiffs are estopped by their act and conduct from filing the present suit. It is also pleaded that plaintiffs have no locus standi to file the present suit and plaintiffs have also no cause of action against the defendant and plaintiffs have not come to Court with clean hands. It is denied that plaintiffs have any title over the suit property. It is pleaded that suit land was allotted to defendant under the H.P. Village Common Land and Utilization Scheme and allotment certificate has been issued by the Collector in favour of the defendant. It is pleaded that possession of suit land was also delivered to the defendant and in alternative defendant has become owner of suit land by way of right of adverse possession. It is pleaded that plaintiffs have no cause of action to file the suit. Prayer for dismissal of suit sought.

4. As per the pleadings of parties learned trial Court framed following issues on dated 12.6.1996:-

1. Whether the plaintiffs are entitled to recover possession over the suit land? OPP
2. Whether the suit is not maintainable? OPD
3. Whether the suit is bad for non-joinder of necessary parties? OPD
4. Whether the plaintiffs are estopped by their act and conduct to file the present suit? OPD
5. Whether the plaintiffs have no locus standi to file the present suit? OPD
6. Whether the plaintiffs have got no cause of action to file the present suit? OPD
7. Whether the plaintiffs have not come to the Court with clean hands if so its effect?OPD
8. Whether the suit land has been allotted by the H.P. Government to the defendant as alleged if so its effect? OPD
9. Relief.

5. Findings of learned trial Court on issues Nos. 1 to 6 were in negative and against the plaintiffs and learned trial Court decided issue Nos. 7 and 8 in favour of the defendant and dismissed the suit filed by plaintiffs.

6. Feeling aggrieved against the judgment and decree passed by learned trial Court appellants have filed appeal before learned Additional District Judge Kangra at Dharamshala and vide Civil Appeal No. 24-N of 2000 titled Jarmej Singh and others vs. Raghubir Singh learned first Appellate Court held

that suit has not been filed in representative capacity in view of the fact that suit land is Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) and thereafter learned first Appellate Court affirmed the judgment and decree passed by learned trial Court.

7. Thereafter feeling aggrieved against the judgments and decrees passed by learned trial Court and affirmed by learned first Appellate Court appellants filed present Regular Second Appeal No. 118 of 2003 titled Jarmej Singh and others vs. Raghubir Singh. Hon'ble High Court admitted the appeal on dated 31.3.2003 on the following substantial question of law:-

> Whether first appellate Court has wrongly read and inferred the oral and documentary evidence on record to come to the conclusion that the plaintiffs-appellants have no locus standi to file their suit in individual capacity as the land in dispute is recorded in the ownership of SHAMLAT DEH HASAB RASAD MALGUZARI?

8. Parties examined following oral witnesses in supported of their case:-

Sr. No.	Name of witness
PW1	Jarmej Singh
PW2	Dhian Singh
DW1	Raghubir Singh
DW2	Puran Chand

8.1. Parties produced following documentary evidence in support of their case:-

Sr. No.	Description
Ext.P1	List of co-sharers.
Ext.P2	Misal Hakiyat for the year 1983-84
Ext.P3	Jamabandi for the year 1990-91
Ext.P4	Jamabandi for the year 1978-79
Ext.P5	Jamabandi for the year 1978-79
Ext.D1	Jamabandi for the year 1972-73
Ext.D2	Certificate of allotment given by Collector
Ext.DA	Copy of Mutation No. 323.

9. Court heard learned Advocates appearing on behalf of the parties and also perused the entire record carefully.

Evidence adduced by parties

9.1 PW1 Jarmej Singh has stated that suit land is Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue). He has stated that plaintiffs have also other immovable land which is owned by plaintiffs and plaintiffs used to pay land revenue. He has stated that defendant has encroached upon the suit land in the year 1983. He has stated that defendant has no share in the suit property and defendant did not pay any land revenue in village. He has stated that State did not become

owner of suit property at any point of time. He has stated that no allotment of land was granted in favour of defendant by the Collector. He has further stated that plaintiffs requested the defendant to vacate the suit land but defendant did not vacate the suit property. He has stated that defendant has no interest in suit property. He has stated that there are more than 150 persons who are owners of suit property. He has stated that initially suit land was owned by Panchayat. He has stated that he does not know that thereafter ownership of suit land vested in H.P. Government. He has denied suggestion that suit land was allotted in favour of defendant in the year 1980. He had admitted that defendant is in settled possession of suit land since the time of settlement.

9.2 PW2 Dhian Singh Patwari has stated that he has brought the summoned record. He has stated that nature of suit land is Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue). He has stated that list of proprietors of suit land is Ext.P1 which is correct as per revenue record.

9.3 DW1 Raghubir Singh has stated that suit land is in his settled possession and he is owner of suit property since 1975. He has stated that suit land was allotted by H.P. Government in the year 1975. He has stated that possession was given by Halqua Patwari and Field Kanungo to the defendant. He has stated that he is owner of suit property and further stated that plaintiffs have no right title or interest in suit property. He has denied suggestion that he is encroacher over the suit property. He has denied suggestion that he has no right title or interest in suit property.

9.4 DW2 Puran Chand has stated that parties are known to him and he has seen the suit property. He has stated that defendant is in possession of suit property for the last more than 25 years. He has stated that suit land was allotted to defendant by H.P. Government. He has stated that possession was delivered to the defendant by Halqua Patwari and Field Kanungo. He has stated that plaintiffs have no title in suit property. He has denied suggestion that defendant is trespasser of suit land.

Findings upon Substantial Question of law framed by Hon'ble High Court:-

10. As per document Ext.P1 fehrist Malkan (List of owners), more than 150 persons have been shown as owners of suit property. As per document Ext.P2 Misal Hakiyat Bandobast (Settlement) prepared for the year 1983-84 in the ownership column of suit property name of Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) has been shown. In possession column name of defendant is recorded and old khasra number is recorded as 1 min and new Khasra Nos. recorded as 19, 20 and 27 and nature of land has been shown as Kuhli Awal (Irrigated land) and barren land. Entries of jamabandi for the year 1990-91 Ext.P3 are the same as recorded in jamabandi for the year 1983-84. As per jamabandi Ext.P4 for the year 1978-79 suit land has been recorded in the ownership of Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) and Khasra number has been shown as 1 and area has been shown as 137 Kanals and nature of suit land has been shown as Gair Mumkin Khud (River). In the remarks column it has been shown that land measuring 10 Kanals 10 marlas situated in Khasra No. 1/4 has been allotted to Raghubir Singh and mutation was sanctioned on dated 10.7.1980. As per further remarks column mutation in favour of Raghubir Singh was reviewed and cancelled. As per jamabandi Ext.P5 placed on record for the year 1978-79 in the ownership column suit land has been shown as Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) and area of suit land is shown as 137 Kanals and nature of suit land has been shown as Gair Mumkin Khud (River) and khasra of suit land has been shown as 1. In the remarks column it has been mentioned that land measuring 10 Kanals 10 marlas was allotted in favour of defendant Raghubir Singh and mutation was

sanctioned on dated 10.7.1980. There is further recital in remarks column that mutation stood reviewed on dated 21.9.1984. As per jamabandi for the year 1972-73 suit land has been shown in ownership of Gram Panchayat Deh and Khasra number has been mentioned as 1 and total area of suit land has been mentioned as 137 Kanals and nature of suit land is shown as Gair Mumkin Khud (River). In the remarks column it has been mentioned that ownership of Gram Panchayat deleted and ownership of Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue) was recorded on dated 4.11.1973. There is further recital in remarks column that vide mutation No. 316 suit land vested in H.P. Government and mutation was sanctioned. There is further recital that mutation in the name of H.P. Government was reviewed and cancelled. There is further recital in remarks column of the jamabandi for the year 1972-73 that 10 Kanals 10 marlas of suit land comprised in Khasra No. 1/4 was allotted in favour of Raghubir Singh and mutation was sanctioned on dated 10.7.1980. There is further recital in remarks column that mutation in favour of defendant was reviewed on dated 21.9.1984 and as per document Ext.D2 land comprised in Khasra No. 1/4 measuring 10 Kanals 10 Marlas was allotted in favour of defendant Raghubir Singh by Collector under H.P. Village Common Lands Vesting and Utilization Schemes 1975.

