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Code of Civil Procedure, 1908 - Section 96 - First appeal - Mode of disposal - Held, when appellate court agrees with view of trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court - Expression of general agreement with reasons given by trial court would ordinarily suffice. However, when first appellate court reverses findings of trial court, it must record findings in clear terms explaining how reasonings of trial court are erroneous. (Para 23) Title: Jagdish Chand & Others Vs. Hari Singh, Page- 332.

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Code of Civil Procedure, 1908 – Order III Rules 1 and 2 and Order VIII Rule 1- Power of attorney holder – Engaging counsel and filing of written statement without annexing power of attorney – Effect - Person engaging counsel, verifying and signing written statement on behalf of defendant - Person not holding any power of attorney on behalf of defendant authorizing him to do such acts at relevant time - Held, written statement so filed cannot be construed to be written statement of defendant. (Paras 6, 26 & 27) Title: Meera Dewan and another Vs. Neelam Rana, Page-241.

Code of Civil Procedure, 1908 – Order VI Rule 16 – Order VIII Rule 6 A- Counter claim – Striking off – Trial Court allowing defendants application for amendment of written statement and permitting them to raise counter claim qua possession – Plaintiff filing application for striking off counter claim of defendants - Trial Court dismissing plaintiff's application – Petition against – Held, defendants pleaded in originally instituted written statement of plaintiff having encroached their land – Also mentioning their having filed application for demarcation of land and seeking leave to file suit for possession against

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Code of Civil Procedure, 1908- Order VIII Rules 6-A(1) and 9 - Counter claim - Filing, after submitting written statement - Whether can be maintained?- Held, counter claim can be filed after filing of written statement provided cause of action had accrued to defendant before he had delivered his defence or before expiry of time fixed for delivery of defence - On facts, defendant permitted to raise counter claim for damages on account of plaintiff's failure to pay balance sale price and get sale deed executed - Application allowed. (Paras 15, 23, 25 & 26) Title: Ashutosh Sharma Vs. Ram Lubhaya, Page- 453.

Code of Civil Procedure, 1908 - Order VIII Rules 6-A & 6-B – Provisions of counter claim - Purpose – Held - Purpose for providing provisions of filing counter claim is to avoid multiplicity of judicial proceedings and save upon court's time as also to exclude inconvenience to parties. (Para 9) Title: Suresh Kumar Vs. Deepak Sood and ors., Page- 122.

Code of Civil Procedure, 1908 - Order XVIII Rules 1 & 2 – Evidence of power of attorney holder - Appreciation thereof – Facts revealing person having no power of attorney in his favour on day he verified, signed and filed written statement on behalf of defendant - Filing power of attorney executed by defendant only on day his evidence was recorded - Held, once there is no legal and valid written statement on behalf of defendant in *lis*, evidence given by power of attorney holder is inconsequential. (Paras no. 29 & 31) Title: Meera Dewan and another Vs. Neelam Rana, Page-241.

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Code of Civil Procedure, 1908 (Code) – Order XXXIX Rules 1 & 2 – Stay – Jurisdiction of civil court – Trial court dismissing application of plaintiff seeking stay of order of discharge passed by Bank – First appellate court dismissing his appeal also - Petition against held trial court should not have made sweeping remarks of its not having jurisdiction to entertain lis while deciding application under order XXXIX Rules 1 & 2 of Code – Order of discharge found having been passed by Managing Director without affording opportunity of being heard to plaintiff – Petition allowed – Operation of order of discharge stayed during pendency of suit. (Para 12) Title: Roshan Lal Vs. Himachal Pradesh State Co-operative Bank Limited, Page-13.

Code of Civil Procedure, 1908 – Order XXXIX Rules 1 and 2 - Temporary injunction – Grant of - Joint land – Exclusive hisadari possession – Effect - District Judge allowing plaintiff's appeal and granted stay on ground that land was joint and raising of construction by defendant would prejudice plaintiff – Petition against – Land recorded in exclusive hisadari possession of defendant – Possession not shown to be beyond his share – Land recorded as 'gair mumkin abadi' – Plaintiff also found having raised construction over parcel of joint land – Prima facie case, balance of convenience and irreparable loss in case of grant of stay stand in defendant's favour – Petition allowed – Order of District Judge set aside and of trial court restored. (Paras 3 to 6) Title: Rajiv Kumar Vs. Ramesh Chand & another, Page-52.

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Code of Criminal Procedure, 1973 – Section 125 **–** Interim maintenance – Quantum – Justification – Additional Chief Judicial Magistrate granting interim maintenance to wife, children and parents of respondent at rate of Rs. 750/- p.m. each – Court of Sessions enhancing maintenance to Rs. 1000/- p.m. each in revision – Petition against – Income certificate of respondent placed on record clearly indicating his income at Rs. 2500/- p.m. - Held, when income of respondent is Rs. 2500/- p.m., he cannot be directed to pay maintenance at rate of Rs. 1000/- p.m. each – Petition allowed – Order of Court of Sessions set aside and of Additional Chief Judicial Magistrate restored. (Paras 5 & 6) Title: Dharam Singh Vs. Pawna Devi and others, Page- 226.

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Code of Criminal Procedure, 1973 - Section 362 - Alteration of judgment or final order - Permissibility - Husband compromising complaint filed by a wife under Domestic Violence Act and agreeing to pay maintenance and provide separate accommodation to wife - Court passing judgment on basis of compromise - Husband filing application almost six years thereafter and praying for alteration of judgment on ground that he never agreed for payment of maintenance to wife - Court dismissing application -Petition against – Held, statement of wife made at time of passing order suggests that she had prayed for maintenance and monthly expenditures - Order in knowledge of petitioner but he never challenged it for almost six years - Wife and children fully dependent on petitioner - Trial court cautiously passed order having taken note of compromise - Petition dismissed. (Paras 1, 2, 4, 5 & 6) Title: Naresh Kumar Vs. Reena Kumari, Page-228.

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Code of Criminal Procedure, 1973 – Section 439 – **Narcotic Drugs and Psychotropic Substances Act, 1985 –** Sections 37 & 50 - Regular bail – Grant of – Rigors - Police recovering 2.689 kg charas from bag in possession of accused - Accused seeking bail on grounds of pure resin contents of contraband bringing it into less than commercial quantity - Accused also pointing to discrepancies in prosecution case including non-compliance with Section 50 of Act and complainant police officer himself investigating case - State opposing bail and contending that recovered stuff falling in commercial quantity and rigors of Section 37 of Act are attracted - Held, in absence of evidence as to neutral material present in recovered stuff, entire contraband to be considered for determining its quantity - Contraband recovered from accused falling in commercial quantity – Discrepancies, if any, and effect of complainant himself investigating case not to be looked into at stage of consideration of bail - Recovery since from bag, Section 50 of Act also not applicable - Application rejected - **State Vs. Mahboob Khan reported in 2013 (3) HLR (FB) 1834** relied upon. (Paras 5, 16 -19, 21, 23, 26, 31 & 35) Title: Sandeep Vs. State of Himachal Pradesh, Page- 610.

Code of Criminal Procedure, 1973 – Section 446 (3) – Penalty – Remission thereof – Held, court imposing penalty on defaulter vis-à-vis forfeited bond has discretion to remit it or part thereof even after its imposition. (Para 8) Title: Netar Singh Vs. State of Himachal Pradesh, Page- 17.

Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Exercise of - Quashing of FIR - Petitioner facing proceedings for taking obscene photographs of victim and circulating them, before Special Court as well as Juvenile Justice Board (J.J.B.) - Filing petition for quashing of FIR and consequential proceedings on ground that report of FSL showing that photographs of victim alleged to be taken by him through mobile, were not taken from his cell phone - Held, at this stage, it is not proper for High Court to appreciate evidence of prosecution since trial pending before Special Judge - Petition dismissed. (Paras 3 to 6) Title: Sayyam Khurana Vs. State of H.P. & another, Page- 51.

Criminal Procedure Code 1973 – Section 482 - Inherent Powers - Exercise of – Quashing of FIRs – Parties compromising dispute and filing petitions for quashing of FIRs registered by them against each other **–** Held, in exercise of its inherent power High Court may quash criminal proceedings even in non-compoundable cases where parties settled matter between themselves - Power to be exercised sparingly and with great caution - Power not to be exercised in cases involving heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc as they are not private in nature and have impact on society - On

facts, offences not heinous showing extreme depravity nor they are against society - Possibility of conviction in both remote and bleak - Continuation of criminal proceedings would tantamount to abuse of process of law – Petitions allowed - FIRs quashed alongwith pending proceedings. (Paras 8, 9 &12) Title: Jaisi Ram and others Vs. State of HP and others, Page- 628.

Constitution of India, 1950 - Article 14 – **Arbitration and Conciliation Act, 1996**- Section 8 – Writ jurisdiction – Availability vis-a-vis work contract containing arbitration clause - Held, alternative remedy is not absolute bar to invocation of writ jurisdiction – In appropriate circumstances, without exhausting alternative remedy writ can be filed by aggrieved person – Existence of arbitration clause *ipso facto* cannot render writ petition not maintainable. (Para 6, 7 & 9) Title: Sher Singh Vs. The Himachal Pradesh Bus Stands Management and Development Authority and anr., Page- 133.

Constitution of India, 1950- Article 14 - Principles of natural justice – Breach of – Writ jurisdiction – Held, non-observance of principles of natural justice itself amounts to prejudice to person - Independent proof of prejudice to aggrieved person not necessary – Decision not based on equity, fair play and justice cannot be allowed to stand – Order directing petitioner to stop further construction work awarded under work contract allegedly on account of deviation without affording opportunity to him, set aside – Respondents asked to re-negotiate with petitioner so that work is executed without delay- Writ disposed of. (Paras 13, 18 to 20) Title: Sher Singh Vs. The Himachal Pradesh Bus Stands Management and Development Authority and anr., Page- 133.

Constitution of India, 1950 – Article 14 - **Motor Vehicles Act, 1988** – Section 88(5) & (6) – Notification regarding Reciprocal Transport Agreement between Himachal Pradesh and Punjab with respect to State Transport Undertakings for plying Inter-State stage carrier service – Challenge thereto - State of H.P. notifying proposal for Reciprocal Transport Agreement on 28.2.2008 – Petitioner not having Corridor Inter-State permit in his name on 28.2.2008 - Such permit stood granted to petitioner only on 9.7.2008 - Held, petitioner has no *locus standi* to challenge notification dated 28.2.2008 issued by State of H.P. (Paras 8 & 13) Title: Inder Singh Vs. State of Himachal Pradesh and another, Page- 220.

Constitution of India, 1950 – Article 14 - **Motor Vehicles Act, 1988** – Section 88(5) and (6)- Notification publishing draft proposal of Reciprocal Transport Agreement issued in 2007- Final notification notifying Reciprocal Transport Agreement published on 14.7.2017 - Challenge thereto – Petitioner challenging said notifications having been issued without affording opportunity to him - Held, material showing that objections to proposal were called for from persons likely to be affected by such agreement within 30 days from publications of notification – Since no objections were filed, draft proposal attained finality – Petition dismissed. (Para 9) Title: Inder Singh Vs. State of Himachal Pradesh and another, Page-220.

Constitution of India, 1950 - Articles 14 and 15 – Reservation in educational institutions – Rule of carry forward – Applicability – Held, rule of carry forward of vacancies to next year as applicable in matter of recruitment is unknown to admissions in professional courses like Medical and Engineering – When candidate from reserved category is not available endeavour should be made to fill such seats from other eligible students – NIT directed to dereserve seat lying vacant for want of eligible reserved candidate and admit petitioner in Ph.D. programme in Electronics and Communication Engineering. (Paras 7 to 13) Title: Tanuja Dogra Vs. National Institute of Technology & others, Page- 109.

Constitution Of India 1950 – Articles 14, 15 & 226 – Reservation in educational institutions – Essentialities - Petitioner appearing in JEE (Mains) and qualifying in OBC (non creamy layer) category - During counselling, institution cancelling his seat against OBC non creamy layer category and considering him under general category – Petition against – Petitioner contending that he ought to have been admitted against seat meant for OBC non creamy layer – Held, reservation for admission to NITs/IITs and CFTIs in favour of OBC is only available to such of candidates who belong to Non Creamy Layer - Certificate showing that petitioner was not under creamy layer was not filed with institution at time of counselling – Though subsequently such certificate brought on record - But it was issued in favour of petitioner based on parental income in financial year 2013-2014 - It did not indicate or mention about his parental income covering three preceding financial years as required by rules - Petitioner not entitled for admission against OBC non creamy layer category - Petition dismissed. (Paras 6, 7, 11 & 12) Title: Vishwas Kumar Vs. State of H.P. and another, Page- 129.

Constitution of India, 1950 - Articles 14 and 16 - Grant of promotion/placement/fitment – Withdrawal – Challenge - Petitioners duly promoted or given placements as Associate Professors on recommendations of Selection Committee and approved by Board of Governors - On findings of Committee constituted by officiating Director regarding wrong placement of petitioners, MHRD advising Institute to recover excess amount from Petitioners - Challenge – Held, fact that promotions or redesignations of petitioners was subject to verification by Audit Department and MHRD had also advised Institute to recover amount from petitioners is inconsequential - MHRD has no power under Act to issue instructions to Institute - Under Act, Director had no power to constitute Committee asking it to look into anomalies of promotions and pay etc – Constitution of Committee itself illegal so also all consequential actions taken thereafter - Petitions allowed (Paras 6, 10,25 & 26) Title: Om Parkash Rahi Vs. Union of India and ors., Page- 139.

Constitution of India, 1950- Articles 14 & 16 - Service law- Promotion- Review DPC- Convening of – Permissibility - Government creating posts of Sub-Divisional Ayurvedic Chakishta Adhikaris (SDACA) and promoting Ayurvedic Chakishta Adhikaris to such posts on ad-hoc basis purely on seniority with rider that it would not confer any right to seek regular promotion - No R&P Rules in existence to fill posts of SDACA - Petitioner retiring in between on 31-10-2000 and filing writ in High Court on allegations that his promotion was intentionally delayed - Hon'ble Single Judge allowing writ and ordering Review DPC with all consequential benefits – LPA - Held, posts were newly created and no Rules for filling up such posts in existence – R & P Rules amended thereafter and notified on 05-12-2000 - Posts could have been filled only on finalization of R&P Rules - Rule making takes time and it is essential – No intentional delay in promotion of petitioner - Judgment of Hon'ble Single Judge directing review DPC not justified - LPA allowed - Judgment of Hon'ble Single Judge set aside. (Paras 6 to 8) State of Himachal Pradesh & anr. Vs. Dr. Amar Nath & ors., Page- 291.

Constitution of India, 1950 - Articles 14 & 16 - Promotion to post of Registrar, Department of Irrigation and Public Health – Eligibility - State Government creating two departments i.e. Department of Irrigation and Public Health (I&PH) and Department of Public Works Department (PWD) from erstwhile Public Works Department - Also giving liberty to officials/officers to opt - On failure of officials to exercise option(s), State Government bifurcating cadre on 'as is where is basis' - Petitioner allocated PWD (B&R) cadre - Petitioner filing writ challenging bifurcation as arbitrary being violative of natural justice and seeking

promotion to post as Registrar, Department of Irrigation and Public Health on basis of combined seniority list - Hon'ble Single Judge dismissing writ – LPA - Held, on date of bifurcation of department as well as on date of bifurcation of cadre, petitioner was with PWD wing - Petitioner not challenging bifurcation of Department and he merely challenging bifurcation of cadre on 'as is where is basis' - Petitioner never exercised any option for allocation of Department of Irrigation and Public Health nor his posting in PWD(B&R) - Petitioner accepted promotion on basis of seniority of PWD(B&R) Department, suggesting his acceptance of allocation in that Department - Petitioner not entitled to lay claim for promotion to post of Registrar in Department of I&PH - LPA dismissed. (Paras 13, 14, 18, 19 & 23) Title: Dharam Pal Gupta Vs. State of H.P. & Another, Page- 391.

Constitution of India, 1950 - Articles 14 , 16 & 226 - Writ jurisdiction - Dispute regarding inter-se seniority of judicial officers – Plea seeking recusal of Hon'ble Judge of Bench from hearing matter – Sustainability - Private respondents seeking recusal of Hon'ble Judge of Bench from hearing writ of petitioners on ground that Hon'ble Judge was member of Judges Committee and author of report, petitioners praying implementation of – Facts revealing that Hon'ble Judges Committee was constituted by Hon'ble Chief Justice pursuant to directions of Hon'ble Supreme Court asking High Court to determine inter-se seniority of officers as per 34 point roster keeping in view of various judgments given in **'All India Judges Association Case'** - Committee's report accepted by Hon'ble Full Court and only then filed before Supreme Court – Representations and objections of private respondents kept alive by Hon'ble Judges Committee and Hon'ble Full Court – Committee's report strictly in accordance with directions of Hon'ble Supreme Court - However, no adjudication made by Apex Court qua report submitted before it on behalf of High Court - **Held, (As Per Hon'ble Shri Justice Sandeep Sharma)** though no independent view was expressed by members of Judges Committee and logic given by private respondents for recusal was equally applicable to every Hon'ble Judge of High court being part of that Full Court which accepted Judges Committee's report yet justice should not only be done but should manifestly and undoubtedly be seem to be done – Judges recuse from hearing case in order to uphold credibility and integrity of institution - Hon'ble Judge recused from hearing case - Registry directed to place matter before Hon'ble Chief Justice for constitution of fresh Bench. (Paras 12-15 & 33) Title: S.C. Kainthla Vs. State of H.P. & Others, Page-468.

Constitution of India, 1950 – Articles 14 & 226 - Contractual Employees – Efflux of contractual period – Effect - Petitioners rendering services as Assistant Professors on contractual basis – State advertising posts after expiry of contractual period - Petitioners filing writs and continuing on posts because of stay orders of court - Petitioners challenging advertisement on ground that contractual employees cannot be replaced by other employees to be engaged on contract basis – Held, person who enters through back-door or side door has to leave from same door - Once appointments were purely contractual then by efflux of time as envisaged in contract itself, same came to an end and persons holding such posts can have no right to continue or renewal of contract of service as matter of right - Petitioners accepted engagement under contract - They are bound by terms of contract - They cannot claim higher rights than available under contract - Petitions dismissed - State permitted to conduct interview pursuant to advertisement and proceed further. (Paras 6 & 7) Title: Pooja Kumari Vs. State of H.P. and others, Page- 510.

Constitution of India, 1950 - Article 21- **Himachal Pradesh Minor Canals Act, 1976** – Distribution of Kuhl water for irrigation – Grievances - Writ jurisdiction - Petitioner alleging arbitrary supply of water for irrigation to village 'K' vis-à-vis village 'B' - High Court directing Deputy Commissioner to look into grievances - Deputy Commissioner constituting

Committee and directing Sub-Divisional Magistrate(SDM) to ensure compliance of Committee's Report – Petitioner again filing petition and challenging order of Deputy Commissioner - Held, Kuhl water is natural resource to which residents of area are equally entitled for irrigation - Committee Report suggesting supply of water on *pro-rata* basis vis-à-vis areas of villages concerned – Petitioner failing in proving less supply of water vis-à-vis village 'K' – Petition dismissed.(Para 4) Title: Gian Dass Negi Vs. State of H.P. & Others, Page- 346.

Constitution of India, 1950 – Articles 21 & 226 – Deficiencies in dental college - Writ jurisdiction - High Court taking *suo moto* cognizance on basis of news item indicating that costly machinery installed in Himachal Pradesh Government Dental College and Hospital, Shimla is either out of order or not being put to use - State filing reply and refuting allegations labeled in news item, however, reply not found satisfactory - Some machinery found outdated requiring replacement whereas some was not being put to use for lack of manpower - High Court directed Secretary (Health) to visit college concerned, convene meeting with stake holders and take appropriate steps within stipulated time. (Paras 6 to 8) Title: Court on its own motion Vs. State of H.P. & Others (CWPIL No.119 of 2018), Page-363.

Constitution of India, 1950 – Articles 21 & 226 – Public Interest Litigation - Water pollution - High Court taking *suo moto* cognizance on basis of news item regarding pollution in Giri river at Chhaila on account of discharge of filth and sullage etc - Reports of various committees including Joint Inspection Committee as well as Advocates Committee, corroborating news item - Committees also suggesting various recommendations for rectification - Held, State being welfare state under obligation to provide clean drinking water to its residents - Authorities responsible for maintaining hygiene in and around water sources in deep slumber - Authorities directed to ensure implementation of suggestions and remedial measures suggested by HP State Pollution Control Board - Deputy Commissioner, Shimla directed to ensure adequate funds for implementation of remedial suggestions. (Paras 14-15) Title: Court on its own motion Vs. State of H.P. & Others (CWPIL No.83 of 2018), Page- 415.

Constitution of India, 1950- Article 226 - Writ jurisdiction – Recusal of Judge - Need to disclose reasons - Held, litigants would also like to know why Judge recused from hearing case or did not recuse to hear despite request – As such reasons are required to be indicated broadly. (Para 30) Title: S.C. Kainthla Vs. State of H.P. & Others, Page-468.

Constitution of India, 1950- Article 226 - Writ jurisdiction – Recusal of Judge – Impartiality - Held, impartiality is essential to proper discharge of judicial office - It applies not only to decision itself but also to process by which decision is made - A Judge shall disqualify himself from participating in any proceeding in which he is unable to decide matter impartially or in which it may appear to reasonble observer that Judge is unable to decide matter impartially. (Para 28) Title: S.C. Kainthla Vs. State of H.P. & Others, Page-468.

Constitution of India, 1950- Article 226 - Writ jurisdiction – Recusal of Judge - Bias- Test for determination - Held, to disqualify person from adjudicating on ground of interest in subject matter of *lis*, test of real likelihood of bias is to be applied - Issue of bias is to be seen from angle of reasonable objective and informed person - It is his apprehension that is of paramount importance. (Paras 25 & 26) Title: S.C. Kainthla Vs. State of H.P. & Others, Page-468.

Constitution of India, 1950 - Article 226 – Writ jurisdiction – Exercise of - Judgment of Hon'ble Single Bench – Challenge thereto – Whether can be challenged by way of Writ ? – Held- No - Hon'ble Single Bench setting aside award of Labour Court and directing employer to reinstate workmen within two months of judgment - No LPAs instituted by employer against judgment of Hon'ble Single Bench – Employer filing Writ petitions for challenging verdict – Further, held, Writ petitions challenging judgment of Hon'ble Single Bench not maintainable - Petitions dismissed. (Paras 5 & 6) Title: H.P.S.E.B and another Vs. Lal Singh, Page-288.

Constitution of India, 1950 - Article 226 – Tender - Acceptance – Extension of rate contract - Court interference - Corporation not accepting tender of petitioner for year 2017-18 for supply of Plant Protection Equipments despite it being lowest – In earlier petition, High Court directing Corporation to consider tender and grant it to petitioner, if lowest - Corporation accepting tender vide communication dated 31-12-2017 and awarding rate contract to petitioner till 31.03.2018, i.e., for three months - Petitioner again approaching High Court and praying for extension of rate contract for complete one year - Held, tender was only for financial year 2017-18 - Directing extension of rate contract would amount to re-writing contract which is not permissible under law – Petition disposed of in view of concession made by Corporation in favour of petitioner. (Paras 17-19) Title: RSR Private Limited Vs. State of H.P. & Others, Page- 327.

Constitution of India, 1950- Article 226 - Poor quality of tarring of road - Epistolary writ jurisdiction - High Court taking cognizance on letter of letter petitioner highlighting poor quality of tarring of road – Letter petitioner mentioning sprouting of grass on road within 15 days of its tarring by contractor - Department justifying work executed by contractor and assigning water logging as cause of sprouting of grass on certain patches of road - Reason assigned by Department not found satisfactory – Interregnum, contractor relaid tarring - Petition disposed of with directions to Engineering-in-Chief, PWD to ensure that work entrusted to contractors is executed as per specifications - Officials of department, if failed, to get work done as per specifications shall be personally liable and cost incurred in repair should also be recovered from their salaries. (Paras 6-9) Title: Court on its own motion Vs. State of H.P. & Others (CWPIL No.81 of 2018), Page- 343.

Constitution of India, 1950 - Article 226 - **Companies Act, 2013 (Act)** - Sections 164(2) & 248(2) - Directors of Companies – Disqualification - Challenge thereto - Writ jurisdiction - Petitioners being Directors of different private companies since not filing requisite returns declared disqualified by Registrar of Companies (ROC) - Petitioners approaching High Court and praying restraint against ROC from blocking their Directors Identification Numbers (DINs) - Petitioners contending that they stood appointed as Directors of other companies and blocking their DINs without notice would adversely affect their interest - Petitions disposed of with directions to petitioners to approach ROC and apply for liquidation of erstwhile companies and avail benefits of CODS-2018 – ROC also directed to expedite the proceedings. (Paras 3-9) Title: Sikander Madan Vs. Union of India & Others, Page- 348.

Constitution of India, 1950 - Article 226 – Notification dated 01.10.2010 - *Ex-gratia*- Entitlement - Writ jurisdiction - Deputy Commissioner denying *ex-gratia* payment to petitioner on ground of her not being *bona fide* resident of Himachal Pradesh - Challenge thereto - Petitioner found residing at Shamshi in Kullu for last 20 years and having certificate of *bona fide* Himachali issued by Competent Authority - Petitioner also availing other benefits, like, ration on concessional rates through department of Civil Supplies -

Held, petitioner is *bona fide* resident of Himachal Pradesh and entitled for *ex-gratia* payment for death of her husband in natural calamity - Petition allowed. (Paras 8-13) Title: Vimlesh Vs. State of H.P. & Others, Page- 365.

Constitution of India, 1950 - Article 226 – Rustication from college – Challenge thereto - Writ jurisdiction - College administration rusticating petitioners for one academic year for assaulting Assistant Professor - Petitioners challenging order of rustication by way of writ - Rustication order found having been passed after affording opportunity of being heard to petitioners - Conduct of petitioners totally unbecoming of student - Keeping in view future of petitioners, High Court persuading college administration to reconsider matter - On suggestion of Court, rustication order withdrawn by College administration after accepting unconditional apology of petitioners and their parents/ guardians subject to certain conditions - Writ disposed of. (Paras 5, 6, 9 &10) Title: Sahil and Others Vs. State of H.P. & Another, Page- 429.

Constitution of India, 1950- Article 226 - **HP Electricity Regulatory Commission (Consumer Grievances Redressal Forum and Ombudsman) Regulations, 2013** - Regulation 17 - Company depositing huge amount with HPSEBL (Board) for installing dedicated feeder for it - Board failing to complete job in time despite several requests of company - Company approaching HP Electricity Regulatory Commission (Commission) for redressal of grievances - Commission directing Board to refund amount received by it from company along with interest - Petition against - Board submitting that it could not complete work because company did not provide right of way to it - Material indicating that (i)company had not only deposited requisite money but also supplied entire material well within stipulated time to Board - (ii) right of way was also arranged by company for purpose of erection of poles and laying of cables, - Held, petition filed by Board is mere abuse of process of law - And company has been harassed by officials of Board - Petition dismissed with costs assessed at Rs.1.00 Lakh (Paras 2 to 9) Title: The Executive Director (Pers), Himachal Pradesh State Electricity Board Limited and another Vs. M/s Virgo Aluminum Ltd., Page- 636.

Constitution of India, 1950 - Article 226 - Executive function - Refusal to grant license - Non speaking order - Writ jurisdiction – Held, all authorities exercising power to determine rights and obligations must give reasons in support of their orders – Decision of Public Distribution Committee declining grant of license to Society for sale of controlled and uncontrolled commodities to ration card holders within its jurisdiction being without any reason, set aside - Petition disposed of - Public Distribution Committee directed to reconsider request of Society within time specified in view of guidelines of Government. (Paras 13 & 14) Title: The Charog Non- agricultural Thrift and Credit Co-operative Society Limited Vs. State of H.P. & others, Page-639.

Constitution of India, 1950 - Article 227- **Code of Civil Procedure, 1908 (Code) –** Order XXXIX Rules 1 and 2 – Interim injunction- Grant of – Report of Local Commissioner – Relevancy – Plaintiff seeking temporary injunction against defendant for restraining him from raising construction – Defendant contesting application and relying upon demarcation report conducted by Local Commissioner appointed by court indicating plaintiff's encroachment over his land - Trial court dismissing application for interim stay – First appellate court dismissing plaintiff's appeal – Petition against – Held, demarcation report without calling and deciding objections could not have been relied upon by courts for denying interim injunction – Petition allowed - Orders of lower courts set-aside and case

remanded to trial court for deciding afresh. (Paras 4 to 6, 10 & 11) Title: Sareshta Devi Vs. Parkash Chand, Page- 1.

Constitution of India, 1950 - Article 227 - **Code of Civil Procedure, 1908 -** Section 24 - Transfer of complaint - Petitioner seeking transfer of complaint filed by her under Protection of Women from Domestic Violence Act, 2005 from Court of Additional Chief Judicial Magistrate, Shimla to Court of JMIC, Nadaun, District Hamirpur - On facts, petitioner having two minor children - Found residing in her parental house in District Hamirpur - Difficult for her to attend hearing at Shimla leaving her minor children at Hamirpur - Held, convenience of wife to be considered over and above inconvenience of husband - Petition allowed - Complaint ordered to be transferred from Court at Shimla to Court at Nadaun, Hamirpur. (Paras 5, 6 & 7) Title: Anita Vs. Balbir Singh, Page-271.

Constitution of India, 1950- Article 311- **Himachal Pradesh Judicial Service Rules, 2004 –** Rules 10 & 11 – Probation - Discharge from service without inquiry - Challenge thereto - High Court discharging appellant from service during probation after holding discreet inquiry on ground of non-suitability - Hon'ble Single Judge dismissing appellant's writ seeking reinstatement – LPA - Appellant contending that discharge from service since preceded by discreet inquiry, he could not have been discharged without affording opportunity of being heard to him - Held, though discreet inquiry was conducted on complaints but inquiry report was never made basis for discharge of petitioner from service during probation - It was on basis of overall performance of petitioner - Discharge neither stigmatic nor punitive in nature - No opportunity of being heard was required to be given to him - LPA dismissed. (Paras 4, 6, 8, 13, 17, 18, 24 & 31) Title: Sunish Aggarwal Vs. State of H.P. & Another, Page- 487.

Constitution of India, 1950- Article 311- **Himachal Pradesh Judicial Service Rules, 2004**-Rules 10 & 11 – Probation - Discreet inquiry - Purpose – Held, purpose of discreet inquiry is to ascertain correctness of allegations. (Para 17) Title: Sunish Aggarwal Vs. State of H.P. & Another, Page- 487.

Constitution of India, 1950- Article 311- Removal from service - When amounts to punishment - Held, when termination is found on misconduct, negligence or inefficiency, it amounts to punishment. (Para 19) Title: Sunish Aggarwal Vs. State of H.P. & Another, Page- 487.

Constitution of India, 1950 - Article 311- Termination from service - Held, service of public servant can be terminated when authority is satisfied regarding his inadequacy for job or unsuitability for temperamental or other reasons not involving moral turpitude. (Para 19) Title: Sunish Aggarwal Vs. State of H.P. & Another, Page- 487.

Constitution of India, 1950 - Article 311 - **Himachal Pradesh Judicial Service Rules, 2004 –** Rules 10 & 11 – Probation - Termination from service without inquiry, when bad? Held, order of discharge passed against probationer at his back on basis of inquiry conducted into allegations made against him and if same formed foundation of discharge order, is bad in eyes of law on ground of violations of rules of natural justice. (Para 19) Title: Sunish Aggarwal Vs. State of H.P. & Another, Page- 487.

'D'

Doctrine of legitimate expectation – Applicability - Held, appointments offered to petitioners were limited one and respondents had not at any given time offered to petitioners that they would continue in service till perpetuity or till date they attain age of superannuation. Question of legitimate expectation to continue in service does not arise. Petitioners at time of entering into contractual appointment were fully aware of consequences of appointments being contractual in nature, therefore, such persons cannot invoke theory of legitimate expectation for being continued in posts. (Para 13) Title: Pooja Kumari Vs. State of H.P. and others, Page-510.

'E'

Easements Act, - 1882 – Section 15- Right of passage by prescription – Requirements – Share Aam rasta – Entries of – Effect – Plaintiff claiming right of way through defendants land by prescription – Banking plea on revenue entries showing suit land as share aam rasta - Trial court dismissing suit - First appellate court also dismissing plaintiff's appeal – RSA – Held, revenue entries cannot be read in isolation when plea of prescriptive easement is raised by plaintiff – Disputed path leading only upto defendants property - No other person of that locality using it as passage – Entries of share aam rasta, thus, lose significance - Plaintiff claiming passage only for effecting repair of septic tank and retaining wall of his house - Such repairs can still be effected from passage located within plaintiff's own land - Right of way by prescription not established – RSA dismissed – Decrees of lower courts upheld. (Paras 8 to 11) Title: Suresh Chadha & another Vs. Gurudatt & Ors., Page-79.

Evidence Act, 1872 – Section 3 – Appreciation of evidence - Official witnesses – Held, deposition put forth by official witnesses cannot be disbelieved merely on account of non-association of independent persons in investigation- But where version of official witnesses not corroborated by independent witnesses then their evidence required to be taken into consideration with utmost care and caution. (Para 10) Title: Munish Kumar Vs. State of Himachal Pradesh, Page-34.

Evidence Act, 1872 – Section 3 – Appreciation of evidence – Principles – Held, evidence must be tested for its inherent consistency and probability - In case of multiple witnesses, consistency with account of other witnesses makes such witness creditworthy (Para 15) Title: Munish Kumar Vs. State of Himachal Pradesh, Page-34.

'F'

Family Courts Act, 1984 - Section 10 - Proceedings through video conferencing - Held, in transfer application High Court cannot direct Family Court to conduct proceedings via video conferencing – It lies within discretion of Family Court whether or not to conduct proceedings through video conferencing. (Paras 11 & 12) Title: Anita Vs. Balbir Singh, Page-271.

'H'

Himachal Pradesh Judicial Officers (Pay and conditions of service) Act, 2003 – Pensionary benefits - Judicial officers retiring between 1.7.1996 to 31.12.2005 — Grant of enhancement on and with effect from 1.1.2006 - Office memorandum dated 14.10.2009 –

Held, for fitment weightage existing pension is to be re-calculated after excluding merged dearness relief of 50 % from pension. (Paras 2 & 3) Title: Rameshwar Sharma Vs. State of H.P. & others, Page- 92.

Himachal Pradesh Tenancy and Land Reforms Act, 1972 – Sections 104 & 112 – Bar of jurisdiction of civil court -Applicability – Held, bar of jurisdiction of civil court in entertaining suit as contemplated under Section 112 of Act is attracted only when order of conferment of proprietary rights on tenant is sought to be challenged before it - When relationship of landowner and tenant is in dispute, jurisdiction of civil court is not barred. (Paras 23 to 25, 31 & 34) Title: Sadhu Singh and ors. Vs. Surjeet Singh, Page- 158.

Himachal Pradesh Tenancy and Land Reforms Act, 1972 – Sections 104 & 112 – Bar of jurisdiction of civil court - Applicability – Plaintiffs filling suit for possession against defendants by averring themselves as owners of suit land and alleging defendants to be trespassers over it – Trial court holding plaintiffs to be owners of suit land and defendants trespassers but returning plaint on ground that latter having already instituted proceedings before AC 1st grade for conferment of proprietary right upon them and civil court having no jurisdiction to entertain suit - District Judge dismissing appeal on ground that plaintiffs had no cause of action since matter was pending before AC 1st grade regarding conferment of proprietary rights on defendants – Revision – Held, plaint clearly indicating plaintiffs' disputing revenue entries showing defendants as sub-tenants under 'G'- Relationship of landowner and tenant in dispute inter-se parties - Cause of action accrued in plaintiffs' favour independent of proceedings before AC 1st grade - Jurisdiction of civil court not barred in view of pleadings raised in plaint & replication - Revision allowed - Order of District Judge set aside - Matter remanded to District Judge for decision on merits. (Paras 23 to 25, 31 & 34) Title: Sadhu Singh and ors. Vs. Surjeet Singh, Page- 158.

Himachal Pradesh Tenancy and Land Reforms Act, 1972 (Act) - Section 118 – Bar of - Specific performance of agreement to sell – Applicability - Held, bar contemplated under Section 118 of Act is attracted only when registration of sale deed is sought to be effected in favour of non-agriculturist of Himachal Pradesh - There is no bar in decreeing suit for specific performance - Decree of trial court declining specific performance of agreement to sell on ground of its being contrary to provisions of Section 118 of Act not correct - Appeal allowed – Decree set aside – Suit decreed for specific performance. (Paras 59 to 61) Title: Meera Dewan and another Vs. Neelam Rana, Page-241.

Himachal Pradesh Urban Rent Control (as amended by Amendment Act, 2009) Act, 1987 (Act) – Section 14- Eviction suit - *Bona fide* requirement - Non-residential building – Permissibility - Landlord filing eviction suit against tenant on ground of building required by him for setting up internet café - Rented premises non-residential one - Rent Controller ordering eviction of tenant - Appellate Authority upholding order – Revision - Tenant submitting that eviction from non-residential building was not provided in the Act when rent suit was filed - Rent suit itself was not maintainable and orders being without jurisdiction - Held, Act stood amended vide Amendment Act, 2009 enabling landlord to seek eviction from non-residential building for *bona fide* requirement - Amendment Act will apply to pending proceedings with retrospective effect. (Para 14) Title: Kewal Krishan Sehgal and others Vs. Rajeshwar Kumar and another, Page-500.

'I'

Indian Evidence Act, 1872 - Section 9 - Last seen theory – Applicability and evidentiary value **–** Held, last seen they comes into play where time gap between point of time when accused and deceased were last seen alive together and deceased found dead is so small and possibility of any person other than accused being author of crime become impossible - Circumstance of last seen together cannot by itself form basis for holding accused guilty of offence – Other circumstances surrounding incident are also relevant. (Paras 61, 64 & 66) Title: Balbir Singh Vs. State of Himachal Pradesh, Page- 543.

Indian Evidence Act, 1872 - Section 26 - Extra-judicial confession – Admissibility - After committing murder accused attempting to commit suicide by consuming poison - Taken to hospital - Accused admitting murdering 'C' before doctor - Police also present nearby at time of making of statement by accused – Defence contending that statement made by accused before doctor inadmissible in evidence as confession ought to have been before Judicial magistrate - Held, accused was neither arrested nor in custody of police at relevant time - Confession not hit by Section 26 of Act. (Paras 69 & 70) Title: Balbir Singh Vs. State of Himachal Pradesh, Page- 543.

Indian Evidence Act, 1872 – Section 61**-** Document – Proof – Held, mere admission of party regarding document or its exhibition does not prove contents of document – Document must be proved in accordance with law – (Para 8) Title: Suresh Kumar and others Vs. Sumitra Devi and others, Page- 260.

Indian Evidence Act, 1872 - Section 65- Secondary evidence – Leave of court – Essential requirements – Held, genuineness of document not to be seen while deciding application for grant of leave for leading secondary evidence – Party must show probative value of document and its entitlement to lead secondary evidence by showing loss or destruction of original - Defendants clearly showing destruction of original record by Department concerned – Document sought to be proved by way of secondary evidence material for decision – Order of trial court declining leave to defendants set aside – Petition allowed. (Paras 14 & 15) Title: Suresh Kumar and others Vs. Sumitra Devi and others, Page- 260.

Indian Evidence Act, 1872 - Section 65 – Secondary evidence - Adduction of - Held, secondary evidence can be adduced only when loss or destruction of original is proved or original is withheld by opposite party - It may also be adduced with leave of court when party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable time - Plaintiff placing on record extract of register of Petition Writer proving existence of documents purported to be lost by him during shifting of articles – Trial court justified in permitting him to lead secondary evidence to prove contents of such agreements - Order upheld – Petition dismissed.(Paras 3 & 5) Title: Mohan Lal Vs. Rajinder Kumar Puri, Page- 46.

Indian Evidence Act, 1872 (Act) – Sections 65 and 66 – Secondary evidence – Adduction of – Notice to opposite party – Purpose – Held, very purpose of notice under Section 66 of Act is only to put other party possessing or having power over document to produce it so as to secure best evidence. (Para 8) Title: Shaminder Kumar Chaoudhary Vs. Sukhdev Chand and others, Page- 208.

Indian Evidence Act, 1872 (Act) – Sections 65 and 66 – **Code of Civil Procedure, 1908 (Code)** –Order XI Rule 14 – Secondary evidence – Adduction of - Notice, when not required –

Circumstances – Trial Court dismissing application of plaintiff to lead secondary evidence on ground of his not having issued notice to defendant to produce original Will – Petition against – Material on record showing execution of Will specifically admitted by defendants in written statement - Earlier plaintiff filed application under Order XI Rule 14 of Code asking defendants to produce Will – Held, in view of pleadings made in written statement and filing of application of Order XI Rule 14 of Code seeking production of original Will was sufficient notice to defendants – No separate notice under Section 66 of Act was required to be given to them – Petition allowed – Order of trial court set aside – Application to lead secondary evidence allowed. (Paras 9, 10 & 12) Title: Shaminder Kumar Chaoudhary Vs. Sukhdev Chand and others, Page- 208.

Indian Evidence Act, 1872 - Section 90 – Thirty (30) years old document – Presumption - Held, presumption of truth is attached to documents which are thirty (30) years old and court may presume that signature and every other part of such document was duly executed and attested by person by whom it purports to be executed and attested. (Para 20) Title: Geeta Bhavan, Mandi Vs. Balbir Singh & Others, Page- 317.

Indian Penal Code, 1860 - Sections 147 & 323 read with 149 – Rioting and assault – Proof – Trial court acquitting accused for want of evidence – State challenging acquittal on ground of wrong appreciation of evidence - Statement of complainant not only contradictory with respect to recitals made in FIR filed at his instance but also at variance with deposition of primary witnesses on material aspects - Stones used for assault not taken into possession by I.O - Clothes not proved to be containing blood belonging to blood group of victims – Acquittal recorded by trial court not suffering from mis-appreciation of evidence - Appeal dismissed. (Paras 10 to 12) Title: State of H.P. Vs. Ram Rattan & others, Page- 76.

Indian Penal Code, 1860 – Section 302 – Murder- Proof **-** Trial court convicting and sentencing accused of murdering 'C' – Appeal - Accused arguing mis-appreciation of evidence on part of trial court - Case based on circumstantial evidence – Facts revealing- (i) accused though engaged with deceased, was liking her cousin 'S', (ii) accused also confiding 'S' that he did not like 'C', (iii) on fateful day, accused and deceased were together in jungle, (iv) accused sent younger brother of 'C' back home from jungle, (v) in evening, dead body of 'C' was found from that very spot, (vi) hammer was found lying nearby dead body, (vii) injuries were ante-mortem in nature and probable with hammer (viii) colleagues of accused found him sad in office during day time on next day (ix) accused attempting to commit suicide by consuming poison on next day, (x) accused making confessional statement of having murdered 'C' before medical officer, (xi) accused identifying place and weapon of offence - Held, chain of circumstantial evidence clearly leads towards guilt of accused - Appeal dismissed – Conviction upheld. (Paras 59-73) Title: Balbir Singh Vs. State of Himachal Pradesh, Page- 543.

Indian Penal Code, 1860 (Code) - Sections 302 & 304 Part-II - Murder or culpable homicide not amounting to murder ? – Distinction – Proof - Trial court convicting and sentencing accused for committing murder of 'K'- Appeal against - Accused contending wrong appreciation of evidence by trial court while convicting him of offence of murder - Held, intention or knowledge to cause death can be gathered generally from few or several circumstances, like, nature of weapon used, whether weapon was carried by accused or picked instantly from spot, whether blow aimed at vital part of body, amount of force employed in causing injuries, whether act was in course of sudden quarrel or sudden fight or free for all fight, whether there was any pre-meditation or prior enmity or whether there

was sudden or grave provocation etc ? - Facts revealing, (i) beatings were given to deceased with sticks and fist blows, (ii) condition of deceased not so serious so as to shift him to hospital immediately and for this reason he was taken by police personnel to his house, (iii) no motive or previous enmity to commit murder, and (iv) incident taking place in spur of moment - Intention or knowledge to commit murder lacking - Conviction altered to one under Section 304 Part II of Code - Appeal partly allowed - Sentence modified to rigorous imprisonment for 10 years and fine with default clause. (Paras 28-32) Title: Pardeep Kumar alias Sunny Vs. State of H.P., Page- 99.

Indian Penal Code, 1860 – Sections 323, 325 and 506 – Grievous injuries and criminal intimidation – Proof – Accused prosecuted before court on allegations that they made assault on complainant 'VN' with dandas, caused grievous injuries and also intimidated him - Trial court convicting accused but Sessions Judge setting aside conviction and acquitting them in appeal – Appeal against – On facts, dispute between parties pertained to land - Possession of land with accused – In order to take possession forcibly, complainant made an assault upon accused – Held, complainant initiator of aggression - Injuries, if any, caused to complainant in exercise of private defence of person as well as property by accused – No reason to interfere with acquittal – Appeal dismissed- Acquittal upheld. (Paras 9, 11 & 12) Title: State of H.P. Vs. Bisham Singh & another, Page- 286.

Indian Penal Code, 1860 – Sections 363, 376 & 452 **– Protection of Children from Sexual Offences Act, 2012** - Section 8 – House trespass, kidnapping, sexual assault etc - Special Judge convicting accused of house trespass and sexual assault on victim – Appeal on ground of mis-appreciation of evidence - Evidence showing (i) accused trespassed into house and took victim to his own house (ii) touched his private part with private part of victim (iii) struggle marks on victim's body (iv) aunt of victim with whom she was sleeping clearly deposing of accused having taken victim with him on that night - Held, evidence clearly proving guilt of accused of said offences - Conviction upheld - Appeal dismissed (Paras 10 to15) Title: Chander Pal Vs. State of H.P., Page-54.

Indian Penal Code, 1860 – Section 376 - **Protection of Children form Sexual Offences Act, 2012** – Sections 6, 7 and 8 **–** Rape and aggravated sexual assault - Medical jurisprudence- Held, question of victim having been sexually abused or not will normally depend on conditions of vagina and not cervix (Para 18) Title: Nikka Ram Vs. State of H.P., Page- 528.

Interpretation of Statutes – Principle of approbate and reprobate – What is ? - Held, a person cannot say at one time that transaction is valid and thereby obtain some advantage under it to which he could only be entitled on footing that it is valid and then turn around and say it is void for securing some other advantage – Operation of this principle must be confined to reliefs claimed in respect of same transaction and parties thereto. (Para 8) Title: Ved Parkash Vs. The Kangra Central Co-operative Bank Ltd. and ors., Page- 189.

'J'

Juvenile Justice (Care and Protection of Children) Act 2015 - Sections 7 and 8 - Jurisdiction of Juvenile Justice Board - Petitioner accused of taking obscene photographs of victim and circulating them - Petitioner facing proceedings before Juvenile Justice Board for taking photographs and trial before Special Judge for circulating said photographs - Petitioner filing petition and submitting that he cannot be put to trial and proceedings for

one offence at two different fora – Held, two offences are distinct and separate - Offence of taking obscene photographs committed when he was below 18 years of age - Proceedings for that offence will lie before Juvenile Justice Board - Offence of circulation of photographs committed after attaining majority by him and trial will proceed before Special Judge - Petition dismissed. (Paras 3 to 6) Title: Sayyam Khurana Vs. State of H.P. & another, Page- 51.

'L'

Land Acquisition Act, 1894 – Sections 11 and 18 – Consent award – Nature – Whether land owners entitled to file reference? – Held, when Collector has passed award with consent of land owners and aggrieved parties have also accepted compensation without any protest, they are not entitled to prefer reference before District Judge - On facts, award passed by Collector found to be with consent of land owners – District Judge went wrong in allowing reference and enhancing compensation with respect to acquired land – RFA allowed – Award of District Judge set aside. (Paras 12 to 17) Title: Khazana Ram and anr. Vs. Land Acquisition Collector and ors., Page- 151.

Land Acquisition Act, 1894 – Sections 18 & 23 – Acquisition of land for public purpose – Market value – Assessment – Absence of exemplar sale deeds – Previous award – Relevancy – Held, when exemplar sale deeds are not available or placed on record, reference court justified in assessing market value of land on basis of previous award of court with respect to lands acquired in adjoining villages under same notification. (Paras 3 & 4) Title: State of H.P. & another Vs. Krishna Devi & others, Page- 74.

Land Acquisition Act, 1894 - Sections 18 & 23 - Acquisition of land for public purpose – Reference – Compensation - Land though belonging to State but building over it owned by someone else - Whether owner of building entitled for compensation? - Held, building cannot stand without land and though building also becomes part of land, yet State can acquire building by paying adequate compensation in accordance with law. (Paras 20 to 25) Title: Sharwan Kumar & Others Vs. LAC & Others, Page- 398.

Land Acquisition Act, 1894 - Sections 18 & 54 - Acquisition of land for public purpose i.e. construction of Sanjauli-Dhalli Bypass – Reference - District Judge awarding compensation at rate of Rs.2,34,500/- per bigha irrespective of classification of acquired land – RFA - On fact, Apex Court granting compensation at rate of Rs.9,05,071/- per bigha in respect of land acquired under same Notification - Held, appellants also entitled for compensation at same rate in respect of other lands. (Paras 12 & 16) Title: Sharwan Kumar & Others Vs. LAC & Others, Page- 398.

Land Acquisition Act, 1894 - Section 54 - **Limitation Act, 1963** - Section 5 - Delay in filing appeal – Condonation - Conditions thereof – Principles - Held, in land acquisition matters while condoning delay in filing appeal, approach of court should be pragmatic and not pedantic - Substantive rights of parties should not be allowed to be defeated on technical grounds - When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. (Paras 2 & 3) Title: Om Prakash & Others Vs. LAC & Others, Page-437.

Limitation Act, 1963 – Article 64 & 65 – Adverse possession – Proof – In suit for possession, defendant raising plea of adverse possession - In earlier suit filed by her, she

(defendant) claimed ownership under Will - No plea of adverse possession raised by her in that suit – Held, defendant has not become owner of land by adverse possession. (Para 10) Title: Kamla Devi Vs. Kiran, Page-61.

Limitation Act, 1963 - Articles 64 & 65 - Adverse possession - Possession under agreement to sell – Nature – Possession under agreement to sell inherently permissive and lawful - Adverse possession emanates from denial of title which vests in other – Plea of adverse possession and plea of possession under agreement to sell mutually destructive – Defendants not proved having become owner by adverse possession – RSA dismissed – Decrees of lower courts upheld. (Paras 11 to 14) Title: Ram Piari and ors. Vs. Pushpa Devi and ors., Page- 194.

'M'

Medical jurisprudence - Age of victim – Determination - Ossification test – Relevancy - Accused relying upon ossification test report of victim and praying for extension of upper age limit by three years and contending that sexual act, if any, was with victim's consent - Held, documentary evidence regarding age of victim not disputed by accused - Documents showing victim not of consenting age – Documentary evidence being of best nature, is to be considered. (Para 13) Title: Chander Pal Vs. State of H.P., Page-54.

Motor Vehicles Act, 1988 – Sections 39, 149 & 166 – Motor accident - Claim application- Defences - Non-registration of vehicle - Effect - Accident taking place when vehicle was not duly registered with Licensing Authority - Claims Tribunal fastening liability on insurer - Appeal against - Held, driving vehicle without due registration amounts to fundamental breach of terms of policy of insurance – Insurer cannot be held liable to pay compensation - Appeal allowed - Award modified with direction to insurer to pay compensation and recover amount from insured. (Paras 3 & 5) Title: United India Insurance Company Ltd. Vs. Bana Pati and others, Page- 581.

Motor Vehicles Act, 1988 – Section 88(1)- Second proviso – Corridor Inter- State permit– Held, where starting and termination point of route are situated within same State but part of such route lies in other State and length of route lying in other State does not exceed 16 kms, permit shall be valid in other State in respect of that part of route lying in other State notwithstanding such permit has not been counter-signed by State Transport Authority or RTA of other State – Object, area and scope of corridor permit are entirely different vis-a-vis route permit issued under Reciprocal Transport Agreement between States. (Para 7 & 10) Title: Inder Singh Vs. State of Himachal Pradesh and another, Page-220.

Motor Vehicles Act, 1988 – Section 147 – **Central Motor Vehicles Rules, 1989** – Rule 143 – Certificate of Insurance – Cover note – Authentication thereof – Insurance company not denying in its reply of having insured offending vehicle - Acknowledgement of receipt of premium qua insurance of offending vehicle by insurer duly proved – Held, insurer cannot avoid its liability to satisfy award – RFA dismissed - Award upheld. (Paras 4 to 8) Title: ICICI Lombard General Insurance Company Ltd. Vs. Mitto Devi & others, Page- 58.

Motor Vehicles Act, 1988 – Section 149 – Motor accident – Claim application - Defences – Route permit – Held, accident took place much prior to issuance of route permit in favour of owner – Offending vehicle had no permit to ply vehicle on said road at relevant time - Owner committed fundamental breach of insurance policy – Insurer not liable to indemnify award –

Tribunal's award directing insurer to pay and recover upheld – RFA dismissed. (Paras 3 & 4) Title: Sabita Parashar Vs. The New India Assurance Company Ltd. and others, Page- 68.

Motor Vehicles Act, 1988 - Motor accident - Claim application – Compensation - Future prospects - Self employed person - Held, in case of self-employed person or person on fixed salary aged below 40 years, increase of 40% towards future prospects can only be given - Appeal partly allowed - Award modified. (Paras 12 & 16) Title: The New India Assurance Company Vs. Kala Devi & Others, Page- 294.

Motor Vehicles Act, 1988 – Section 157(1) & (2) – Motor accident - Claim application – Defences - Transfer of vehicle - Non-intimation of change of ownership to insurer - Effect - Held, with valid transfer of vehicle, certificate of insurance and policy are deemed to stand transferred to transferee from date of transfer - Mere non-intimation of transfer of ownership of vehicle by transferee to insurer within statutory period is immaterial - Insurer cannot avoid its liability on ground that intimation of transfer of ownership was not given to it within stipulated period. (Paras 6 & 7) Title: Bajaj Allianz Insurance Company Ltd. Vs. Dev Raj & Others, Page- 588.

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application – Death of house wife – Monthly income – Assessment – Held, even when deceased house wife is not proven to rear any income from sources pleaded in claim application yet monetary value of her contribution as house maker vis-a-vis her family is difficult to compute - On facts, assessment of monthly income of deceased at Rs. 6,000/- done by Tribunal not interfered with. (Paras 3 & 4) Title: National Insurance Company Ltd. Vs. Jyoti Sharma and others, Page-65.

Motor Vehicles Act, 1988 – Section 166- Motor accident - Claim application – Monthly income - Determination – Deceased running tea stall and serving food thereat - Held, such person cannot be equated with skilled worker for determination of his monthly income – On facts, deceased had engaged helper at his tea stall – Monthly income taken at Rs. 15,000/- - Compensation re-determined accordingly. (Para 5) Title: Shriram General Insurance Company Ltd. Vs. Santosh Kumari & Others, Page- 70.

Motor Vehicles Act, 1988 – Section 166 – Motor accident - Claim application – Bodily injuries – Permanent disability – Quardi paraplegia – Compensation - Tribunal taking *quardi paraplegia* as permanent disability and granting compensation accordingly including amount towards loss of enjoyment of life but with deductions – Appeal by insurer - Insurer relying upon CD prepared by its investigator showing claimants capability to sit or stand with help of hands – Held, in *quardi paraplegia* person may have sensation in limbs but he cannot move – Being case of total impairment of limbs of claimant, he is entitled for permanent loss of income and permanent loss of enjoyment of life – Deductions of 10 % made by Tribunal, thus, wrong – Appeal of claimant allowed - Award modified. (Para 3) Title: Bajaj Allianz General Insurance Co. Ltd. Vs. Sushil Bhimta & Others, Page-86.

Motor Vehicles Act, 1988- Section 166 - Motor accident - Claim application - Compensation under conventional heads - Claims Tribunal allowing application of legal representatives of deceased and awarding compensation to tune of Rupees one lac each under heads 'Loss of love and affection', 'loss of consortium' and 'loss of estate' - Appeal against - Held, head relating to 'loss of care and guidance' for minor children does not exist - No compensation can be awarded towards loss of love and affection - Compensation

awarded under other conventional heads also brought in tune with **National Insurance Company Limited vs. Pranay Sethi and Others, AIR 2017 SC 5157.** (Paras 10 & 11) Title: The New India Assurance Company Vs. Kala Devi & Others, Page- 294.

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application – Compensation- Assessment- Self-employed person- Claims Tribunal accepting claim application of legal representatives of deceased, a tea vendor - And adding 50% to established income towards future prospects and also granting Rs. 1.00 lakh each towards loss of consortium, loss of love and affection and loss of estate - Appeal against – Held, deceased being self-employed, accretions towards future prospectus can only be to extent of 40% - Compensation under conventional heads also brought down in tune with **National Insurance Co. Ltd. vs. Pranay Sethi (2017 ACJ 2700)** - Appeal partly allowed- Award modified. (Paras 6 & 7) Title: National Insurance Company Ltd. Vs. Parvinder and others, Page- 579.

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Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 18 (c) - **Code of Criminal Procedure, 1973** - Section 377 – Opium-poppy cultivation – Confession - Inadequacy of sentence – Appeal - On confession of accused, Special Judge sentencing accused to imprisonment for period already undergone and fine for opium-poppy cultivation in his land without licence – State filing appeal on ground of inadequacy of sentence - Held, Section 18(c) of Act does not provide 'small quantity' or 'commercial quantity' with respect to cultivation of opium-poppy - Courts while awarding sentence under Section 18 (c) shall of their own wisdom taking note of quantity and bulk of opium-poppy shall award sentence - On facts, accused found having planted 22 plants of opium - No material suggesting his previous involvement in such kind of activities - Accused poor person and sole bread earner of family - No reason to differ with order of sentence of Special Judge - Appeal dismissed. (Paras 9, 14 &15) Title: State of Himachal Pradesh Vs. Uday Ram, Page- 435.

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) - Section 20 - Recovery of Charas – Proof - Trial court convicting accused of possessing 490 gms of Charas - Charas found having been recovered from person (vest) of appellant/accused, who was an occupant of bus and tried to flee on seeing police checking documents of bus - Appeal against – Accused contending wrong appreciation of evidence by Special Judge - On facts, 'R' a witness to recovery and seizure as well as 'O' and 'A', driver and conductor respectively of bus not supporting prosecution case during trial - Police having prior information of person travelling in bus with contraband - Provisions of Section 50 of Act not adhered to – Held, in circumstances of case, trial vitiated for non-compliance with provisions of Section 50 of Act - Appeal allowed - Conviction set aside. (Paras 7-13 & 18-27) Title: Mahesh Kumar Vs. State of Himachal Pradesh, Page-623.

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) – Sections 35 & 54 – Presumptions – Applicability - Held, though these provisions speak of reverse onus on accused but these presumptions would attract only when prosecution has proved recovery of contraband from conscious possession of accused. (Para 23) Title: Mahesh Kumar Vs. State of Himachal Pradesh, Page- 623.

National Institute of Technology Act, 2007 – General - Held, Authorities thereunder are identified - Powers and jurisdiction of said authorities have also been specifically spelt out -

Under Act, Ministry of Human Resource Development (MHRD) has no power to issue instructions or guidelines to any National Institute of Technology (Institute). (Para 20) Title: Om Parkash Rahi Vs. Union of India and ors., Page- 139.

National Institute of Technology Act, 2007- Section 17 - **1st Statute For All National Institutes of Technology, 2009** - Powers of Director - Explained – Held, even though Director of Institute is one of Authorities who can be appointed in prescribed manner but he can discharge his duties only within prescribed norms – He cannot constitute committee of his own atleast with regard to teachers with respect to whom he is not Appointing Authority - He has limited jurisdiction as regards, academic staff in posts of lecturers or above - His power is confined to take decisions of non-academic staff in any cadre where maximum of pay scale is less than of Rs. 10,500/- (Paras 27 & 28) Title: Om Parkash Rahi Vs. Union of India and ors., Page- 139.

Negotiable Instruments Act, 1881 (Act) - Sections 138 & 147- **Code of Criminal Procedure, 1973 (Code)**- Section 320 - Dishonour of cheque - Complaint - Whether composition of offence permissible after conviction but before passing of order of sentence ? – Held, Act is special statute and has overriding effect over provisions of Section 320 of Code – Section 147 of Act is independent provision enabling composition of offence vis-a-vis Section 320 of Code - As such offence can be compounded with leave of court after conviction but before passing of order of sentence. (Paras 12-13) Title: M/s.Mohan Meakin Limited Vs. M/s.Spirit and Beverages L-1, Page-405.

'P'

Punjab Excise Act,1914 (as applicable to the State of Himachal Pradesh)- Section.61(1)(a) - Recovery of country and Indian made foreign liquor (IMFL) without permit - On tip off, Police laying Naka and intercepting vehicles of accused and recovering huge quantity of Country and IMFL being transported by them without permit - Trial court convicting accused - Appellate court reversing trial court's judgment and acquitting accused – State in appeal - State contending wrong appreciation of evidence by Sessions Court - Facts showing (i) place of recovery being highway, a busy road, surrounded by many houses and shops and independent witnesses easily available but no independent witness associated (ii) statements of prosecution witnesses examined during trial inspiring no confidence as these riddled with material contradictions and inconsistencies (iii) samples from entire recovered stuff not taken – Held - Evidence on record does not warrant interference with judgment of acquittal - Appeal dismissed. (Paras 8,9 &14) Title: State of Himachal Pradesh Vs. Sukh Dev and others, Page- 515.

'R'

Right to Information Act, 2005 (Act) - Section 15 - Appellate Authority – Nature of functions – Held, appellate authority constituted under Act, discharges quasi – judicial functions while exercising appellate jurisdiction. (Para 11) Title: Manasi Sahay Thakur Vs. Madan Lal Sharma, Page-112.

Right to Information Act, 2005 (Act) - Section 21 – **Judges (Protection) Act, 1985** – Sections 2 and 3 – "Judge" - Meaning – Held, expression "judge' means person who is empowered by law to give in any legal proceedings a definitive judgment which, if confirmed by some other authority, would be definitive – It includes appellate authority constituted

under Section 15 of Act – Such persons will be immune from legal action in respect of anything done or purported to be done in discharge of appellate jurisdiction (Paras 17 to 19) Title: Manasi Sahay Thakur Vs. Madan Lal Sharma, Page-112.

'S'

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Act) - Sections 13(4), 17(1), 34 & 35 - **Code of Civil Procedure, 1908 – Order XXXIX Rules 1 & 2 -** Temporary injunction – Grant of – Debt Recovery Tribunal (DRT) taking proceedings under Section 13(4) of Act against immovable property of borrowers (secured assets) - Plaintiff filing suit in High Court and challenging said sale deeds concerning secured assets – Plaintiff alleging sale deeds having been procured by borrowers from her on basis of fictitious and fraudulent GPA - Plaintiff seeking stay of proceedings before DRT till disposal of suit - Facts revealing photographs of plaintiff on sale deeds - Documents registered before Sub-Registrar which carry presumption of valid execution – Held, plaintiff has no prima facie case and balance of convenience in her favour - Not entitled for temporary injunction – Application dismissed. (Paras 6 & 7) Title: Aruna Bedi Vs. Narinder Rana & others, Page-584.

Specific Relief Act, 1963 - Section 5 - Suit for possession on basis of title – Proof - Plaintiff filing suit for possession by averring that suit property owned by it and one 'D' was only its manager - And 'D' had no authority to alienate it – Trial court dismissing plaintiffs suit - Appeal also dismissed by District Judge – RSA – In documentary evidence suit property recorded as 'Dev Asharam' – No connecting evidence that 'Dev Asharam' ever remained part of plaintiffs property – Held, mere fact of 'D' proclaiming in some documents himself as its manager (Sanchalak) does not prove title of plaintiff over suit land - Title of plaintiff over suit land not proved - Suit rightly dismissed - RSA dismissed. Judgments of lower courts upheld. (Paras 10-13,18 & 35) Title: Geeta Bhavan, Mandi Vs. Balbir Singh & Others, Page-317.

Specific Relief Act, 1963 - Section 5 - Suit of possession on strength of title – Maintainability - Plaintiff filing suit for permanent prohibitory injunction and in alternative for possession of suit land, if dispossessed, from it during pendency of suit - Trial court dismissing suit *in toto* - District Judge allowing appeal and decreeing suit for possession holding defendants to be in its unauthorized possession – RSA- Facts revealing that in earlier suit filed by defendants, plaintiff had set up counter-claim for possession of suit land - His counter-claim stood dismissed on plaintiff's claiming his own possession over suit land - Plaintiff not filing any appeal against dismissal of his counter-claim in earlier suit - Also not pleading anything in present suit about his dispossession from suit land subsequent to judgment of earlier suit - Held, findings qua plaintiff's entitlement for possession of suit land had attained finality in earlier suit / counter-claim - Fresh suit for possession was not maintainable - Appeal allowed – Judgment and decree of first appellate court set aside - Suit dismissed.(Paras 14,15 and 25) Title: Jagdish Chand & Others Vs. Hari Singh, Page-332.

Specific Relief Act, 1963 - Section 34 - Suit for declaration of title and injunction – Proof - Plaintiff seeking declaration of his ownership over suit land by claiming title through 'DN' to whom it was allegedly given as Patta by Raja of Koti - In alternative plaintiff claiming ownership by adverse possession - Trial court dismissing suit by holding plaintiff not proving his title or possession - District Judge dismissing his appeal – RSA - On facts, grant of Patta in favour of 'DN' qua suit land not proved - No cogent evidence indicating plaintiff's

possession over suit land - Plaintiff himself not stepping in witness box to prove his possession - Plaintiff's own witnesses deposing qua possession of State Government over disputed land - Held, no material on record to conclude plaintiff having become owner of suit land either by purchase or by way of adverse possession - RSA dismissed - Judgments of lower courts upheld. (Paras 11-19 and 30) Title: Deep Chand Anand Vs. The Principal Secretary(Revenue) to the Government of H.P. & Another, Page- 351.

Specific Relief Act, 1963 - Section 34 - **Code of Civil Procedure, 1908** - Order VIII - Rule 9 – Order XXXII Rules 3, 4 & 12 - Subsequent pleadings - Additional written statement - Whether minor defendants can file additional written statement on attaining majority without repudiating stand taken by guardian *ad–litem*? – Guardian *ad-litem* admitting execution of Will set up plaintiff - Defendants on attaining majority intending to file additional written statement by averring themselves to be exclusive owner of suit property pursuant to subsequent Will - Trial court allowing application and permitting them to file additional written statement - Challenge thereto - Plaintiff contended that on attaining majority defendants cannot file additional written statement and take contrary stand than what is pleaded in written statement - Further alleging that application having been filed to fill up lacunae – Held, when a minor on attaining majority can assail alienation made by father or guardian then there is no question as to why they cannot file additional written statement and take stand contrary to what is pleaded by guardian on their behalf - Petition dismissed - Order upheld. (Paras 14 to 16 & 23) Title: Thakur Dass Vs. Sukhdev & Others, Page- 461.

Suit for damages - Maintainability – Held, plaintiff must plead minimal provisions of law i.e., torts or general or special law under which he is entitled to claim damages from defendant – Plaint lacking such particulars liable to be rejected. (Paras 8 and 22) Title: Manasi Sahay Thakur Vs. Madan Lal Sharma, Page-112.

'T'

Torts – Assault – Bodily injuries – Damages – Trial Court dismissing suit filed for damages for inflicting bodily injuries on plaintiff – First appellate court partly allowing appeal and decreeing suit in part - RSA – Held, acquittal of defendants in criminal case arising from same incident *ipso facto* not valid reason for dismissal of suit – Suit to be decided on basis of pleadings made in plaint and evidence adduced to support them – On facts, evidence not showing that disability suffered by plaintiff was result of assault of defendants – Causal nexus between injuries and assault not proved – Plaintiff not entitled for damages – RSA allowed – Decree of first appellate court set aside and that of trial court restored. (Paras 7 to 10) Title: Virender Singh & another Vs. Shyam Lal, Page- 83.

Transfer of Property Act, 1882 – Section 62- **Limitation Act, 1963 -** Article 61- Usufructuary mortgage - Redemption - Period of - Held, period to redeem usufructuary mortgage commences from date of payment of mortgage money either from usufructs or partly from usufructs and partly from other than usufructs - Period does not commence from date of creation of mortgage or from date of attestation of mutation - Decree of District Judge holding mortgagee to have become owner of mortgaged property with efflux of thirty years from date of mortgage set aside - Decree of trial court dismissing suit of mortgagee restored. (Paras 10-11) Title: Dharam Singh and others Vs. Tulsi Ram (since deceased) through her legal heirs and others, Page- 574.

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'A'

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

Sareshta Devi .....Petitioner
Versus
Parkash Chand .....Respondent

CMPMO No. 198 of 2018
Date of Decision: 29.11.2018

Constitution of India, 1950 - Article 227- **Code of Civil Procedure, 1908 (Code) –** Order XXXIX Rules 1 and 2 – Interim injunction- Grant of – Report of Local Commissioner – Relevancy – Plaintiff seeking temporary injunction against defendant for restraining him from raising construction – Defendant contesting application and relying upon demarcation report conducted by Local Commissioner appointed by court indicating plaintiff's encroachment over his land - Trial court dismissing application for interim stay – First appellate court dismissing plaintiff's appeal – Petition against – Held, demarcation report without calling and deciding objections could not have been relied upon by courts for denying interim injunction – Petition allowed - Orders of lower courts set-aside and case remanded to trial court for deciding afresh. (Paras 4 to 6, 10 & 11)

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Mst. Rattani and others vs. Dharam Chand alias Dharman and others, 1999(3) Shim. L.C.443
Om Prakash vs. Ved Parkash and others, AIR 2000 Himachal Pradesh 45

For the Petitioner : Mr. Rajnish K. Lal, Advocate.
For the Respondent : Mr. Ajay Shandil, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Being aggrieved and dissatisfied with the judgment dated 17.03.2018, passed by learned District Judge, Hamirpur, District Hamirpur, H.P., in Civil Misc. Appeal No.12 of 2015, having been filed by the petitioner ***(hereinafter referred to as the 'plaintiff'),*** laying therein challenge to order dated 20.02.2015, passed by learned Civil Judge (Senior Division), Court No.1, Hamirpur, H.P., in CMA No.170 of 2014 in Civil Suit No.114 of 2014, whereby an application under Order 39 Rule 1 & 2 CPC having been filed by the plaintiff came to be dismissed, petitioner has approached this Court in the instant proceedings filed under Article 227 of the Constitution of India, praying therein to allow his application filed under Order 39 Rule 1 and 2 CPC, after setting aside the impugned order/judgment passed by the learned Courts below.

2. Facts, as emerge from the record are that plaintiff filed suit for permanent prohibitory injunction and alternative for possession by way of demolition against the respondent ***(hereinafter referred to as the defendant).*** Alongwith the aforesaid suit, plaintiff also filed an application under Order 39 Rule 1 and 2 CPC for restraining the defendant, his agent servants, assigness and family members from extending the construction/project on of his house from Khasra No.499, measuring 353.00 Square Metres towards the house /land of plaintiff comprised in khata No.279, Khatauni Nos. 380 and 382, Khasra Nos. 487 and 491, measuring 118.38 square metres as per jamabandi for the

year, 2007-08, situated in Up Mahal Anu, Mouza Matti Tihra, Tehsil and District Hamirpur, H.P. Plaintiff averred in the application that suit land is jointly owned and possessed by the parties alongwith other co-sharers, however, in Khasra No.499 there exists a house of defendant consisting of 8-9 rooms, whereas in Khasra No.487 and 491 there is house/Abadi and land of the plaintiff. Plaintiff specifically averred in the application that suit land has not been partitioned till date through metes and bounds, but respondent is hellbent in extending the projection of his house situated over Khasra No.499 towards the land and house of plaintiff comprised in Khasra Nos.487 and 491 without leaving set-back and as such, he be restrained from doing so during the pendency of suit. Aforesaid application having been filed by the plaintiff came to be dismissed by the learned Civil Judge (Senior Division), Court No.1, Hamirpur, H.P. vide order dated 20.2.2015.

3. Being aggrieved and dissatisfied with the aforesaid order, plaintiff preferred an appeal under Order 43 Rule (1)(r) read with Section 104 of the Code of Civil Procedure in the Court of learned District Judge, Hamirpur, H.P., however fact remains that same was also dismissed. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, praying therein to allow his application filed under Order 39 Rule 1 and 2 CPC, after setting aside the impugned judgment/order passed by the learned courts below.

4. Having heard learned counsel for the parties and perused the material available on record vis-a-vis impugned order/judgment passed by the learned courts below, this Court is persuaded to agree with Mr. Rajnish K. Lal, learned counsel representing the plaintiff that once Court below during the pendency of application filed by the plaintiff under Order 39 Rule 1 and 2 CPC, had called for the report of Local Commissioner and had afforded opportunity to the plaintiff to file objections, it ought to have considered and decided the same before passing final order in the application.

5. Careful perusal of order dated 20.2.2015, passed by learned Civil Judge (Senior Division) Court No.1, Hamirpur, H.P, clearly suggests that during the pendency of proceedings, demarcation of the suit land was conducted by retired Naib Tehsildar Dhian Chand, who in his report reported that pillars so raised by the defendant were found in Khasra No.499 only. He also stated in his report that no such encroachment /interference was found to be done by the defendant over the suit land, which is in possession of the plaintiff.

6. True, it is that aforesaid Local Commissioner may not have stated that encroachment or interference was found over the suit land, but once plaintiff was afforded opportunity to file objections to the report of Local Commissioner, learned Court below ought to have decided the same, in accordance with law. Undisputedly, suit land is joint between the parties as it has been not partitioned till date by metes and bounds, but pleadings adduced on record by the respective parties, clearly suggest that parties are in possession of their respective portions. Defendant has categorically stated in his reply that he is not carrying out construction over the suit land, rather he has already constructed his house in the year, 1994-95. While placing on record copy of order dated 11.12.2013 passed in Execution Petition No.25 of 2007, defendant averred/proved before the Court below that he had filed suit against Sita Devi, from whom plaintiff purchased the suit land and same was decreed. Pursuant to aforesaid judgment and decree passed in that suit, respondent-defendant filed Execution petition, wherein vide order dated 11.12.2013, Executing Court held that present plaintiff has encroached 1.3 square metre of the land comprised in Khasra No.499/1/1, which was in possession of the respondent-defendant. However, record of the case at hand reveals that factum with regard to filing of earlier suit and subsequent order/judgment rendered by Executing Court never came to be incorporated in the plaint

filed by the plaintiff, which factor weighed heavily with the Court below while rejecting the application under Order 39 Rule 1 and 2 CPC.

7. However, this Court having carefully perused the reasoning assigned by both the Courts below on the application filed under Order 39 Rule 1 and 2 CPC, finds no reason to differ, but having taken note of the fact that plaintiff had filed objections to the report of Local Commissioner, wherein it was reported that no encroachment has been done by the respondent-defendant on the spot, it is of the view that Court below before passing order, if any, on the application filed under Order 39 Rule 1 and 2 CPC ought to have decided the objections filed by the plaintiff.