11. In present case it is proved on record that suit land was comprised in Khasra No. 1 measuring 137Kanals and it is also proved on record that land measuring 10 Kanals 10 Marlas was allotted in favour of defendant comprised in Khasra No. 1/4 situated in Tika Thapkaur Mauza Thapkaur Tehsil Nurpur District Kangra (H.P.) under H.P. Village Common Lands Vesting and Utilization Scheme 1975. There is no documentary evidence on record in order to prove that certificate of allotment of land in favour of defendant was cancelled by Collector. It is well settled law that title passed in favour of defendant after issuance of allotment certificate by the Collector qua 10 Kanals 10 marlas of land situated in Khasra No. 1/4 situated in Tika Thapkaur mauza Thapkaur Tehsil Nurpur District Kangra. As per Section 10 of H.P. Village Common Land Vesting and Utilization Act 1974 order passed by Collector could not be challenged before the Civil Court and same could be challenged only under Section 9 before the State Government or before the Officer authorized by the State Government by notification within 60 days from the passing of order. There is no evidence on record that certificate of allotment granted by the Collector in favour of defendant has been set aside by any competent authority of law in appeal as mentioned in Section 9 of H.P. Village Common Lands Vesting and Utilisation Act 1974. It is held that simple review of mutation in favour of defendant did not extinguish the title of defendant granted to the defendant by way of allotment under H.P. Village Common Lands Vesting and Utilization Act 1974 because it is well settled law that mutation did not confer or extinguish any title. It was held in case reported in ***AIR 1994 SC 227 titled Guru Amarjeet Singh vs. Rattan Chand and others*** that mutation does not confer or extinguish any title. ***(Also see 1996(4) SLJ 2982 titled Mohammad Iqbal vs. Government of India and others)*** It is proved on record that suit land is in ownership of general public who are residents of village Tikka Thapkaur as per land revenue paid by them and all villagers have proprietary rights on suit property as per share of land revenue paid by them. In present case plaintiffs have not filed the suit in representative capacity. It is proved on record that plaintiffs have filed the suit regarding the suit property owned by general public residing in village. It is well settled law that suit relating to immovable property which is owned by general public residing in the village could be filed in representative capacity only with leave of Court under Order 1 Rule 8 of Code of Civil Procedure 1908. Plaintiff did not seek the leave of Court in present case. In present case suit property is not shown to have been exclusively owned by plaintiffs but by documentary evidence placed on record it is proved that suit property is owned by general public who is residing in the

village and share of general public is as per payment of land revenue. Exclusive names of plaintiffs did not figure in the ownership column of suit property. On the contrary there is recital in record of rights prepared under H.P. Land Revenue Act that suit property is owned by general public residing in the village as per payment of land revenue. The plaintiffs themselves pleaded in the plaint that they have filed the present suit for the benefit of other co-owners also. As per Order 1 Rule 8 of CPC whenever any civil suit is filed for the benefit of other co-owners also then prior permission of Court is essential to file the suit in representative capacity. In present case plaintiff did not seek any permission to file any suit in representative capacity for the benefit of other co-owners. Hence it is held that no relief could be granted in favour of plaintiffs in view of provision of Order 1 Rule 8 of CPC. Even it is proved on record that present suit has been filed by plaintiffs in personal capacity but personal names of plaintiffs did not record in ownership column of suit property. On the contrary in the ownership column it is recorded that suit land is owned by all proprietors of village who use to pay land revenue i.e. Shamlat Deh Hasab Rasad Malguzari.

12. In present case there is recital in plaint that present suit has been filed for the benefit of other co-owners also. As per record of right placed on record prepared by public servant in discharge of official duty suit land is owned by Shamlat Deh Hasab Rajad Malguzari (All proprietors of village have shares as per payment of land revenue). There is no evidence on record that suit land has been partitioned in accordance with law. Individual name of plaintiff is also not recorded in ownership column of suit land prepared under H.P. Land Revenue Act and share of plaintiff is also not defined till date. In view of certificate given by Collector Nurpur qua allotment of land in favour of defendant qua 10 Kanals 10 Marlas of land comprised in Khasra No. 1/4 situated in Tika Thapkaur Tehsil Nurpur District Kangra it is not expedient in the ends of justice to grant relief to plaintiffs as sought in relief clause of plaint. Allotment certificate given by Collector Ext.D2 will form part and parcel of decree sheet. Substantial question of law framed by Hon'ble High Court is answered in negative against the appellants.

13. In view of above findings RSA No. 118 of 2003 filed by appellants is dismissed. Judgments and decrees passed by learned Courts below are affirmed. Parties are left to bear their own costs. Decree sheet as mentioned under Section 100 of CPC be prepared forthwith. File of learned trial Court and first Appellate Court along with certified copy of judgment and decree be transmitted forthwith. Pending applications if any also disposed of. Appeal stands disposed of.

****

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

Joginder Singh @ Pamma ..... Appellant.

Versus

Vikram @ Vicky and others ....Respondents

FAO (MVA) No.108 of 2007
Judgment reserved on 5.12.2014
Date of decision: 19 .12.2014.

Motor Vehicle Act, 1988- Section 149- Tribunal had held that driver did not have a valid driving licence - Driver had a valid driving licence to drive light motor vehicle- he was driving a Canter at the time of accident- unladen weight of Canter is less than 4000 kg and gross weight of the same is 10005 kg- held, that canter falls

within the definition of "Light Motor Vehicle" as given in Sections 2 (21) and 2 (28) of the Motor Vehicles Act —licence was valid and the Tribunal had fallen in error in holding that driver did not possess a valid driving licence. (Para-15 to 19)

Cases referred:

Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd. AIR 1999 SC 3181

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

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant:	Mr. C.N. Singh, Advocate.
For the respondents:	Nemo for respondents No. 1 and 2. Mr. Rajinder Dogra, Advocate, for respondent No.3. Mr. B.M. Chauhan, Advocate, for respondent No.4. Mr. Ashwani K. Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this appeal, the appellant/ owner-cum-driver of Canter No. PB-10-Z-8353, has thrown challenge to the judgment and award dated 21.07.2003, made by the Motor Accident Claims Tribunal Solan, for short "the Tribunal", in MAC Petition No. 83-S/2 of 2002, titled *Shri Vikram alias Vicky versus Shri Joginder Singh alias Pamma and others*, whereby compensation to the tune of Rs.2,12,000/- along with interest @ 9 % per annum, came to be awarded in favour of the claimant. Respondent No.1- owner-cum driver and insurer/New India Assurance Company-respondent No. 4 have been saddled with the liability jointly and severally to the extent of 60% with right of recovery from respondent No.1-appellant herein, hereinafter referred to as "the impugned award.", for short, on the grounds taken in the memo of appeal.