8. The Hon'ble Apex Court in ***Om Prakash vs. Ved Parkash and others,*** AIR 2000 Himachal Pradesh 45, wherein it has been held as under:-

> "18. The case was reheard on 9.7.1997 and orders were pronounced on 11.7.1997, whereby the objections were dismissed, the report of Local Commissioner was affirmed and a final decree in terms thereof was passed.
>
> 19. A reading of the orders passed by the learned trial Court since after the receipt of the report of the Local Commissioner till 11.7.1997, the date on which final decree was passed brings out the following facts:-
>
> (1) No opportunity was given to the defendant to lead evidence in support of his objections to the report of the Local Commissioner.
>
> (2) Even his request made to summon the Local Commissioner was not acceded to. In fact the application made by defendant No.1 in this behalf on 5.5.1997 was never disposed of and without deciding the said application, the learned trial Court had proceeded to dismiss the objections."

9. Reliance is also placed upon the judgment rendered by this Court in case titled **Mst. Rattani and others versus Dharam Chand alias Dharman and others,** 1999(3) Shim. L.C.443, wherein it has been held as under:-

> "17. Following the ratio laid down in the above referred cases, it is held that the report of the Local Commissioner cannot be relied upon and treated as evidence under Order 26, Rule 10(2), Code of Civil Procedure without first deciding the objections made thereto by a party. The question of law, formulated above, is answered accordingly.
>
> 20. As a result, the present appeal is allowed. The judgments and decrees of the two Courts below are set-aside and the suit being Suit No.836/84 is remanded to the learned trial Court for deciding the same afresh after disposing of the objections preferred by the defendants to th report of the Local Commissioner after affording an opportunity to the parties to produce such evidence as they may wish to produce with regard to the objections to the report of the Local Commissioner."

10. It is quite apparent from the aforesaid exposition of law that report of Local Commissioner cannot be relied upon and treated as evidence under Order 26 Rule 10(2), Code of Civil Procedure without first deciding the objections made thereto by the parties and as such, order passed by the trial Court cannot be allowed to sustain. Interestingly,

aforesaid aspect of the matter has been not looked into/taken care of by the learned District Judge while deciding the appeal having been filed by the plaintiff.

11. Consequently, in view of the above, judgment dated 17.3.2018, passed by the learned District Judge, Hamirpur, H.P., in Civil Misc. Appeal No.12 of 2015 and order dated 20.2.2015, passed by the learned Civil Judge(Senior Division) Court No.1, Hamirpur, H.P. in CMA No.170 of 2014, are set-aside and the case is remanded back to the learned trial Court for deciding the same afresh. Needless to say , learned Court below before deciding the application shall dispose of the objections having been filed by the plaintiff to the report of the Local Commissioner.

12. The parties through their counsel(s) are directed to appear before the learned trial Court on **13.12.2018**, to enable the Court below to proceed with the matter in terms of the instant judgment passed by this Court. Record, if any, be returned forthwith so as to reach well before the date fixed.

13. Registry is directed to apprise the learned Court below with regard to passing of the instant order forthwith, so that needful is done well within stipulated period.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of the petition alone.

The petition stands disposed of in the aforesaid terms, so also pending application(s), if any. Interim order granted by this Court on 26.5.2018, is vacated.

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

Jasvinder Singh Narula .....Petitioner

Versus

Kultar Singh & another .....Respondents

CMPMO No : 469 of 2017
Date of Decision: 4.12.2018

Code of Civil Procedure, 1908 – Order VIII Rule 6-A – Counter claim – Filing of – Held, defendant can file counter claim at any time provided cause of action has accrued to him against plaintiff either before filing of written statement or before expiry of time granted by court for filing it. (Para 5)

Code of Civil Procedure, 1908 – Order VI Rule 16 – Order VIII Rule 6 A- Counter claim – Striking off – Trial Court allowing defendants application for amendment of written statement and permitting them to raise counter claim qua possession – Plaintiff filing application for striking off counter claim of defendants - Trial Court dismissing plaintiff's application – Petition against – Held, defendants pleaded in originally instituted written statement of plaintiff having encroached their land – Also mentioning their having filed application for demarcation of land and seeking leave to file suit for possession against plaintiff – Cause of action accrued to defendants before filing of written statement – Trial Court correct in dismissing plaintiff"s application for striking off counter claim – Petition disposed of with direction to trial court to take written statement of plaintiff and proceed further. (Paras 3,4, 6 & 7)

Cases referred:
Mahendra Kumar and another vs. State of Madhya Pradesh and others, AIR 1987 SC 1395
Mohinder Singh vs. Karnail Singh and others, (2013)5 RCR (Civil)

For the Petitioner : Mr. Sanjeev Kuthiala,Advocate
For the Respondents : Mr. Vikrant Chandel, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Being aggrieved and dissatisfied with the order dated 27.07.2017, passed by learned Civil Judge (Junior Division), Court No.4, Mandi, District Mandi, H.P, whereby an application having been filed by the petitioner ***(hereinafter referred to as the 'plaintiff')*** under Order 6 Rule 16 read with Section 151 of the Code of Civil Procedure, praying therein to strike out the written statement and counter claim of respondent No.1 ***(hereinafter referred to as defendant No.1)***, came to be dismissed, plaintiff has approached this Court in the instant proceedings filed under Article 227 of the Constitution of India.

2. Having heard learned counsel for the parties and perused the material available on record vis-a-vis reasoning assigned by the learned Court below while passing the impugned order, this Court finds no illegality and infirmity in the impugned order, rather same appears to be based upon proper appreciation of evidence and law and as such, same needs to be upheld.

3. It is not in dispute that defendant No.1 while responding to the suit having been filed by the plaintiff, categorically stated in the written statement that the plaintiff has made illegal encroachment adjoining to his house on the land of the replying defendant recently and defendant No.1 reserves his right to file a separate suit for possession after obtaining proper demarcation and spot map. It is not in dispute that during the pendency of the suit i*nter se* parties, defendant No.1 obtained demarcation, wherein plaintiff was allegedly found to have encroached upon the land of defendant No.1. Since, the plaintiff was alleged to have encroached upon the land of defendant No.1, defendant No.1 while praying for amendment in the written statement also sought permission from the Court to raise counter claim, which plea was accepted by the learned Court below.

4. Being aggrieved and dissatisfied with the aforesaid permission granted by the Court below, plaintiff moved an application under Order 6 Rule 16 read with Section 151 CPC, praying therein to stike out the written statement and the counter claim of defendant No.1, however as has been noticed hereinabove, since plea of having taken steps for obtaining demarcation qua the disputed land was already taken by defendant No.1 in the written statement coupled with the fact that report of the same was procured after filing of the suit, defendant No.1 could not be precluded from raising counter claim after filing of written statement. Otherwise also, as per Order 8 Rule 6 CPC, defendant could always file counter claim after filing of written statement provided that cause of action had accrued to him/ her prior to filing of written statement or prior to date of expiry to file written statement.

5. The Hon'ble Apex Court in ***Mahendra Kumar and another vs. State of Madhya Pradesh and others, AIR 1987 SC 1395,*** has categorically held that under Order VIII, Rule 6A(1) CPC, counter claim can be filed after filing of written statement, provided the cause of action had accrued to the defendant before the defendant had delivered his defence

or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not. The Hon'ble Apex Court in ***Mahendra Kumar's*** case *supra* has held as under:-

> ***"5. After the filing of the written statement, the appellants filed a counter-claim claiming title to the treasure. It is not necessary for us to state the basis of the claims of the parties to the treasure. The respondents Nos. 2 to 5 filed an application praying that the counter-claim should be dismissed contending that it was barred by limitation as prescribed under section 14 of the Act and that it was also not maintainable under Order VIII, Rule 6A(1) of the Code of Civil Procedure. The learned District Judge came to the finding that the counter-claim was barred by section 14 of the Act and, in that view of the matter, dismissed the counter-claim. Being aggrieved by the said order of the learned District Judge, the appellants and the said respond- ents Nos. 6 to 8 moved the High Court in revision against the same. The High Court upheld the order of the learned District Judge that the counterclaim was barred by limita- tion as prescribed by section 14 of the Act.The High Court further held that the counter-claim having been filed after the filing of the written statement, it was not maintainable under Order VIII, Rule 6A(1) of the Code of Civil Procedure. Hence this appeal by special leave.***
>
> ***15. The next point that remains to be considered is whether Rule 6A(1) of Order VIII of the Code of Civil Procedure bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for Rule 6A(1) does not, on the face of it, bar the filing of a counter-claim by the defendant after he had filed the written statement. What is laid down under Rule 6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of Rule 6A(1) in holding that as the appellants had filed the counter-claim after the filing, of the written statement, the counter-claim was not maintainable. The finding of the High Court does not get any support from Rule 6A(1) of the Code of Civil Procedure. As the cause of action for the counter- claim had arisen before the filing of the written statement, the counter-claim was, therefore, quite maintainable. Under Article 113 of the Limitation Act, 1963, the period of limitation of three years from the date the right to sue accrues, has been provided for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counter-claim, which is treated as a suit under section 3(2)(b) of the Limitation Act has been filed by the appellants within three years from the date of accrual to them of the fight to sue. The learned District Judge and the High Court were wrong in dismissing the counter-claim."***

- 6. The Hon' ble High Court of Punjab and Haryana High Court in ***Mohinder Singh vs. Karnail Singh and others, (2013)5 RCR (Civil)*** has reiterated that counter claim can be filed, even subsequent to filing of the written statement, subject to the condition that cause of action for filing the counter claim should have

accrued before the filing of the written statement. In the aforesaid judgment, Punjab and Haryana High Court has held that counter claim can be entertained even if the same was not included in the written statement, subject to the aforesaid condition. The Court has held as under:-

"5. Counsel for the petitioner contended that defendant No.7 was submitting his written statement by including the counter claim therein, but the trial court did not admit the counter claim of defendant No.7. Counsel for respondent No.1, however, contended that counter claim was not part of the written statement that was filed by the petitioner in the trial court. Counsel for the petitioner submitted that even if counter claim was not part of the written statement, the same can be filed even thereafter. Reliance in support of this contention has been placed on two judgments of this Court i.e. Raghubir Singh and others v. Tajinder Pal Singh and others reported as 2009(4) Civ.C.C. 755 and Nini Kumar Jain v. Neena Devi and others reported as 2006(4) R.C.R. (Civil) 770. On the other hand, counsel for respondent No.1, relying on judgment of Gujarat High Court in the case of Sidi Muslim Jamat Bilali v. Kasamsha Hasisha Sotiayara reported as 2010(85) AIC 345 and judgment of Hon'ble Supreme Court in the case of Bollepanda P.Poonacha and another v. K.M. Madapa reported as 2008(3) R.C.R (Civil) 150, contended that counter claim cannot be filed subsequent to the filing of the written statement.

6. Having carefully considered the aforesaid contentions, I have come to the conclusion that counter claim can be filed even subsequent to the filing of the written statement, subject to the condition that cause of action for filing the counter claim should have accrued before the filing of the written statement. Consequently, counter claim fo defendant No.7-petitioner can be entertained even if the same was not included in the written statement, subject to the aforesaid condition. In this view, I am supported by judgments of this Court in the cases of Raghubir Singh (supra) and Nini Kumar Jain (supra). In those cases, judgment of Hon'ble Supreme Court namely Mahdndra Kumar v. State of M.P. reported as AIR 1987 Supreme Court 1395 (1) was also relied on. Judgment of Gujarat High Court in the case of Sidi Muslium Jamat Bilali of curse supports the contention of counsel for respondent No.1, but the same cannot be preferred over judgment of this Court referred to herein before, which also relied on judgment of Hon'ble Supreme Court in the case of Mahendra Kumar (Supra). In so far as judgment of Hon'ble Supreme Court in the case of Boilepanda P.Poonacha (supra), cited by counsel for respondent No.1 is concerned, in the said case, no such proposition of law, as sought to be canvassed by counsel for respondent No.1, has been laid down. On the contrary, in that case, counter claim was sought to be filed after the suit had already been decreed. It was held that counter claim could not be filed after the suit had been decreed. In the said judgment, it was also observed that for filing counter claim, cause of action should have accrued before filing of the written statement. However, it was not laid down that counter claim should be filed before filing of written statement. On the contrary, in view of judgment of Hon'ble Supreme Court in the case of Mahendera Kumar (supra) also, counter claim can be filed even subsequent to filing of written statement.

7. However, in the case at hand, this Court is persuaded to agree with Mr. Sanjeev Kuthiala, learned counsel representing the plaintiff that learned court below while granting permission to defendant No.1 to raise counter claim, ought to have granted time to plaintiff to file written statement to the same, but in the case at hand, careful perusal of the impugned order suggests that court below while holding defendant entitle to file counter claim in his defence fixed the matter for framing of issues directly.

8. Consequently, in view of the above, impugned order dated 27.7.2017, passed by learned Civil Judge(Junior Division) Court No.4, Mandi, District Mandi, H.P., is modified to the extent that plaintiff would be entitled to file written statement, if any, to the counter claim raised by defendant No.1, whereafter Court would proceed to frame issues. Ordered accordingly.

9. Learned counsel representing the parties undertake to cause presence of their respective parties before the learned Court below on **18.12.2018**, to enable it to proceed with the matter, so that no unnecessarily delay is caused.

10. Registry is directed to apprise the learned Court below with regard to passing of the instant order forthwith, so that needful is done without any delay.

Accordingly, the present petition stands disposed of in the aforesaid terms alongwith pending application(s), if any.

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

Karan Singh .....Petitioner
Vs.
Himachal Pradesh State Co-operative Bank Limited .....Respondent

CMPMO No : 464 of 2018
Date of Decision: 5.12.2018

Code of Civil Procedure, 1908 (Code) – Section 9 **- Himachal Pradesh State Co-operative Bank Limited Rules, 1979** – Rule 56 – Discharge from service – Jurisdiction of civil court – Held, against illegal discharge from service by Cooperative Bank, aggrieved party can file civil suit challenging order of discharge. (Paras 6 & 8)

Code of Civil Procedure, 1908 (Code) – Order XXXIX Rules 1 & 2 – Stay – Jurisdiction of civil court – Trial court dismissing application of plaintiff seeking stay of order of discharge passed by Bank – First appellate court dismissing his appeal also - Petition against - Held, trial court should not have made sweeping remarks of its not having jurisdiction to entertain *lis* while deciding application under order XXXIX Rules 1 & 2 of Code – Order of discharge found having been passed by Managing Director without affording opportunity of being heard to plaintiff – Petition allowed – Operation of order of discharge stayed during pendency of suit. (Para 12)

Case referred:
Shakti Chand Thakur vs. State of H.P and others, 2015 (2) Him. L.R. 691

For the Petitioner : Mr. J.L.Bhardwaj, Advocate.

For the Respondents: Mr. Sushant Vir Singh, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant petition filed under Article 227 of the Constitution of India, is directed against the judgment dated 23.10.2018, passed by learned District Judge, Shimla, District Shimla, H.P.,in CMA No.29-S/14 of 2018, titled as ***Karan Singh versus Himachal Pradesh State Co-operative Bank Limited,*** affirming the order dated 7.9.2018, passed by learned Civil Judge, Court No.3, Shimla, District Shimla,HP,in CMA No.143-6 of 2018 in Civil Suit No.364-1 of 2018, whereby an application under Order 39 Rule 1 and 2 CPC having been filed by the petitioner ***(hereinafter referred to as the plaintiff***), praying therein for stay of termination order dated 10.8.2018, passed by the respondent ***(hereinafter referred to as the defendant-bank)*** during the pendency of the suit, came to be dismissed.

2. Briefly stated facts, as emerge from the record are that the plaintiff filed a civil suit ***(Annexure P-1)*** for declaration to the effect that termination order dated 10.8.2018, passed by the defendant-bank in Ref. No.StCB/HO/Estt.Pers-1852/5529/2018-19, is bad, illegal, wrong, void ab-initio and without jurisdiction. Alongwith the aforesaid suit, plaintiff also filed an application under Order 39 Rule 1 and 2 CPC, praying therein that order referred hereinabove, may be stayed during the pendency of present suit, however, fact remains that application referred hereinabove, came to be dismissed by learned Civil Judge, Court No.3, Shimla, H.P. Learned Civil Judge while dismissing the application observed that service matters falls within the Special Domain of the Hon'ble Central Administrative Tribunal for which, applicant should have knocked the right forum for claiming the relief.

3. Being aggrieved and dissatisfied with the aforesaid order, passed by learned Civil Judge, plaintiff preferred an appeal under Order 43 Rule 1(r) CPC in the Court of learned District Judge, Shimla, H.P, which also came to be dismissed vide judgment dated 23.10.2018. In the aforesaid background, petitioner has approached this Court in the instant proceedings.

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

5. Certain undisputed facts, as emerge from the record are that the plaintiff after having been discharged from Assam Rifles came to be appointed as Sub Helper in the defendant-Bank. It is not in dispute that plaintiff was appointed against the post of Sub Helper on the basis of application made by him pursuant to the advertisement issued by the defendant-bank in the daily news paper. It is also not in dispute that plaintiff applied for the post of Sub-Helper against reserve post of ex-serviceman. Plaintiff at the time of making application had submitted all the documents. Since, application and documents of the plaintiff were found proper at the time of scrutiny, which was done prior to written test, he was allowed to sit in written examination. Plaintiff, who had cleared the written test was made to participate in personal interview, whereafter on the basis of overall performance, he was offered appointment against the post of Sub Helper on contract basis. Initially, the plaintiff was appointed on contract basis, which was renewed from year to year basis. But pleadings adduced on record reveal that subsequently the services of the plaintiff were regularized against the post of Sub Helper, now termed as Peon. After regularization of the plaintiff, somebody represented to His Excellency The Governor of Himachal Pradesh, alleging therein that plaintiff and other persons procured appointments from the defendant-bank by concealing material facts and as such, inquiry came to be constituted. Defendant -

Bank constituted inquiry and served show cause notice to the plaintiff on 9.9.2014, calling upon him to furnish his reply. Plaintiff by way of reply refuted the allegations raised against him and reiterated that he is ex-serviceman retired from Assam Rifles and as such, his appointment is as per law. However, fact remains that Managing Director of the bank without taking into consideration the reply having been filed by the plaintiff, issued order of termination on 10.8.2018, whereby he was ordered to be discharged from the services on the ground that he was non ex-serviceman and as such, not entitled to claim the benefit of ex-serviceman.

6. Since, in the case at hand, order of termination was passed by the Managing Director of the bank, who was otherwise as per Rule 56 of the rules relating to the terms of employment and working condition with the employees of the Himachal Pradesh State Co-operative Bank Limited Rules, 1979, was competent authority to impose major penalty in case of employees in Grade II, III, IV, plaintiff, who otherwise would have filed appeal before him, was left with no option but to file civil suit, seeking therein declaration that order discharging him from services is bad in law.

7. It would be profitable to reproduce Section 56 of the Himachal Pradesh State Co-operative bank Limited hereinbelow:-

> " 56(a) An employee may, for acts or omissions described in chapter 11 and in rule 54 be proceeded against for awarding punishment under Rule 55 by the competent authority. The category of employees and competent authorities to award punishment are shown in the table below.
>
> Provided that where for imposing major punishment of an officer, prior permission of the Registrar is necessary in accordance with bye-laws of the Bank, such punishment would be inflicted only after the permission of the Registrar is obtained.
>
> | **Category of Employees** | **Competent Authority** |
> |---|---|
> | (i) Members of Subordinate Staff | (i) Dy. G.M/G.M. |
> | (ii) Employee in Grade II, III, IV | (ii) Managing Director |
> | (iii)Employee in Special Grade and Grade-I | (iii) Board of Directors |
>
> (b) No punishment for major misconduct shall be imposed on an employee unless he is proved guilty of major misconduct in enquiry conducted in the following manner:-
>
> (I) The competent authority/Managing Director shall serve on the employee a charge sheet in Form 'A' for major misconduct clearly setting forth the misconduct charged and the circumstances appearing against him and call for his explanation.
>
> (ii) The employee shall be given for submitting his explanation a period of atleast two weeks.
>
> (iii) If the employee accepts the charge(s) the competent authority shall award suitable punishment to him. In case of denial, the competent authority shall cause an enquiry to be conducted by an officer appointed by him for the purpose.
>
> (iv) The employees shall be allowed to defend by himself of by any other employee of the Bank, if he so desires, but an outsider shall not be allowed to conduct the defence on behalf of the delinquent employee.

(v) The employee shall be permitted to produce witnesses in his defence and cross examine any witness on whose evidence the charge rests.

(vi) The substance of the evidence shall be recorded and read over to the concerned employee.

(vii) The Officer appointed to conduct the enquiry will complete the enquiry and submit his report within such time and any extension thereof as may be allowed by the competent authority. The enquiry report shall include the statement of witnesses adduced for and against the employee and the finding of the enquiry officer based on such evidence each charge.

(viii) On receipt of the enquiry report the competent authority shall examine the findings applying his own best judgment and in awarding punishment shall not merely be lead by the findings of the enquiry officer. His order should be self speaking.

(ix) The order of punishment shall be in writing and shall be issued under the signature of the competent authority or other officer authorized by him. A copy of the order passed awarding the punishment shall be given to the employee.

(c) No punishment for minor misconduct shall be imposed on an employee unless he is proved guilty of minor misconduct as under:-

I) The competent authority or any other office authorized by him in this regard shall give the employee a charge sheet for minor misconduct in Form 'B' clearly stating the nature of misconduct charge and the circumstances appearing against him and call for his explanation.

(ii) The employee shall be given an opportunity to submit his explanation within a period of 7 days.

(iii) After the explanation is received the competent authority may look into the circumstances and pass order of punishment and if he thinks fit also make such enquiry and in such manner as he deems proper. His order shall be self speaking.

(d) The mode of punishment indicated in sub -rule (a) and sub-rule (b) of rule 55 is arranged in increasing order of severity.'

8. Careful perusal of Rule 56, clearly suggests that order imposing major penalty qua the category of members of subordinate staff (plaintiff category) can be passed Dy. G.M/G.M, so that appeal, against the same, if any, is filed to the Managing Director of the Bank as envisaged in Rule 64 of the Rules, referred hereinabove. But since in the case at hand order terminating services of plaintiff came to be passed by Managing Director, who otherwise ought to have heard the appeal, if any, preferred by the plaintiff, plaintiff had no option but to file civil suit. Needless to say, plaintiff could have not laid challenge to the termination order passed by the defendant-bank by way of Civil Writ Petition, as it is a society and order passed by it is only assailable before the authority prescribed under Himachal Pradesh State Co-operative Bank Limited(Terms of Employment and Working Conditions) Rules, 1979.Otherwise this Court in case titled as ***Shakti Chand Thakur versus State of H.P and others,*** 2015 (2) Him. L.R. 691, has categorically held that in such like cases writ petition is not maintainable, rather Civil suit is maintainable. It would be profitable to reproduce relevant para of the aforesaid judgment herein:-

"6. In view of the aforesaid discussion, it can safely be concluded that the present petition under Article 226 of the Constitution is not

maintainable against the H.P. State Co-operative Bank Ltd and even the Registrar has no power to adjudicate such kinds of disputes as the same do not touch the constitution, management or business of the Co-operative Societies. Accordingly, the present petition is dismissed , leaving the petitioner to avail of any other remedy which may be available to him under the law. Costs easy."

9. As has been noticed hereinabove, plaintiff was given appointment on the basis of documents adduced on record by him, which were duly verified by the defendant bank at the time of offering appointment. Otherwise also, it is none of the case of the defendant-bank that plaintiff forged the documents, rather bank's case is that plaintiff is not ex-serviceman in terms of clause No.18.3.1(a) and clause No.18.3.1.(b)(1), contained in Government of Himachal Pradesh Department of Personnel Handbook on Personnel Matters Volume I(Second Edition), which was admittedly not condition precedent for applying for the post of Sub Helper. Condition provided by the defendant-bank while issuing advertisement was that persons intending to apply against the post of Sub Helper reserved against category of ex-serviceman should be an ex-serviceman. In the case at hand, admittedly plaintiff is an ex-serviceman, who retired from Assam rifles, as is evident from his discharge certificate.

10. There is another question which arises for determination is that whether services of plaintiff, who was a regular employee could be terminated without there being any regular inquiry. Answer, is No. In the instant case, it is quite apparent that bank authorities without holding regular inquiry terminated the plaintiff mere on the basis of preliminary inquiry that too on the basis of the anonymous complaint made by some person to His excellency The Governor of Himachal Pradesh that too without associating the plaintiff. Though, aforesaid aspects of the matter are to be considered and decided by the Court below on the basis of the totality of evidence to be led by the parties in the civil suit, however,this court is convinced and satisfied that the plaintiff on the basis of the pleadings, ably carved out a prima facie case entitling him for interim relief, as prayed for in the application. Otherwise also, balance of convenience also lies in favour of the plaintiff because admittedly he has been rendering services against the post of Sub Helper that too for the last 12 years continuously. Similarly, irreparable loss would be caused to him in case prayer made by him for interim relief is not granted.

11. Leaving everything aside, this court has no hesitation to conclude that learned trial Court by rendering finding that plaintiff ought to have gone to Central Administrative Tribunal for redressal of his grievance has virtually decided the main suit of the plaintiff and as such, impugned judgment/order passed by the learned courts below cannot be allowed to sustain, which aspect of the matter has been totally ignored by the learned District Judge while deciding the appeal having been filed by the plaintiff.

12. Consequently, in view of the discussion made hereinabove, present petition is allowed and impugned order/ judgment passed by learned courts below are quashed and set-aside. Accordingly, the application having been filed by the applicant/plaintiff under Order 39 Rule 1 & 2 CPC in the learned trial Court is allowed. The termination order dated 10.8.2018, passed by the defendant bank in Ref. No.StCB/HO/Estt.Pers-1852/ 5529/ 2018- 19 (Annexure P-2), is stayed and defendant bank is directed to permit the plaintiff to join his services back.

13. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

Pending application(s), if any, also stands disposed of.

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

Roshan Lal .....Petitioner
Vs.
Himachal Pradesh State Co-operative Bank Limited .....Respondent

CMPMO No : 465 of 2018
Date of Decision: 5.12.2018

Code of Civil Procedure, 1908 (Code) – Section 9 **- Himachal Pradesh State Co-operative Bank Limited Rules, 1979 –** Rule 56 – Discharge from service – Jurisdiction of civil court – Held, against illegal discharge from service by Cooperative Bank, aggrieved party can file civil suit challenging order of discharge. (Paras 6 & 8)

Code of Civil Procedure, 1908 (Code) – Order XXXIX Rules 1 & 2 – Stay – Jurisdiction of civil court – Trial court dismissing application of plaintiff seeking stay of order of discharge passed by Bank – First appellate court dismissing his appeal also - Petition against held trial court should not have made sweeping remarks of its not having jurisdiction to entertain lis while deciding application under order XXXIX Rules 1 & 2 of Code – Order of discharge found having been passed by Managing Director without affording opportunity of being heard to plaintiff – Petition allowed – Operation of order of discharge stayed during pendency of suit. (Para 12)

Case referred:
Shakti Chand Thakur versus State of H.P and others, 2015 (2) Him. L.R. 691

For the Petitioner : Mr. J.L.Bhardwaj, Advocate.
For the Respondents: Mr. Sushant Vir Singh, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Instant petition filed under Article 227 of the Constitution of India, is directed against the judgment dated 23.10.2018, passed by learned District Judge, Shimla, District Shimla, H.P.,in CMA No.30-S/14 of 2018, titled as ***Roshan Lal Sharma versus Himachal Pradesh State Co-operative Bank Limited,*** affirming the order dated 7.9.2018, passed by learned Civil Judge, Court No.5, Shimla, District Shimla,HP,in CMA No.221-6 of 2018 in Civil Suit No.116-1 of 2018, whereby an application under Order 39 Rule 1 and 2 CPC having been filed by the petitioner ***(hereinafter referred to as the plaintiff)***, praying therein for stay of termination order dated 10.8.2018, passed by the respondent ***(hereinafter referred to as the defendant-bank)*** during the pendency of the suit, came to be dismissed.

2. Briefly stated facts, as emerge from the record are that the plaintiff filed a civil suit ***(Annexure P-1)*** for declaration to the effect that termination order dated 10.8.2018, passed by the defendant-bank in Ref. No.StCB/ HO/Estt.Pers-1852/5528/2018-19, is bad,

illegal, wrong, void ab-initio and without jurisdiction. Alongwith the aforesaid suit, plaintiff also filed an application under Order 39 Rule 1 and 2 CPC, praying therein that order referred hereinabove, may be stayed during the pendency of present suit, however, fact remains that application referred hereinabove, came to be dismissed by learned Civil Judge, Court No.5, Shimla, H.P. Learned Civil Judge while dismissing the application observed that service matters falls within the Special Domain of the Hon'ble Central Administrative Tribunal for which, applicant should have knocked the right forum for claiming the relief.

3. Being aggrieved and dissatisfied with the aforesaid order, passed by learned Civil Judge, plaintiff preferred an appeal under Order 43 Rule 1(r) CPC in the Court of learned District Judge, Shimla, H.P, which also came to be dismissed vide judgment dated 23.10.2018. In the aforesaid background, petitioner has approached this Court in the instant proceedings.

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

5. Certain undisputed facts, as emerge from the record are that the plaintiff after having been discharged from Para Military Force (for short 'CRPF') came to be appointed as Sub Helper in the defendant-Bank. It is not in dispute that plaintiff was appointed against the post of Sub Helper on the basis of application made by him pursuant to the advertisement issued by the defendant-bank in the daily news paper. It is also not in dispute that plaintiff applied for the post of Sub-Helper against reserve post of ex-serviceman. Plaintiff at the time of making application had submitted all the documents. Since, application and documents of the plaintiff were found proper at the time of scrutiny, which was done prior to written test, he was allowed to sit in written examination. Plaintiff, who had cleared the written test was made to participate in personal interview, whereafter on the basis of overall performance, he was offered appointment against the post of Sub Helper on contract basis. Initially, the plaintiff was appointed on contract basis, which was renewed from year to year basis. But pleadings adduced on record reveal that subsequently the services of the plaintiff were regularized against the post of Sub Helper, now termed as Peon. After regularization of the plaintiff, somebody represented to His excellency The Governor of Himachal Pradesh, alleging therein that plaintiff and other persons procured appointments from the defendant-bank by concealing material facts and as such, inquiry came to be constituted. Defendant -Bank constituted inquiry and served show cause notice to the plaintiff on 9.9.2014, calling upon him to furnish his reply. Plaintiff by way of reply refuted the allegations raised against him and reiterated that he is ex-serviceman retired from CRPF and as such, his appointment is as per law. However, fact remains that Managing Director of the bank without taking into consideration the reply having been filed by the plaintiff, issued order of termination on 10.8.2018, whereby he was ordered to be discharged from the services on the ground that he was non ex-serviceman and as such, not entitled to claim the benefit of ex-serviceman.

6. Since, in the case at hand, order of termination was passed by the Managing Director of the bank, who was otherwise as per Rule 56 of the rules relating to the terms of employment and working condition with the employees of the Himachal Pradesh State Co-operative Bank Limited Rules, 1979, was competent authority to impose major penalty in case of employees in Grade II, III, IV, plaintiff, who otherwise would have filed appeal before him was left with no option but to file civil suit, seeking therein declaration that order discharging him from services is bad in law.

7. It would be profitable to reproduce Section 56 of the Himachal Pradesh State Co-operative bank Limited hereinbelow:-

" 56(a) An employee may, for acts or omissions described in chapter 11 and in rule 54 be proceeded against for awarding punishment under Rule 55 by the competent authority. The category of employees and competent authorities to award punishment are shown in the table below.

Provided that where for imposing major punishment of an officer, prior permission of the Registrar is necessary in accordance with bye-laws of the Bank, such punishment would be inflicted only after the permission of the Registrar is obtained.

Category of Employees	**Competent Authority**
(i) Members of Subordinate Staff	(i) Dy. G.M/G.M.
(ii) Employee in Grade II, III, IV	(ii) Managing Director
(iii)Employee in Special Grade and Grade-I	(iii) Board of Directors

(b) No punishment for major misconduct shall be imposed on an employee unless he is proved guilty of major misconduct in enquiry conducted in the following manner:-

(I) The competent authority/Managing Director shall serve on the employee a charge sheet in Form 'A' for major misconduct clearly setting forth the misconduct charged and the circumstances appearing against him and call for his explanation.

(ii) The employee shall be given for submitting his explanation a period of atleast two weeks.

(iii) If the employee accepts the charge(s) the competent authority shall award suitable punishment to him. In case of denial, the competent authority shall cause an enquiry to be conducted by an officer appointed by him for the purpose.

(iv) The employees shall be allowed to defend by himself of by any other employee of the Bank, if he so desires, but an outsider shall not be allowed to conduct the defence on behalf of the delinquent employee.

(v) The employee shall be permitted to produce witnesses in his defence and cross examine any witness on whose evidence the charge rests.

(vi) The substance of the evidence shall be recorded and read over to the concerned employee.

(vii) The Officer appointed to conduct the enquiry will complete the enquiry and submit his report within such time and any extension thereof as may be allowed by the competent authority. The enquiry report shall include the statement of witnesses adduced for and against the employee and the finding of the enquiry officer based on such evidence each charge.

(viii) On receipt of the enquiry report the competent authority shall examine the findings applying his own best judgment and in awarding punishment shall not merely be lead by the findings of the enquiry officer. His order should be self speaking.

(ix) The order of punishment shall be in writing and shall be issued under the signature of the competent authority or other officer authorized by him. A copy of the order passed awarding the punishment shall be given to the employee.

(c) No punishment for minor misconduct shall be imposed on an employee unless he is proved guilty of minor misconduct as under:-

I) The competent authority or any other office authorized by him in this regard shall give the employee a charge sheet for minor misconduct in Form 'B' clearly stating the nature of misconduct charge and the circumstances appearing against him and call for his explanation.

(ii) The employee shall be given an opportunity to submit his explanation within a period of 7 days.

(iii) After the explanation is received the competent authority may look into the circumstances and pass order of punishment and if he thinks fit also make such enquiry and in such manner as he deems proper. His order shall be self speaking.

(d) The mode of punishment indicated in sub -rule (a) and sub-rule (b) of rule 55 is arranged in increasing order of severity.'

8. Careful perusal of Rule 56, clearly suggests that order imposing major penalty qua the category of members of subordinate staff (plaintiff category) can be passed Dy. G.M/G.M, so that appeal, against the same, if any, is filed to the Managing Director of the Bank as envisaged in Rule 64 of the Rules, referred hereinabove. But since in the case at hand order terminating services of plaintiff came to be passed by Managing Director, who otherwise ought to have heard the appeal, if any, preferred by the plaintiff, plaintiff had no option but to file civil suit. Needless to say, plaintiff could have not laid challenge to the termination order passed by the defendant-bank by way of Civil Writ Petition, as it is a society and order passed by it is only assailable before the authority prescribed under Himachal Pradesh State Co-operative Bank Limited(Terms of Employment and Working Conditions) Rules, 1979. Otherwise, this Court in case titled as ***Shakti Chand Thakur versus State of H.P and others,*** 2015 (2) Him. L.R. 691, has categorically held that in such like cases writ petition is not maintainable, rather Civil suit is maintainable. It would be profitable to reproduce relevant para of the aforesaid judgment herein:-

> ***"6. In view of the aforesaid discussion, it can safely be concluded that the present petition under Article 226 of the Constitution is not maintainable against the H.P. State Co-operative Bank Ltd and even the Registrar has no power to adjudicate such kinds of disputes as the same do not touch the constitution, management or business of the Co-operative Societies. Accordingly, the present petition is dismissed , leaving the petitioner to avail of any other remedy which may be available to him under the law. Costs easy."***

9. As has been noticed hereinabove, plaintiff was given appointment on the basis of documents adduced on record by him, which were duly verified by the defendant bank at the time of offering appointment. Otherwise also, it is none of the case of the defendant-bank that plaintiff forged the documents, rather bank's case is that plaintiff is not ex-serviceman in terms of clause No.18.3.1(a) and clause No.18.3.1.(b)(1), contained in Government of Himachal Pradesh Department of Personnel Handbook on Personnel Matters Volume I(Second Edition), which was admittedly not condition precedent for applying for the post of Sub Helper. Condition provided by the defendant-bank while issuing advertisement was that persons intending to apply against the post of Sub Helper reserved against category of ex-serviceman should be an ex-serviceman. In the case at hand, admittedly plaintiff is an ex-serviceman, who retired from CRPF, as is evident from his discharge certificate.

10. There is another question which arises for determination is that whether services of plaintiff, who was a regular employee could be terminated without there being any regular inquiry. Answer, is No. In the instant case, it is quite apparent that bank authorities without holding regular inquiry terminated the plaintiff mere on the basis of preliminary inquiry that too on the basis of the anonymous complaint made by some person to His excellency The Governor of Himachal Pradesh that too without associating the plaintiff. Though, aforesaid aspects of the matter are to be considered and decided by the Court below on the basis of the totality of evidence to be led by the parties in the civil suit, however,this court is convinced and satisfied that the plaintiff on the basis of the pleadings, ably carved out a prima facie case entitling him for interim relief, as prayed for in the application. Otherwise also, balance of convenience also lies in favour of the plaintiff because admittedly he has been rendering services against the post of Sub Helper that too for the last 12 years continuously. Similarly, irreparable loss would be caused to him in case prayer made by him for interim relief is not granted.

11. Leaving everything aside, this court has no hesitation to conclude that learned trial Court by rendering finding that plaintiff ought to have gone to Central Administrative Tribunal for redressal of his grievance has virtually decided the main suit of the plaintiff and as such, impugned judgment/order passed by the learned courts below cannot be allowed to sustain, which aspect of the matter has been totally ignored by the learned District Judge while deciding the appeal having been filed by the plaintiff.