2. It is necessary to give a brief resume of the relevant facts, the womb of which has given birth to the instant appeal.

3. Claimant Vikram *alias* Vicky, being the victim of a vehicular accident, had filed claim petition before the Motor Accidents Claims Tribunal, Solan for the grant of compensation to the tune of Rs.6,50,000/- , as per the break-ups given in the claim petition. It is averred in the claim petition that he was working as cleaner in truck (Canter) No. HR-69-0113, owned by respondent No. 2, which was being driven by respondent No. 3 Naresh Kumar and insured with respondent No. 5-United India Insurance Company, was travelling in the said vehicle as such, on 23.6.2002 from Gamberpul to Delhi, in which vegetables and tomato boxes were loaded. When the said vehicle reached near Bastara crossing on G.T. Road at Madhuban, another vehicle bearing registration No. PB-10Z-8353, which was ahead of them, being driven by Joginder Singh, appellant herein, in a high speed, without giving signal, applied emergency brakes and in that process, the said Canter hit vehicle bearing registration No. HR-69-0113 and claimant sustained injuries resulting in amputation of his left arm and rendered him permanent disabled. He was taken

to Arpana Hospital, Madhuban and remained under treatment there till 2.7.2000.

4. Respondents, except respondent No. 2 Mr. Munna Khan, who did not put in appearance before the Tribunal and was proceeded against ex parte, resisted and contested the claim petition by filing separate replies.

5. The Tribunal, on the pleadings of the parties framed the following issues:

(i) *Whether petitioner has sustained the injuries on account of rash and negligent driving by driver as alleged, if so, its effect? ……. OPP*

(ii) Whether the petitioner is entitled for compensation, if so, how much and from whom? …..OPP

(iii) Whether respondent No. 1 was not having valid and effective DL, if so, its effect? …..OPR-4.

(iv) Whether vehicle No. PB-10-Z-8353 was being driven in contravention of terms and conditions of policy? ….OPR-4.

(v) Whether there is misjoinder of respondents No. 3 and 5 as alleged? ….OPR-5.

(vi) Whether respondent No. 3 was not having valid and effective DL as alleged? …..OPR-5.

(vii) Relief.

6. Parties led evidence and also produced documents.

7. The Tribunal, after hearing the learned counsel for the parties and scanning the evidence on record, held that both the drivers of the offending vehicles had failed to take due care and caution and had driven the vehicle rashly and negligently and caused the accident in which claimant sustained injuries and rendered him permanent disabled.

8. Only Joginder Singh driver-cum- owner of offending vehicle bearing registration No.PB-10Z-8353 has questioned the impugned award. The owner, driver and the insurer of vehicle No.HR-69-0113, have not questioned the impugned award on any ground thus, it has attained finality so far as it relates to them.

9. Before I deal with Issues No. 2 and 3, I deem it proper to deal with Issues No. 4 to 6.

10. Respondent No. 4, i.e., New India Assurance Company had to discharge the onus on this issue, has failed to do so. Thus, the findings returned on issue No. 4 are upheld.

11. The onus to discharge issues No. 5 and 6 was on respondent No. 5- United India Insurance Company, has also failed to discharge the same. Thus, the findings returned on these issues are upheld.

12. The Tribunal, while determining Issues No. 2 and 3 held that the claimant is entitled to compensation to the tune of Rs.2,12,000/- and saddled respondent No. 1, i.e., appellant herein and respondent No.4-New India Assurance Company liable to the extent of 60% and owner, driver of offending vehicle bearing registration No.HR-69-0113 and respondent No.5-United India Insurance Company, to the extent of 40%.

13. The only question to be determined is whether the Tribunal has rightly held the insurer-New India Assurance Company entitled to right of recovery? 14. The Tribunal, while determining Issue No. 3 held that

owner–cum-driver, i.e., appellant herein was not having a valid and effective driving licence. Admittedly, he was having license to drive light motor vehicle. Copy of driving licence stands exhibited as Ext. RA on the record, which is valid and driver was competent to drive light motor vehicle.

15. Canter's unladen weight is less than 4000kg and gross weight is 10005kg, thus, falls within the definition of "Light Motor Vehicle" as given in Sections 2 (21) and 2 (28) of the Motor Vehicles Act, for short "the Act".

16. This issue was raised before the Supreme Court in case titled ***Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd.*** reported in ***AIR 1999 SC 3181***. It is apt to reproduce paras 10, 11 and 14 of the said judgment herein:

> *"10. Definition of "light motor vehicle" as given in clause (21) of Section 2 of the Act can apply only to a "light goods vehicle" or a "light transport vehicle". A "light motor vehicle" otherwise has to be covered by the definition of "motor vehicle" or "vehicle" as given in clause (28) of Section 2 of the Act. A light motor vehicle cannot always mean a light goods carriage. Light motor vehicle can be non-transport vehicle as well.*
>
> *11. To reiterate, since a vehicle cannot be used as transport vehicle on a public road unless there is a permit issued by the Regional Transport Authority for that purpose, and since in the instant case there is neither a pleading to that effect by any party nor is there any permit on record, the vehicle in question, would remain a light motor vehicle. The respondent also does not say that any permit was granted to the appellant for plying the vehicle as a transport vehicle under Section 66 of the Act. Moreover, on the date of accident, the vehicle was not carrying any goods, and thought it could be said to have been designed to be used as a transport vehicle or goods carrier, it cannot be so held on account of the statutory prohibition contained in Section 66 of the Act.*
>
> *12-13 ....*
>
> *14. Now the vehicle in the present case weighed 5,920 kilograms and the driver had the driving licence to drive a light motor vehicle. It is not that, therefore, that insurance policy covered a transport vehicle which meant a goods carriage. The whole case of the insurer has been built on a wrong premise. It is itself the case of the insurer that in the case of a light motor vehicle which is a non-transport vehicle, there was no statutory requirement to have specific authorisation on the licence of the driver under Form 6 under the Rules. It had, therefore, to be held that Jadhav was holding effective valid licence on the date of accident to drive light motor vehicle bearing Registration No. KA-28-567."*

17. This Court in **FAO No. 54 of 2012** titled ***Mahesh Kumar and another*** vs**. *Smt. Piaro Devi and others*** decided on 25th July, 2014, held that such type of vehicle is LMV. It is apt to reproduce paras 10,11,14,16,18 and 19 of the said judgment herein:

> *"10.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."

11. 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.

12-13. ....

14. 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.

15.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."

15- …. ….. …..

16. 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.

17. ….. ……. …….. …….

18. 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'."

19. 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."

18. Applying the ratio, the vehicle in question falls within the definition of "Light Motor Vehicle" while keeping in view the "unladen weight", "gross weight" and type of vehicle, given in the Registration Certificate and other documents.

19. Same principles of law have been laid down in FAOs No. 385 of 2007 & 388 of 2007 decided on 14.11.2014, FAOs No. 33 & 55 of 2010, decided on 17.10.2014 and FAO No. 293 of 2006 decided on 4.4.2014.