12. Consequently, in view of the discussion made hereinabove, present petition is allowed and impugned order/ judgment passed by learned courts below are quashed and set-aside. Accordingly, the application having been filed by the applicant/plaintiff under Order 39 Rule 1 and 2 CPC in the learned trial Court is allowed. The termination order dated 10.8.2018, passed by the defendant bank in Ref. No.StCB/HO/Estt.Pers-1852/ 5528/ 2018- 19 (Annexure P-2), is stayed and defendant bank is directed to permit the plaintiff to join his services back.

13. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

Pending application(s), if any, also stands disposed of.

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

Netar Singh .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr.MMO No.482 of 2018

Date of Decision: 16.11.2018

Code of Criminal Procedure, 1973 – Section 446 (3) – Penalty – Remission thereof – Held, court imposing penalty on defaulter vis-à-vis forfeited bond has discretion to remit it or part thereof even after its imposition. (Para 8)

Case referred:

Jameela Khader and others vs. State of Kerala, 2004 CRI. L.J. 3389

For the Petitioner:	Mr. Balwant Singh Thakur, Advocate.
For the Respondent:	Mr. S.C.Sharma, Mr. Dinesh Thakur & Mr. Sanjeev Sood, Additional Advocate Generals.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant petition filed under Section 482 of the Code of Criminal Procedure, prayer has been made on behalf of the petitioner for quashing of orders dated 29.8.2017, 9.4.2018 and 18.9.2018, passed by learned Special Judge(II) Kullu, H.P., whereby bail bonds of the accused have been cancelled and forfeited to the State of H.P., and proceedings under Section 446 Cr.P.C have been initiated against the present petitioner, who stood surety to the accused.

2. Facts, as emerge from the record are that in the Session Trial No. 27 of 2016, titled as ***State of Himachal Pradesh versus Bhupinder Kumar,*** which is pending adjudication before the learned Special Judge-II, Kullu, District Kullu, H.P., present petitioner stood surety of accused namely, Bhupinder Kumar and furnished surety bond in the sum of Rs. 1,00,000/-. Since, accused failed to appear before the Court below, it cancelled the bail bonds of the accused and forfeited to the State of H.P. and initiated proceedings under Section 446 Cr. P.C., against the present petitioner vide order dated 29.8.2017 ***(Annexure P-1).*** On 19.9.2017, petitioner sought time to file reply,whereafter he made all out efforts to trace and find out the accused, so that he could be presented before the trial Court, but he was unable to find out the accused. On 9.4.2018. learned Special Judge(II) Kullu forfeited the surety amount to the State of Himachal Pradesh and issued realization warrant against the petitioner for 26.5.2018 ***(Annexure P-2)***. On 18.9.2018 learned court below adjourned the matter for 26.10.2018 for payment of forfeited amount i.e. Rs. 1,00,000/- . In the aforesaid background, present petitioner has approached this Court in the instant proceedings, praying therein to quash and set-aside the aforesaid orders passed by the learned court below.

3. Mr. Balwant Singh Thakur, learned counsel representing the petitioner, contended that bare perusal of zimni orders placed on record, clearly suggests that petitioner was condemned unheard because no opportunity of being heard was ever afforded to the petitioner by the Court below before forfeiting the surety amount. He further contended that petitioner belongs to poor family and he is hardly meeting daily expenses of the family and it is beyond his limit to deposit Rs. 1,00,000/- in terms of the realization warrant issued by the Court below vide order dated 9.4.2018. He further contended that petitioner has a family to support and he requires sufficient money to look after his old age parents and school going children. While referring Section 446(3) Cr.P.C, Mr. Thakur, contended that Court has power ***"to remit any portion of the penalty"*** and as such, in the peculiar facts and circumstances of the case, prayer made in the application may be accepted.

4. Having heard learned counsel for the parties and perused the material available on record, it is not in dispute that present petitioner stood surety of the accused in Sessions Trial No.26 of 2016, titled as ***State of H.P. Versus Bhupinder Kumar***, which is still pending adjudication before the learned Special Judge(II), Kullu, H.P. It is also not in dispute that accused Bhupinder Kumar is absconding and inspite of best efforts put in by

the prosecution as well as petitioner, his whereabouts are not known. Since, accused failed to put in appearance as per surety furnished by him, learned Court below rightly issued notice under Section 446 Cr.P.C to the present petitioner, being his surety. But question which needs to be decided in the present petition whether amount of surety can be remitted or reduced by this Court while exercising power under Section 482 Cr.P.C or not?. Question whether the petitioner had received any summon/ information from the Court before initiation of proceedings under Section 446 Cr.P.C, has no relevance, especially when impugned orders, as have been taken note above, were passed in the presence of the present petitioner, rather careful perusal of order dated 18.9.2018, clearly suggests that learned counsel appearing on behalf of the petitioner had sought time for making payment in terms of realization warrant issued on 6th July, 2018.

5. It would be profitable to reproduce Clause(3) of Section 446 Cr.P.C as under:-

> **"The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only."**

6. There is no dispute that sub section (3) of Section 446 Cr.P.C, which is reproduced hereinabove, empowers the Court to exercise its discretion to remit any portion of the penalty and enforce payment of only part of the penalty.

7. Question with regard to competence of Court to remit penalty under Section 446 Cr.P.C, came to be adjudicated by the Hon'ble High Court of Kerala in case titled as ***Jameela Khader and others versus State of Kerala,*** 2004 CRI. L.J. 3389, wherein it has been held as under:-

> "7. As mentioned earlier, the petitioners were directed to show cause why penalty should not be imposed on them for their failure to produce the accused before the Court on the date fixed for hearing. Sub-Section (2) of Section 446 provides that if the sureties do not show sufficient cause and they do not pay the penalty imposed on them, the Court may proceed to recover the same as though it is a fine imposed by the Court under the Code. If recovery becomes impossible, the sureties are liable to suffer imprisonment in civil jail for a term which may extend to six months.
>
> 8. There is no dispute that sub-Section (3) of Section 446 empowers the Court to use its discretion to remit any portion of the penalty and enforce payment of only part of the penalty. Clause 3 of Section 446 reads as hereunder:-
>
> "3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in party only."
>
> It is true that the above provision does not specify at what state the Court can remit the penalty. But the preceding clause make it clear that the Court can impose penalty only after recording proof of forfeiture and after issuing show cause notice.
>
> 9. The short question are:-
>
> (1) Can the Court which forfeits the bond of the surety remit or order part payment of the penalty after imposing such penalty?
>
> (2) Can the Criminal Court reopen or review its earlier order of imposition of penalty to invoke the power of discretion as provided under Sub-Section (3) of Section 446?."

10. On a perusal of the provisions in Section 446, it is evident that a bond which has been executed either for appearance of accused or production of property shall be forfeited the moment it is proved that a condition in the bond has been violated. For instance, if the accused fails to appear on the day on which he has been directed to appear, the Magistrate is empowered to forfeit the bond of the accused as well as that of the sureties forthwith. Of course, the Court must be satisfied that the condition in the bond has been violated. Thus it can be seen that the power vested with the Court to forfeit the bond is unfettered. However, clause (1) of Section 446 provides that the Court shall record the grounds of proof of forfeiture. Thereafter the Court may call upon any person bound by such bond to pay the penalty or to show cause why it should not be paid. Thus clause (1) of Section 446 clearly indicates that the forfeiture of a bond for breach of any of the conditions is almost an inevitable or automatic consequence. It is then for the surety to explain the reasons for the breach. Clause (2) of Section 446 stipulates that if sufficient cause is not shown and the penalty is not paid the Court may proceed to recover it. The proviso to clause (2) deals with the consequences of failure to pay the penalty. The person who is bound as surety is liable to suffer imprisonment in civil jail if he fails to pay the penalty imposed.

11. A reading of the above two clauses of Section 446 clearly shows that forfeiture of the bond and payment of penalty would follow as a natural consequence for breach of any of the conditions of the bond. The quantum of penalty may be the entire amount covered under the bond or it may be as decided by the Court after hearing the surety. It is provided in clause (1) that “the Court may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid” (emphasis supplied). Nevertheless, the Court can exonerate the surety from payment of penalty, if it is satisfied that there are valid reasons for the failure to produce the accused or the property. The Court can exercise its discretion in the matter after hearing the surety. The court can remit any portion of the penalty and direct the surety to pay only a portion thereof.”

12. But incidentally, it may be noticed that by the subsequent introduction of Section 446-A in the Code, the situation is slightly different. If the bond is executed for appearance of an accused and the bond is cancelled due to his failure to appear, then the court can forfeit the bond. His release can be ordered "upon the execution of a fresh personal bond.....with one or more of such sureties". No penalty is envisaged under Section 446-A. More importantly the provisions contained in Section 446-A are "without prejudice to the provisions of Section 446".

13. However, the question that has arisen in this case is at what stage the court can use its discretion to remit a portion of the penalty if the bond is cancelled under Section 446. Evidently the court which forfeits the bond has to necessarily consider all facts and circumstances before imposing the penalty. There may be situations where the accused might have been prevented from appearance in Court due to valid reasons beyond his control. Instances may be numerous and variegated depending on factual situations which cannot be enumerated. But the crucial issue is to find

out whether the accused had failed to appear before the Court for genuine and justifiable reasons and also whether the sureties were at fault in failing to procure the attendance of the accused. All the attendant circumstances have to be considered by the Court while imposing the penalty consequent on the forfeiture. Question of remission of penalty or enforcement of payment only in part is also to be considered at that stage. In my view, the discretion has to be exercised at the time when the penalty is imposed and not at any later stage. In that view of the matter, the order impugned cannot be faulted.

14. But learned counsel for the petitioners submits that the Court can exercise the power of discretion at any stage. He places reliance on a few reported decisions in support of his contention.

15. In Balraj S. Kapoor v. State of Bombay, AIR 1954 Bombay 365, it was held that the Court can remit a portion of the penalty invoking its discretionary power under Section 514(5) of 1898 Code (Section 446(3) of the 1973 Code) even at a subsequent stage.

16. In Sualal Mushilal v. State, AIR 1954 M.P. 231, it was held that the power to remit a portion of the penalty in exercise of its power under Clause (5) of Section 514 of the 1898 Code (corresponding to Section 446(3) of 1973 Code) could be exercised so long as the payment of any portion of the penalty remains unenforced. Though the circumstances which justify remission of a portion of the penalty have to be considered by the Court before it proceeds to consider the answer of the surety to the show cause notice, still the Court could remit any portion of the penalty if such circumstances occur subsequent to the order of recovery so long as the amount was not totally recovered.

17. In Moola Ram v. State of Rajasthan, 1982 Crl.L.J. 2333, the High Court of Rajasthan held as follows:

> "Even after passing the final order forfeiting the bond for appearance in Court and for recovery of the whole amount of penalty under the bond, the Court under Section 446(3) can remit any portion of the penalty so long as the amount is not totally recovered. There is nothing in Section 446(3) to show that an order remitting any portion of the penalty and enforcing payment of part thereof can be passed by the Court only at the time it passed the final order directing forfeiture of the bond and realisation of the amount thereof as penalty."
>
> In the above decision the learned Single Judge had followed B**alraj Kapoor's case and Sualal Mushilal's** case mentioned supra.

18. Sri. Mohammed Anzar, learned counsel for the petitioners submits that judicial precedents mentioned above are unanimous in the view that the court which imposes the penalty after forfeiture of the bond can remit the penalty or direct that only a portion thereof be paid. This can be done even at a subsequent stage. But I find it difficult to agree with the above proposition.

19. **In Balraj Kapoor's case (supra),** the learned Judge of the Bombay High Court had observed that:

> "..... it seems to me that the better View is that the Court is called upon to require the surety to pay the amount of the penalty or to

> remit a portion of the penalty as soon as the bond is forfeited. It is at that stage that the Court is called upon to consider the question as to whether the entire amount of the penalty should be ordered to be paid or only a portion of the amount should be ordered to be paid.....
>
> The question whether the discretion is to be exercised at a subsequent stage or at the stage when the Court calls upon the surety to pay the amount of the penalty is, I think, not free from difficulty. It is, I think, possible to take the view that the Court may, in its discretion, remit a portion of the penalty and enforce payment in part only even at a subsequent stage. But I would prefer to say that the Court can insist upon the payment of the entire amount of the penalty or may make an order remitting a portion of the penalty as soon as the bond is forfeited and the Court is called upon to apply its mind to the matter....."
>
> 20. I am inclined to agree with the above observation in the judgment, though it was ultimately held by the learned Judge that the Court can remit the penalty even at a subsequent stage.
>
> 21. There is yet another reason to take the above view. A criminal Court does not have the power to review or re-open its own order. In this case the order that was passed imposing a penalty of Rs. 5,000/- each had become final. Therefore, the Court could not have reopened or reviewed its own earlier order as requested by the petitioners.
>
> 22. However, the discretion vested in the Court by virtue of Clause (3) of Section 446 can be exercised by the appellate or revisional court if the order is challenged as provided under the Code. The appellate or revisional Court, as the case may be, can always consider, even at a later stage, whether there are circumstances warranting remission of penalty.
>
> 23. It is contended by the learned Public Prosecutor that in the case on hand, the petitioners had a remedy to challenge the impugned order before the Sessions Court by filing an appeal. It is contended that this petition under Section 482 of the Code cannot be entertained since the petitioners had not resorted to the remedy available to them. It is true that an appeal is provided under Section 449 of the Code which enables the aggrieved party to file an appeal against "all orders passed under Section 446". If the impugned order is passed by a Magistrate, an appeal shall lie to the Sessions Court. In the case of an order made by a Court of Sessions, an appeal lies before the High Court. Therefore there is force in the contention of the learned Public Prosecutor that the petitioners are not without any remedy as provided under the Code.
>
> 24. But in the peculiar facts and circumstances of this case, I am not inclined to direct the petitioners to approach the Appellate Court. This Court can always consider the question whether an order passed by the inferior court is just or legal. If there is any illegality or irregularity, this Court can always interfere in order to meet the ends of justice.

8. Consequently, in view of the aforesaid position of law as well as view taken by the Courts, referred hereinabove, the discretion vests in the Court by virtue of clause (3) of Section 446 Cr.P.C to remit the amount of penalty. In the present case, learned counsel for the petitioner submits that the petitioner is a poor person and is not in a position to make payment of the penalty of Rs. One lakh. So, keeping in view the submission made by

learned counsel for the petitioner, this Court is of the view that the petitioner deserves concession of reduction of penalty. Therefore, the orders dated 29.8.2017, 9.4.2018 and 18.9.2018, passed by the learned court below are modified to the extent that the petitioner shall pay a penalty of Rs.10,000/-, which shall be deposited before the trial Court within a period of two months from the date receipt of certified copy of this order.

The petition is disposed of in the aforesaid terms.

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

Pooja Sharma .....Petitioner
Versus
Sarvesh Sharma .....Respondent

CMPMO No. 350 of 2018
Date of Decision: 19.12.2018

Code of Civil Procedure, 1908 – Section 24 – Divorce petition - Transfer of - Wife seeking transfer of divorce petition instituted by husband from court of District Judge, Sirmour to court of District Judge, Una - After matrimonial dispute wife residing with her parents at Una – Held, as against husband's inconvenience, it is wife's convenience which must be looked at and given precedence – Petition allowed – Petition transferred to court of District Judge, Una. (Para 11)

Cases referred:
Anjali Ashok Sadhwani vs. Ashok Kishinchand Sadhwani AIR 2009 SC 1374
Arti Rani alias Pinki Devi and another vs. Dharmendra Kumar Gupta (2008) 9 SCC 353
Kulwinder Kaur alias Kulwinder Gurcharan Singh vs. Kandi Friends Education Trust and others (2008) 3 SCC 659
Rajani Kishor Pardeshi vs. Kishor Babulal Pardeshi (2005) 12 SCC 237
Soma Choudhury vs. Gourab Choudhaury (2004) 13 SCC 462
Sumita Singh vs. Kumar Sanjay and another (2001) 10 SCC 41

For the Petitioner : Mr. Virender Singh Kanwar & Mr. Raman Parashar, Advocates.
For the Respondent : Mr. P.S.Goverdhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of instant petition filed under Section 24 of the Code of Civil Procedure, prayer has been made on behalf of the petitioner for transfer of case No.139-HMA/3 of 2017, titled as ***Sarvesh Sharma versus Pooja Sharma,*** pending in the Court of learned District Judge, Sirmour, District Nahan, H.P. to the Court of learned District Judge, Una, District Una, H.P.

2. The marriage between the petitioner and the respondent was solemnized on 16.4.2012 at village Bharolia Khurd, Tehsil & District Una, Himachal Pradesh, but fact

remains that they were unable to live together on account of certain differences and as such, petitioner left her matrimonial house and started living at her parental house at village Bharolia Khurd, Tehsil and District Una, H.P.

3. As per the averments contained in the petition, respondent filed petition under Section 13 of the Hindu Marriage Act ***(for shot the 'Act')*** in the Court of learned District Judge, Sirmour, District Nahan, H.P., seeking therein dissolution of marriage. After having received summons/ notices ***(Annexure P-1)*** issued by learned District Judge, Sirmour in the aforesaid petition having been filed by the respondent (husband), petitioner has approached this Court in the instant proceedings, praying therein to transfer the proceedings from the Court of learned District Judge, Sirmour to the Court of learned District Judge, Una, District Una, H.P., on the grounds of inconvenience, insufficiency of means, compulsive litigation and on the ground that the distance between Sirmaur and Una is more than 200 KMs and it is difficult for her to attend the Court at Sirmour, District Nahan, H.P.

4. Having heard learned counsel representing the parties and perused the material available on record, this Court has no hesitation to conclude that matrimonial proceedings and other like proceedings, which are the outcome of matrimonial discord, it is the convenience of the wife which is required to be taken into consideration by the Court while considering the prayer, if any, made for transfer of the case.

5. In ***Sumita Singh*** *versus* ***Kumar Sanjay and another (2001) 10 SCC 41,*** it was held by the Hon'ble Supreme Court that in a case where the wife seeks transfer of the petition, then as against husband's convenience, it is the wife's convenience which must be looked at.

6. In ***Soma Choudhury*** *versus* ***Gourab Choudhaury (2004) 13 SCC 462,*** it was held by the Hon'ble Supreme Court that once the wife alleges that she has no source of income whatsoever and was entirely dependent upon his father, who was a retired government servant, then it was the convenience of the wife which was required to be looked into and not that of the husband, who had pleaded a threat to his life. It was further observed that if the respondent therein had any threat to his life, he could take police help by making an appropriate application to this effect.

7. In ***Rajani Kishor Pardeshi*** *versus* ***Kishor Babulal Pardeshi (2005) 12 SCC 237,*** in a case seeking transfer of the case at the instance of the wife, it was specifically held by the Hon'ble Supreme Court that convenience of wife was the prime consideration.

8. Similarly, while dealing with the application for transfer of proceedings in ***Kulwinder Kaur alias Kulwinder Gurcharan Singh*** *versus* ***Kandi Friends Education Trust and others (2008) 3 SCC 659***, the Hon'ble Supreme Court after analyzing the provisions of Sections 24 and 25 of the Code of Civil Procedure laid down certain broad parameters for transfer of cases and it was held:-

> "23. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts. They are balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public

interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a "fair trial" in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order."

9. In ***Arti Rani alias Pinki Devi and another*** *versus* ***Dharmendra Kumar Gupta (2008) 9 SCC 353***, the Hon'ble Supreme Court was dealing with a case where the wife had sought transfer of proceedings on the ground that she was having a minor child and it was difficult for her to attend the Court at Palamu, Daltonganj, which was in the State of Jharkhand and at a quite distance from Patna where she was now residing with her child. Taking into consideration the convenience of the wife, the proceedings were ordered to be transferred.

10. Similarly, in ***Anjali Ashok Sadhwani*** *versus* ***Ashok Kishinchand Sadhwani AIR 2009 SC 1374***, the wife had sought transfer of the case to Bombay from Indore in Madhya Pradesh on the ground of inconvenience as there was none in her family to escort her to Indore and on this ground the proceedings were ordered to be transferred.

11. It is quite apparent from the aforesaid exposition of law that in dispute of the present kind where the petitioner is compelled to reside at her parent house at Bharolia Khurd, Tehsil & District Una, H.P., on account of matrimonial dispute, it is convenience of the petitioner, which is required to be considered over and above the inconvenience of the husband.

12. In view of the aforesaid discussion, the present petition is allowed and the case No.139-HMA/3 of 2017 titled as ***Sarvesh Sharma versus Pooja Sharma***, pending in the Court of learned District Judge, Sirmour, District Nahan, H.P. is ordered to be transferred to the Court of learned District Judge, Una, District Una, H.P. Record, if any, be sent forthwith. The parties through their respective counsel(s) are directed to appear before the learned District Judge, Una District Una, H.P. on **11.01.2019.**

The petition stands disposed of in the aforesaid terms, so also pending application(s), if any. Interim order granted by this Court on 5.9.2018, is vacated.

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

Desh Raj .....Petitioner
Versus
State of Himachal Pradesh .....Respondent.

Cr. MP(M) No. 1421 of 2018
Date of Decision No.20.10.2018

Code of Criminal Procedure, 1973 – Section 438 – Pre-arrest bail – Grant of – Petitioner accused of offences of abduction and rape praying for pre-arrest bail – On facts, victim found major – She of her own going to accused's house and solemnizing marriage with him in

presence of his close relatives – Custodial interrogation of accused not required – Accused already having joined investigation – Application allowed – Pre-arrest bail granted subject to conditions (Paras 6, 7 & 13)

Cases referred:

Dataram Singh vs. State of Uttar Pradesh & Anr, Criminal Appeal No. 227/2018, decided on 6.2.2018

Prasanta Kumar Sarkar vs. Ashis Chatterjee and Another (2010) 14 SCC 496

Sanjay Chandra vs. Central Bureau of Investigation (2012)1 Supreme Court Cases 49

For the petitioner:	Mr. Digvijay Singh, Advocate
For the respondent:	Mr. S.C.Sharma & Mr. Dinesh Thakur, Additional Advocate Generals, with Mr. Amit Kumar, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Sequel to order dated 30.10.2018, whereby bail petitioner namely, Desh Raj was ordered to be enlarged on bail in the event of arrest in relation to FIR No.268 of 2018, dated 13.10.2018, under Sections 366, 376, 120-B and 506 of IPC registered at police Station, Balh, District Mandi, H.P, SI Hem Raj has come present alongwith the record. Mr. Amit Kumar Dhumal, learned Deputy Advocate General has also placed on record status report, prepared on the basis of the investigation carried out by the Investigating Agency. Record perused and returned.

2. Close scrutiny of the record/status report, reveals that on 13.10.2018 complainant, namely Smt. Sarla Devi, who happened to be mother of the victim ***(hereinafter referred to as the prosecutrix)*** lodged complaint at police Station, Balh, District Mandi,H.P., alleging therein that on 7.10.2018 her daughter had gone to the house of her friend Veena Devi, but she did not return till 9.10.2018, whereafter maternal Uncle of Veena Devi gave a phone call to her daughter Pooja, whereby he informed that her daughter i.e. prosecutrix has solemnized marriage with his Nephew i.e. present bail petitioner Desh Raj. Complainant alleged that on 10.10.2018, maternal Uncle of bail petitioner came to her house and informed that prosecutrix has solemnized marriage with the bail petitioner, but they refused to send her daughter to her house. On 12.10.2018, person namely Kishan Chand informed that function is being organized on account of marriage of bail petitioner with the prosecutrix, but suddenly on 13.10.2018, at 7:00 AM somebody on phone informed that prosecutrix has left the house of bail petitioner without intimating anybody. Complainant alleged that bail petitioner in connivance with his relatives allured her daughter and subsequently compelled her to solemnize marriage with him. On the basis of aforesaid complaint, FIR detailed hereinabvoe, came to be lodged against the present bail petitioner on 13.10.2018 under Sections 366, 376 and 120-B of IPC. On 15.10.2018, prosecutrix came back to her village and allegedly informed complainant that she was forced to solemnize marriage with bail petitioner, who sexually assaulted her against her wishes. On 15.10.2018, police got recorded the statement of prosecutrix under Section 164 Cr.P.C, wherein she stated that bail petitioner with the help of his relatives forcibly solemnize marriage with her and thereafter sexually assaulted her. Police also got prosecutrix medically examined, wherein it has been opined that possibility of sexual assault cannot be ruled out, however report of FSL, is still awaited.

3. Mr. Amit Kumar Dhumal, learned Deputy Advocate General, on the instructions of Investigating Officer, fairly stated that pursuant to order dated 30.10.2018 bail petitioner has joined the investigation and is fully cooperating in the investigation. He also stated that at this stage nothing is required to be recovered from the bail petitioner, however his enlargement on bail at this stage, can be detrimental to the investigation and as such, prayer made in the instant application may be rejected.

4. Mr. Digvijay Singh, learned counsel representing the bail petitioner, while making this court to travel through the record/status report, vehemently argued that no case, if any, is made out against the bail petitioner under Sections 366 and 376 IPC because there is nothing on record to suggest that bail petitioner allured and then compelled the prosecutrix to solemnize marriage with him. Rather, evidence available on record itself suggest that prosecutrix, who is major, of her own joined the company of bail petitioner and then in the presence of her family members, especially maternal Grand father solemnized marriage in a temple at Sundernagar. He also contended that after solemnization of marriage, both i.e. bail petitioner and prosecutrix went to Public Notary where they both executed affidavits, stating therein that they both are major and they with their own volition have solemnized marriage and as such, bail petitioner has been falsely implicated in the case. He further contended that since complainant is not happy with the present marriage, she has compelled the prosecutrix to falsely depose against the bail petitioner, who is now her husband. Learned counsel for the petitioner also made available photographs in the Court to demonstrate that marriage was solemnized in a temple, whereafter prosecutrix remained in the company of bail petitioner and other family members for almost one week and during this period no attempt, whatsoever was ever made by her to lodge complaint, if any, against the bail petitioner or other family member, which clearly suggest that she was happy with the marriage, but subsequently on the insistence of her mother, she gave false statement under Section 164 Cr.P.C. He also invited attention of this Court to the statement of Sh. Ram Singh, who happened to be maternal Grand father of prosecutrix, to demonstrate that prosecutrix of her own will had solemnized marriage in the presence of her maternal grand father and at no point of time, she was ever compelled by the bail petitioner or other family members.

5. Learned Deputy Advocate General, while responding to the aforesaid arguments having been made by learned counsel for the petitioner, contended that keeping in view the gravity of the offences allegedly committed by the bail petitioner, he does not deserves to be enlarged on bail. Learned Additional Advocate General further contended that statement having been made by the prosecutrix under Section 164 Cr.P.C, clearly suggests that bail petitioner in connivance with other family members firstly allured the prosecutrix and then solemnized marriage with her by making her to consume some intoxicating substance.

6. Having heard learned counsel for the parties and perused the material available on record, this Court finds that at the time of alleged incident prosecutrix was major. It is also not in dispute that prosecutrix had gone to the house of bail petitioner of her own, because there is no evidence to suggest that bail petitioner or his family members compelled the prosecutrix to join their company. It has specifically come in the statement of Ram Singh, who happened to be maternal grand father of prosecutrix that prosecutrix wanted to marry the present bail petitioner and she of her own volition solemnized marriage with the bail petitioner. It is also not in dispute that marriage was solemnized on 9.10.2018 at Sundernagar Temple,whereafter admittedly prosecutrix remained in the company of bail petitioner or other family members for almost a week. As per own version of complainant, she was in constant touch of the family members of bail petitioner till 13.10.2018 when

complainant was informed that some function is being organized on account of solemnization of marriage. But there is nothing on record to suggest that during this period attempt, if any, was ever made by prosecutrix to raise hue and cry to lodge the complaint, if any, against the bail petitioner or other family members qua their forcible act, if any.

7. Leaving everything aside, affidavits adduced on record by the investigating Officer, which were executed by the bail petitioner and prosecutrix on 11.10.2018, clearly suggest that they of their own volition had solemnized marriage at Sundernagar Temple. These affidavits also reveals that by that time both parties were major. Interestingly, maternal grand father of prosecutrix is one of the witness to the affidavits. Advocate Pawan, before whom affidavits were executed, have also stated that both bail petitioner and prosecutrix had personally come to him and stated that they have solemnized the marriage. Though, aforesaid aspects of the matter are to be considered and decided by the court below on the basis of the totality of evidence collected on record by the investigating agency, but having perused the material available on record at this stage, this Court sees no reason for custodial interrogation of bail petitioner and as such, he deserves to be enlarged on bail. Otherwise also, it is well settled that till the time guilt of a person is not proved in accordance with law, he/she is deemed to be innocent.

8. It has been repeatedly held by Hon'ble Apex Court as well as this Court that freedom of an individual cannot be curtailed for indefinite period, especially when his/her guilt is yet to be proved, in accordance with law.

9. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual cannot be curtailed for indefinite period, especially when his guilt has not been proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:-

> ***2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.***

10. By now it is well settled that gravity alone cannot be decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in ***Sanjay Chandra versus Central Bureau of Investigation*** (2012)1 Supreme Court Cases 49; wherein it has been held as under:-

> ***" The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."***

11. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise, bail is not to be withheld as a punishment. Otherwise also, normal rule is of bail and not jail. Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

12. The Hon'ble Apex Court in ***Prasanta Kumar Sarkar v. Ashis Chatterjee and Another*** (2010) 14 SCC 496, has laid down the following principles to be kept in mind, while deciding petition for bail:

> (I) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;
>
> (II) nature and gravity of the accusation;
>
> (III) severity of the punishment in the event of conviction;
>
> (IV) danger of the accused absconding or fleeing, if released on bail;
>
> (V) character, behaviour, means, position and standing of the accused;
>
> (VI) Likelihood of the offence being repeated;
>
> (VII) reasonable apprehension of the witnesses being influenced; and
>
> (VIII) danger, of course, of justice being thwarted by grant of bail.

13. Consequently, in view of the above, order dated 30.10.2018, passed by this Court, is made absolute, subject to petitioner's furnishing personal bonds in the sum of Rs. 1,00,000/-(Rs. One Lakh) with one surety in the like amount, to the satisfaction of the Investigating Officer, besides the following conditions:

A. He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

B. He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

C. He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade them from disclosing such facts to the Court or the Police Officer; and

D. He shall not leave the territory of India without the prior permission of the Court.

14. It is clarified that if the petitioner misuses his liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of his bail.

15. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone.

The bail petition stands disposed of accordingly.

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

Dr. Honey Johar ....Petitioner
Versus
Ramnik Singh Johar .....Respondent

CMPMO No. 330 of 2017
Date of Decision: 21.12.2018

Code of Civil Procedure, 1908 – Section 151– Additional evidence- Adduction of – Circumstances – Held, additional evidence can be adduced by party only with leave of court – Court must exercise its discretion keeping in view that no prejudice is caused to other party – On facts, divorce petition at stage of final argument - Husband seeking to adduce CD by way of additional evidence containing material indicating cruelty meted out to him by wife and her relatives – Husband knowing about said CD before commencement of trial itself and mentioning about CD in his rejoinder – Husband cannot be permitted to adduce additional evidence at fag end of trial. (Paras 11 & 13)

Case referred:
Ram Rati vs. Mange Ram(Dead) through legal representatives and others, 2016(11) SCC 296

For the Petitioner : Mr. Anuj Nag, Advocate.
For the Respondent : Mr. R.G.S Saini, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Being aggrieved and dissatisfied with the order dated 17.7.2017, passed by learned District Judge, Shimla, District Shimla, H.P., whereby an application having been filed by the respondent ***(hereinafter referred to as the husband),*** seeking therein permission to lead additional evidence, came to be allowed, petitioner ***(hereinafter referred to as the wife)***, has approached this Court in the instant proceedings, praying therein to set-aside the order, referred hereinabove.

2. Briefly stated facts, as emerge from the record are that husband filed divorce petition under Section 13 of the Hindu Marriage Act, against the wife in the Court of learned District Judge, Shimla, District Shimla, H.P. on the ground of cruelty. During the pendency of aforesaid divorce petition, husband filed an application under Order 18 Rule 17-A read with Section 151 CPC ***(Annexure P-1),*** seeking therein permission of the Court to allow him to lead additional evidence, which may be necessary and just for the proper adjudication of the case. Husband averred in the application that on 27.5.2017 wife led her evidence as RW-1 and RW-2, wherein she categorically admitted that her parents had come to Shimla in the month of July, 2014 and had a meeting with the family of the husband. Husband claimed by way of application that he is having recorded version in the form of audio CD of the entire conversation of this meeting held in July, 2014, which may be helpful for the proper adjudication of the dispute/case *inter-se* parties. Husband further averred in the application that in para Nos. 6 and 7 of the petition, he has categorically stated that he was subjected to physical and mental cruelty, which fact has been further reiterated in para 34 of the replication, wherein he has categorically averred that he is in possession of original recording of the conversation, wherein the wife has stated that she never wanted to marry the husband being asthmatic and hunchback. Husband in the application also stated that bare perusal of recording intended to be adduced on record by way of additional evidence would go to show that father of the wife has openly threatened him as well as his family members. Husband further averred in the application that during cross-examination, RW-1 and RW-2 have admitted the factum of meeting held at Shimla in July, 2014, but completely stated false facts and as such, in order to ascertain truth and veracity of the depositions of wife and her mother, it is very crucial and important to bring this piece of evidence (Audio CD) on record, to enable the learned Court to render just and fair decision in the case.

3. Aforesaid application having been filed by the husband came to be hotly contested by the wife, who opposed the application on the ground of inordinate delay. She stated in the reply that when matter is fixed for argument such application cannot be allowed and in case application is allowed at this stage, it would amount to filling up lacuna.

4. Learned District Judge taking note of the pleadings adduced on record by the respective parties, allowed the application vide order dated 17.7.2017 subject to cost of Rs.5000/- and also held husband liable to bear the to and fro expenses of the wife's witnesses on the production of the proof of the same by them. Vide same order, learned District Judge, adjourned the matter for 25.7.2017 with the direction to the wife's witnesses to remain present for their cross-examination. In the aforesaid background, wife has approached this Court in the instant proceedings.

5. Having heard learned counsel representing the parties and carefully perused the material available on record vis-a-vis reasoning assigned by the learned District Judge, while passing impugned order, this Court finds that application under order 18 Rule 17-A CPC , which otherwise stands deleted came to be filed on behalf of the husband at the stage of argument. No doubt Court while exercising inherent power under Section 151 CPC can

allow either of the party to produce additional document at any time/stage before rendering its judgment if it deems it necessary for the proper adjudication of the case, but same time such power is required to be exercised very cautiously, so that no prejudice, whatsoever, is caused to the other party.

6. Interestingly, husband in replication to the reply filed by the wife has stated in para-34 that he is in possession of audio recording of wife and her father, wherein wife has stated that she never wanted to marry husband being asthmatic and hunchback and her father openly threatened the husband and his family members and as such, this Court finds considerable force in the arguments of Mr. Anuj Nag, learned counsel representing the petitioner-wife that once such CD containing audio recording of wife and her father was in possession of husband then what prevented him from placing it on record before commencement of trial or at the time of cross-examination of wife and other witnesses.

7. Careful perusal of the application having been filed by the husband, seeking therein permission to lead additional evidence, clearly suggests that by way of additional evidence husband intended to prove factum with regard to threats extended to him and his family members by the father of the wife, which fact was very much in his knowledge at the time of filing replication. Careful perusal of cross-examination conducted upon the wife witnesses, nowhere reveals that suggestion, if any, was ever put to the wife with regard to existence of audio CD or recording of the conversation qua the meeting held at Shimla. No doubt, wife in his examination-in-chief or cross-examination has admitted the factum with regard to meeting held at Shimla, but there appears to be no attempt on the part of the husband to put a suggestion to wife that during meeting at Shimla he and his family members were threatened and he was in possession of the CD, which omission on the part of the husband certainly compels this Court to agree with Mr. Anuj Nag, learned counsel representing the petitioner-wife that application having been filed by the husband at the time of arguments is an afterthought merely to fill up the lacuna. Husband by way of placing audio CD on record wants to prove misbehave of father of wife and statement given by wife at one point of time, but interestingly, no such suggestion came to be put to her in her cross-examination, rather such suggestion came to be put to RW-2 in her cross-examination I.e. mother of the wife, which in my mind could not be of any help.

8. Leaving everything aside, once pleadings adduced on record by the husband itself suggest that audio CD sought to be produced on record by way of additional evidence was very much in existence before commencement of trial or cross-examination of wife or her family member, learned Court below ought not to have allowed the application having been filed by the husband, seeking therein permission to lead additional evidence that too at the stage of arguments because it would amount to filling up of lacuna.

9. Basic purpose of Rule 17 is to enable the Court to clarify any position or doubt. While exercising power Under Order 18 Rule 17-A CPC, Court may, either *suo motu* or on the request of any party, recall any witness at any stage in this regard. No doubt, power can be exercised at any stage, once the Court recalls the witness for the purpose of any such clarification, the court may permit the parties to assist the court by examining the witness for the purpose of clarification required or permitted by the Court. The power under Rule 17 cannot be stretched any further, however said power cannot be invoked to fill up omission in the evidence already led by a witness.

10. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in ***Ram Rati versus Mange Ram(Dead) through legal representatives and others,*** 2016(11) Supreme Court Cases 296, wherein it has been held as under:-

> **" 11. The respondent filed the application under Rule 17 read with Section 151 CPC invoking the inherent powers to the court to make orders for the ends of justice or to prevent abuse of the process of the Court. The basic purpose of Rule 17 is to enable the court to clarify any position or doubt, and the court may, either such motu or on the request of any party, recall any witness at any stage in that regard. This power can be exercised at any stage of the suit. No doubt, once the court recalls the witness for the purpose of any such clarification, the court may permit the parties to assist the court by examining the witness for the purpose of clarification required or permitted by the court. The Power under Rule 17 cannot be stretched any further. The said power cannot be invoked to fill up omission in the evidence already led by a witness. It cannot also be used for the purpose of filling up a lacuna in the evidence. " No prejudice is caused to either party " is also not a permissible ground to invoke Rule 17. No doubt, it is a discretionary power of the Court but to be used only sparingly, and in case, the court decides to invoke the provision, it should also see that the trial is not unnecessarily protracted on that ground."**

11. It is quite apparent from the aforesaid exposition of law that though it is discretionary power of Court to allow parties to adduce on record additional evidence at any stage of the trial, but such power is required to be used sparingly so that it is not abused. The Hon'ble Apex Court has specifically held that in case Court decides to invoke this provision, it should see that the trial is not unnecessarily protracted on that ground. In the judgment(supra) Hon'ble Apex Court has held that " no prejudice is caused to either party is also not a permissible ground to invoke Rule 17 and as such, there is no force in the arguments of learned counsel representing the husband that no prejudice would be caused in case order passed by the District Judge is allowed to sustain, rather it would help to ascertain the truth. This Court finds from the record that matter is repeatedly being adjourned on one pretext or the other on the request of learned counsel representing the parties. Hence, this Court having taken note of the fact that since factum with regard to existence of audio CD sought to be adduced on record as additional evidence was very much in the knowledge of the husband before commencement of trial and at the time of leading evidence, has no hesitation to conclude that application filed under Order 18 Rule 17-A CPC is nothing, but an attempt to protract the trial and as such, same deserves to be dismissed.

12. Consequently, in view of the discussion made hereinabove, the present petition is allowed and impugned order dated 17.07.2017, passed by the learned Court below is quashed and set-aside.

13. The parties through their respective counsel(s) are directed to appear before the learned Court below on **4.01.2019**, to enable it to proceed with the matter. Having taken note of the fact that the matter is hanging fire since 2014, this Court hopes and trust that learned Court below shall conclude the case expeditiously, preferably on or before 15th March, 2019. Interim order dated 28.07.2017 is vacated.

14. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

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

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

Cr. Appeal No. 45 of 2017
Date of Decision: 24.12.2018

Evidence Act, 1872 – Section 3 – Appreciation of evidence - Official witnesses – Held, deposition put forth by official witnesses can not be disbelieved merely on account of non-association of independent persons in investigation- But where version of official witnesses not corroborated by independent witnesses then their evidence required to be taken into consideration with utmost care and caution. (Para 10)

Evidence Act, 1872 – Section 3 – Appreciation of evidence – Principles – Held, evidence must be tested for its inherent consistency and probability - In case of multiple witnesses, consistency with account of other witnesses makes such witness creditworthy (Para 15)

Case referred:
C. Magesh and Ors. v. State of Karnataka (2010) 5 SCC 645

For the Appellants : Mr. Peeyush Verma, Advocate, for the appellant
For the Respondent: M/s S. C. Sharma and Mr. Dinesh Thakur, Additional Advocates General, for the respondent-State.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant appeal having been filed by the appellant-accused (herein after referred to as "the accused"), is directed against the judgment dated 24.1.2017, passed by the learned Special Judge-II, Chamba, H.P. in Sessions Trial No. 533/2014, titled *State of H.P. Versus Munish Kumar*, whereby court below while holding the accused guilty of having committed offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act'), convicted and sentenced him to undergo rigorous imprisonment for a period of 4 years and pay fine of Rs.10,000/- and in case of default of payment of fine, to further undergo simple imprisonment for one year.

2. In nutshell, story of the prosecution, as emerges from the record, is that on 2.10.2014, Inspector Bhupinder Singh (PW-11), HC Bhagwan Chand, Constable Dharmender (PW-3), Constable Anil Kumar (PW-2) and HC Bhajan Singh (PW-1) alongwith Government vehicle driven by HHG Vijay Kumar, IO kit and search light were present at Goli Zero Point in connection with Nakkabandi. On the intervening night of 02.10.2014 and 3.10.2014, at around 4.45 AM, one person came from the side of Chohda Dam, who on seeing the police party, stopped for a while and thereafter turned back and tried to flee from the spot and on this, Inspector Bhupinder Singh(PW-11) raised the suspicion and asked him to stop but he did not stop. Inspector Bhupinder Singh (PW-11) alongwith other police officials nabbed the accused at a distance of about 20 meters. Thereafter, Inspector Bhupinder Singh (PW-11) asked about his credentials, on which he disclosed his name to be Munish Kumar, resident of Mai Ka Bag, Tehsil and District Chamba, HP. That person was carrying a blue coloured carry bag on his right hand. On the

basis of suspicion and his conduct the carry bag was searched. On opening the carry bag, one red coloured polythene bag came out. On checking the red coloured polythene bag, a black coloured hard substance in the shape of rounds sticks came out. Thereafter, Inspector Bhupinder Singh (PW-11) made a telephonic call to MHC P.S. Dalhousie to send some person with drug detection kit, digital camera and videography camera, thereafter, the police party waited for some time for the arrival of drug detection kit, digital camera and videogrphy camera. Around 5.45 AM, Constable Pawan (PW-10) reached at the spot alongwith the above said articles on the motor cycle. Thereafter, the black coloured hard substance carried by that person in his carry bag was checked with the help of drug detection kit. On checking, it was found to be charas/cannabis. Thereafter, Inspector Bhupinder Singh (PW-11) raised a suspicion that person/accused might be carrying some suspicious article or contraband in his person, as such, he told the accused that he wanted to take his personal search. That person was apprised about his legal right to be searched in the presence of Gazetted Officer or Magistrate. He gave his consent that he wanted to give his search before the police party present at the spot. To that effect consent memo Ex.PW-1/A was prepared. On consent memo. Ex. PW-1/A, accused gave his written consent to be searched before the police party present at the spot. Before taking the search of the accused, he was apprised that he can also take the search of the police officials. To that effect search memo Ex.PW-1/B was prepared. The accused took the search of the police party present at the spot, except Pawan Kumar (PW-10) and HHG Vijay Kumar. As per story of the prosecution, personal search of the accused was conducted, but nothing incriminating was found on his personal search. Thereafter, Inspector Bhupinder Singh (PW-11) took the blue coloured scale from his I.0. kit and weighed the contraband and the same was found to be 410 grams charas, whereafter, the recovered contraband was put in the red coloured polythene bag and carry bag in the same manner and carry bag was sealed in the white piece of cloth with seven seal impressions of seal N. Sample seal Ex.PW-1/C was drawn on a separate piece of cloth. Inspector Bhupinder Singh (PW-11) filled the relevant columns of NCB forms in triplicate and embossed seal on NCB forms. Seal after use was handed over to HC Bhajan Singh (PW-1). To that effect memo Ex.PW-1/D was prepared. Inspector Bhupinder Singh (PW-11) prepared the recovery and seizure memo Ex.PW-1/E and gave a copy of the same to the accused free of costs. Thereafter, Inspector Bhupinder Singh. (PW-11) prepared the 'rukka' Ex.PW-11/B and sent the same to Police Station, Dalhousie through Constable Anil Kumar (PW-2) for the registration of the FIR Ex.PW-9/A. Inspector Bhupinder Singh (PW-11) also sent the copy of the rukka Ex. PW-6/A to S. P. Chamba for his information through C. Dharmender Kumar (PW-3). The photography and videography of the spot were conducted by Constable Anil Kumar(PW-2) and Constable Dharmender (PW-3). Inspector Bhupinder Singh (PW-11) prepared the spot map Ex.PW-11/C as per the factual position. He also recorded the statements of the witnesses. The accused was arrested vide arrest memo Ex.PW-1VF. The information of his arrest was given to his brother. Thereafter, the jamatalashi of the accused was conducted vide memo Ex. PW-1/G. After completion of the proceedings at the spot Inspector Bhupinder Singh (PW-11)alongwith the police party came to Police Station, Dalhousie. At Banikhet Chowk Constable Anil Kumar (PW-2) met the police party alongwith case file. Constable Anil Kumar (PW-2) handed over the case file to Inspector Bhupinder Singh (PW-11), who filled the FIR number on the documents, prepared on the spot and he also recorded the statement of Constable Anil Kumar (PW-2) at Banikhet Chowk. HC Bhajan Singh (PW-1) and Constable Anil Kumar (PW-2) were dropped at P.P.Behloon Cantt. Inspector Bhupinder Singh (PW-11) alongwith the remaining police party reached at P. S. Dalhousie around 10.30 AM. On reaching there Inspector Bhupinder Singh (PW-11) handed over the case property to MHC/HC Deepak Kumar (PW-9), P.S. Dalhousie with the direction to sent the same for chemical analysis to FSL, Junga. He (PW-11) also filled columns No.10 and 11 of the NCB forms. On 4-10-2014,

IO Bhupinder Singh (PW-11) sent the special report Ex.PW-6/B to S. P. Chamba through HHC Bichittar Singh (PW-4). On 3-10-2014 MHC Deepak Kumar (PW-9) entered aforesaid case property and articles of jamatalashi in the Malkhana register Ex.PW-9/C at the Sr. No. 114. On 5-10-2014 MHC Deepak Kumar (PW-9) sent the above said case property alongwith the documents except Jamatalashi articles to FSL Junga through HHC Amrik Singh (PW-5) vide RC No.8214 Ex-PW-9D. He also made an entry to that effect against the same in Malkhana register. On 25.10.2014 HHC. Rajesh Kumar (PW-6) handed over report of chemical analyst alongwith the case property to HHC Deepak Kumar (PW-9) who entered the case property and result of the chemical analyst against the same Sr. No. in the Malkhana register. Thereafter, MHC PW-9 handed over the result of the chemical analyst to the I.O. of the case. On16.12.2014 vide RC No. 118/2014 MHC Deepak Kumar (PW-9) sent the case property through HHC Mahinder Singh to District Malkhana at Chamba. MHC Deepak Kumar (PW-9) made an entry qua sending of the case property to District Malkhana, Chamba against the same Sr. No.114. He also issued the CIPA certificate Ex.PW-9/E. On 2.10.2014 LHHC Suraksha Devi (PW-B) entered rapat No.34(A) Ex.PW-8/A regarding departure of the police party around 11.05 PM. On 3.10.2014, around 10.30 AM, she (PW-8) made an entry of the rapat No.15 (A) Ex.PW-8/B regarding the arrival of the police party. The Chemical Examiner on analysis of the charas/cannabis opined as per report Ex.PX that the substance examined was extract of cannabis and sample of Charas and quantity of resin found therein was 23.81% w/w. After receiving the result of the chemical Analyst Ex.PX and on the completion of the investigation, Inspector Bhupinder Singh (PW-11) prepared challan and presented the same in the Court.

3. Court below, on being satisfied that prima facie case exists against the accused charged him for the commission of offence punishable under Section 20 of the Act, to which he pleaded not guilty and claimed trial. Subsequently, vide judgment dated 24.01.2017, learned trial Court, on the basis of totality of evidence collected on record by prosecution, convicted and sentenced the accused, as per the description given here-in-above. In the aforesaid background, the appellant-accused has approached this court by way of instant appeal, seeking his acquittal after setting aside the judgment of conviction recorded by the Court below.

4. Shri Peeyush Verma, learned counsel representing appellant-accused while making this Court to peruse the impugned judgment of conviction recorded by the court below, strenuously argued that the same is not sustainable in the eye of law because the same is not based upon proper appreciation of evidence as well as law. Shri Verma, contended that court below has failed to appreciate the evidence in its right perspective, as a consequence of which erroneous findings have come to the fore to the determinant of accused, who has been falsely implicated in the case. He aruged that careful perusal of material available on record, clearly reveals that there is no proper compliance of provision of Section 50 of the Act, which is mandatory. He further contended that no independent witness ever came to be associated by the police, notwithstanding the fact that the same could be easily available. While referring to the statements of prosecution witnesses PW-1 and PW-2, Mr. Verma forcefully, contended that they are verbatim same and reading of the same clearly suggest that the court below has not bothered at all to separate the chaff from the grain, rather, in most casual manner, accepted the version put forth by the prosecution as was presented to it. He while making this court to read the statements of PW-1 and PW-2 juxtaposing each other, contended that this is only cut, copy and paste and as such, no much reliance could be placed upon the same, by the Court below while ascertaining the guilt, if any, of the accused.

5. Lastly, Mr. Verma contended that there are major discrepancies in the statements of witnesses relied upon by the court below, while recording the judgment of conviction. He further contended that in the case at hand, complainant i.e. Inspector Bhupinder Singh (PW-11) is himself is the Investigating Officer and the informant and as such, investigation, if any, carried out by him on the basis of FIR, lodged at his behest bound to fail in terms of judgment dated 16.8.2018, rendered by the Hon'ble Apex Court in Criminal Appeal No. 1880 of 2011 (Mohan Lal v. the State of Punjab).

6. Shri Dinesh Thakur, learned Additional Advocate General while refuting the aforesaid submissions having been made by Shri Peeyush Verma, supported the impugned judgment of conviction, recorded by court below and contended that there is no illegality and infirmity in the same, rather, same is based on proper appreciation of evidence and facts. Mr. Thakur while making this Court to peruse the statements of prosecution witnesses adduced on record contended that all the witnesses have categorically stated before the court below that on the date of alleged incident, accused was apprehended/nabbed carrying 410 gram of charas/cannabis and as such, court below rightly held the accused guilty of offence punishable under Section 20 of the Act. While making this court peruse consent memo. Ex. PW-1/A, Mr. Thakur, contended that there is proper compliance of Section 50 of NDPS Act because before conducting search on the person of accused, he was apprised of his right to be searched before Gazetted Officer. Accused vide consent memo agreed to be searched by police party and as such, there is sufficient compliance of Section 50 of the Act. While inviting attention of this court to search Memo Ex. PW-1/B, Mr. Thakur contended that in the case at hand, police officials before conducting the search upon the person of accused gave their own search. Mr. Thakur further contended that since contraband came to be recovered in wee hours, no independent witnessed could be associated and as such, there is no reason to disbelieve the version put-forth by police officials, which is otherwise fully corroborated by the version of each other. While refuting the contentions/submissions made by Shri Peeyush Verma that statement of police witnesses, PW-1 and PW-2 is cut, copy and paste, Mr. Thakur contended that it is sheer coincidence because both the witnesses gave narration of facts almost in similar fashion/manner and as such, it cannot be said that it is a cut, copy and paste and otherwise also, if facts narrated by these witnesses are corroborated by each other, similarity, if any, in their statements, cannot be said to be prejudicial to the case of prosecution. He also contended that statements of prosecution witnesses, if read, in its entirety, nowhere suggests that there are any discrepancies, rather, they clearly suggest that all the witnesses unequivocally stated that on the date of incident, appellant-accused was apprehended with charas weighing 410 grams at Zero Point, Goli at 4.45 AM.

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

8. With a view to ascertain the correctness and genuineness of arguments/submissions having been made by Shri Peeyush Verma, learned counsel presenting accused, this Court carefully examined the evidence, be it ocular or documentary adduced on record by the prosecution vis-à-vis impugned judgment passed by court below, perusal whereof certainly not compels this Court to agree with the contention of Mr. Verma, that there is no compliance of Section 50 of the NDPS Act, rather, material available on record suggest that there is sufficient compliance of Section 50 of the NDPS Act. It clearly emerges from the record that accused was nabbed on 3.10.2014, at around 4.45 AM, at a distance of about 20 meters from Zero Point, Goli by the police party. Investigating Officer Bhupinder Singh (PW-11) raised a suspicion that person/accused might be carrying some suspicious article or contraband on his person and expressed his intention to carry out his

personal search. Investigating Officer in his statement deposed that he apprised the appellant-accused about his right to be searched in the presence of Gazetted Officer or Magistrate. PW-11 in his statement, clearly stated, which fact has been further corroborated by other prosecution witnesses that he apprised the appellant-accused of his right to be searched before the Gazetted Officer or Magistrate but appellant-accused consented to give search before the police official present on the spot. Which fact further stands established by consent memo Ex. PW-1/A. However, there appears to be some force in the arguments of Shri Peeyush Verma that before conducting personal search of accused, all the members of police party ought to have given their personal search to the accused. Though, statements having been made by aforesaid prosecution witnesses, especially, Inspector Bhupinder Singh(PW-11) reveals that accused was made aware that he can take search of members of police party and allegedly accused had taken search of all the members of policy party as stands recorded in personal search memo of police official Ex. PW-1/B, but two members of policy party, namely, HHG Vijay Kumar, who was present with the police party and Constable Pawan Kumar (PW-10) who subsequently reached on spot with drug detection kit, digital camera and videography camera, never gave their search and there is no explanation that why they were not searched before effecting recovery, if any, from the person of accused. Though having carefully perused material placed on record by prosecution, which has been further corroborated to certain extent by prosecution witnesses, it clearly emerges that police party headed by PW-11 immediately after nabbing accused at 4.45 AM searched him and had recovered 410 gram of charas/cannabis without waiting for drug detection kit, which admittedly was brought later on at 5.45 AM by Constable Pawan Kumar (PW-10), but this Court is convinced and satisfied that there is sufficient compliance of Section 50 of the Act.

9. As per prosecution story, appellant-accused was allegedly nabbed on 3rd October, 2014 at about 4.45 AM, at Zero Point Goli by police party, whereafter Investigating Officer (PW-11) telephonically called for drug detection kit, digital camera and videography camera from Police Station, which was brought by Constable Pawan Kumar (PW-10) on motor cycle, at 5.45 AM. Interestingly, during this period, no efforts ever came to be made by raiding party headed by Inspector Bhupinder Singh (PW-11) to associate any independent witness, especially, when such interception was made on the Highway. Inspector Bhupinder Singh (PW-11) in his cross examination admitted that at a distance of 300-400 meters from the spot, there are Dhabas and at a distance of about 1.00 KM, there was a village and at a distance of 10 minutes, at a place Bathari, there is a Hospital, School and residence of Doctors. Constable Anil Kumar (PW-2) in his cross examination also admitted that at a distance of 10-15 meters from the spot, there are Dhabas and at a distance of 10 minutes, at a place called Bathari, there are Hospital, School as also residences of Doctors. Constable Pawan Kumar (PW-10), in his cross- examination admitted that, at Bathri, there are 7-8 dhabas and hardware shop. Though, record reveals that accused came to be apprehended/nabbed at 4.45 AM but admittedly Constable Pawan Kumar (PW-10) reached at spot with the drug detection kit, digital camera and videography camera from Police Station at 5.45 AM and as such, there appears to be considerable force in the argument of Mr. Peeyush Verma, representing appellant-accused that by that time dhabas, which are situate on highway are usually open. All the prosecution witnesses, referred to above, PW-1, PW-2 and PW-10 have admitted in their cross-examination that apart from dhabas, there were hospital, school and residence of doctors, meaning thereby, Investigating Officer(PW-11) easily could associate independent witnesses to lent support to the story of prosecution, but in the case at hand, there appears to be no attempt, if any, on the part of Investigating Officer to associate any independent witness. It has also come in the statements of prosecution witnesses referred above that at the nakka, at Zero Point, Goli, many vehicles passed when such incident had occurred, but it is not understood that

why police party failed to associate any independent witness. This being so, non-association of independent witnesses by police, certainly raises serious doubt with regard to the alleged factum of recovery of charas from the possession of the appellant-accused on the alleged date of incident.

10. No doubt, there cannot be any quarrel with the proposition of law that version put-forth by official witnesses cannot be disbelieved or brushed aside, merely on account of non-association of independent witnesses but same time, it is to be kept in mind that version put-forth by official witness, if not corroborated by independent witness, is required to be taken into consideration with utmost care and caution while ascertaining the guilt of the accused. In the case at hand, as clearly emerges from the record, though, police party headed by Inspector Bhupender Singh (PW-11) had ample opportunity to associate independent witnesses to prove the case against appellant-accused but there is no explanation that why efforts, if any, were not made by the Investigating Officer to associate independent witness. Arguments/submissions made by learned Additional Advocate General that since interception was made in wee hours, no independent witness could be associated, is not acceptable because admittedly codal formality, if any, pursuant to interception made at 4.45 AM, actually started on the spot at 5.45 AM that too on the highway and as such, this court has reason to believe/presume that had the Investigating Officer (PW-11), made efforts, independent witnesses could be easily associated, especially when they were available in abundance, which fact is categorically admitted by Constable Pawan Kumar (PW-10) and Constable Anil Kumar (PW-2).

11. Reliance is placed upon ***Latest HLJ (2016) HP 1471, Latest HLJ (2015) HP (Supp) 213, Latest HLJ (2015) HP (Supp) 488, Latest HLJ (2015) HP 789, Latest HLJ (2016) HP 222, Latest HLJ (2016) HP 28 and Latest HLJ (2017) HP 1283***.

12. Perusal of the statement of HC Bhajan Dass (PW-1) and Constable Anil Kumar (PW-2) would reveal that same are cut, copy and paste, verbatim stereotype with common typographical mistakes and the same appears to be typed/recorded without putting question by the Public Prosecutor. Having carefully gone through the statements of aforesaid witnesses juxtaposing each other, this court has no hesitation to conclude that the court below appears to have adopted very casual approach while analyzing the evidence that too in such a sensitive matter, where if accused is convicted he would be sentenced for rigorous imprisonment. Adopting such a procedure is denial of fair trial and justice to the accused, which is definitely in contravention of provision contained under Article 21 of Constitution of India. Otherwise also, if entire judgment, passed by court below, is read in its entirety, great reliance has been placed upon the statements of PW-1 and PW-2, who are the police witnesses and there is no independent witness to corroborate the version put-forth by these witnesses. In the case at hand, what to talk about careful examination/analysis of statements made by these two official witnesses (PW1 and PW2), which are otherwise stereotyped or verbatim same, by the court below while ascertaining the guilt of accused, rather court below in most cursory and causal manner without their being any corroboration, accepted the version put-forth by PW-1 and PW-2 causing great prejudice to the accused.

13. Since this court had an occasion to read/peruse statements made by the prosecution witnesses during proceedings of the case, this court is persuaded to agree with Shri Peeyush Verma, learned counsel representing accused that there are material discrepancies and inconsistencies in the statements of all the prosecution witnesses and as such, the same could not be made basis to hold accused guilty of having committed offence punishable under Section 20 of NDPS Act. HC Bhajan Singh (PW-1) has stated that Constable Anil Kumar and Constable Dharminder Kumar left the the spot with rukkas at

7.35 AM. Both of them gone on foot to the main road and thereafter took lift. To the contrary, Constable Anil Kumar(PW-2) deposed that he left the spot at 7.45 AM in a bus and PW-3 stated that he left the place at 8.45 AM in a bus. As per prosecution story, Investigating Officer (PW-11) telephonically called for digital camera and videography camera from police Station, which was received at the spot through Constable Pawan Kumar (PW-10), who reached on the spot by motor cycle at 5.45 AM, however, there is no daily dairy report placed on record, recording the factum of Constable Pawan Kumar(PW-10) leaving the police station for the spot after having received telephonic request of Investigating Officer, on official motor cycle alongwith drug detection kit, digital camera and videography camera from Police Station, hence, very presence of Constable Pawan Kumar(PW-10) on the spot is itself doubtful. Constable Pawan Kumar (PW-10) speaks about the contraband being taken out from black coloured bag, whereas the same was taken out from blue coloured bag as per the statements of other witnesses before Constable Pawan Kumar (PW-10), when he reached on the spot. Constable Pawan Kumar(PW-10) deposed that after weighing the contraband, the Investigating Officer (PW-11) put the contraband in the blue coloured bag, which statement of him, is also contrary to the statement of other witnesses, who have stated that on opening the carry bag, one red colour polythene bag came out, wherein charas was put and after weighting the same, it was put in a polythene bag. Strangely enough, though story of prosecution suggest that digital camera and videography camera from police Station was available with the Investigating Officer which, in fact, was brought on the spot by Constable Pawan Kumar (PW-10) but there is no videography of the incident. Likewise, though digital camera is stated to have been used but the photographs placed on record as Ex. PW-2/A to A-8 do not bear any date and time.

14. Leaving everything aside, as per initial story of prosecution, accused was nabbed on 3rd October, 2014 at about 4.45 AM at 20 meters from Zero Point at Goli by the police party and Investigating Officer(PW-11) raised suspicion that accused might be carrying contraband on his person and expressed his intention to carry out his personal search, whereas as per own statement of Investigating Officer, PW-11 he apprised the appellant-accused about his legal right to be searched before the Gazetted Officer or Magistrate, on which appellant-accused consented the police on the spot to be searched by the police. His statement suggest that accused was searched and 410 grams of charas was recovered before arrival of Constable Pawan Kumar (PW-10) on the spot, who categorically stated in his statement that he having received call from Investigating Officer (PW-11) reached on the spot at 5.45 AM on motor cycle carrying drug detection kit, digital camera and videography camera. If the statement of PW-10 is further read juxtaposing the statement of PW-11, Investigating Officer, it falsify entire case of prosecution because as per PW-10 entire exercise with regard to personal search and recovery of 410 grams of charas from person of the accused was conducted in his presence, which statement of him is totally contrary to the statement of other prosecution witnesses and, as such, this Court has no hesitation to conclude that there are material inconsistencies and discrepancies in the statements of all the prosecution witnesses and court below could not have held accused guilty of having committed offence under Section 20 of the Act on the basis of statements having been made by the prosecution witnesses.

15. The Hon'ble Apex Court has repeatedly held that since the fundamental aspect of criminal jurisprudence rests upon the well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, the Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that

evidence in criminal cases needs to be evaluated on touchstone of consistency. Reliance is placed on Judgment passed by the Hon'ble Apex Court in ***C. Magesh and Ors. v. State of Karnataka*** (2010) 5 SCC 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasise, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Suraj Singh v. State of U.P., 2008 (11) SCR 286 has held:- (SCC p. 704, para 14)
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> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy. The probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
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> 46. In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that "no man is guilty until proven so", hence utmost caution is required to be exercised in dealing with situations where there are multiple testimonies and equally large number of witnesses testifying before the court. There must be a string that should join the evidence of all the witnesses and thereby satisfying the test of consistency in evidence amongst all the witnesses."

16. Lastly, Shri Verma, learned counsel representing the appellant-accused, invited attention of this Court to the latest judgment rendered by the Hon'ble Apex Court in Criminal Appeal No. 1880 of 2011 titled as Mohan Lal Versus The State of Punjab... to state that since Investigating Officer (PW-11) himself was the complainant/informant, he could not have investigated the case and, as such, investigation conducted by him and consequent proceedings thereto are vitiated and conviction based on the same deserves to be quashed and set aside. At this stage, it would be profitable to take note of following para of judgment passed by the Hon'ble Apex Court in Mohan Lal's case supra:-

> 14. In a criminal prosecution there is an obligation cast on the investigator not only to be fair,judicious and just during investigation but also that the investigation on the very face of it must appear to be so, eschewing any conduct or impression which may give rise to a real and genuine apprehension in the mind of an accused and not mere fanciful, that the investigation was not fair. In the circumstances, if an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof makes the allegations, is himself asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. It would be illogical to presume and contrary to normal human conduct, that he would himself at the end of the investigation submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the Investigation would therefore be a forgone conclusion.
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> 15. The discussion in the present case may not be understood as confined to the requirements of a fair investigation under the NDPS Act only carrying a reverse burden of proof. Baldev Singh (supra) related to a

prosecution under Section 165A of the IPC. Nonetheless, it observed that if the informant were to be made the investigation officer, it was bound to reflect on the credibility of the prosecution case. Megha Singh (supra) concerned a prosecution under the Terrorist and Disruptive Activities (Prevention) Act, 1985. It was held that the Head Constable being the complainant himself could not have proceeded with the investigation and it was a practice, to say the least, which should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation. Rajangam (supra) was a prosecution under the NDPS Act, an objection was taken that PW-6 who apprehended the accused could not have investigated the case. Upholding the objection, relying on Megha Singh (supra) the accused was acquitted. The view taken by the Madras High Court in Balasundaran vs. State, 1999(112) ELT 785(Mad.), was also noticed as follows:-

"16. Learned Counsel for the appellants also stated that P.W 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution, P.W. 5, according to the prosecution, was present with PWs 3 and 4 at the time of search. In fact, P.W. 5 alone took up investigation in the case and he had examined the witnesses, No doubt the successor to P.W. 5 alone had filed the charge sheet. But there is no material to show that he had examined any other witnesses. It therefore follows that P.W. 5 was the person who really investigated the case. P.W. 5 was the person who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency. On this score also the, investigation is bound to suffer and as such the entire proceedings will be vitiated."

24. The view taken by the Kerala High Court in Kader (supra) does to meet our approval. It tantamounts to holding that the F.I.R. was a gospel truth, making investigation an empty formality if not a farce. The right of the accused to a fair investigation and fair trial guaranteed under Article 21 of the Constitution will stand negated in that event, with arbitrary and uncanalised powers vested? With the police in matters relating to the NDPS Act and similar laws carrying a reverse burden of proof. An investigation is a systemic collection of facts for the purpose of describing what occurred and explaining why it occurred. The word systemic suggests that it is more than a whimsical process. An investigator will collect the facts relating to the incident under investigation. The fact is a mere information and is not synonymous with the truth. Kader(supra) is, therefore, overruled. We approve the view taken in Naushad(supra).

25. In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the

investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof."

17. Careful reading of aforesaid exposition of law laid down by the Hon'ble Apex Court in *Mohan Lal's* case (supra), clearly suggests that informant and the investigator cannot be the same person so that possibility of bias or a predetermined conclusion is excluded. In the case at hand learned Additional Advocate General was unable to dispute that investigating officer (PW11) is not the complainant/ informant and at his behest FIR, which ultimately culminated into trial, came to be lodged against the accused in the present case and, as such, impugned judgment passed by the court below deserves to be quashed and set aside on this sole ground only.

18. Consequently, in view of the aforesaid discussion as well as law relied upon, findings returned by the trial Court, convicting the accused, cannot be said to be based on correct and complete appreciation of testimonies of prosecution witnesses. Such findings cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused. Incorrect and incomplete appreciation thereof, has resulted into grave miscarriage of justice, inasmuch as accused stands wrongly convicted for the charged offence.

19. Hence, for all the aforesaid reasons, appeal is allowed and the judgment of conviction and sentence passed by the court below is quashed and set aside and accused (Munish Kumar) is acquitted of the charged offences. Accused, who is in jail and has already suffered almost two years imprisonment, is ordered to be released forthwith, if not required in any other case. Fine amount, if deposited by the accused, be refunded to him. Release warrants be prepared forthwith and sent through fax/email.

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

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

Smt. Indu Devi .....Petitioner

Versus

Naveen Kumar .....Respondent

CMPMO No. 110 of 2018
Date of Decision: 28.11.2018

Code of Civil Procedure, 1908 – Section 24 – Divorce petition - Transfer of - Wife seeking transfer of divorce petition instituted by husband from court of Additional District Judge, Shimla to court of District Judge, Sirmaur - After matrimonial dispute wife residing with her parents at Sirmaur – Held, as against husband's inconvenience, it is wife's convenience which must be looked at and given precedence – Petition allowed – Petition transferred to court of District Judge, Shimla. (Para 14)

Cases referred:

Anjali Ashok Sadhwani vs. Ashok Kishinchand Sadhwani AIR 2009 SC 1374

Arti Rani alias Pinki Devi and another vs. Dharmendra Kumar Gupta (2008) 9 SCC 353,
Kulwinder Kaur alias Kulwinder Gurcharan Singh vs. Kandi Friends Education Trust and others (2008) 3 SCC 659
Rajani Kishor Pardeshi vs. Kishor Babulal Pardeshi (2005) 12 SCC 237
Soma Choudhury vs. Gourab Choudhaury (2004) 13 SCC 462
Sumita Singh vs. Kumar Sanjay and another (2001) 10 SCC 41

For the Petitioner : Mr. Surinder Saklani, Advocate
For the Respondent : *ex-parte.*

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Despite service, none came present on behalf of the sole respondent,however, this Court solely with a view that respondent does not remain unrepresented repeatedly passed over the matter, but since none has come present, this Court has no option, but to proceed him against *ex-parte.*

2. By way of instant petition filed under Section 24 of the Code of Civil Procedure, prayer has been made on behalf of the petitioner for transfer of case No.66-S/30/17, titled as ***Naveen Kumar versus Smt. Indu Devi,*** pending in the Court of learned Additional District Judge (II), Shimla to the Court of learned District Judge, Sirmour at Nahan, H.P., Circuit Court at Paonta Sahib.

3. The marriage between the petitioner and the respondent was solemnized on 3.5.2013 at village Bhaila, Post Office Negheta, Tehsil Paonta Sahib, District Sirmour, Himachal Pradesh, but fact remains that they were unable to live together on account of certain differences and as such, petitioner left her matrimonial house and started living with her father at village Bhaila, Post Office, Negheta, Tehsil Paonta Sahib, District Sirmour, H.P.

4. As per the averments contained in the petition, respondent filed petition ***(Annexure P-2)*** under Section 13 of the Hindu Marriage Act, 1955 ***(for shot the 'Act')*** in the Court of learned Additional District Judge (II) Shimla, seeking therein dissolution of marriage on the ground of cruelty. After having received summons/notices ***(Annexure P-1)*** issued by learned Additional District Judge (II), Shimla in the aforesaid petition having been filed by the respondent (husband), petitioner has approached this Court in the instant proceedings, praying therein to transfer the proceedings from the Court of learned Additional District Judge(II), Shimla to the Court of learned District Judge, Sirmour at Nahan, H.P., circuit Court at Paonta Sahib on the grounds of inconvenience, insufficiency of means, compulsive litigation and on the ground that the distance between Paonta Sahib, District Sirmaur and Shimla is more than 190 KMs and it is difficult for her to attend the Court at Shimla, District Shimla, H.P.

5. Since, despite opportunity having been afforded to the respondent, he has failed to file the reply, this Court has no option but to take into consideration the averments contained in the petition while considering the prayer having been made by the petitioner for transfer of the case.

6. Having heard learned counsel representing the petitioner and perused the material available on record, this Court has no hesitation to conclude that matrimonial proceedings and other like proceedings, which are the outcome of matrimonial discord, it is

the convenience of the wife which is required to be taken into consideration by the Court while considering the prayer, if any, made for transfer of the case.

7. Careful perusal of the averments contained in the petition under Section 13 of the Hindu Marriage Act, 1955 for decree of divorce having been filed by the respondent, itself suggest that the parties cohabited as husband and wife at their native village, Dochi hardly for two years after the marriage, which had taken place on 3.5.2013. As per the averments contained in the divorce petition ***(Annexure P-2)***, petitioner left the company of the respondent in November, 2015 and since then she is living separately from her husband. Factum with regard to petitioner's living separately for the last three years stands duly mentioned in the petition for divorce filed by the respondent, hence, there cannot be any dispute that present petitioner is living with her father at village Bhaila, Post office Nagheta, Tehsil Paonta, District Sirmour, H.P. Petitioner, who was totally dependent upon her husband is compelled to live at her native place with her father. It is also not in dispute that there is one minor daughter born out of the wedlock of the petitioner and respondent and she is also residing with the petitioner.

8. In ***Sumita Singh*** *versus* ***Kumar Sanjay and another (2001) 10 SCC 41,*** it was held by the Hon'ble Supreme Court that in a case where the wife seeks transfer of the petition, then as against husband's convenience, it is the wife's convenience which must be looked at.

9. In ***Soma Choudhury*** *versus* ***Gourab Choudhaury (2004) 13 SCC 462,*** it was held by the Hon'ble Supreme Court that once the wife alleges that she has no source of income whatsoever and was entirely dependent upon his father, who was a retired government servant, then it was the convenience of the wife which was required to be looked into and not that of the husband, who had pleaded a threat to his life. It was further observed that if the respondent therein had any threat to his life, he could take police help by making an appropriate application to this effect.

10. In ***Rajani Kishor Pardeshi*** *versus* ***Kishor Babulal Pardeshi (2005) 12 SCC 237,*** in a case seeking transfer of the case at the instance of the wife, it was specifically held by the Hon'ble Supreme Court that convenience of wife was the prime consideration.

11. Similarly, while dealing with the application for transfer of proceedings in ***Kulwinder Kaur alias Kulwinder Gurcharan Singh*** *versus* ***Kandi Friends Education Trust and others (2008) 3 SCC 659***, the Hon'ble Supreme Court after analyzing the provisions of Sections 24 and 25 of the Code of Civil Procedure laid down certain broad parameters for transfer of cases and it was held:-

> "23. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts. They are balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be

treated as exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a "fair trial" in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order."

12. In ***Arti Rani alias Pinki Devi and another*** *versus* ***Dharmendra Kumar Gupta (2008) 9 SCC 353***, the Hon'ble Supreme Court was dealing with a case where the wife had sought transfer of proceedings on the ground that she was having a minor child and it was difficult for her to attend the Court at Palamu, Daltonganj, which was in the State of Jharkhand and at a quite distance from Patna where she was now residing with her child. Taking into consideration the convenience of the wife, the proceedings were ordered to be transferred.

13. Similarly, in ***Anjali Ashok Sadhwani*** *versus* ***Ashok Kishinchand Sadhwani AIR 2009 SC 1374***, the wife had sought transfer of the case to Bombay from Indore in Madhya Pradesh on the ground of inconvenience as there was none in her family to escort her to Indore and on this ground the proceedings were ordered to be transferred.

14. It is quite apparent from the aforesaid exposition of law that in dispute of the present kind where the petitioner is compelled to reside at her parent house at Bhaila, Post Office Negheta, Tehsil Paonta Sahib, District Sirmour, H.P., on account of matrimonial dispute, it is convenience of the petitioner which is required to be considered over and above the inconvenience of the husband.