20. Having said so, the Tribunal has fallen in error in holding that driver was not having a valid and effective driving licence. Accordingly, findings returned on issue No. 3 are set aside and it is held that the driver was having a valid and effective driving lilcence.

21. It was for the insurer to plead and prove that the owner has committed any willful breach which he failed to do so. The owner has not committed any willful breach. The insurer is to be saddled with the liability.

22. The Apex Court in a case titled **National Insurance Co. Ltd.** *versus* **Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** has also laid down principles, how the insurer can 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."*

23. 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,** hereinbelow:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

24. Thus, the Tribunal has fallen in error in saddling the owner with the liability and granting right of recovery to the insurer. Accordingly, findings to the extent impugned in this appeal, are set aside.

25. As a corollary, the appeal is allowed and the impugned award is modified by providing that the insurer-New India Assurance Company is saddled with the liability to the extent of 60% without right of recovery.

26. The appeal stands accordingly, disposed of alongwith pending applications, if any. Send down the records forthwith.

****

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

FAO No. 347 of 2007
a/w FAO No. 407 of 2007
Reserved on: 05.12.2014
Decided on: 19.12.2014

FAO No. 347 of 2007

Kesari Devi ...Appellant.

Versus

Anil Kumar Mastana & others ...Respondents.

.....

FAO No. 407 of 2007

Rajesh Kumar ...Appellant.

Versus

Kesari Devi & others ...Respondents.

Motor Vehicle Act, 1988- Section 149- Owner claimed that he had engaged one 'R' as driver and 'A' on his own had started vehicle and had caused accident- A did not have a valid driving licence at the time of accident- held, that if 'R' was engaged as driver it was not explained as to how 'A' could have opened the door of the vehicle and could have started the same- no police report was filed before the Tribunal- held, that in these circumstances, Tribunal had rightly held owner to be liable.

(Para-16 to 18)

FAO No. 347 of 2007

For the appellant: Mr. Suneet Goel, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Vinod Thakur, Advocate, for respondent No. 2.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

.....

FAO No. 407 of 2007

For the appellant: Mr. Vinod Thakur, Advocate.
For the respondents: Mr. Suneet Goel, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Both these appeals are outcome of award, dated 14th June, 2007, made by the Motor Accident Claims Tribunal, Hamirpur, H.P. (hereinafter referred to as "the Tribunal) in MAC Petition No. 81 of 2006, titled as Kesari Devi versus Anil Kumar @ Mastana and others, whereby compensation to the tune of Rs. 1,50,000/- with interest @ 9% per annum from the date of petition till its realization came to be awarded in favour of the claimant-injured and the owner-insured and driver-Anil Kumar came to be saddled with liability jointly and severally (hereinafter referred to as "the impugned award"). Therefore, I deem it proper to dispose of both these appeals by a common judgment.

2. By the medium of **FAO No. 347 of 2007,** the claimant-injured has questioned the impugned award on the ground of adequacy of compensation.

3. The owner-insured, by the medium of **FAO No. 407 of 2007,** has called in question the impugned award on the ground that the Tribunal has fallen in error in saddling him with liability.

4. In order to determine the issue, it would be profitable to give a brief resume of the facts of the case.

Brief facts:

5. The claimant-injured, namely Smt. Kesari Devi, filed a claim petition before the Tribunal for grant of compensation on the ground that on 29th June, 2006, at about 12.45 p.m., she was waiting at Bus Stand Hamirpur for boarding a bus, was hit by a bus, bearing registration No. HP-22-7103, which was being driven by Shri Anil Kumar @ Mastana-respondent No. 1 in the claim petition, rashly and negligently, sustained grievous injuries because her right hand was crushed, FIR No. 236 of 2006 was registered at Police Station Hamirpur, was referred to Regional Hospital, Hamirpur, remained under treatment for two months. Further pleaded that she has suffered 75% permanent disability and the disability certificate, Ext. PW-1/A, was issued by the concerned Doctor.

6. The claimant-injured has claimed compensation to the tune of Rs. 15,50,000/- as compensation including 50,000/- as interim compensation.

7. The insurer, owner-insured and the driver of the offending vehicle resisted the claim petition on the grounds taken in the respective memo of objections.

8. On the pleadings of the parties, following issues came to be framed by the Tribunal:

> *"1. Whether the petitioner had sustained injuries in a motor vehicle accident owing to rash and negligent driving on the part of respondent No. 1 while driving bus No. HP-22-7103?*
> *OPP*
>
> *2. In case issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom?*
> *OPP*
>
> *3. Whether respondent No. 1 was not holding a valid and effective driving licence at the time of the accident and if so, its effect? OPR-3*
>
> *4. Whether offending bus was being plied without a valid Route Permit and Registration & Fitness Certificates and if so, its effect? OPR-3*
>
> *5. Relief."*

9. The claimant-injured has examined Shri Sanjay Pathania, Record Keeper, Regional Hospital, Hamirpur as PW-1, Dr. Dinesh Thakur as PW-2, HC Prakash Chand as PW-3 and has herself stepped into the witness box as PW-4. The driver-Anil Kumer has himself stepped into the witness box as RW-1. The owner-insured as examined Shri Ramesh Chand as RW-3 and has himself stepped into the witness box as RW-2. The insurer has not led any evidence in support of its case.

Issue No. 1:

10. The Tribunal, after scanning the evidence, held that the claimant-injured has proved that the accident was outcome of rash and negligent driving of Shri Anil Kumar while driving the bus, bearing registration No. HP-22-7103. Accordingly, issue No. 1 came to be decided in favour of the claimant-injured.

The claimant-injured, the owner-insured and the insurer have not questioned the findings returned by the Tribunal on issue No. 1, are accordingly upheld.

11. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 and 4.

Issues No. 3 and 4:

12. The insurer had to prove both these issues, has not led any evidence. The owner-insured and the alleged driver, namely Shri Ramesh Chand, have admitted that Shri Anil Kumar-respondent No. 1 in the claim petition had driven the vehicle at the relevant point of time, caused the accident and he was not holding driving licence.

13. It is also positive case of the owner-insured that he had not engaged Shri Anil Kumar as a driver, but has engaged one Shri Ramesh Chand, who was in possession of the vehicle alongwith the keys and Shri Anil Kumar had unauthorizedly driven the vehicle. Shri Anil Kumar has neither pleaded nor proved that he was having the driving licence, rather he has denied that he had driven the vehicle at the time of accident. Thus, the Tribunal has rightly recorded the findings on issue No. 3 to the effect that driver-Anil Kumar was not having valid and effective driving licence. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

14. The insurer has failed to lead evidence to prove that the offending vehicle was being driven without valid documents, i.e. route permit, registration and fitness certificates and rightly came to be decided against the insurer. Having said so, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 2:

15. The Tribunal has discharged the insurer from liability and directed the owner-insured and driver-Anil Kumar to satisfy the award.

16. The owner-insured has questioned the said finding on the ground that he had engaged Shri Ramesh Chand as driver and Shri Anil Kumar, on his own, has started the vehicle and caused the accident, without his permission or without the consent of Shri Ramesh Chand. Further, it is pleaded that they have also lodged a police report.