15. In view of the aforesaid discussion, the present petition is allowed and the case No.66-S/30/17 titled as ***Naveen Kumar vs. Smt. Indu Devi***, pending in the Court of learned Additional District Judge(II),Shimla is ordered to be transferred to the Court of learned District Judge, Sirmour at Nahah, Circuit Court at Paonta Sahib. The parties through their respective counsel(s) are directed to appear before the learned District Judge, Sirmour at Nahan on 20.12.2018.

The petition stands disposed of in the aforesaid terms, so also pending application(s), if any. Interim order granted by this Court on 4.5.2018, is vacated.

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

Mohan Lal .....Petitioner
Versus
Rajinder Kumar Puri .....Respondent

CMPMO No.471 of 2018
Date of Decision: 30.11.2018

Indian Evidence Act, 1872 - Section 65 – Secondary evidence - Adduction of - Held, secondary evidence can be adduced only when loss or destruction of original is proved or original is withheld by opposite party - It may also be adduced with leave of court when party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable time - Plaintiff placing on record extract of register of Petition Writer proving existence of documents purported to be lost by him during

shifting of articles – Trial court justified in permitting him to lead secondary evidence to prove contents of such agreements - Order upheld – Petition dismissed.(Paras 3 & 5)

Case referred:
Rakesh Mohindra vs. Anita Beri and others, 2016(16) SCC 483

For the Petitioner	Mr. .B.N.Sharma, Advocate.
For the Respondent	Mr. Anubhav Chopra, Advocate vice Mr. Nitish Negi, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Being aggrieved and dissatisfied with the order dated 25.09.2018, passed by learned Civil Judge, Court No.II, Una, District Una, H.P., in CMA No.1658 of 2018, whereby an application under Section 65 of the Indian Evidence Act***(for short the 'Act')*** having been filed by the respondent ***(hereinafter referred to as the plaintiff),*** seeking therein permission to lead secondary evidence, came to be allowed, petitioner (***hereinafter referred to as the defendant),*** has approached this Court in the instant proceedings, praying therein to set-aside the impugned order dated 25.9.2018., referred hereinabove.

2. Having carefully perused the material available on record, this Court is not persuaded to agree with Mr. B.N. Sharma, learned counsel representing the defendant that impugned order passed by the learned Court below is not inconformity with the provisions contained under Section 65 of the Act, rather this Court is of the view that impugned order is strictly in conformity with the provisions contained under Section 65 of the Act. In the application at hand, plaintiff has specifically averred that defendant had entered into agreements dated 1.7.1995, 30.12.1995 and 10.9.1996 and these document were duly entered in the register of Petition Writer namely, Mangat Ram at Serial No.225 dated 1.7.1995, at Serial No.382, dated 30.12.1995 and Serial No.137, dated 10.9.1996. Plaintiff also claimed before the Court below that earlier he was in possession of these documents, but since original documents have been misplaced in the house of the plaintiff at the time of shifting of articles, he is entitled to prove the same by way of leading secondary evidence in terms of the provisions contained under Section 65 of the Act.

3. Section 65 of the Act, deals with the situations/ circumstances under which secondary evidence relating to documents can be given to prove the existence, condition or contents of the documents. If Section 65 is read in its entirety, it reveals that secondary evidence can be led if original of documents intended to be produced by secondary evidence is destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time. Party intending to produce secondary evidence requires to establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot be accepted.

4. In this regard, reliance is placed upon the judgment rendered by the Hon' ble Apex Court in ***Rakesh Mohindra versus Anita Beri and others,*** 2016(16) Supreme Court Cases, 483, wherein it has been held as under:-

"14. Section 65 of the Act deals with the circumstances under which secondary evidence relating to documents may be given to prove the existence, condition or contents of the documents. For better appreciation Section 65 of the Act is quoted herein below:-

> "65. Cases in which secondary evidence relating to documents may be given: Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-
>
> (a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
>
> (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
>
> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
>
> (d) when the original is of such a nature as not to be easily movable;
>
> (e) when the original is public document within the meaning of section 74;
>
> (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force 40[India] to be given in evidence ;
>
> (g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court and the fact to be proved it the general result of the whole collection.
>
> In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.
>
> In case (b), the written admission is admissible.
>
> In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, admissible.
>
> In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relied upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted.

16. The High Court in the impugned order noted the following :(Anita Beri vs. Rakesh Mohindra SCC Online HP 4258 para-9)

"9. There is no averment about Ext. DW-2/B in the Written Statement. The Written Statement was filed on 19.2.2007. DW-2/B infact is only a photocopy. The plaintiffs are claiming the property on the basis of a registered will deed executed in her favour in the year 1984. It was necessary for the defendant to prove that in what manner the document dated 24.8.1982 was executed. The defendant while appearing as AW-1 has admitted in his cross-examination that except in his affidavit Ext. AW-1/A, he has not mentioned in any document that the letter of disclaimer was executed by Justice late Sh. Tek Chand in his presence. The statement of DW-2 does not prove that Ext. DW-2/A, ever existed. DW-2 Sh. Gurcharan Singh, has categorically admitted in his cross-examination that he has not brought the original of Ext. DW- 2/B. He has also admitted that on Ext. DW-2/B, the signatures of P.C. Danda were not legible. Volunteered that, those were not visible. The learned trial Court has completely misread the oral as well as the documentary evidence, while allowing the application under Section 65 of the Indian Evidence Act, 1872, more particularly, the statements of DW-2 Gurcharan Singh and DW-3 Deepak Narang. The applicant has miserably failed to comply with the provisions of Section 65 of the Indian Evidence Act, 1872. The learned trial Court has erred by coming to the conclusion that the applicant has taken sufficient steps to produce document Ext. DW- 2/B."

17. The High Court, following the ratio decided by this Court in the case of J. Yashoda vs. Smt. K. Shobha Rani, AIR 2007 SC 1721 and H. Siddiqui (dead) by lrs. vs. A. Ramalingam, AIR 2011 SC 1492, came to the conclusion that the defendant failed to prove the existence and execution of the original documents and also failed to prove that he has ever handed over the original of the disclaimer letter dated 24.8.1982 to the authorities. Hence, the High Court is of the view that no case is made out for adducing the secondary evidence.

18. The witness DW-2, who is working as UDC in the office of DEO, Ambala produced the original GLR register. He has produced four sheets of paper including a photo copy of letter of disclaimer. He has stated that the original documents remained in the custody of DEO. In cross-examination, his deposition is reproduced hereinbelow:-

> "xxxxxxxx by Sh. M.S. Chandel, Advocate for the plaintiff No.2. I have not brought the complete file along with the record. I have only brought those documents which were summoned after taking up the documents from the file. As on today, as per the GLR, Ex.DW-2/A, the name of Rakesh Mohindra is not there. His name was deleted vide order dated 29.8.2011. I have not brought the original of Ex.DW-2/B. It is correct that Ex.DW-2/D does not bear the signatures of Sh. P.C. Dhanda. Volunteered.: These are not legible. Ex.DW-2/C is signed but the signatures are not leible. On the said document the signatures of the attesting officer are not legible because the document became wet. I cannot say whose signatures are there on these documents. On Ex.DW-2/E the signatures at the place deponent also appears to have become illegible because of water. Ex.DW-2/F also bears the faded signatures and only Tek Chand is legible on the last page. It is incorrect to suggest that the last page does not have the signatures of the attesting authority. Volunteered: These are faded, but not legible.

> The stamp on the last paper is also not legible. There is no stamp on the first and second page. In our account, there is no family settlement, but only acknowledgement of family settlement. I do not know how many brothers Rakesh Mohindra has. It is correct that the original of Ex.DW-2/H does not bear the signatures of Sh. Abhay Kumar. I do not know whether Sh. Abhay Kumar Sud and Rakesh Mohindra are real brothers. The above mentioned documents were neither executed nor prepared in my presence. It is incorrect to suggest that the above mentioned documents are forged. It is incorrect to suggest that because of this reason I have not brought the complete file."

19. In Ehtisham Ali v. Jamma Prasad 1921 SCC OnLine PC 65 a similar question came for consideration as to the admissibility of secondary evidence in case of loss of primary evidence. Lord Phillimore in the judgment observed:(SCC Online PC)

> " It is, no doubt, not very likely that such a deed would be lost, but in ordinary cases, if the witness in whose custody the deed should be, deposed to its loss, unless there is some motive suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed."

20. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law.

5. In the case at hand,plaintiff by placing on record extract of register of the Petition Writer has duly established existence of the agreements in question, hence learned court below rightly concluded that presence of documents intended to be proved by leading secondary evidence, is proved from the relevant extract of register of deed writer and also from the pleadings of the plaintiffs. Now,question whether these entries in the register of deed writer are forged or not can only be decided at the later stage when both the parties would be afforded an opportunity of leading evidence and at this stage, Court is not required to go into the merits of the case. At this Stage,Court is only required to go into the question with regard to existence of documents intended to be proved by leading secondary evidence.

6. In the instant case, plaintiff by successfully placing on record relevant extract of register of petition writer proved the existence of document purported to be lost by him during shifting of articles.

7. Thus, in view of the foregoing reasons, this Court does not find any occasion to interfere with the impugned order dated 25.9.2018 passed by the learned trial Court, which has been assailed in the present petition. The impugned order does not suffer from any illegality and has been passed in accordance with law.

Accordingly, the present petition, being devoid of any merit, is dismissed alongwith pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Sayyam Khurana .....Petitioner
Versus
State of H.P. & another .....Respondents

Cr. MMO No. 12 of 2017
Decided on : 31st December,2018

Code of Criminal Procedure, 1973 - Section 482 - Inherent power - Exercise of - Quashing of FIR - Petitioner facing proceedings for taking obscene photographs of victim and circulating them, before Special Court as well as Juvenile Justice Board (J.J.B.) - Filing petition for quashing of FIR and consequential proceedings on ground that report of FSL showing that photographs of victim alleged to be taken by him through mobile, were not taken from his cell phone - Held, at this stage, it is not proper for High Court to appreciate evidence of prosecution since trial pending before Special Judge - Petition dismissed. (Paras 3 to 6)

Juvenile Justice (Care and Protection of Children) Act 2015 - Sections 7 and 8 - Jurisdiction of Juvenile Justice Board - Petitioner accused of taking obscene photographs of victim and circulating them - Petitioner facing proceedings before Juvenile Justice Board for taking photographs and trial before Special Judge for circulating said photographs - Petitioner filing petition and submitting that he cannot be put to trial and proceedings for one offence at two different fora – Held, two offences are distinct and separate - Offence of taking obscene photographs committed when he was below 18 years of age - Proceedings for that offence will lie before Juvenile Justice Board - Offence of circulation of photographs committed after attaining majority by him and trial will proceed before Special Judge - Petition dismissed. (Paras 3 to 6)

For the petitioner : Ms. Archana Dutt, Advocate.
For the respondents : Mr. Shiv Pal Manhans Additional Advocate General with Mr.R.P.Singh and Mr.R.R.Rahi, Deputy Advocate General, for respondent No.1 and none for respondent No.2.

The following judgment of the Court was delivered:

Justice Vivek Singh Thakur, Judge *(Oral)*

Present petition has been filed for quashing the proceedings in case No. 2 of 2014 titled State of H.P. vs. Sayyam Khurana pending before learned Principal Magistrate Juvenile Justice Board, Kangra at Dharamshala and in case No. SC No. 9-B/VII/14 titled as State of H.P. vs. Sayyam Khurana pending before learned Special Judge, Kangra at Dharamshala against FIR No. 35/2013 dated 8.3.2013 registered at P.S. Baijnath under Sections 292, 384, 201, 506, 354 (c) of Indian Penal Code and 66-E, 67-A, B of IT Act and Section 14(1) of the Protection of Children from Sexual Offence Act, 2012 and also for quashing of FIR on the ground that from the Forensic Science Laboratory report, it is clear that images/photographs of the victim, alleged to have been taken by the petitioner through

mobile phone handed over by the petitioner to the police during investigation, have not been found to be taken with the said instrument.

2 During hearing of the case, it was also pointed out by learned counsel for petitioner that for one offence, alleged to have been committed by the petitioner, FIR No. 35 of 2013 has been registered against him in P.S. Baijnath, however, the petitioner has been subjected to two trials i.e. one before the Juvenile Justice Board, Kangra at Dharamshala and another before the Special Judge, Kangra at Dharamshala for commission of one and same offence.

3 So far as the first plea of petitioner is concerned, evaluation of particular piece of evidence is to be considered by the concerned Court during trial before itself and it is not a proper stage to evaluate the evidence of prosecution by this Court, relied upon by it during trial which is still pending. Therefore, proceedings/FIR cannot be quashed, as pleaded by the petitioner on this ground.

4 The notice of accusation put to the petitioner by the Principal Magistrate Juvenile Justice Board has also been placed on record along with the copy of FIR. Record of learned Special Judge has also been summoned. Perusal of charge framed against the petitioner therein reveals that petitioner has been subjected to the trial before learned Special Judge for circulation of indecent nude photographs of victim on 6.3.2013, whereas from the notice of accusation put to him by Juvenile Justice Board, reveals that he has been subjected to proceedings before the said Board for preparing and capturing the nude and indecent material i.e. photographs of prosecutrix through his mobile between December 2011 to 27th November, 2012.

5 Admittedly, date of birth of petitioner is 28.11.1994 and he has attained the age of 18 years on 28.11.2012. He has been subjected for proceedings before the Board for commission of offence during the period December 2011 to 27th November, 2012 i.e. prior to his attaining age of 18 years, whereas offence of circulation of those photographs has been alleged to have been committed on 6.3.2013 i.e. after his attaining of 18 years age.

6 In these aforesaid circumstances, I find no illegality or irregularity subjecting the petitioner to trial before two different Forums i.e. Juvenile Justice Board and Court of learned Special Judge, as two distinct and different offences alleged to have been committed by petitioner at different times there and for commission of offence before attaining the age of 18 years petitioner is liable to face the proceedings before the Juvenile Justice Board and for commissioner of offence after attaining the age of 18years, he is liable to face trial before learned Special Judge. Parties are directed to appear before learned Special Judge, Kangra at Dharamshala on ***19th January, 2019*** in case SC No. 9-B/VII/14 titled as State of H.P. vs. Sayyam Khurana.

7 With aforesaid observations, petition is dismissed as also the pending miscellaneous application(s), if any. Record be sent back forthwith.

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

Rajiv Kumar ....Petitioner.

Versus

Ramesh Chand & another ....Respondents.

CMPMO No. 41 of 2018
Decided on : 28.12.2018

Code of Civil Procedure, 1908 – Order XXXIX Rules 1 and 2 - Temporary injunction – Grant of - Joint land – Exclusive hisadari possession – Effect - District Judge allowing plaintiff's appeal and granted stay on ground that land was joint and raising of construction by defendant would prejudice plaintiff – Petition against – Land recorded in exclusive hisadari possession of defendant – Possession not shown to be beyond his share – Land recorded as 'gair mumkin abadi' – Plaintiff also found having raised construction over parcel of joint land – Prima facie case, balance of convenience and irreparable loss in case of grant of stay stand in defendant's favour – Petition allowed – Order of District Judge set aside and of trial court restored. (Paras 3 to 6)

For the petitioner: Mr. Sanjeev K. Suri, Advocate.
For the respondents: Mr. Devinder K. Sharma, Advocate, for respondent No.1.
Respondent No.2 ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

Despite effectuation of service, upon, respondent No.2, he has omitted to record his appearance before this Court either in person or through authorized counsel, hence, he is proceeded against ex-parte.

2. The suit khasra numbers, qua, wherewith, the plaintiff one Ramesh Chand, instituted a suit for rendition, of, a decree, of permanent prohibitory injunction, and, for restraining the defendants, from, raising construction thereon, (i) stand borne in land measuring 00-09-83 hectare, comprised in khewat No. 116, khatauni No. 261 and 264, (ii) and stand comprised in khasra No. 2554, 2541, 2543, 2544, 2545, and, 2565, (ii) as well as in land measuring 00-04-89 hectare, and, stand comprised in khewat No. 167, khatauni No. 265, khasra Nos. 2542 and 2556, situated, in village Ghanari Brahmna Changa, Tehsil Amb, District Una, H.P.

3. The afore espousal, for, rendition of the afore decree, stands rested upon the afore suit khasra Nos., being un-partitioned, and, till dismemberment thereof, hence occurring through metes and bonds, (i) thereupto, all the co-owners thereon hence holding unity of title, and, community of possession, and, consequently, each being barred, from exclusively appropriating hence any part of the undivided suit property, vis-a-vis, their exclusive user(s). However, the validity, of, the afore espousal wanes and subsides, for, the hereinafter excepting therewith hence material on record.

4. The defendants in their written statement, contended while placing reliance, upon, the Jamabandi appertaining to the suit land, and, prepared in the year 2009-10, vis-a-vis, land measuring 00-09-83 hectare, comprised in khewat No. 116, khatauni No. 261 and 264, (ii), and, as stands comprised in khasra No. 2554, 2541, 2543, 2544, 2545, and, 2565, as well as in land, measuring 00-04-89 hectare, and, as comprised in khewat No. 167, khatauni No. 265, khasra Nos. 2542, and, 2556, (iii) wherein, one Ramesh Chand is reflected, vis-a-vis, afore khasras, and, in the column of classification thereof, to be in exclusive possession thereof, (iv), and, with all the afore khasra Nos., being reflected therein, to rather carry the classification of gairmumkin, and, rather with a rebutable presumption of

truth being assignable thereto, (v) thereupon his holding the befitting capacity, to, proceed, to, after demolition, hence raise, a, new abadi thereon. The verdicts pronounced by both the learned courts below, do not, pronounce (vi) qua any evidence existing, for, rebutting the afore presumption of truth, acquired by the afore jamabandi, (vii) thereupon, the presumption of truth assigned qua the afore reflections borne, vis-a-vis, the afore khasra Nos. does, acquire immense tenacity. Though, the learned trial Judge has proceeded to accept, the contention raised by the learned counsel, for the defendants, (viii) however, the learned first appellate Court granted relief, to, the plaintiffs', upon, their application, cast under the provisions of Order 39 Rules 1 and 2 CPC, and, also reversed the relief granted, to, the defendants' (ix) for the reasons that in case construction, is, permitted to be raised by the defendants, upon, the afore khasra Nos. thereupon, prejudice hence accruing, vis-a-vis, the plaintiff. The afore reason assigned by the learned first appellate Court, is, in visible detraction, of, the afore reflections', hence occurring in the jamabandi appertaining, to, the afore khasra Nos., (i) whereupon, the strivings, of, the defendants, to, after apt demolition, hence raise, a, new abadi thereon, is, a befitting endeavor. Furthermore, since obviously, the plaintiffs' also appear to raise abadi, upon, certain portion(s) of the undivided suit khasra Nos., (ii) and, with no evidence standing placed on record, at this stage, for hence its making aany visible display, that, the defendants' possession, upon, the afore khasra Nos., being beyond their share, in, the undivided suit property or it comprising the best valuable portion, of, the undivided suit property, (iii) thereupon the afore reflections borne in the afore jamabandi, and, with, graphic depictions' thereinqua the defendant hence holding exclusivity of possession thereon, hence beget conclusions', (a) qua, even upon occurrence, of, dismemberment, of, the undivided suit property amongst them, his possession therein hence remaining undisturbed (b) nor their/his settled possession, upon the afore khasra Nos., hence thereat coming under a cloud, (c) nor the defendants, under, the garb of raising construction thereon, can be concluded, to, hence deprive the plaintiffs, of, their valuable rights, in, the undivided suit property. Consequently, all the triplicate facts qua (i) prima facie case existing in favour of the defendant, (ii) balance, of, convenience being loaded in his favour (iii) and, irreparable loss, on refusal, of, relief to him being encumbered upon him, rather being satiated by him.

5. In view of the above observations, there is merit in the instant petition and the same is accordingly allowed. The impugned order is quashed and set aside, and, the order rendered by the learned trial Judge is maintained. All pending application also disposed of.

6. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case, and, the trial Court shall decide the matter uninfluenced, by any observation made herein above.

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

Chander Pal .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 5 of 2016.
Reserved on: 18th December, 2018.
Date of Decision: 31st December, 2018.

Indian Penal Code, 1860 – Sections 363, 376 & 452 **– Protection of Children from Sexual Offences Act, 2012** - Section 8 – House trespass, kidnapping, sexual assault etc - Special Judge convicting accused of house trespass and sexual assault on victim – Appeal on ground of mis-appreciation of evidence - Evidence showing (i) accused trespassed into house and took victim to his own house (ii) touched his private part with private part of victim (iii) struggle marks on victim's body (iv) aunt of victim with whom she was sleeping clearly deposing of accused having taken victim with him on that night - Held, evidence clearly proving guilt of accused of said offences - Conviction upheld - Appeal dismissed. (Paras 10 to15)

Medical jurisprudence - Age of victim – Determination - Ossification test – Relevancy - Accused relying upon ossification test report of victim and praying for extension of upper age limit by three years and contending that sexual act, if any, was with victim's consent - Held, documentary evidence regarding age of victim not disputed by accused - Documents showing victim not of consenting age – Documentary evidence being of best nature, is to be considered. (Para 13)

For the Appellant:	Mr. Umesh Kanwar, Advocate.
For the Respondent:	Mr. Hemant Vaid and Mr. Desh Raj Thakur, Additional Adv. Generals with Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. A. Gs.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, is, directed by the convict/ accused/appellant, against, the pronouncement made by the learned Special Judge, Kullu, District Kullu, H.P., upon, Sessions Trial No.136 of 2013, whereunder, he convicted, besides imposed consequent sentence, upon, the convict/accused/appellant, for his committing offences punishable under Sections 452, 363, 376/511 and 506 of the IPC, and, under Section 8 of the Protection of Children from Sexual Offences Act (hereinafter referred to as the "POCSO Act").

2. The facts relevant to decide the instant case are that the prosecutrix was residing with her maternal grandmother (PW-4) in village Jindour, and, was studying in 5th class. On 26.6.2013, PW-4 and husband of PW-3 had gone to their field for night watch. Prosecutrix and her aunt (PW-3) were at home. At about 2.00 A.M in the night, when prosecutrix and her aunt were sleeping in a room, accused entered their room and lifted the prosecutrix by gagging her mouth and took her to his house situated at village Nangcha. PW-3, who had recently delivered a child and was having weak physic, tried to save the prosecutrix from the clutches of the accused, but she could not. Accused threatened PW-3 to do away with her life. Accused committed sexual assault and attempted to rape on the prosecutrix in his house. In the morning, PW-4, maternal grandmother of prosecutrix, came back from the field, to whom, PW-3 told that during the night, accused entered their house and took away the prosecutrix. Thereafter PW-4 went to the house of accused. She found the prosecutrix there and noticed that there were injuries on the body of prosecutrix and her "salwar" was also torn. Thereafter, PW-4 alongwith prosecutrix came to the police station and got FIR, Ex.PW4/A registered against the accused. Partial investigation of the case was conducted by PW-11, S.I. Firoj Khan, who sent the prosecutrix to the hospital for her medical examination through LC Saroj. Investigating officer also prepared spot map and recorded the statements of the witnesses. The prosecutrix was got medically examined from

PW-5 Dr. Tanu Sharma. The doctor, on examination, found marks of violence on the person of prosecutrix and opined that there was no physical interference with the genitalia and then issued MLC Ex.PW5/B. However, prosecutrix was referred by PW-5 for x-ray examination and opinion for age estimation. During the course of investigating clothes of the prosecutrix were also taken into possession and sealed in a parcel. Thereafter, the police also completed other formalities with respect to the investigation.

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

4. The accused/appellant herein stood charged, by the learned trial Court, for, his committing offences, punishable under Sections 452, 363, 376 read with Section 511, Section 506 of the IPC, and, under Section 8 read with Section 18 of the POCSO Act. In proof of the prosecution case, the prosecution examined 11 witnesses. On conclusion of recording, of, the prosecution evidence, the statement of the accused, under, Section 313 of the Code of Criminal Procedure, was, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction upon the accused/ appellants herein, for theirs hence committing the aforesaid offences.

6. The appellant herein/accused, stand aggrieved, by the findings of conviction, recorded, by the learned trial Court. The learned counsel appearing, for, the appellant herein/accused, has concertedly and vigorously contended, qua the findings of conviction, recorded by the learned trial Court, standing not, based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation, by it, of the material on record. Hence, he contends qua the findings of conviction warranting reversal by this Court, in the exercise of its appellate jurisdiction, and, theirs being replaced by findings of acquittal.

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

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

9. The testimony of the prosecutrix, if, is worthy of gaining, the, confidence of this Court, and, is credible, (a) given it being not ridden, with, any active vice of gross improvements or embellishments, vis-a-vis, her previous statement recorded in writing, (b) AND, it being free from any active taints of inter se contradictions, vis-a-vis, her statement comprised in her examination-in-chief, and, IN her testification borne in her cross-examination, (c) thereupon, this Court would be coaxed to succumb to her testification rendered on oath.

10. In making an endeavour to determine whether the testification rendered by the prosecutrix, hence being free, from all the afore taints, an incisive perusal thereof, makes imminent disclosure, qua her, in her examination-in-chief, (a) rendering echoings bearing consonance with her previous statement recorded in writing, excepting the factum qua hers, in purported improvement thereof, rather making a disclosure qua the accused

perpetrating sexual inter course upon her, whereas, hers in her previous statement making an articulation qua the accused attempting to hold her, to, coitus. (b) Nonetheless, the afore improvement, is, stripped of its purported adverserial effects, given the prosecutrix, upon, hers being re-examined, hers rendering a statement qua the accused touching his private part, with, her private part. Since, the afore rendered testification, is, uneroded of its vigour, and, further when, she, in her cross-examination, conducted on 19.6.2014, rather has denied a suggestion qua hers rendering a testification, under, active tutorings, meted, upon, her by her relatives, and, the police officials, (c) thereupon, she has proven her statement recorded before the Magistrate, especially qua it being free from vices of duress or exertion being exerted upon her, (d) thereupon, when the afore penal misdemeanor ascribed by her qua the accused also constitutes an offence, under the amended definition of rape, hence, on the strength of the uneroded testification of the prosecutrix, this, Court concludes qua the prosecution, proving the charge against the accused.

11. The afore uneroded testification qua the charge, and, as rendered by the prosecutrix, acquires corroboration from PW-3, who in her testification, embodied in her examination-in-chief, renders, an echoing qua the accused, hence, kidnapping the prosecutrix from her abode, (i) despite hers abortively attempting to repulse the endeavour, of, the accused, given a critical weakness befalling upon her, on account, of, hers delivering, a child, 12 days, prior to the occurrence, (ii) and, with hers also deposing qua hers noticing injury marks on the body of the prosecutrix, and, with the afore testification remaining uneroded, (iii) despite hers being subjected to an exacting, and, rigorous cross-examination, by the learned defence counsel, also constrains this Court to conclude qua the prosecution succeeding, in, proving the charge against the accused.

12. Be that as it may, PW-5, during. the course of hers stepping into the witness box, proving, the apt MLC, borne, in Ex.PW5/B, and, with hers in consonance with the apt MLC, also making disclosures qua hers noticing, the, existence of marks of violence, upon, her person, (i) and, hers also making a disclosure, in her examination-in-chief qua the injury marks noticed by her, and, as reflected in Ex.PW5/B, being possible, upon, resistance being meted by the prosecutrix, to an assault being perpetrated, upon, her person, (ii) thereupon, the afore disclosure made by PW-5, during, the course of her examination-in-chief, supports the version qua the occurrence, rendered by both, the prosecutrix, and, by PW-3, thereupon, corroborative vigour, thereto, also stands reinforcingly acquired.

13. However, the learned counsel appearing for the accused/appellant has contended with much vigour, before this Court, (a) that with the prosecutrix in her deposition comprised in her cross-examination, disclosing, qua existence of a family dispute inter se, her maternal grand father, and, the family of the father of the accused, (b) and, with hers, in her cross-examination further making an articulation qua the existence of a shop, en-route, the abode of the accused, whereat, the penal act stood perpeterated, upon, her person, (c) and, with hers also testifying qua hers not raising any alarm, (d) thereupon, it being maybe inferable qua the prosecutrix consensually succumbing to the sexual overtures of the accused. The tenacity, if any, of the afore espousal reared before this Court by the learned counsel, appearing for the accused/appellant, would gain an aura of immense potency, (e) upon, evidence being adduced, qua the prosecutrix, at the relevant time, acquiring the age of consent. In the afore endeavour, the learned counsel for the accused/appellant, relies, upon the deposition rendered by PW-6, who, in his cross-examination, has rendered an echoing qua the results, of, the ossification test being amenable, to, variation, upto, 2 to 3 years on either side, (f) and, with a catena of judicial verdicts, propounding a trite proposition of law, that, the benefit of the upper margin being bestowable upon the accused, (g) thereupon, he further contends that when, the,

ossification age of the prosecutrix, rather, is,testified by PW-6, to be within the range of 10 to 14 years, hence after adding three years, on, the upper margin thereof, (h) hence, the prosecutrix is to be concluded to be acquiring the age of consent. Even if, the afore testification has some vigour, yet it would acquire formability, only upon failure of the prosecution, to, adduce the best documentary evidence, comprised in the birth certificate, of, the prosecutrix. However, the prosecution, through PW-7, rather has proven, date of birth of the prosecutrix, date of brith whereof, stands embodied in Ex.PW7/B. A perusal thereof, discloses that at the relevant stage, hers being a minor. Even if, the afore reflections, as, borne in Ex.PW7/B qua the relevant factum probandum, were ridden with any gross infirmity, (i) thereupon, it was incumbent, upon, the defence to after holding PW-7, to, a rigorous cross-examination, hence, prove qua the reflections borne in Ex.PW7/B rather being fictitious, and, being doctored, and, (ii) theirs not being made at the instance of the parents of the prosecutrix, (iii) and, also it was incumbent, upon, the defence to, through the aegis of the Court, seek summoning of the records, from, the school concerned, wherefrom Ex.PW7/B emanated, for, hence enabling determination, qua, the reflections borne in Ex.PW7/B, being anvilled, upon surmises or conjectures or remaining unanvilled either upon abstract of Pariwar Register or upon the birth register maintained, with, the Panchayat concerned, or with the Registrar, Birth and Deaths. (iv) The afore endeavours remained unrecoursed by the defence, and, hence, all the reflections as borne in Ex.PW7/B qua the relevant factum probandum, are, to be construed to be bearing, an aura of formadibility, and, on anvil thereof, it is to be concluded that the prosecutrix hence being a minor at the relevant stage, and, obviously hers not holding an apt capacity, to, mete consent to the accused, for the latter holding her to coitus. Therefore, consent, if any, purveyed by the prosecutrix, to accused, for holding her to sexual coitus, is both irrelevant or stands subsided.

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

15. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

ICICI Lombard General Insurance Company Ltd. .....Appellant.

Versus

Smt. Mitto Devi & others .....Respondents.

FAO No. 132 of 2017.
Reserved on : 26th December, 2018.
Decided on : 31st December, 2018.

Motor Vehicles Act, 1988 – Section 147 – **Central Motor Vehicles Rules, 1989** – Rule 143 – Certificate of Insurance – Cover note – Authentication thereof – Insurance company not denying in its reply of having insured offending vehicle - Acknowledgement of receipt of

premium qua insurance of offending vehicle by insurer duly proved – Held, insurer can not avoid its liability to satisfy award – RFA dismissed - Award upheld. (Paras 4 to 8)

For the Appellant:	Mr. Jagdish Thakur, Advocate.
For Respondent No. 1 to 4:	Mr. Karan Singh Kanwar, Advocate.
For Respondent No.5:	Mr. Rupinder Singh, Advocate.
For Respondent No. 6:	Mr. Dalip K. Sharma, Advocate.
For Respondent No.7:	Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The learned Motor Accident Claims Tribunal-II, Sirmaur, District at Nahan, H.P., initially. on 1.06.2009, upon, making a verdict, vis-a-vis, MAC Petition No. 15-N/2 of 2006, determined compensation amount, borne in a sum of Rs.10,28,448/-, along with interest at the rate of 7.5.% per annum from the date of filing of the petition till its realization, and, fastened the apposite indemnificatory liability, upon, M/s Shanti Flats & Fondations Pvt. Ltd., respondent No.7 herein. The verdict initially rendered on 1.6.2009, upon, afore MAC petition, stood, challenged by the afore respondent, by the latter constituting, an appeal before this Court, appeal whereof assigned FAO No.413 of 2009, and, thereon this Court, without disturbing the findings, upon, issues No.1, 3, 4, 5 and 6, proceeded to make an order of remand, vis-a-vis, the learned Tribunal, for, its rendering findings afresh, upon issues No.2 and 7, (i) issues whereof appertain, to the quantum of compensation, whereto, the claimants being entitled, and, qua the apt indemnificatory liability, being fastenable, upon, the insurer or the owner of the offending vehicle. The learned tribunal on receiving the matter, on remand to it, rendered a fresh decision on 31.12.2016, upon, the afore issues, and, proceeded to reaffirm the findings earlier rendered upon issue No.2, whereas, it recorded disaffirmative findings, upon, issue No.7, and, reversed the earlier conclusion qua the respondent No.7 herein being amenable for fastening, of, the apposite indemnificatory liability, and, rather the apposite indemnificatory liability stood fastened, upon, the insurer of the offending vehicle.

2. The Insurer of the offending vehicle, is aggrieved therefrom, hence, has proceeded to cast, a challenge thereto, by its, instituting the instant FAO before this Court.

3. Since, the counsel appearing for the insurer, does not strive to cast any onslaught, vis-a-vis, the quantum of compensation assessed by the learned tribunal, in the initial verdict recorded on 1.6.2009, (i) hence, the quantum of compensation, as, determined thereunder, is,concluded to acquire conclusivity, and, finality.

4. However, the learned counsel appearing for the insurer ha with immense strength contended vigorously before this Court (i) that the findings returned, upon, the issue appertaining to the apposite indemnificatory liability being fastenable, upon, the insurer, hence warranting theirs being reversed by this Court. His, afore submission, is, rested, upon, a purported fallacy, committed by the learned tribunal, in, assigning probative strength to Ex.RW1/D, (ii) despite the afore exhibit, merely being a photo copy, (iii) and, rather it making a mere display of an apt acknowledgement being made by the insurer, vis-a-vis, premium, as, borne in a sum of Rs.4,234/-, being received from the owner, of, the offending vehicle. (iv) The afore exhibit not hence either constituting, a certificate of insurance nor it being construable to be a cover note, whereas, the apt Rule 143, of, the Central Motor Vehicles Rules 1989, rule whereof stands extracted hereinafter, peremptorily

requiring issuance, of, the afore certificate of insurance or cover note, both whereof are enjoined to be authenticated, by the authorized official, of, the insurer, (v) and, upon, the afore rule being read in conjunction, with Section 147 of the Motor Vehicles Act, especially sub section (1) thereof, provisions whereof also stand extracted hereinafter, (vi) and, with a dire necessity, of, strict statutory compliance therewith hence standing embodied therein, vis-a-vis, requirement, of, an insurance policy, vis-a-vis, the offending vehicle, (vii) thereupon, also the owner of the offending vehicle was enjoined, to, for ensuring, any valid burdening, of, the apposite indemnificatory liability, upon, the insurer, hence tender the policy of insurance, (viii) whereas, his omitting to do so, thereupon, the afore exhibit embodied in Ex.RW1/D, is, inconsequential, nor is a worthy piece of evidence, for, fastening the apposite indemnificatory liability, upon, the insurer. Provisions of Rule 143 of the Central Motor Vehicles Rules, 1989, read as under:-

> "**143. Issue of certificate of insurance**.-Every certificate of insurance or cover note issued by an insurer in compliance with the provisions of this Chapter shall be duly authenticated by such person as may be authorised by the insurer.

The relevant provisions of Section 147 of the Motor Vehicles Act, read as under:-

> "**147 Requirements of policies and limits of liability.** —(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—
>
> (a) is issued by a person who is an authorised insurer; and
>
> (b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—
>
> (i) against any liability which may be incurred by him in respect of the death of or bodily 27 [injury to any person, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;\
>
> (ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:...."

5. Nonetheless, the afore contention, reared before this Court, by the learned counsel appearing for the insurer rather, is, for the reasons to be assigned hereinafter, hence amenable, for being discountenanced, (a) RW-6, an official of the insurer, upon, stepping into the witness box, though, in his deposition borne in is examination-in-chief, denied the factum of issuance of Ex.RW1/D, yet, his afore denial is ridden with an entrenched inveracity, (b) given his admitting the factum, of, the premium amount, as, disclosed therein to stand borne in a sum of Rs.4,234/-, rather being received by the insurer, (c) and, his explicating its receipt, by the insurer, vis-a-vis, it being the premium defrayable, vis-a-vis, the policy appertaining, to, non motor machinery, and, policy whereof, is, embodied in Ex.RW6/A. However, even the afore testification embodied in the examination-in-chief of RW-6, is, belied by the latter, in his cross-examination, rather making an admission qua the premium payable, vis-a-vis, Ex.RW6/A, hence standing already received by the insurer, (d) Ex.RW1/D making a clear echoing qua the premium acknowledged to be received therethrough hence by the insurer, rather, appertaining to the offending vehicle.