17. The Tribunal has discussed the said issue in paras 14 and 15 of the impugned award, is well reasoned and needs no interference. I deem it proper to record herein that if Shri Ramesh Chand was the driver; was in possession of the keys and were with him at the relevant point of time, then how Shri Anil Kumar opened the window/door of the vehicle and entered into the same, is an important factor which goes against the owner-insured and the driver. Thus, adverse inference is to be drawn.

18. The owner-insured and Shri Ramesh Chand, while appearing in the witness box as RW-2 and RW-3, have stated that they have lodged a police report. There is no proof on the file to the effect or to show as to what was the outcome of the police report and the investigation conducted. Even the owner-insured has not examined any witness from the police department in order to substantiate his plea.

19. Having said so, the Tribunal has rightly recorded the findings and has rightly saddled the owner-insured and driver-Anil Kumar with liability.

20. The claimant-injured has also questioned the findings returned on issue No. 2 so far it relates to quantum of compensation. I have gone through the claim petition. The claimant-injured has not given the break-ups how she has claimed compensation to the tune of Rs.15,00,000/-. She has also not placed on record the medical reports or bills to substantiate her claim.

Even, there is no evidence on the file to prove her income and how it has affected her earning capacity.

21. It appears that the Tribunal, after making guess work, has rightly awarded Rs.50,000/- under the head "pain and sufferings" and Rs.1,00,000/- under the head "permanent disability".

22. May be the amount is meager, but keeping in view the fact that the owner-insured also belongs to rural area and appears to be poor read with the fact that the driver-Anil Kumar has passed away during the pendency of the appeal, I am of the considered view that the amount awarded is just and appropriate.

23. Having said so, the findings returned by the Tribunal on issue No. 2 are upheld.

24. Having glance of the above discussions, the impugned award needs to be upheld, is accordingly upheld and both the appeals are dismissed.

25. The driver-Anil Kumar has passed away during the pendency of the appeal. The insurer has deposited Rs.25,000/- as interim compensation. Thus, I direct the owner-insured to deposit Rs. 1,25,000/- with interest @ 9% per annum from the date of the petition, i.e. 9th October, 2006, till its deposition, before the Registry within twelve weeks. On deposition of the amount, the same be released in favour of the claimant-injured after proper identification.

26. Send down the records after placing copy of the judgment on each of the files.

****

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

Oriental Insurance Company ...Appellant.
Versus
Anil Kumar & others ...Respondents.

FAO No. 155 of 2007
Decided on: 19.12.2014

Motor Vehicle Act, 1988- Section 149- Passengers carrying capacity of the vehicle was '4+1' which means that risk of 4 passengers and one driver was covered- deceased was travelling in the vehicle at the time of accident- insurer had not proved the terms and conditions of the policy- it cannot be said to be an 'Act Policy'- held, that the insurer was rightly held liable.

(Para-12 and 13)

For the appellant: Mr. Lalit K. Sharma, Advocate.
For the respondents: Mr. K.S. Banyal, Advocate, for respondents No. 1 to 4.
Mr. Bheem Raj, Advocate, vice Mr. Lalit Sehgal, Advocate, for respondents No. 5 to 10.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the award, dated 24th May, 2006, made by the Motor Accident Claims Tribunal (II), Shimla, H.P. (for short "the

Tribunal") in M.A.C. No. 120-R/2 of 2004/01, titled as Anil Kumar & others versus Smt. Sumitra Devi & others, whereby compensation to the tune of Rs. 4,90,000/- with interest @ 7.5% per annum from the date of institution of the claim petition till its realization came to be awarded in favour of the claimants and the appellant-insurer came to be saddled with liability (for short "the impugned award"), on the grounds taken in the memo of appeal.

2. The claimants and the driver-cum-owner/insured have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Learned counsel for the appellant-insurer contested the impugned award on the ground that the insurance policy was 'Act Policy' and the appellant-insurer was not to be saddled with liability.

4. In order to determine the issue involved, I deem it proper to give a brief resume of the facts of the case:

Brief facts:

5. The claimants had claimed compensation to the tune of Rs. 20,00,000/-, as per the break-ups given in the claim petition, on the ground that they became the victims of a motor vehicular accident, which was caused by the driver, namely Shri Jawahar Lal Negi, while driving the Gypsy, bearing registration No. HP-10-0004, rashly and negligently on 31st March, 2001, at Seri-Nalah near Summerkot in Tehsil Rohru.

6. The respondents resisted the claim petition on the grounds taken in the respective memo of objections.

7. Following issues came to be framed by the Tribunal on 15th March, 2002:

> *"1. Whether the driver Jawahar Lal Negi was driving the Gypsy bearing No. HP-10-0004 at Serinalah, near Summerkot in rash and negligent manner, resulting in death of Sh. Yoginder Prasad on 31.3.2001, as alleged? OPP*
>
> *2. If issue No. 1 is proved, whether the petitioners are entitled for compensation, if so from whom? OPP*
>
> *3. Whether the vehicle in question was being driven in violation of conditions and provisions of the Insurance policy, as alleged? OPR-7*
>
> *4. Whether the vehicle in question at the time of accident was carrying unauthorised passengers in violation of law, route permit and insurance policy, as alleged? OPR-7*
>
> *5. Whether the vehicle was being driven by an unauthorized person who did not have valid and effective driving licence, as alleged? OPR-7*
>
> *6. Relief."*

8. The claimants have led evidence in support of their case. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation to the tune of Rs. 4,90,000/- with interest @ 7.5% per annum from the date of institution of the claim petition till its realization in favour of the claimants and saddled the appellant-insurer with liability.

Issues No. 1 and 5:

9. Learned counsel for the appellant-insurer has not questioned the findings returned by the Tribunal on issues No. 1 and 5. However, I have gone

through the evidence and am of the considered view that the claimants have proved that the driver of the offending vehicle had driven the vehicle rashly and negligently and caused the accident. The appellant-insurer has failed to prove that the driver of the offending vehicle was not having valid and effective driving licence. Thus, the findings recorded by the Tribunal on issues No. 1 and 5 are upheld.

10. Issues No. 2 to 4 are inter-dependent. Therefore, I deem it proper to club these issues.

Issues No. 2 to 4:

11. It was for the appellant-insurer to plead and prove that the owner has committed any willful breach, has failed to do so. Thus, the findings returned by the Tribunal on issues No. 2 and 3 need no interference and are, accordingly, upheld.

12. Learned counsel for the appellant-insurer argued that the findings returned by the Tribunal on issue No. 4 are not correct. The argument, though attractive, is devoid of any force for the simple reason that the perusal of the insurance policy, Ext. R-1, does disclose that the offending vehicle was insured with the appellant-insurer at the time of accident, in terms of which the 'passengers carrying capacity' of the offending vehicle was '4+1', meaning thereby, risk of four passengers and one driver was covered. Thus, the risk of the deceased was covered in terms of the insurance policy, Ext. R-1.

13. It was for the insurer to prove the terms and conditions contained in the insurance policy, has not led any evidence, thus, cannot be said to be an 'Act Policy'. The Tribunal has rightly returned the findings in para 15 of the impugned award, need no interference.

14. Having said so, I am of the considered view that the Tribunal has not fallen in error in saddling the appellant-insurer with liability.

15. Viewed thus, the appeal deserves to be dismissed. Accordingly, the appeal is dismissed and the impugned award is upheld.

16. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

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

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

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

Versus

Smt. Leela Devi and others ...Respondents

FAO (MVA) No. 109 of 2007.
Date of decision: 19th December, 2014.

Motor Vehicle Act, 1988- Section 166- Deceased was returning to his home in a Tractor- he requested the driver to stop the tractor- driver stopped the tractor on which the deceased got down the tractor- Driver started the tractor but could not control it- tractor rolled down- deceased was crushed and succumbed to the injury-

insurer had failed to prove that driver did not have a valid driving licence – insurer had not pleaded and proved that owner had committed willful breach of the terms and conditions of the policy- held that deceased was not in the tractor and was present on the road side, and the insurance company was rightly held liable to pay compensation. (Para-10 to 15)

For the appellant:	Mr. G.D. Sharma, Advocate.
For the respondents:	Mr.Dinesh Kumar, Advocate, for respondents No. 1 to 3. Mr. Vinod Gupta, Advocate, for respondents No. 4 and 5. Nemo for respondents No. 6 to 11.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Insurer-appellant has questioned the judgment and award dated 21.12.2005, made by the Motor Accident Claims Tribunal-II, Solan, for short "the Tribunal" in MAC Petition No. 4-S/2 of 2004, titled *Smt.Leela Devi and others versus Group Finance Unit and others,* whereby compensation to the tune of Rs.4,20,167/- came to be awarded in favour of the claimants and against the insurer-appellant herein, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. Claimants had invoked the jurisdiction of the Motor Accident Claims Tribunal for the grant of compensation to the tune of Rs.10 lacs, as per break-ups given in the claim petition.

3. Precisely, the case of the claimants was that on 21.5.1998, deceased Ram Swaroop was coming back to his home in the offending vehicle, i.e., tractor bearing registration No. 12191. He requested the driver of the tractor, namely, Surjeet Singh, to stop the tractor enabling him to answer the call of nature. He stopped the vehicle and the deceased, after alighting while covering a little distance on foot, on the side of the road, the driver of the tractor suddenly started driving the tractor rashly and negligently, could not control the tractor and it rolled down. Consequently, deceased was crushed and succumbed to the injuries. The details of the accident have been given in para 20 of the claim petition.

4. Respondents resisted and contested the claim petition by filing separate replies.

5. On the pleadings of the parties, following issues came to be framed by the Tribunal:

"(i) *Whether on 21.5.1998 at 1 AM at village Lohara, the driver of the Tractor No.12191 was driving the Tractor rashly and negligently and as such caused the death of deceased Ram Swaroop? OPP.*

(ii) If issue No. 1 is proved, to what amount of compensation, the petitioners are entitled to and from whom? OPP.

(iii) Whether the driver of the tractor No. 12191 did not have effective and valid driving licence at the time of accident? OPR-7.

(iv) Whether the petition is not maintainable? OPR

(v) Whether the tractor was over-loaded and was being driven in breach of standard insurance policy? OPR-7.

(vi) Whether the deceased was the owner of the tractor, if so to what effect? OPR-7.

(vii) Relief.

6. The claimants examined six witnesses, namely, Smt. Leela Devi, (PW-1), Krishan Kumar (PW-2), Lachhi Ram (PW-3), Mohan Lal (PW-4), Dr. Niraj Mittal (PW-5) and Tulsi Ram (PW6).

7. Respondent No. 7 examined only one witness, namely, Nokh Ram, as RW-7.

8. The Tribunal, after scanning the evidence, held that the claimants have proved that the driver of the offending tractor has driven the offending vehicle rashly and negligently and returned the findings in favour of the claimants. These findings are not in dispute; accordingly the findings returned are upheld.

9. Before I deal with Issue No.2, I deem it proper to deal with Issues No. 3 to 6.

10. The insurer had to prove issue No. 3, has failed to lead any evidence and even the learned counsel for the appellant has not questioned the findings returned on this issue. However, I have gone through the record. Insurer has failed to prove that the driver of the offending tractor was not having any valid and effective driving license. Thus, the findings returned on this issue are upheld.

11. **Issue No. 4**. It was for the insurer to prove that the claim petition was not maintainable. However, claimants are victims of a vehicular accident and claim petition, in terms of Section 166 of the Motor Vehicles Act was maintainable. Thus, the findings returned on this issue are accordingly upheld.

12. **Issue No.5.** Respondent No. 7 has not led any evidence that the tractor was over-loaded. There is not even a whisper to this effect. Accordingly, findings returned by the Tribunal on issue No. 5, merit to be upheld. It is also worthwhile to mention here that the learned counsel for the appellant has not questioned the findings returned on issue No. 5, accordingly, the same are upheld.

13. **Issue No. 6.** Admittedly, deceased was travelling in the offending tractor. He came down and in the meantime, driver of the offending tractor lost control over the tractor. The tractor rolled down and in the process, deceased was crushed. Respondents have not led any evidence to prove this issue. Accordingly, findings returned on this issue are upheld.

14. Now adverting to issue No. 2. The adequacy of compensation is not in dispute for the simple reason that neither the claimants nor owner, driver and insurer have questioned the adequacy of compensation. I have gone through the impugned award. It is just and appropriate and cannot be said to be inadequate or meager in any way. The only question is, who is to be saddled with the liability.

15. It was for the insurer to plead and prove that the owner has committed willful breach and driver was not having a valid and effective driving licence. The insurer has not led any evidence and has failed to prove any breach and even has not placed on record the copy of insurance policy though, it is admitted that the vehicle was insured. The deceased was not in the tractor at the relevant point of time. He was on the road side when he became victim of the said accident, thus was a third party. The claimants being the victims of the

accident, have lost source of dependency. The Tribunal has discussed the entire evidence and the insurer came to be rightly saddled with the liability.

16. Accordingly, the appeal merits to be dismissed and is accordingly dismissed. Registry is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payee's cheque account, after proper identification.

17. The appeal stands disposed of, as indicated hereinabove, alongwith pending applications. Send down the record, forthwith, after placing a copy of this judgment.

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

Sagar Chaudhary .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 403 of 2011
Reserved on: December 18, 2014.
Decided on: December 19, 2014.

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of 7 kg of charas concealed under the clothes- an option was given to him whether he wanted to be searched by police on the spot, magistrate or gazetted officer prior to the search- held, that accused has to be given an option to be searched before gazetted officer or magistrate- option given to the accused to be searched before the Magistrate, gazetted officer or the police is against the letter and spirit of Section 50 of the ND & PS Act- the entire trial is vitiated due to non-compliance of the provisions of Section 50- accused acquitted (Para-16)

Cases referred:
Man Bahadur vrs. State of Himachal Pradesh, (2008) 16 SCC 398
Ashok Kumar Sharma vrs. State of Rajasthan, (2013) 26 SCC 67

For the appellant: Mr. B.C.Verma, Advocate.
For the respondent: Mr. P.M.Negi, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 11.7.2011, rendered by the learned Special Judge, Kullu, H.P. in Sessions Trial No. 31 of 2010, whereby the appellant-accused (hereinafter referred to as accused) who was charged with and tried for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act), has been convicted and sentenced to undergo rigorous imprisonment for ten years and to pay fine of rupees one lac and in default of payment of fine he was ordered to suffer further imprisonment for six months.