6. Be that as it may, the necessity of strict compliance with the afore extracted provisions, as, borne in Section 147 of the Motor Vehicles Act, and, with Rule 143, of, the Central Motor Vehicles Rules, also stood encumbered, upon, the insurer, (a) emphatically

when this Court, for reasons aforestated rather has concluded qua Ex.RW1/D, appertaining to the offending vehicle. However, the insurer hence omitted to mete compliance therewith, despite, RW-4, in his testification rendered on oath, and, his in his deposition, comprised, in his examination-in-chief, making an articulation qua his, through Ex.RW4/F to Ex.RW4/H, making entreaties, upon, the insurer, of, the offending vehicle, for the latter hence meteing the afore requisite statutory compliance. Even through, the afore exhibits, rather stand admitted by RW-4, in his deposition, comprised in his cross-examination, hence to be transmitted to the insurer, and, also despite the afore exhibit being photo copies, (i) yet, the afore purported infirmities hence gripping the afore exhibits, are inconsequential, for making, any unflinching conclusion qua the insurer, not, receiving the afore communications from, RW-4, (ii) necessarily when a close circumspect reading of the cross-examination, of RW-4, fails to make any emergences, qua, any apposite suggestion being put thereat, to, RW-4, appertaining to the afore exhibits rather never coming to be received by the insurer. The effect of the afore lack of disclosures, in, the cross-examination of RW-4, rather fosters an inference qua respondent No.4, not derelicting in making the requisite entreaties upon the insurer, for, the latter hence meteing compliance with the afore provisions, (iii) rather the insurer on the afore invented or pretextual grounds, failing to mete the requisite compliance therewith. Corollary thereof being qua the afore espousal reared before this Court, by the counsel for the insurer remaining unrested, upon, evidence existing on record, and, obviously his contention, warrants, its, outright rejection.

7. Furthermore, all the afore arguments addressed before this Court by the learned counsel, for the insurer, and, purported evidence in consonance therewith, as, depended upon by him, is, apparently beyond pleadings relevant thereto, and, constituted in the reply furnished by the insurer, to the apposite claim petition, (i) wherein, rather, hence, all the afore contentions, were enjoined to be pleaded both with precision, and, with the utmost meticulousness, (ii) whereas, the insurer rather raising a cursory contention, qua, for want of supply, of, particulars of the insurance policy, (iii) thereupon, the owner, of, the offending vehicle holding no insurable interest, vis-a-vis, the offending vehicle, (iv) thereupon, the afore vague, and, nebulous contention(s) reared by the insurer in its reply, to the claim petition, obviously rather fails to encapsulate, the entire expanse of the afore evidence, (v) thereupon, the evidence alluded to, and, depended upon, by the learned counsel for the insurer, for, hence, its purported valid exculpation, of, its indemnificatory liability hence remained unbedrocked, upon, the apt pleadings, and, warrants rejection.

8. For the foregoing reasons, there is no merit, in the instant appeal, and, it is dismissed accordingly. The award impugned before this Court is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Smt. Kamla Devi .....Appellants/defendants.
Versus
Smt. Kiran .....Respondent/Plaintiff.

RSA No. 482 of 2017.
Reserved on : 19th December, 2018.
Decided on : 31st December, 2018.

Limitation Act, 1963 – Article 64 & 65 – Adverse possession – Proof – In suit for possession, defendant raising plea of adverse possession - In earlier suit filed by her, she (defendant) claimed ownership under Will - No plea of adverse possession raised by her in that suit – Held, defendant has not become owner of land by adverse possession. (Para 10)

For the Appellant: Mr. S.V. Sharma and Ms. Anu Tuli, Advocates.
For the Respondent: Mr. Hamender Singh Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiffs' suit for possession qua the suit premises, was, hence decreed.

2. Briefly stated the facts of the case are that the plaintiff set out a case that she is owner of the property comprised in Khata No.75 min, Khatauni No.286, Khasra No. 14, 15, and 16, measuring 1.59 sq. meter, situated at Mauza Bhagwati Nagar, Teh. and District Shimla, H.P. According to the plaintiff, the suit land/suit property was previously owned by Sh. Durga Ram s/o Sh. Ghavlia, who inherited it from Sh. Shonkia Ram. It was purchased by the plaintiff from Durga Ram under a sale deed No.1023 of 21.07.2008. Defendant No.1 Smt. Kamla Devi had previously filed a civil suit against Durga Ram claimant the suit property on the basis of a "Will" purportedly executed by Sh. Shonkia Ram. The suit was dismissed by the ld. Civil Judge (Jr. Divn.), Court no.4, Shimla, on 30.05.2008. As per the plaintiff, even the appeal preferred by defendant No.1 was dismissed by the learned First Appellate Court on 31.05.2011. The plaintiff avers that the land comprised in the afore kahsra No. consists of two parts of construction. On part, consists of a "Katcha Makaan" and the second part consists of "pucca Makan". The defendant was kept as a care-taker by Sh. Shonkia Ram in one room and no "Will" was executed by him in her favour. The plaintiff further contends that as of now there are five rooms including a kitchen in the suit property. It is further contended that one room was constructed by defendant before filing the previous suit. Thus, there were three rooms in existence when the previous suit was filed by defendant No.1. Two rooms were constructed by Sh. Shonkia Ram and one room was unauthorisedly constructed by the defendant. It is averred that the defendants, taking advantage of the fact that the plaintiff is living out of Shimla for her job, constructed a two room structure behind the back of the plaintiff. The defendants have absolutely no right whatsoever to remain in possession of the suit property, and, they are liable to be evicted. The plaintiff further contends that the suit property which is in possession of the defendants, can easily fetch a rent more than Rs.3,000/- per month. The plaintiff claims that the defendants are liable to pay Rs.3,000/- per month from November, 2008 as use and occupation charges. The plaintiff also contends that the defendants are in habit of raising construction and taking advantage of her absence and therefore, they are liable to be restrained from raising any construction on the suit land.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objections inter alia limitation, adverse possession, non joinder of necessary parties and estoppel. On merits, the defendants have denied that the plaintiff is the owner of the suit property. It is contendd that Durga Ram was not entitled to inherit the property of late Sh. Shonka Ram. The defendants further avers that alothough their civil suit was dismissed by lower Court however their appeal was partly allowed by ld. Appellate Court. It is contended that before the purported "Will" in favour of defendant No.1,

defendant No.2 was inducted as tenant by late Sh. Shonkia Ram in one room and kitchen. It is contended that defendant No.1 constructed three pucca rooms in 1990 and no construction was raised after 1995. The defendants also claim ownership of the suit property by way of adverse possession. Alternatively, the defendants contend that they are in lawful possession of the suit property as tenant and since the suit property is situated in municipal area, therefore, they can only be evicted by the Rent Controller and not through a Civil Suit.

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

1. Whether the plaintiff is entitled for decree of possession, as prayed for? OPP
2. Whether the plaintiff is entitled for decree of permanent prohibitory injunction, as prayed for? OPP
3. Whether the plaintiff is entitled for decree of Rs.1,08,000/- as use and occupation charges w.e.f. November, 2008? OPP
4. Whether the suit is barred by limitation?OPD
4-A. Whether the defendant has become owner of the suit property by way of adverse possession, as alleged?OPD.
5. Whether the suit is bad for non joinder of necessary parties, as alleged? OPD.
6. Whether the suit is barred by principle of estoppel?OPD.
7. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court partly decreed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom by the defendants/appellants herein, before the learned First Appellate Court, the latter Court dismissed the appeal, and, affirmed the findings recorded by the learned trial Court.

6. With respect to the extant suit khasra numbers, defendant No.1, Kamla Devi, had, previously instituted a civil suit, bearing No. 614 - 1 of 1999, before the learned trial Court concerned, rearing therein, an, espousal for rendition, of, a decree for declaration, and, for permanent prohibitory injunction. The afore espousal stood rested, upon, a testamentary disposition executed, vis-a-vis, her by one Shonkia Ram. However, the afore propagation, of, the plaintiff therein (defendant No.1 in the extant suit), stood rejected, by the learned trial Court concerned, through, a verdict, rendered upon, Civil Suit No.614-1 of 99, (i) also the further relief claimed therein, for, rendition of a decree, for permanent prohibitory injunction, vis-a-vis, the suit khasra numbers therein, and, analogous to the suit khasra numbers hereat, also stood declined to defendant No.1 herein (plaintiff in the afore suit). In an appeal carried therefrom, by the afore aggrieved Kamla Devi, before, the learned First Appellate Court, the latter Court proceeded to affirm, the, declining, of, relief of rendition, of, a declaratory decree, vis-a-vis, the thereat suit khasra numbers, as, analogous to the extant suit khasra numbers, (ii) yet proceeded to reverse, the, finding recorded by the learned trial Court, vis-a-a-vis, the declining(s) qua the afore Kamla Devi, the relief of permanent prohibitory injunction, (iii) and, also rather proceeded to grant qua her a relief qua, till, her settled possession, upon, the suit khasra nubers, is, through process of law, concerted to be retrieved, from her, thereupto, her possession thereon, not warranting its being disturbed.

7. The afore conclusive verdict pronounced in the earlier suit, vis-a-vis, suit khasra numbers, common to both the earlier suit, and, to, in the extant suit, even though, the defendant, in, the earlier suit was one Durga Ram, who, however, remains unimpleaded in the apposite array of parties in the extant suit, negatives the defendants' espousal (ii) given reiteratedly, the binding, and, conclusive effect of the verdict pronounced, upon, the earlier suit, remaining intact, (iii) conspicuously, vis-a-vis, the failure of afore Kamla Devi to establish her entitlement, to, the suit property, on anvil, of, a purported Will executed in her favour, by one Shonkia Ram. (iii) Rather with forthright evidence making emergences qua after rendition, of, a conclusive binding decree, upon, the earlier suit, the defendant in the earlier suit, one Durga Ram, hence, executing a registered deed of conveyance, vis-a-vis, the suit property, in favour of the plaintiff, (iv) and, also when valid concurrent findings stand returned, by both the learned Courts below, vis-a-vis, valid and due execution of Ex.PW2/A, inter se the plaintiff, and, one Durga Ram, who, stood arrayed as defendant in the earlier suit, (v) reinforcingly, settles, the, trite factum qua the disentitlement, of, the afore Kamla Devi hence to stake any claim, on anvil, of, the afore testamentary disposition, vis-a-vis, the extant khasra numbers.

8. The cullings out, of, the afore facts, (a)importantly the one appertaining to the afore liberty being reserved, vis-a-vis, one Durga Ram, the defendant in the earlier suit, to seek possession in accordance with law, of, the suit khasra numbers, from, the afore Kamla Devi, and, with afore Durga Ram, after rendition of a conclusive verdict pronounced, upon, Civil Suit No. 614-1 of 1999, (i) hence making, through, Ex.PW2/A, a valid alienation of the suit property, vis-a-a-vis, the plaintiff herein, (ii) does obviously capacitate, the plaintiff, to, through, the extant suit, hence, seek rendition of a decree, for possession, and, to also seek rendition, of, a decree for permanent prohibitory injunction, against, the afore Kamla Devi.

9. The learned counsel appearing for the defendant, has, contended with much vigour, before this court, that the concurrent findings rendered, by both the learned Courts below, appertaining to the acquisition, of title, by the defendant(s), vis-a-vis, the suit property, by adverse possession, wanting in legal strength, (i) especially when she had proven all the trite rubric(s) appertaining therewith. However, the afore contention, is, rather frail, for, the reasons (a) a perusal of the plaint reared in the earlier suit by Kamla Devi, copy whereof, is, borne in Ex.PW1/A, failing to make any disclosure qua, the, afore Kamla Devi, hence, rearing any plea therein, vis-a-vis, hers hence acquiring any title qua the suit property, by adverse possession, (b) nor obviously any issue stood struck qua therewith nor any evidence stood adduced thereon, and, hence no findings stood earlier rendered, upon, the afore propagation, as, stands reared only before this Court, by the aggrieved defendant. The afore omission, of, afore Kamla Devi, to, in the earlier suit hence rear the afore propagation, attracts qua her the principle of estoppel, constituted under the provisions of Order 2, Rule 2 of the CPC, (c) and, attraction whereof qua her, is, reinforced by the factum qua in the earlier suit, hers rather claiming qua hers acquiring title qua the suit property, under a testamentary disposition executed, vis-a-vis, her by one Shonkia Ram, (d) espousal whereof stood dispelled, by, rather concurrent verdicts recorded, upon, the earlier suit by the learned trial Court, and, by the learned First Appellate Court, (e) also thereupon, it is to be concluded, that, the afore plea, as, stands herebefore reared by one Kamla Devi, in, her written statement filed to the plaint, being construable to be a sheer invention, and, an afterthought.

10. Be that as it may, the aggrieved defendants also proceed to contend, that, during his life time, one Shonkia Ram, had, inducted them, as tenant(s), upon, a portion of the suit property, (i) and, with the property being located within the jurisdiction of the

Municipal Corporation, (ii) hence, the only valid remedy, available, to the plaintiff for seeking their eviction therefrom, is, comprised, in, the institution of an eviction petition, before the learned Rent Controller concerned. However, the afore contention, is, not bedrocked, upon, any deposition in consonance therewith, being rendered by DW-1, upon, hers stepping into the witness box, (iii) and, the effect, if any, of afore omission, is fully enhanced, by an echoing occurring in the cross-examination of DW-1, qua hers not making any attornments of rent qua the afore Shonkia Ram. The further effect thereof, being qua with the defendants hence not clinchingly, proving qua theirs attorning any rent, to, the afore deceased Shonkia Ram, (iv) thereupon, it being not concludable qua theirs holding any tenancy rights, upon, any portion of the suit property nor hence it can be concluded, that, if any, portion of the suit property, stands, located, within the jurisdiction of Municipal Corporation, Shimla, thereupon, also the apt remedy for seeking their eviction, from the suit property, not being, through a petition being filed before the Rent Controller concerned, rather the extantly recoursed remedy being the apt remedy.

11. For the foregoing reason, no substantial question of law, much less a substantial question of law arises, for determination in the instant appeal. Consequently, there is no merit, in the instant appeal, and, it is dismissed. In sequel, the judgments and decrees rendered by the learned Courts below are affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

National Insurance Company Ltd. .....Appellant.

Versus

Miss Jyoti Sharma and others ....Respondents.

FAO No. 233 of 2017.
Reserved on : 21st December, 2018.
Decided on : 31st December, 2018.

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application – Death of house wife – Monthly income – Assessment – Held, even when deceased house wife is not proven to rear any income from sources pleaded in claim application yet monetary value of her contribution as house maker vis-a-vis her family is difficult to compute - On facts, assessment of monthly income of deceased at Rs. 6,000/- done by Tribunal not interfered with. (Paras 3 & 4)

Cases referred:

Jitendra Khimshankar Trivdi and others vs. Kasam Daud Kumbhar and others, (2015)4 SCC 237

National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant: Mr. Jagdish Thakur, Advocate.
For Respondents No. 1 & 2: Mr. Saurav Rattan, Advocate.
For Respondent No. 3: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal-II, Kinnaur at Rampur Bushehar, H.P., upon, MAC Petition No. 65-R/2 of 2016/2015, whereunder, compensation amount comprised, in, a sum of Rs.9,33,000/- alongwith interest accrued thereon, at the rate of 9% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing or the appellant/insurer, (i) does not contest, the validity of affirmative findings, rendered by the learned tribunal, upon, the issue, appertaining to the relevant accident, being, a, sequel of rash, and, negligent manner, of, driving of the offending vehicle, by Varun Sharma, respondent No.3 herein, (ii) nor he contests, the, validity of dis-affirmative findings, returned, upon the issue appertaining, to, any of the apposite terms, and, conditions of the contract, of insurance being, hence, breached by the owner-cum-driver, of the offending vehicle. His trite onslaught, vis-a-vis, the impugned award is centered, upon, despite the learned tribunal concerned, returning a valid conclusion, qua, the deceased not earning, any, per mensem sum of Rs.25,000/-, from, hers hitherto performing various avocations, (a) given no apt therewith cogent evidence existing on record, (b) hence, he proceeds to contend that the computation, vis-a-vis, the monetary value of services, as, rendered by the deceased, towards her performing, the, apt household chores, and, pegged in a sum of Rs.6,000/- per mensem, rather warranting interference. He also contends, that, (c) meteing of 15 % hike thereon, is, also stained with an alike infirmity, and, also warrants hence interference by this Court.

3. However, the afore contention, reared before this Court, by the learned counsel appearing for the insurer, is, ridden with a gross inherent fallacy, (a) given the Hon'ble Apex Court in a judgment pronounced, in a case titled as ***Jitendra Khimshankar Trivdi and others vs Kasam Daud Kumbhar and others,*** reported in ***(2015)4 SCC 237***, the relevant paragraph No.10 whereof stand extracted hereinafter, expostulating a clear proposition of law (a) qua even when the deceased housewife, and, a homemaker is not proven, to rear any income, from any of her pleaded sources, or avocations, (b) yet the monetary value of her contribution, as a housewife, and, as a homemaker, vis-a-vis her family, being not ignorable, nor discardable, and, its proceeding, to monetize the services or domestic chores, performed by a housewife, and, by a homemaker, rather in a sum of Rs.3,000/- per mensem. The relevant paragraph No.10, of, Jitendra Khimshankar Trivedi's case (supra) reads as under:-

> "10. Even assuming Jayvantiben Jitendra Trivedi was not self- employed doing embroidery and tailoring work, the fact remains that she was a housewife and a home maker. It is hard to monetize the domestic work done by a house-mother. The services of the mother/wife is available 24 hours and her duties are never fixed. Courts have recognized the contribution made by the wife to the house is invaluable and that it cannot be computed in terms of money. A house-wife/home-maker does not work by the clock and she is in constant attendance of the family throughout and such services rendered by the home maker has to be necessarily kept in view while calculating the loss of dependency. Thus even otherwise, taking deceased Jayvantiben Jitendra Trivedi as the home maker, it

is reasonable to fix her income at Rs.3,000/- per month."
(p.241-142)

4. Even though, the learned Tribunal concerned, in the year 2017, proceeded to assess, the, monetary value(s) of the services performed, by the deceased, as a housewife, and, as a home-maker, qua her estate/home, hence in a sum of Rs.6000/- per mensem. However, the aforesaid monetization, of, domestic services, hence, performed by the deceased at her home, and, vis-a-vis, her estate, may not be construable to be either excessive or exorbitant, nor it can be construed, to fall, beyond the parameters, of the apt paragraphs of the verdict, of, the Hon'ble Apex Court, rendered in Jitendera Khimshankar's case (supra), (a) conspicuously when the afore verdict, is, pronounced in the year 2015, whereas, the impugned award is rather pronounced in the year 2017, (b) hence, with some time elapsing inter se the pronouncement, made by the Hon'ble Apex Court in Jitendra Khimshankar's case (supra), vis-a-vis, the pronouncement, of, the impugned award, (c) and, obviously since then upto now, the monetary value of the services rendered by the deceased, as a home-maker or as a housewife, vis-a-vis, her estate or her home, has obviously incurred apt accretions, (d) hence, the learned tribunal, in, monetizing rather her apt contribution towards her estate or home, in a sum of Rs.6000/- per mensem, rather cannot be construed, to, wander astray, from, the domain of the verdict supra, rendered by the Hon'ble Apex Court.

5. The learned counsel, appearing for the insurer has contended, that, the, meteing of 15% hikes, vis-a-vis, the afore sum also meriting interference, (a) given it being beyond the domain of the verdict of the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700.*** The afore contention of the learned counsel has strength, given the Hon'ble Apex Court in the afore verdict mandating qua rather it being permissible for meteing of 10% hikes, vis-a-vis, the deceased, who was self employed or on a fixed salary, and, was between the age of 50 to 60 years. Since the postmortem report reflects, the deceased being aged 52 years, at the relevant time, hence with the mandate of the Hon'ble Apex Court, encapsulated in Pranay Sethi's case (supra), mandating, qua accretions towards future incremental prospects, vis-a-vis, the per mensem income of the deceased, being pegged, upto 10% thereof, besides being tenably meteable, vis-a-vis, the apposite per mensem income. Consequently, after meteing 10% increase(s) vis-a-vis the apposite per mensem income, thereupon, the relevant per mensem income, of, the deceased, is, recoknable to be Rs.6,600/-, [Rs.6000/-(per mensem income of the deceased)+Rs.6002/-(10% of the per mensem income). Significantly, the number of dependents, of, the deceased, are, two, hence, 1/3rd deduction is to be visited, upon, a sum of Rs.6600/-. Consequently, the per mensem dependency, including the future hikes towards future prospects, after meteing the afore 1/3rd deduction, is, worked out, now at Rs.6600/- –Rs.2,200/- = Rs.4,400/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.4,400/-x12= Rs.52,800/-. After applying the apposite multiplier of 11, the total compensation amount, is assessed in a sum of Rs.5,80,800/- (Rs.Five lakhs, eighty thousand and eight hundred only).

6. However, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lacs each, vis-a-vis, the claimants, (i) under the head, "loss of love and affection", (ii) and. quantification, of compensation, borne in a sum of Rs. 1 lac, vis-a-vis, claimants under the head, "loss of estate", and also funeral expenses borne in a sum of Rs.25,000/-, is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively, (iii) and, with no

expostulation occurring therein vis-a-vis the compensation amount(s), being awardable, to the off springs of the deceased, especially under the head, loss of love and affection, hence reliefs in respect thereto being impermissibly granted. Consequently, the award of the learned tribunal is also interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads vis-a-vis, claimants. Accordingly, in addition to the aforesaid amount of Rs.5,80,800/-, the claimants, are, entitled under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the petitioners are entitled comes to Rs.5,80,800/-+15,000/- +40,000/- 15,000/-= Rs.6, 50,800/-(Rs. Six lakhs, fifty thousand and eight hundred only).

7. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants/petitioners, are, held entitled to a total compensation of Rs.6,50,800/--, along with pending and future interest @9 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants in the ratio of 50:50. The share of the minor claimant/petitioner No.2 shall remain invested, in FDRs, upto, the stage of his attaining majority. All pending applications also stand disposed of. Records be sent back forthwith.

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

Smt. Sabita Parashar ....Appellant.

Versus

The New India Assurance Company Ltd. and others ....Respondents.

FAO No. 396 of 2016.
Reserved on :27th December, 2018.
Decided on : 31st December, 2018.

Motor Vehicles Act, 1988 – Section 149 – Motor accident – Claim application - Defences – Route permit – Held, accident took place much prior to issuance of route permit in favour of owner – Offending vehicle had no permit to ply vehicle on said road at relevant time - Owner committed fundamental breach of insurance policy – Insurer not liable to indemnify award – Tribunal's award directing insurer to pay and recover upheld – RFA dismissed. (Paras 3 & 4)

For the Appellant: Mr. Neel Kamal Sood, Advocate.
For Respondent No. 1: Mr. Raman Sethi, Advocate.
For Respondents No.2 and 3: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The owner of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts a challenge, upon, the award pronounced by the learned

Motor Accident Claims Tribunal-III, Una, H.P., upon, MAC RBT No. 29/13/2011, whereunder, compensation amount comprised, in, a sum of Rs.1,32,219/- along with interest accrued thereon, at the rate of 9% per annum, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimant, and, the apposite indemnificatory liability thereof, was, fastened upon the owner of the offending vehicle/appellant herein.

2. The learned counsel appearing for the owner/appellant herein, has, contended with much vigour before this Court, that, the rendition, of, affirmative findings, upon, issue appertaining to the relevant mishap hence being a sequel of rash and negligent manner of driving, of the offending vehicle by one Raj Kumar (respondent No.2 herein), hence, warranting interference, (I) dehors, the ocular witnesses to the occurrence, rendering an apt credible narration, whereunder, they ascribed negligence to respondent No.2 herein, in his driving the offending vehicle, (ii) given the insurer establishing, the, pleaded factum qua the offending vehicle, at the relevant time, being encumbered with a latent defect, and, for rectification whereof, it being plied to the apposite workshop, (iii) hence, fortifyingly, he contends that the effect, if any, of the negligence of respondent No.2 herein in driving the offending vehicle, rather being subsumed hence by the afore pleaded fact. However, the afore submission addressed before this Court, by the learned counsel, appearing for the appellant/owner of the offending vehicle, is, enfeebled, given its remaining in realm, of, pleadings, (c) and, rather the report of the mechanical expert, borne in Mark-A, (existing on the record of MAC Petition No. 9 of 2011) making voicings, unsupportive, vis-a-vis, the espousal of the learned counsel appearing, for, the owner/appellant herein. In sequel, the findings returned, upon, the issue appertaining to the relevant mishap, being a sequel of rash, and, negligent manner of driving, of the offending vehicle by respondent No.2, herein, obviously do not merit any interference.

3. Furthermore, the learned counsel appearing for the insurer, has, proceeded to contend with much vigour before this Court, (i) that the findings returned by the learned tribunal, upon, the issue appertaining to the offending vehicle at the stage contemporaneous, to the relevant mishap, hence, not holding the requisite route permit, for its being plied, on the route concerned, also being beyond the domain of the recitals borne, in, Ex.RW1/E. However, the afore submission is ill-founded, (ii) as the apposite column, appertaining to the date of issuance of the apposite route permit, making a clear display, qua its issuance occurring, on, 9.11.2011, and, its surviving upto 8.11.2016, whereas, with the relevant mishap, rather occurring hence much prior to its issuance, inasmuch, on 21.3.2011, and, with the owner of the offending vehicle, not placing, on record any route permit, with, a display therein, that, in contemporaneity, vis-a-vis, the ill-fated occurrence, the offending vehicle also possessing a valid route permit, (iii) thereupon, the apt sequel thereof, is, qua with lack of apt possession, or lack of issuance, in, contemporaneity to the ill-fated mishap, rather a valid route permit, vis-a-vis, the offending vehicle, hence, constituting a fundamental breach of terms, and, conditions of the insurance policy, (iv) whereupon, the insurer held a valid exculpatory ground hence for avoiding the fastening, of, the indemnificatory liability, upon, it, rather the fastening of the apt indemnificatory liability, vis-a-vis, the compensation amount, upon the appellant herein/owner of the offending vehicle, is both fit and appropriate, (v) besides the adoption by the learned tribunal, of, the principle of pay, and, recover, is also both proper and tenable.

4. For the foregoing reasons, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned award is maintained and affirmed. All pending applications also stand disposed of. No costs.

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

Shriram General Insurance Company Ltd. .....Appellant.
Versus
Santosh Kumari & Others ....Respondents.

FAO No. 553 of 2017 along
with FAO No. 404 of 2018.
Reserved on: 27th December, 2018.
Decided on : 31st December, 2018.

Motor Vehicles Act, 1988 – Section 166- Motor accident - Claim application – Monthly income - Determination – Deceased running tea stall and serving food thereat - Held, such person cannot be equated with skilled worker for determination of his monthly income – On facts, deceased had engaged helper at his tea stall – Monthly income taken at Rs. 15,000/- - Compensation re-determined accordingly. (Para 5)

Case referred:
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant(s):	Mr. Jagdish Thakur, Advocate, in FAO No. 553 of 2017, and Mr. Umesh Kanwar, Advocate, in FAO No. 404 of 2018.
For Respondent No. 1:	Mr. Umesh Kanwar, Advocate in FAO No.553 of 2017, and, Mr. T.S. Chauhan, Advocate in FAO No. 404 of 2018.
For Respondent No.2:	Mr. Umesh Kanwar, Advocate in FAO No. 553 of 2017, and Mr. Amit Dhumal, vice Ms.Richa Thakur, Advocate in FAO No. 404 of 2018.
For Respondent No.3:	Mr. T.S. Chauhan, Advocate, in FAO No.553 of 2017, and, Mr. Jagdish Thakur, Advocate in FAO No. 404 of 2018.
For Respondent No.4:	Mr. Amit Kumar Dhumal, vice Ms. Richa Thakur, Advocate in FAO No. 553 of 2017 and Mr. Prashant Sharma, Advocate in FAO No. 404 of 2018.
For Respondent No.5:	Mr. Prashant Sharma, Advocate in FAO No. 553 of 2017.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Both the afore FAOs, are, instituted against the impugned award rendered by the learned Motor Accidents Claims Tribunal, Ghumarwin, camp at Bilaspur, upon, MAC No. 13-2 of 2015, respectively by the insurer, and, the claimants, whereunder, compensation amount, borne in a sum of Rs.17,61,000/-, along with interest, at, the rate of 9% per annum, from, the date of institution of petition, till its final realization thereof, stood

assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, stood fastened, upon, the insurer of the offending vehicle, and, wherethrough, the afore respectively seek reduction, and, enhancement, of, the afore determined compensation amount.

2. Since, both the afore FAOs hence arise, from, a common verdict, hence, both are amenable for a common adjudication being meted thereon.

3. The learned counsel(s) appearing, for the insurer, in making, a, vehement submission before this Court, (a) that the amount of per mensem salary, of, the deceased, as, computed by the learned tribunal, in a sum of Rs.8,000/-, as, purportedly derived from his tea stall, and, also his serving food thereat to the customers, rather standing erroneously computed, has, depended, upon, Ex.PW4/C, (b) whereunder, rather a valid permission was granted to the deceased to only operationalise a tea stall, (c) and, thereupon, he contends that any serving of food thereat hence by the deceased, and, also any derivation of any income, from the afore sale(s) by the deceased, being discardable, (d) besides he further contends that for want of best documentary evidence, comprised in apt income tax returns filed by the deceased, the oral testification of the claimants, is, discardable, rather he contends that the apt module for making the relevant determination, was, in consonance with the apt per diem wages, derived by a skilled workman.

4. However, for the reasons to be assigned hereinafter, this Court disconcurs, hence, with the afore submission addressed by the learned counsel for the insurer, (a) given Ex.PW4/C making a vivid display of the deceased operationalizing a tea stll, hence, his being self employed or his being an entrepreneur, thereupon, it being impermissible to construe him to be a skilled workman, (b) besides it also being impermissible to compute qua any derivation of income by him, from, his running a commercial establishment not constituting the apt parameter, for, making a determination, of his, per mensem salary therefrom, (c) nor it being permissible, obviously, in contradiction, vis-a-vis, the afore conclusion, of, his rather being an entrepreneur, hence compute his per diem wages, at par with the wages drawn, by a skilled workman. (d) Even though, the wife of the deceased was unable to place, on record, the apt income tax returns, in personification of the claimed income, derived by the deceased, from his operationalising a tea stall, and, also his thereat serving food to the apposite customers, (e) yet the afore omission also cannot dispel the vigour, of, her apt testification, wherein, she has voiced qua her deceased husband rather drawing the pleaded income, from his avocation, of, his operationalizing a tea stall, and also serving thereat food, to the customers thereof, (f), given rather the wherewithal(s) available with the insurer, to elicit, from the income tax department, the relevant income tax returns filed by the deceased, and, its visibly omitting to elicit the afore evidence, from, the quarter concerned, (g) rather with PW-6, the supplier of goods ,to the deceased, rendering an echoing in his examination-in-chief qua the deceased, daily prucahsing goods in a sum of Rs.1000 to Rs.1200/-, for his hence preparing food, to be served, to his customers, hence visiting his commercial establishment, testification whereof remain unscathed, of its vigour, (h) besides with PW-7, a helper engaged by the deceased, at, the afore commercial establishment, also testifying qua the deceased earning Rs. 2000/- to Rs.3000/- per day, and, his being defrayed wages comprised in a sum of Rs.4,000/- per mensem, (I) though, also stood cross-examined by the counsel for the insurer, for belying the afore factum, yet with his remaining unscathed in the afore ordeal, (j) and, when best evidence comprised, in the persons residing in proximity to the commercial establishment of the deceased, remained unexamined, whereas, they could befittingly testify qua PW-7, never standing employed by the deceased, at his commercial establishment, (k) thereupon, it is to be concluded qua the testifications of PW-6, and, PW-7 hence being amenable for credence being meted thereto. Consequently,

even if, assumingly, the deceased after deducting all the requisite expenses, hence, was earning a sum of Rs.500/- per diem, from his commercial establishment, thereupon, it can safely be concluded qua his earning a sum of Rs.15,000/- per month.

6. Since, Ex.PW4/C, makes a display of the deceased being an entrepreneur, and, his being self employed, and, with the rates of items served by him, at his establishment, obviously with the efflux of time, begetting escalation or hikes, (i) thereupon, with hence visible evident certainty of income, standing rather derived by the deceased, from, his operationalizing a tea stall, obviously rather surging forth, (ii) and, thereupon, necessarily concomitant accretions, vis-a-vis, his aforestated certain income, rather warrant(s) application thereon.

4. The deceased, is, in the postmortem report, is reflected, at the relevant time, to be hence aged 40 years, at the relevant time. With the Hon'ble Apex Court, in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, the relevant paragraph No.59 extracted hereinafter:

> "59.Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would

> tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life,etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable."
>
> (p.2721-2722)

expostulating (i) that where the deceased concerned, is rendering employment, in non government organization(s), and, with apparently, the deceased rearing, a, certain, and, settled income from his afore entrepreneurship,(a) thereupon, hikes or accretions, on anvil of future incremental prospects, vis-a-vis, the salary drawn by him, at the time contemporaneous, to, the ill fated mishap, from his employer, or, from his entrepreneurship being also meteable thereto. However, before applying the mandate of the aforesaid relevant paragraph, borne in the judgment supra, it is significant to also bear in mind, the age of the deceased, (ii) since the postmortem report reflects, the deceased being aged 32 years, at the relevant time, hence with the afore extracted paragraph, mandating, of, accretions towards future incremental prospects, vis-a-vis, the salary drawn by the deceased, being pegged upto 40% thereof, besides being tenably meteable vis-a-vis the apposite per mensem income. Consequently, after meteing 40% increase(s) vis-a-vis the apposite per mensem income of the deceased, thereupon, the relevant last per mensem income of the deceased, is, recoknable at Rs.21000/-, [Rs.15000(per mensem income salary of the deceased from his apposite avocation)+Rs.6000/-(40% of the apposite income). Significantly, the number of dependents, of, the deceased, are, three, hence, 1/3rd deduction is to be visited upon a sum of Rs.21,000/-, hence, after making apt aforesaid deduction vis-a-vis Rs.21,000/-, the per mensem dependency comes to Rs.14,000/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.14,000x12=Rs.1,68,000/-. After applying thereon the apposite multiplier of 16, the total compensation amount, is assessed in a sum of Rs.1,68,000x16=Rs.26,88,000/- (Rs. Twenty six lacs, and, eighty eight thousand only).

7. However, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lacs vis-a-vis, the widow of deceased, (i) under the head, loss of estate, (ii) and quantification, of compensation, vis-a-vis, the off springs of the deceased, borne in a sum of Rs.one lakh, under the head, loss of love and affection, as also quantification of funeral charges borne in a sum of Rs.25,000/-, is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium vis-a-vis the widow of the deceased, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively, (iii) and, with no expostulation occurring therein vis-a-vis the compensation amount(s), being awardable, to the off springs of the deceased, especially under the head, "loss of love and affection", hence reliefs in respect thereto being impermissibly granted. Consequently, the award of the learned tribunal is interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads, vis-a-vis, the widow of the deceased, as also, vis-a-vis the off springs. Accordingly, in addition to the aforesaid amount of Rs.26,88,000/-, the claimants, are, entitled under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the

total compensation to which the petitioners are entitled comes to Rs.26,88,000 + Rs.15,000/- + Rs.40,000/- + Rs.15,000/-= Rs.27,58,000/-(Rs. Twenty seven lakhs, fifty eight thousands only).

8. For the foregoing reasons, both the afore appeals are partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the petitioners, are, held entitled to a total compensation of Rs.27,58,000/-, along with pending and future interest @9 %, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. The aforesaid amount of compensation be apportioned amongst the claimants in, the manner, as ordered by the learned tribunal. The share of the minor child, shall remain invested, in FDRs, upto, the stage of his attaining majority. However, the interest accrued thereon, shall be releasable, vis-a-vis, his mother, only when she explains, of, its being required, for, the upkeep and benefit of her minor child. All pending applications also stand disposed of. Records be sent back forthwith.

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

State of H.P. & another ...Appellant.
Versus
Smt. Krishna Devi & others ....Respondents.

RFA No. 584 of 2011.
Reserved on : 18th December, 2018.
Decided on : 31st December, 2018.

Land Acquisition Act, 1894 – Sections 18 & 23 – Acquisition of land for public purpose – Market value – Assessment – Absence of exemplar sale deeds – Previous award – Relevancy – Held, when exemplar sale deeds are not available or placed on record, reference court justified in assessing market value of land on basis of previous award of court with respect to lands acquired in adjoining villages under same notification. (Paras 3 & 4)

For the Appellants: Mr. Hemant Vaid and Mr. Desh Raj Thakur, Addl. Advocate Generals with Mr. Y.S. Thakur and Mr. Vikrant Chandel, Dy. A.Gs.
For the Respondents: Mr. Vijay Sharma, Advocate

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The State of Himachal Pradesh, is, aggrieved by the award pronounced by the learned Reference Court, upon, reference petition No. 14-FTC/4 of 2009, whereunder, it determined, the, market value of the acquired lands, in a sum of Rs.30,000/- per biswa, and, applied the afore market value, to, all the categories of lands, as stood brought to acquisition, and, added thereon, all, the requisite statutory benefits.

2. The short submission addressed before this Court by the learned Additional Advocate General, for impugning, the, apt award is centered, (i)upon, an inapt reliance being placed by the learned Reference Court, upon, Ex.PW1/B, exhibit whereof is a certified copy of an award pronounced by the learned Additional District Judge, Solan, upon, petition No.34-S/4 of 2009, (ii) whereunder, the market value, vis-a-vis, the lands located in village Jabal Jamrot, stand, computed in a sum of Rs.6 lacs per bigha, on the ground (a) qua the afore verdict being not attracted, vis-a-vis, the acquired lands located in, a, contradistinct therefrom village, inasmuch as Village Sujni; (b) also when no evidence stood adduced, vis-a-vis, proximity of lands located in village Suni, vis-a-vis, the lands located in village Jabal Jamrot. Contrarily, the learned Additional Advocate General has contended with much vigour before this Court, (c) that the one year average market value of the lands, as, assessed by the learned Collector concerned, rather comprising the justifiable parameter, for, on its anvil, hence determining the just and fair compensation, vis-a-vis, the acquired lands. However, the afore contention, cannot be accepted, (d) given the existence, on the file of the learned reference Court, a site plan, disclosing the proximity of village Sujni, whereat the acquired lands located, vis-a-vis, village Jabal Jamrot, (e) AND, when with respect, to, lands located in the, latter village, Ex.PW1/B, stood, pronounced, and, also stood relied upon by the Reference Court, in its, making the impugned award, renders, hence, reliance thereon, to be well founded.