2. The case of the prosecution, in a nut shell, is that on 29.3.2010, the police party headed by PW-9 Insp. Prem Singh comprising of HC Narender, PW-7 Const. Rakesh Lal and PW-6 S.I. Rajinder Kumar were on patrol duty for detection of crime relating to forests and narcotics. The police party was present at *Hathithan* near Bhuntar at about 5:15 AM. They noticed the accused coming from Manikaran side. The accused on seeing the police tried to escape. He was nabbed. The name and particulars of the accused were ascertained. The Investigating Officer had suspicion about possessing of some contraband by the accused. He expressed his intention to conduct search of the accused. The accused was apprised about his right to be searched either before the police on the spot, or Magistrate or Gazetted Officer. The accused consented to be searched by the police vide memo Ext. PW-6/A. Thereafter, the I.O. gave his personal search vide memo Ext. PW-6/B. Nothing incriminating was found. The I.O conducted the search of the accused and the accused was found bearing vest underneath shirt and was found possessing black coloured substance in the shape of rectangle and in the form of chapatis. After removing the cello tape, it was found to be charas. It weighed 7 kgs. The I.O. sealed the contraband with 10 seals of impression 'B'. NCB-1 form in triplicate was filled in. The impression of seal 'B' was drawn on Ext. PW-6/D. The seal was handed over to S.I. Rajinder Kumar. The case property was taken into possession vide memo Ext. PW-6/C. *Rukka* Ext. PW-9/A was prepared and sent to the Police Station Kullu through Const. Rakesh Lal. SHO registered the FIR vide Ext. PW-9/D. The I.O. prepared the site plan Ext. PW-9/B. The I.O. also prepared special report Ext PW-1/A. It was sent to Dy. S.P., Police Station SV and ACB, Kullu. The case property alongwith the impression of seal 'B', NCB forms, copies of FIR and seizure memo were sent to FSL, Junga vide RC Ext. PW-3/A through PW-4 Const. Paras Ram. He deposited the case property alongwith requisite documents at FSL, Junga. Report of the FSL is Ext. PW-8/A. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 9 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C. The accused has denied having committed any offence. According to him, nothing was recovered from him and he was falsely implicated. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. B.C.Verma, Advocate, appearing on behalf of the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. P.M.Negi, Dy. AG, has supported the judgment of the learned trial Court dated 11.7.2011.

5. We have heard learned counsel for both the sides and gone through the records of the case carefully.

6. PW-1, SI Kanshi Ram has proved the copy of special report vide Ext. PW-1/A.

7. PW-2 Const. Surender Kumar, is a formal witness.

8. PW-3 HC Hans Raj, deposed that on 29.3.2010, he was working as MHC, Police Station SV and ACB, Kullu. Inspector Prem Singh deposited one sealed parcel which was sealed with ten seals of seal 'B' alongwith NCB form in triplicate and specimen seal impression of seal 'B' with him. He entered all these articles in the relevant register at Sr. No. 23. On 30.3.2011 he handed over the case property to HHC Paras Ram with a direction to deposit the same at FSL, Junga. The case property was given to HHC Paras Ram vide RC No. 35/2010 vide Ext. PW-3/A. In his cross-examination he admitted that in respect of the entries at Sr. No. 23, in register No. 19, there was a cutting. Voluntarily deposed that the cuttings were initialed by him.

9. PW-4 Const. Paras Ram deposed that on 30.3.2010, parcel Ext. P-1 was given to him by MHC Hans Raj (PW-3) alongwith NCB form in triplicate,

sample seal and other relevant documents. He deposited the case property at FSL Junga vide receipt Ext. PW-3/B.

10. PW-5 DSP Amar Nath is a formal witness.

11. PW-6 SI Rajinder Kumar testified that on 29.3.2010, he along with the police party started from Kullu in an official vehicle at about 3:30 AM. At about 4:15 AM, the police party reached at a place just ahead to Jia bridge. The place was secluded. The police had put a barrier/Naka. At about 5:15 AM, the police party noticed a person coming from the Manikaran side. On seeing the police party, the said person tried to flee away. His activities raised a suspicion. He alongwith HC Narender Kumar nabbed that person. The I.O. Inspector Prem Singh inquired about the name and address of the said person. The accused was apprised of his right to be searched either before the police or some Gazetted Officer or some competent Magistrate. The accused opted to be searched by the police present on the spot. The I.O. has also given his personal search. The I.O. searched the accused after frisking and found something concealed under the clothes of the accused. The I.O. found that the accused has kept something concealed under the *dupatta* type vest cloth. The clothes were removed. It was found containing charas. The charas weighed 7 kgs. The recovered charas was put alongwith the clothes and cello tape in cloth parcel, which was sealed with ten seals of impression 'B'. The case property was taken into possession vide seizure memo Ext. PW-6/C. NCB forms in triplicate were also filled in and handed over to him by the I.O. In his cross-examination, he admitted that they have checked 3-4 vehicles before arrival of the accused. The accused noticed them from a distance of about 15 feet. The accused could only run for about 4-5 paces when they nabbed him. The distance between Bhunter bridge and Jia bridge is approximately five hundred meters. He also admitted that there are number of hotels and *dhabas* situated in and around Jia bridge. He also admitted that in and around Jia bridge, there is *abadi (*habitation*)*. Voluntarily stated that the place where the police had put *Naka* was secluded one.

12. PW-7 Const. Rakesh Lal also deposed the manner in which the accused was apprehended, the search and sampling process was completed on the spot. He also admitted in his cross-examination that from Bhunter bridge up to Jia bridge, there were hotels, restaurants and shops on both sides of the road. Voluntarily deposed that the place where the police party had laid barrier/naka was secluded one. The place where the police had laid barrier/naka was one kilometer from Jia bridge towards Manikaran side.

13. PW-8 Dr. Kapil Sharma, has proved the FSL report Ext. PW-8/A.

14. PW-9 Insp. Prem Singh deposed the manner in which the accused was apprehended at 5:15 AM. He apprised the accused about the suspicion and also apprised that the police wants to search him and it was his right to give his search to the police present on the spot or to any Magistrate or to any Gazetted Officer. The accused consented to be personally searched by the police officer. The option/consent memo was prepared vide Ext. PW-6/A. The search and sampling process was completed on the spot. The Rukka was prepared vide memo Ext. PW-9/A. It was sent to the Police Station SV and ACB Kullu through Const. Rakesh Lal. He prepared the spot map Ext. PW-9/B. He also prepared the special report Ext. PW-1/A. In his cross-examination, he also admitted that there was habitation near Bhunter bridge. There were hotels and other houses on both sides of the road. The place where the barrier/naka was put up was just behind the village *Hathithan*. He also admitted that the road on which they had laid the *Naka* remains busy and vehicular traffic plies on the same. According to him, only two vehicles passed through the spot.

15. The case of the prosecution, precisely, is that the accused was apprehended on 29.3.2010. Charas was recovered from the person of the

accused. It weighed 7 kgs. According to PW-6 Rajinder Kumar, the option was given to the accused regarding his search either before the police, some Gazetted Officer or some competent Magistrate. PW-7 Const. Rakesh Lal also deposed that the I.O. had apprised the accused about his legal right to opt regarding his search and accused has consented to be searched by the Police Officer. PW-9 Insp. Prem Singh also deposed that he apprised the accused about the suspicion and also apprised that the police wanted to search him and it was his right to give his search to the police present on the spot or to any Magistrate or to any Gazetted Officer.

16. The requirement of Section 50 of the Act is that if the contraband is recovered from the person, the accused has to be given an option either to be searched before the nearest Gazetted Officer or the nearest Magistrate. However, as per Ext. PW-6/A consent memo, the option which was given to the accused was to be searched before the Magistrate or Gazetted Officer or the I.O. The consent memo Ext. PW-6/A is against the letter and spirit of Section 50 of the ND & PS Act. The option was to be restricted only to the Gazetted Officer or the Magistrate and not to the Police Officer concerned. Thus, the entire trial is vitiated for non-compliance with mandatory provisions of Section 50 of the Act. Moreover, we have also seen in the present case that the accused was apprehended on 29.3.2010 and the area where the accused was apprehended, there were number of restaurants, hotels, shops and houses and despite that no independent witness was associated during the investigation.

17. Their lordships of the Hon'ble Supreme Court in the case of ***Man Bahadur vrs. State of Himachal Pradesh,*** reported in ***(2008) 16 SCC 398,*** have held that when the I.O. only giving option to appellant to be searched by the I.O. himself or in presence of Magistrate or Gazetted Officer, Section 50 was not substantially complied with. Their lordships have held as under:

> "(5) In this case it is accepted at the Bar that the search memo or any other document do not show that the appellant was made aware of his right to be searched before a gazetted officer or a Magistrate.
>
> (6) From the deposition of P.W.10-I.O.P.P. Pandoh, it appears that he had merely given an option to the appellant to be searched either by himself or in presence of a Magistrate or a gazetted Officer.
>
> (7) No evidence has been adduced to show that the appellant was communicated of his right either to be searched in presence of a Magistrate or a gazetted officer on the one hand and by an empowered officer on the other.
>
> (8) In the instant case, there has been even no substantial compliance of Section 50 of the N.D.P.S. Act.
>
> (9) For the reasons aforementioned, the impugned judgment of conviction and sentence cannot be upheld. It is set aside accordingly. The appeal is allowed."

18. Their lordships of the Hon'ble Supreme Court in the case of ***Ashok Kumar Sharma vrs. State of Rajasthan,*** reported in ***(2013) 26 SCC 67,*** have held that the empowered officer is legally obliged to inform suspect/accused of his right under Section 50 to be searched before a Gazetted Officer or a Magistrate and it is only if suspect/accused does not choose to exercise his said right, can empowered officer conduct search of person of suspect/accused himself. Their lordships have further held that Section 50 of the Act is mandatory and non-compliance with said mandatory procedure vitiates entire proceedings initiated against the accused and entitles him to acquittal.

19. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated

11.7.2011, rendered by the Special Judge, Kullu, H.P., in Sessions Trial No. 31 of 2010, is set aside. Accused is acquitted of the charges framed against him. 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.

20. 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 MANSOOR AHMAD MIR, C. J.

FAO No. 173 of 2007 a/w
FAOs No. 174 & 175 of 2007
Decided on: 19.12.2014

FAO No. 173 of 2007
United India Insurance Company Ltd. ...Appellant.
Versus
Smt. Salima Devi & others ...Respondents.

.....

FAO No. 174 of 2007
United India Insurance Company Ltd. ...Appellant.
Versus
Smt. Urmila Devi & others ...Respondents.

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FAO No. 175 of 2007
United India Insurance Company Ltd. ...Appellant.
Versus
Smt. Ram Rakhi & others ...Respondents.

Motor Vehicle Act, 1988- Section 166- High Court had decided one of appeal bearing number FAO No. 278 of 2007, titled as United India Insurance Company Ltd. versus Shri Tulsi Ram and others, on 31.10.2014 in which the insurer was saddled with liability- the insurer had not questioned the same and the order had attained the finality- held that the insurer was liable to pay the compensation in view of the earlier judgment. (Para-7)

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Mr. Jagdish Thakur, Advocate, for respondents No. 1 to 5 in FAO No. 173 of 2007, for respondents No. 1 to 4 in FAO No. 174 of 2007 and for respondents No. 1 to 6 in FAO No. 175 of 2007.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

These appeals are outcome of a motor vehicular accident, which was caused by the driver, namely Shri Khushi Ram Sharma, while driving bus, bearing registration No. HP-22-5785, on 25th November, 2005, near Village Amb (Pathiar) in District Kangra, rashly and negligently. Thus, I deem it proper to dispose of all these appeals by this common judgment.

2. **FAO No. 173 of 2007** is directed against the award, dated 17th February, 2007, made by the Motor Accident Claims Tribunal, Hamirpur (for short "the Tribunal") in MAC No. 09 of 2006, titled as Salima Devi & others versus Anju Thakur & others, whereby compensation to the tune of Rs. 5,76,000/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the appellant-insurer came to be saddled with liability (for short "the impugned award-I"), on the grounds taken in the memo of appeal.

3. By the medium of **FAO No. 174 of 2007,** the appellant-insurer has questioned the award, dated 17th February, 2007, made by the Tribunal in MAC No. 11 of 2006, titled as Urmila Devi & others versus Anju Thakur & others, whereby compensation to the tune of Rs. 3,16,800/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the appellant-insurer came to be saddled with liability (for short "the impugned award-II"), on the grounds taken in the memo of appeal.

4. **FAO No. 175 of 2007** is directed against the award, dated 17th February, 2007, made by the Tribunal in MAC No. 04 of 2006, titled as Smt. Ram Rakhi & others versus Anju Thakur & others, whereby compensation to the tune of Rs.3,03,700/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the appellant-insurer came to be saddled with liability (for short "the impugned award-III"), on the grounds taken in the memo of appeal.

5. The claimants, the driver and the owner-insured have not questioned the impugned awards on any count, thus, have attained finality so far it relate to them.

6. The appellant-insurer has questioned the impugned awards on the grounds that the Tribunal has wrongly saddled the appellant-insurer with liability.

7. Learned counsel for the respondents stated at the Bar that this Court has already determined one appeal, which is also outcome of the same accident, being **FAO No. 278 of 2007,** titled as **United India Insurance Company Ltd. versus Shri Tulsi Ram and others,** decided on 31.10.2014, in terms of which the insurer has been saddled with liability, the insurer has not questioned the same, thus, has attained finality.

8. I have gone through the judgment (supra) and the findings returned, have not been questioned by the insurer. Thus, the findings returned by the Tribunal in all these awards are to be upheld in view of the judgment (supra).

9. Perused the entire record. The Tribunal has rightly recorded the findings on all issues in view of the judgment (supra), need no interference.

10. At this stage, learned counsel for the appellant(s)-insurer stated at the Bar that the compensation awarded in all the cases is excessive.

11. I have examined the averments made in all the claim petitions and am of the considered view that the Tribunal has rightly assessed the compensation, which is just and proper, cannot be said to be excessive in any way.

12. Having said so, the argument of the learned counsel for the appellant(s) is not tenable.

13. Viewed thus, all the appeals deserve dismissal, are accordingly dismissed and the impugned awards are upheld. The judgment (supra) shall form part of this judgment also.

14. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the respective impugned awards after proper identification.

15. Send down the record after placing copy of the judgment on Tribunal's file and on each of the appeals.

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