3. A bare perusal of the afore site plan, brought on record, by an official of the Land Acquisition Collector concerned, through makes (a) disclosure of some villages being rather located, intervening, the location of village Sujni, and, village Jabal Jamrot. However, even if, there is occurrence of some villages, intervening, the location of village Sujni, and, of village Jabal Jamrot, (b) yet the award borne in Ex.PW1/B, pronounced with respect to the lands located in village Jabal Jamrot, would per se not hence be rendered either irrelevant or unreadable, for, hence on its anvil, making computation of the market value of the lands, located in village Sujni, (c) unless evidence stood adduced, that, in proximity, to, the issuance of notification under Section 4 of the Land Acquisition Act, notification whereof stood issued on 11.8.2007, sale deeds being executed, vis-a-vis, lands located in village Sujni, and, qua villages located in proximity thereto. However, the aforesaid evidence is grossly amiss, (d) thereupon, when under the apposite statutory notification, hence, lands located in village Sujni, as well as, those located, in village Jabal Jamrot, were acquired for a common public purpose, (e) thereupon, when there is no further evidence, that, the lands located in village Sujni, did not, carry a market value, at par with the lands located, in village Jabal Jamrol, hence, therefrom an imminent conclusion, is, fostered qua the reliance placed upon Ex.PW1/B by the learned Reference Court, for, on its anvil, its, adjudging the market value of the acquired lands, not, suffering from any gross infirmity.

4. Even otherwise, reiteratedly, with no sale exemplars, being placed on record by the appellant, appertaining to the lands located in village Sujni, and, nor also the afore purported sale exemplars hence satiating the twin parameters; (a) its/theirs purported execution occurring in proximity tot he issuance of the apposite statutory notification; (b) or lands borne therein holding proximity in location angle, vis-a-vis, the acquired lands, thereupon, its appears that the reliance placed, upon, Ex.PW1/B by the learned Reference Court, for, thereupon its adjudging the market value of the acquired lands, rather not suffering from any gross fallibility or inherent fallacy.

5. A catena of judicial verdicts, has settled, the legal proposition qua upon the lands standing acquired for a common public purpose, inasmuch as for construction of road, thereupon, the contradistinct value(s) borne by the contradistinct categories of lands,

rather paling into insignificance, given, upon, completion of the public purpose, the relevant categorization rather standing eclipsed.

6. For the foregoing reasons, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned award is affirmed and maintained. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

State of H.P. .....Appellant.
Versus
Ram Rattan & others .....Respondents.

Cr. Appeal No. 499 of 2010.
Reserved on: 20th December, 2018.
Date of Decision: 31st December, 2018.

Indian Penal Code, 1860 - Sections 147 & 323 read with 149 – Rioting and assault – Proof – Trial court acquitting accused for want of evidence – State challenging acquittal on ground of wrong appreciation of evidence - Statement of complainant not only contradictory with respect to recitals made in FIR filed at his instance but also at variance with deposition of primary witnesses on material aspects - Stones used for assault not taken into possession by I.O - Clothes not proved to be containing blood belonging to blood group of victims – Acquittal recorded by trial court not suffering from mis-appreciation of evidence - Appeal dismissed. (Paras 10 to 12)

For the Appellant: Mr. Hemant Vaid and Mr. Desh Raj Thakur, Additional Advocate Generals with Mr. Y.S. Thakur and Mr. Vikrant Chandel, Deputy Advocate Generals.
For the Respondents: Mr. Harsh Khanna, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, stands, directed by the State, against, the pronouncement made by the learned Judicial Magistrate, 1st Class, Kandaghat, District Solan, H.P., upon, Criminal Case No. 1/2 of 2008, whereunder, the accused/respondents herein stood acquitted.

2. The facts relevant to decide the instant case are that on 18.8.2017, at about 10.50 p.m., an intimation received from Medical Officer of Civil Hospital, Chail that some persons have been injured in a quarrel and came to the hospital. On this information H.C. Rajinder along with other police officials visited the hospital, and, recorded statement under Section 154 Cr.P.C., of, complainant Rajinder Kumar to the effect that he is resident of Village Nagali. Ram Rattan, Om Prakash, Inder Singh and Ramesh are also residing in the same village with their families. The afore named persons are inimical towards their family.

They used to load seasonal vegetables in the vehicle, but the above named persons always obstruct them to do so. The afore named persons bringing their vehicles for the last 8 to 10 days for loading. On 18.8.2007 at about 7.30 p.m., in the evening when vehicle came on the road then his mother Vidya Devi went to see the vehicle on the road. When his mother did not return after some time, then his brother Balwant went to see his mother on the road. Ram Rattan and his family members caught hold Balwant from his throat and started beating him. When his brother started crying then his sister and mother also came on the spot and asked that when they were beating Balwant, on which all these persons started quarreling with them. After some conversation, the accused persons, namely, Ram Ratta, Kanta, Om Prakash, Inder Singh, Ramesh, Ashok Kumar, Madan Lal, Sanjay, Ajay, Vijay, Pankaj, Uma, Sharda, Sunita, Anita and Sheela gave beatings to Vidya, Reena Thakur and Balwant Singh with kick and fist blows. They also pelted stones on them owing to which injuries were sustained on head and left eye of his person. Vidya Devi sustained injuries on head, and, Balwant sustained injuries on his eyes and chest, whereas, Reena sustained injuries on her head, and, on other parts of the body. On hearing their cries, Joginder and Devender came to the spot and they were rescued by them. He along with Vidya Devi, Reena and Balwant were taken to the hospital by Joginder and Devender. On the afore statement of the complainant, FIR was registered in the Police Station concerned, and, the police investigating the case.

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

4. The accused/respondents herein stood charged, by the learned trial Court, for, theirs committing offences, punishable under Sections 147, 149 and 323 of the IPC. In proof of the prosecution case, the prosecution examined 11 witnesses. On conclusion of recording, of, the prosecution evidence, the statements of the accused, under, Section 313 of the Code of Criminal Procedure, were, recorded by the learned trial Court, wherein, the accused claimed innocence, and, pleaded false implication in the case.

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

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

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

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

9. Preeminently, the prosecution was enjoined, to, prove the genesis of the prosecution case, encapsulated in the statement, borne in Ex.PW1/A, statement whereof, stands recorded at the instance of the complainant, who, stepped into the witness box, as

PW-1. The testification rendered on oath by the complainant, is enjoined to make vivid bespeakings, hence bearing absolute concurrence, with all, the recitals borne in Ex.PW1/A. However, in case, therein rather occur, gross embellishments, and, improvements, therefrom, also, hence apparent rife contradictions therefrom, hence, occur, in the testification rendered on oath by PW-1, thereupon inferences would stand sparked qua (a) the recitals borne in Ex.PW1/A being falsified, (b) and, theirs being hence construed to be invented or fabricated, (c) and, also qua the testifications, of, the purported ocular witnesses, in purported corroboration thereof, also losing their vigour.

10. For determining the afore factum probandum, an allusion to the recitals borne in Ex.PW1/A, and, to the testification rendered on oath by PW-1, is imperative. In Ex.PW1/A, wherein, the genesis of the prosecution case, is, embodied, a narration occurs qua the mother, of, the complainant, initially proceeding, towards, the contentious road, and, thereafter, after elapse of some time, the, brother of the complainant one Balwant, hence, proceeding to the relevant spot, and, on hearing cries, the, complainant along with his sister, visiting the site of occurrence. The afore narrations, borne in Ex.PW1/A, were, enjoined to be testified, with, the utmost corroboration by PW-1, upon, the latter stepping into the witness box. However, a perusal, of, the statement, rendered on oath, by PW-1, especially, the, one comprised, in his examination-in-chief, unveil (a)qua echoings being borne therein, qua, rather his mother, and, brother together, visiting the spot, and, his after hearing shrieks, and, cries erupting therefrom, rather hence, visiting the relevant site, of occurrence, alongwith his sister. Obviously, hence, the the afore apparent rife contradictions, belittle(s), the worth of the narrations borne in Ex.PW1/A, thereupon, the recitals encapsulated in Ex.PW1/A, are construable to be falsified, and, are also construable to be a sheer invention or concoction, (b) with, a further sequel qua any purported corroboration thereto, as, rendered by the purported testified ocular witnesses to the occurrence also losing their apt efficacy. More so, with PW-2 in addition to PW-1, hence naming one Joginder, and, one Devender hence being available at the relevant site, for, hence rescuing them, from, the assault perpetrated, upon, the victims, rather also naming one Daya Ram, (b) also adds, to the aura of skepticism hence surrounding the testification, rendered by PW-1. Furthermore, PW-3 in addition, to, the afore also adding the name of one Kapil, also, aggravates the aura of skepticism rather engulfing the genesis of the prosecution case, rendering it to remain not cogently proven.

11. In addition, though, the complainant, testifies qua all the victims, being admitted in hospital, for three days, (a) yet when hence the prosecution narration, is, qua only Vidya and Reena, being admitted in hospital, and, other persons leaving to their respective abodes, after, receiving treatment, also stains the truth, of, the prosecution version. Cumulatively, hence, all the afore inter se or intra se improvements or embellishments, inter se the version borne in Ex.PW1/A, and, the testification in discord therewith, rendered by PW-1, (b) and, also all the afore inter se contradictions, inter se, the testifications rendered by the afore purported ocular witnesses, to, the ill-fated occurrence, rather enhances an inference, qua, the genesis of the prosecution case, being both incredible, and, unbelievable.

12. However, the learned Additional Advocate General, has, contended (a) that with the respectively drawn MLCs by PW-7, exhibits whereof, are, borne in Ex.PW7/A to Ex.PW7/D, hence being proven by PW-7, and, also with PW-7 in her deposition, borne in her examination-in-chief, making, echoings qua all the injuries, borne in all the afore MLCs, being, caused by user of blunt weapon, (b) and, with hers, in her cross-examination, conducted by the learned defence counsel, denying a suggestion qua the injuries reflected in MLCs, respectively borne in Ex.PW7/A to Ex.PW7/D, being not causable by fall on on hard

surface or heap of stones, (c) thereupon, the prosecution version qua the accused pelting stones, upon, the victims, hence standing proven. However, the afore submission falters, for want, of, collection of stones, and, also for want of the stones being shown to PW-7, during, the course of her deposition being recorded. Moreover, the afore omission is grave, given the purported oozing, of blood, from the injuries respectively sustained by the victim, purportedly by pelting of stones, by the accused, upon, the respective persons, of, the victims, (d) thereupon, some stains of blood were enjoined to occur thereon, (e) and, also the purportedly pelted stones, upon, the person of the victims, were enjoined to remain at the site of occurrence, and, also warranted their collection. Reiteratedly, the afore omissions also falsify the prosecution versions, and, when the collections, of, apposite clothes, as respectively seized under memos, borne in Ex.PW1/B, Ex.PW2/A, and, Ex.PW3/A rather remained undispatched to the FLS concerned, for renditions, of an opinion thereon, by the expert concerned, (f) whereas, upon, the afore endeavour being recoursed by the prosecution, firm evidence would erupt qua the afore items, being smeared with the blood belonging, to the blood group of the victims. Sequelly, hence, even the afore omission rather fosters an inference qua the seizure of clothes of the victims, as, made through Ex.PW1/B, Ex.PW2/A, and, Ex.PW3/A not carrying thereon, their blood, and, also hence the prosecution version being falsified. .

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

14. Consequently, there is no merit in the instant appeal, and, it is dismissed accordingly. In sequel, the impugned judgment is affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Suresh Chadha & another .....Appellants/Plaintiffs.
Versus
Sh. Gurudatt & Ors. .....Respondents/Defendants.

RSA No. 9 of 2006.
Reserved on : 21st December, 2018.
Decided on : 31st December, 2018.

Easements Act, - 1882 – Section 15- Right of passage by prescription – Requirements – Share Aam rasta – Entries of – Effect – Plaintiff claiming right of way through defendants land by prescription – Banking plea on revenue entries showing suit land as share aam rasta - Trial court dismissing suit - First appellate court also dismissing plaintiff's appeal – RSA – Held, revenue entries cannot be read in isolation when plea of prescriptive easement is raised by plaintiff – Disputed path leading only upto defendants property - No other person of that locality using it as passage – Entries of share aam rasta, thus, lose significance - Plaintiff claiming passage only for effecting repair of septic tank and retaining wall of his house - Such repairs can still be effected from passage located within plaintiff's

own land - Right of way by prescription not established – RSA dismissed – Decrees of lower courts upheld. (Paras 8 to 11)

For the Appellants:	Mr. Rajneesh K. Lal, Advocate vice Mr. Sanjeev Sood, Advocate.
For the Respondents 1, 3 (a) to 3(c), 4 and 6:	Mr. Tek Chand, Sharma, Advocate.
For Respondents No. 5:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed, against, the concurrently recorded verdicts by both the learned Courts below, whereby, the plaintiffs, suit for rendition, of, a decree of permanent prohibitory injunction, as well as, for declaration qua the suit khasra number(s), was, hence dismissed.

2. Briefly stated the facts of the case are that the plaintiffs are owners of the property and building detailed in the plaint. It is averred that the building of the plaintiffs is known as East View, Kasumpti, building on Khasra No.635. The defendants are owners in possession of th adjoining property comprised in Khata/Khatoni No.71/97, Khasra Nos. 610, 611, 616, 676, 628 at Kasumpti. The property of the plaintiffs and adjoining property of the defendants are abutted. But between the landed properties of the parties exist a common passage 4-5 feet wide passing through the land of Khasra No.676 of the defendants. The passage has been used and enjoyed by the plaintiff after purchase of the land. Earlier their predecessors had been using the passage since time immemorial, without obstruction or interference. Such usage by them was open, peaceful and hostile. In settlement of 1995, the common passage of Khasra No.767 was recorded as Rasta Share Aam. Defendants have no right to interfere or obstruct in usage of path by the plaintiffs. But in September, 1999, they started interfering in peaceful user of the path which plaintiffs had been using for purpose of repair and maintenance of the retaining wall of 10 feet high and 50 feet long abutting the common passage.

3. The defendants contested the suit and filed separate written statements. In their written statement, the defendants controverted the case of the plaintiffs by denying their allegations. Existence of common passage on land of defendants Khasra No.676 is denied. It is also denied that the plaintiffs are owners of the adjoining land to the extent of 1699.55 sq. meters. The plaintiff, in connivance with revenue officials, got more land recorded in their names in revenue record than their actual entitlement. The plaintiffs had purchased land from Shiv Raj Devi, who was owner of 2-2 bighas only. So present settlement record showing more possession of the plaintiffs is wrong and illegal. However, defendants admits themselves to be owners of the land in Khata/Khauni No.71/95 min and 71/97. But denied the existence of path upon khasra No.676. It is averred that neither any path is being used by the plaintiff through land of the defendants since times immemorial nor they were using so called common passage peacefully. Settlement was conducted in violation of the mandatory provisions of law, which was challenged by way of civil suit by the defendants. Gair Mumkn Rasta as wrongly incorporated in the revenue record. It is averred that the plaintiffs had not left any set back to repair their retaining wall and cannot claim right over the adjoining land of the defendants.

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

1. Whether the plaintiffs have the right to use common passage through Khasra No.676 as alleged if so its effect? OPP.
2. Whether the plaintiffs are entitled to relief of permanent prohibitory injunction, as prayed for?OPP.
3. Whether the suit is not maintainable in the present form?OPD.
4. Whether the suit has not been properly verified?OPD.
5. Whether the suit is not property valued for the purpose of court fee and jurisdiction? OPD.
6. Whether the plaintiffs have not come to the court with clean hands?OPD.
7. Whether the plaintiffs have suppressed the material facts from the court? OPD.
8. Whether the plaintiffs have no cause of action to file the present suit?OPD.
9. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/appellant(s) herein. In an appeal, preferred therefrom by the plaintiffs/appellant(s) herein, before the learned First Appellate Court, the latter Court dismissed, the appeal and affirmed the findings recorded by the learned trial Court.

6. Now the plaintiffs/appellant herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 13.01.2006, hence, admitted the appeal instituted by the plaintiffs/appellant against the judgment and decree, rendered by the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

a) Whether from the material on record, it was established that the plaintiff had acquired the right of passage for repair of the retaining wall and septic tank by necessity as also prescription and the plaintiff had a right of passage which was recorded as Gair Mumkin Rasta Share Aam to which presumption of truth was attached?

b) Whether from the evidence on record the only conclusion which could be drawn was that the plaintiff had proved the existence of common public path on the land in dispute entitling the plaintiff to use the same by necessity as also acquisition of the same by prescription?

c) Whether presumption of truth attached to the revenue records have been ignored and wrong inference drawn which has vitiated the findings?

Substantial questions of Law No.1 to 3:

7. The learned counsel appearing for the appellants, has, contended with much vigour, before this Court (i) that in declining the espoused relief to the plaintiff, both the learned courts below rather committing, a, grave fallacy, comprised, in theirs mis-comprehending or mis-appreciating, the, import, of, the relevant entries, occurring in Ex.PW1/A, and, in Ex.PW1/B, exhibits whereof are revenue documents, appertaining to the suit khasra number, (ii) especially appertaining, to, the successive entries, occurring therein, ephatically in the column of cultivation thereof, wherein rather reflections occur

qua the suit property being depicted, as, Shreaam Rasta, and, also in the column of classification thereof, the suit khasra number, being depicted as gair mumkin path, (iii) thereupon, when the suit khasra number(s), were, given the afore self evident graphic bespeaking, made by the afore reflections, rather hence, available for user by the general public, for, ingress into and egress from, their, respective abodes, (iv) thereupon, the afore suit khasra numbers, hence constituted the apt servient heritage, and, the plaintiffs became, the, dominant owners thereof, along with other members of the public, trudging thereon, for the relevant purpose, (v) and, also hence the plaintiffs firmly proving theirs hence acquiring an easementary right of passage, upon, the suit khasra numbers. However, the afore contention, is, unworthy of any merit, and, is outrightly rejected, (a) given the afore reflections, occurring in the afore exhibits, not enjoining, theirs being read in isolation, from, oral evidence adduced by the plaintiffs qua the pleaded factum, of, acquisition of right of passage, upon, the suit khasra number(s), rather ensuing qua them, on account of immemorial user thereof, by persons residing, in, the locality concerned, (b) nor ipso facto hence he afore reflections, not bestowing, upon, the plaintiff, an absolute indefeasible right of user of suit khasra number(s), as an apt passage, (c) besides rather contrary therewith oral evidence, of, immense potency, obviously, when, undermines veracity thereof, it, also benumbing the presumption, of truth enjoyed hence by the afore entries.

8. Nowat, hence, apart from hence negativing, the afore, presumption of truth, enjoyed by the afore reflections occurring, in the afore exhibits, it is also incumbent upon this Court, to further determine, whether, the pleaded factum probandum qua the acquisition of right of passage, upon, the suit khasra number(s), rather accruing, vis-a-vis, the plaintiffs, imperatively since times immemorial, (i) and, concomitantly, the apt espoused right acquiring the mantle of, right of absolute prescriptive user thereof, by the plaintiffs, (ii) rather hence also coming to be proved, by cogent evidence therewith, being adduced by the plaintiff. In the afore endeavour, PW-1 though testified qua his predecessor, using, the suit khasra number. However, his echoing qua therewith is frail, for, want of his predecessor(s) stepping into the witness box, (iii) also, for want of other persons, residing in the locality concerned, making corroborative therewith testifications, with, firm echoings therein qua the user of the contested suit path, rather occurring since times immemorial. Reiteratedly, with the afore apt evidence hence being grossly amiss hereat, rather with PW-2, in his testification, borne in his cross-examination, making an admission qa the contested suit passage, only leading upto the house of the defendants, (iv) and, thereafter though, he also makes, an echoing, qua, it also leading to the abodes, of the persons residing below the suit passage, (v) yet in succession thereof, hence failing to name the persons, whose abodes exist below the contested suit passage. Consequently, the effect(s) of an incisive reading thereof, obviously does make trite unfoldments, that, the contested suit passage, rather leading only to the house of the defendants, and, corollary thereof being qua the contested suit passage rather not leading upto the house of the plaintiff, (vi) and, therefrom, the, further inference is qua the plaintiffs, hence, making a false propagation qua theirs hence using the contested suit passage, for egressing into or ingressing from their abodes. Furthermore, with thereafter PW-2 in his cross-examination also making an admission qua the plaintiffs' hence, for making repairs, of, their septic tank, making user, of, rather a path alternative, to, the contested suit path, (vii) and, his also making an echoing, that, the plaintiffs, being also facilitated, to, effect repairs to the septic tank, from, within, the boundaries of the khasra numbers, as, owned and possessed by them, (viii) thereupon, a firm clinching inference, is, garnerable qua the plaintiff, even for effecting repairs, of, the septic tank, rather holding an apt alternative passage hence to arrive thereupto, (ix) and, when a passage alternative to the suit passage, is available hence for the afore purpose, to, the plaintiffs, thereupon, they are barred to espouse that they hence hold any easementary right of

necessity, or prescription rather to trudge, upon, the suit passage, for any purpose whatsoever.

9. In summa, the afore reliance, upon, the afore reflections, occurring in Ex. PW1/A and, Ex.PW1/B, cannot, (i) subsume the effect of the pleadings, reared by the plaintiffs in their plaint, wherethrough, they rather claim a right of easement by prescription, vis-a-vis, the contested passage, (ii) reiteratedly when evidence adduced qua therewith, for reasons aforestated, is both frail, and, weak, (iii) nor ipso facto hence the afore reflections, can in the least empower, the plaintiff to claim a right, of, passage, upon, the contested suit khasra number(s), (iv) rather rendition of an affirmative decree, vis-a-vis, the plaintiff would cause an immense casualty, to, the afore oral evidence adversarial, to the afore reflections, occurring in the afore exhibits, (v) besides would untenably solitarily empower, the, plaintiffs, to, use the suit khasra number(s), as a path, despite, no other person residing in the locality, using it, for the afore purpose, (vi) whereas, for the afore entry to carry any aura of truth or veracity, evident user, of, the suit passage, as a path, by the entire public hence residing in the locality concerned, was imperative, (vii) thereupon, it appears that the afore entry, is, merely a paper entry, hence carries no relevance, for, enabling the plaintiffs to derive any strength hence whatsoever therefrom, (viii) thereupon, the presumption, of, truth, if any, carried by the afore entriy, is, fully effaced.

10. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court, being based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court, have not, excluded germane and apposite material from consideration. Accordingly, the substantial questions of law are answered in favour of the respondents and against the appellants.

11. In view of the above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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

Virender Singh & another ...Appellants/Defendants
Versus
Shyam Lal ....Respondent/Plaintiff.

RSA No. 384 of 2004.
Reserved on : 14th December, 2018.
Decided on : 31st December, 2018.

Torts – Assault – Bodily injuries – Damages – Trial Court dismissing suit filed for damages for inflicting bodily injuries on plaintiff – First appellate court partly allowing appeal and decreeing suit in part - RSA – Held, acquittal of defendants in criminal case arising from same incident *ipso facto* not valid reason for dismissal of suit – Suit to be decided on basis of pleadings made in plaint and evidence adduced to support them – On facts, evidence not showing that disability suffered by plaintiff was result of assault of defendants – Causal nexus between injuries and assault not proved – Plaintiff not entitled for damages – RSA

allowed – Decree of first appellate court set aside and that of trial court restored. (Paras 7 to 10)

For the Appellants:	Ms. Jyotsana Rewal Dua, Sr. Advocate with Ms. Charu Gupta, Advocate.
For the Respondent:	Mr. Karan Singh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal is directed by the defendants/appellants herein, against, the verdict recorded, upon, Civil Appeal No. 88-CA/13 of 2003 by the learned District Judge, Sirmaur District at Nahan, wherethrough, he after reversing the verdict, of,dismissal of the plaintiff's suit, rendered by the learned trial Court, partly decreed the plaintiff's suit, for, damages comprised in a sum of Rs.50,000/-, subject to the requisite court fees, vis-a-vis, the afore sum being, within a period of 15 days, appended upon the plaint.

2. Briefly stated the facts of the case are that the plaintiff is employed as driver in HRTC, Nahan. On 24.11.1997, around 9 a.m., the plaintiff was on duty on Bus No.HP-18-3546. He was driving the bus, in question from Village Vasni to Sarahan. When the plaintiff reached at village Bhelan bus stop, the defendants Virender Singh and Gian Singh stopped the bus, without any provocation and with criminal intent assaulted the plaintiff while he was sitting on driver's seat. He was dragged out of the driver sat. The defendants gave him blows of fist and legs, as a result of which he fell down in the Nali. The defendants continued assaulting him with their fists and feet. Resultantly, the left leg of the plaintiff was fractured at the knee joint. The defendants have also inflicted injuries on the head on left and right side by hitting him from feet. He was also hit in the stomach. As a result of serious injuries, the plaintiff remained admitted in Sarahan hospital for 10 days. He remained bed ridden and looked after by two attendants. From Sarahan Government Hospital, he was referred to District Hospital Nahan, from where he was further referred to PGI, Chandigarh for treatment. The The plaintiff's case is that he is still under treatment and is unable to do his duties of driving. He can only stand and move with the help of support. Despite having remained under treatment, the plaintiff's case is his knee joint remains swollen. The Specialist at PGI, according to him, advised operation of knee joint and left leg The operation was advised in the month of June, 2000. The plaintiff's further case is that before the said incident, he was an efficient driver and he was able to work for 10to 12 hours a day. He was earning about 12,000/- per month. But, after the incident, he avers, he cannot under take the driving of bus, he has been given light duty, and, has been suffering a loss of Rs.4,000/- per month ever since the occurrence. The plaintiff avers that he has been crippled for life and he is unable to lead now a normal life. The plaintiff's case is that, on 15.1.2000, though, he sent a registered notice to the defendant,s but they refused to receive the same. This how the plaintiff's suit for damages/compensation of Rs.1,50,000/- was laid by him in the trial Court.

3. The defendants contested the suit and filed written statement, wherein, they have taken preliminary objection qua maintainability, non joinder of necessary parties and court fee. On merits, it is denied by the defendants that had inflicted any injuries on the person of the plaintiff.

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

1. Whether the plaintiff was assaulted by the defendants and sustained injuries and thereby plaintiff became incapable to lead a normal life, as alleged? OPP
2. If issue No.1, is answered in affirmative, whether the plaintiff is entitled to the damage, if so what amount?OPP
3. Whether the suit is not maintainable in the present form, as alleged?OPD
4. Whether the suit is bad for non joinder of necessary parties, as alleged? OPD.
5. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as alleged?OPD.
6. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff/respondent herein. In an appeal, preferred therefrom, by, the plaintiff/respondent herein, before the learned First Appellate Court, the latter Court partly allowed, the, appeal, and, reversed the findings recorded by the learned trial Court.

6. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 23.8.2004, 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:-

> d) Whether the ld. Appellate Court erred in law in reversing the decree of ld. Trial Court when there is absolutely no evidence on record whatsoever to link the alleged injury of the respondent, with the appellants. And therefore whether the impugned judgment and decree suffers from misreading and not appreciating the entire evidence on record of the case?

Substantial question of Law No.1:

7. The suit for damages, arising, from the tort of assault, allegedly perpetrated by the defendants, upon, the plaintiff, enjoined adduction of cogent proof, vis-a-vis, the afore assault, being, hence perpetrated by the defendants. A judgement of acquittal, pronounced by the learned trial Court concerned, upon, criminal case No. 37/2 of 97, as, arose from, an incident similar qua wherewith the instant suit has been filed, is borne in Ex.D-1. However, even if, the afore verdict of acquittal, as, borne in the afore exhibit, has acquired conclusivity, yet it may not oust the plaintiff, to, canvass for rendition of a decree for damages, arising from, his being assaulted hence by the defendants, (a) upon, cogent evidence existing on record in proof of the averments, as, reared in the plaint. The afore evidence is comprised in the evidence of PW-1, PW-2 and PW-3. Even if, the afore Pws hence rendered rather testifications in corroboration, vis-a-vis, the averments in respect thereof, carried in the plaint, however, the plaintiff was also enjoined to prove, the, factum probandum (a) qua the injuries entailed upon his person in sequel to his being allegedly assaulted, by the defendants, thereupon, rather in immediate sequel thereto or in quick spontaneity thereto, hence begetting entailment, of, a severe disability, upon, his person, (b) whereafter he evidently stood precluded or deterred to perform the duties appertaining to his employment. The MLC prepared immediately subsequent to the occurrence, and, embodied in Mark-A, rather on its closest, and, incisive perusal, omits to make unfoldments, qua any

severe critical injuries being encumbered, upon, the plaintiff. Furthermore, with PW-6, who, in quick spontaneity to the afore assault, hence proceeded to medically examine the plaintiff, rather echoing in his deposition comprised in his examination-in-chief, qua his referring the plaintiff for X-ray examination, and, thereafter in his cross-examination, his, making disclosures, that, the expert concerned, hence, opining qua in sequel to the injuries suffered by the plaintiff in the relevant assault, rather no fracture being entailed upon his person. The effect thereof, when construed in entwinement, with, the deposition of PW-4, who, issued disability certificate borne in Ex.PW4/A, and, who during the course of his examination-in-chief, has hence proven it, conspicuously, with his in his cross-examination rather making an echoing, (a) that the injuries in sequel whereof Ex.PW4/A stood issued, appertaining to a period three or four months earlier thereto, (b) thereupon, when Ex.PW4/A, stood issued in the year 2000, whereas, the alleged assault occurred in the year 1997, (c) thereupon, when the disability as testified by PW-4, in his cross-examination, is echoed therein, to hence stand entailed upon the person of the plaintiff, hence, visibly, is, a sequel, of, injuries suffered, upon, his person, rather three or four months earlier qua its issuance, (d) rather fosters an inference that the disability certificate borne in Ex.PW4/A, remaining, visibly grossly unconnected, and, unrelated to the afore alleged assault, even if it stood proven, by the depositions of PW-1 to PW-3. Corollary whereof, sparks a further inference qua that the dependence made by the learned First Appellate Court, upon, the oral testification of the plaintiff, (e) qua in sequel to the afore disability, his remaining confined in bed for six months, and, thereafter, the learned First Appellate Court, hence, towards loss of extra salary payable, to the plaintiff, arising, from the nature of the duties appertaining to his avocation, hence, assessing compensation, borne in a sum of Rs.24,000/-, (f) and, also in the learned First Appellate Court rather proceeding to assess a sum of Rs.20,000/- on account of pain, suffering and loss of comforts, and, Rs.6,000/- in lieu of gratuitous services, (f) resultantly has wandered astray from the afore best documentary evidence, (g) conspicuously, given the afore best documentary evidence, omitting to establish the requisite proximity inter se the assault, and, consequent therewith disability encumbered, upon, the plaintiff, as pronounced in Ex.PW4/A, (h) AND, hence, the apt applicable hereat doctrine, of, remoteness of damages, rather working with its fullest negating effects, vis-a-vis, the plaintiff's suit.

8. The above discussion, unfolds, that the conclusions as arrived by the learned First Appellate Court hence being not based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Accordingly, the substantial question of law, is, answered in favour of the appellants/defendants, and, against the plaintiff/respondent.

9. In view of the above discussion, the instant appeal is allowed and in sequel, the, judgment and decree rendered by the learned First Appellate Court, upon, Civil Appeal No.88-CA/13 of 2003 is set aside, whereas, the judgment and decree rendered by the learned trial Court upon Civil Suit No. 59/1 of 2000, is, affirmed and maintained. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

Bajaj Allianz General Insurance Co. Ltd. .....Appellant.
Versus

Sushil Bhimta & Others .....Respondents.

FAO No. 79 of 2017 along
with FAO No. 141 of 2017.
Reserved on: 18th December, 2018.
Decided on : 31st December, 2018.

Motor Vehicles Act, 1988 – Section 166 – Motor accident - Claim application – Bodily injuries – Permanent disability – Quardi paraplegia – Compensation - Tribunal taking *quardi paraplegia* as permanent disability and granting compensation accordingly including amount towards loss of enjoyment of life but with deductions – Appeal by insurer - Insurer relying upon CD prepared by its investigator showing claimants capability to sit or stand with help of hands – Held, in *quardi paraplegia* person may have sensation in limbs but he cannot move – Being case of total impairment of limbs of claimant, he is entitled for permanent loss of income and permanent loss of enjoyment of life – Deductions of 10 % made by Tribunal, thus, wrong – Appeal of claimant allowed - Award modified. (Para 3)

Cases referred:
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700
State of Haryana and another vs. Jasbir Kaur and others, 2003 ACJ 1800

For the Appellant(s):	Mr. Jagdish Thakur, Advocate, for the appellant in FAO No. 79 of 2017 and Mr. Virender Sharma, Advocate, for the appellant in FAO No. 141 of 2018.
For Respondent No. 1:	Mr. Virender Sharma, Advocate for respondent No.1 in FAO No. 79 of 2017 and Mr. Sanjay Sharma, Advocate, for respondent No.1. in FAO No. 141 of 2017.
For Respondent No.2:	Mr. Sanajay Sharma, Advocate, for respondent No.2 in FAO No.79 of 2017. Ms. Monika Singh, Advocate, for respondent No.2 in FAO No.141 of 2017.
For Respondent No.3:	Ms. Monika Singh, Advocate, for respondent No.3 in FAO No. 79 of 2017.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Both the afore FAOs, arise, from a award pronounced, by the learned Motor Accidents Claims Tribunal (IV), Shimla, H. P., upon, MACT Petition RBT No. 112/-S/2 of 2014, and, the respectively aggrieved therefrom, the claimant, and, the insurer, respectively raised contention(s) therein, vis-a-vis, the amount of compensation determined therein, warranting enhancement, and, reduction. Since, obviously both the afore FAOs, stand directed against a common award, hence, both are amenable for rendition of a common verdict thereon.

2. The learned counsel, appearing for the insurer of the offending vehicle, does not, contest the validity, of, affirmative findings returned, (a) upon, the issue appertaining to the relevant accident, being a sequel of rash and negligent manner of driving of the

offending vehicle, by its driver, namely, Vishal Shankra, and, (b) nor he contests, the, fastening of the apposite indemnificatory liability, upon, the insurer of the offending vehicle.

3. In sequel to the injuries entailed, upon, the claimant, 90% disability as encapsulated, in, the apposite disability certificate, embodied in Ex.PW6/M, hence stood encumbered, upon, the claimant. Dr. Lokinder Sharma, who stepped into the witness box, as PW-7, (a) has, in his deposition comprised in his examination-in-chief, made graphic echoings, qua with the passage of time, the, physical condition of the claimant, rather, than improving would deteriorate, and, he has further voiced therein, that, the claimant would be requiring regular follow up treatment. He has also in his deposition, echoed, qua the disability would impede the claimant, in his enjoying hence connubial bliss. The insurer has not contested the factum, that, the disability, certificate borne in Ex.PW6/M, being connected with the injuries, hence, suffered, in the relevant accident, by the claimant. However, the learned counsel for the insurer has contended, with much vigour before this Court, (i) that the afore echoings, borne in the deposition of PW-7, who authored Ex.PW6/M, coming under an eclipse, (ii) given RW-2, an Investigator appointed by the Insurer, for determining the physical condition, of the claimant, after interacting with the claimant, his preparing CD, borne in Ex.RW2/A, and, also with his in consonance therewith, rendering, a, deposition qua his, at the relevant time, hence noticing the petitioner/claimant's movement of limbs, being free from any hindrance, (iii) and, also with RW-4, (Dr. Jabon Pramodh Kumar), in his deposition comprised in his examination-in-chief, testifying, qua a person, suffering from quardi paralegia rather being unable to move his four limbs, i.e. both hands and both legs, and, with his further testifying, that, on his watching, the CD, borne in Ex.RW2/A, his noticing that the claimant, is, standing with help of his hands, and, his also noticing, in, the CD that the claimant is sitting with the help of his hands, (iv) thereupon, the per centum of disability pronounced in Ex.PW6/M, being amenable for discarding, and, also hence no invincible conclusion being formable (a) qua any permanent loss of enjoyment of life, hence, besetting the claimant; (b) or any permanent loss of income to the claimant, from his purported avocation, also being beset upon him, (c) and, nor permanent loss of enjoyment of connubial bliss, rather also being encumbered, upon, him, hence compensation as assessed upon the claimant, rather warranting reduction. However, the afore evidence, does not, have the apt befitting effect, for, hence repulsing the pronouncement(s), occurring in Ex.PW6/M, (d) given RW-2 in his cross-examination, making an echoing, that, his not holding, a, MBBS degree, and, with his also making, an, articulation qua, a, patient afflicted with quardic paraplegia, being hindered or precluded, to perform day to day activities, except with the help, of attendants, (e) and, further with PW-4, in his cross-examination, admitting that Ex.PW6/M, stands issued by the Medical Board, as per the norms, and, his also admitting, that, a patient of quadriplegia, can have sensation in his limbs, but, he cannot move them, (f) and, with RW4 thereafter admitting, that the if, there were chances improvement, in the condition of the claimant, rather only, a, temporary disability certificate, would stand issued, than, a permanent disability certificate. Consequently, the further effect, thereof, is that rather there being, a, total impairment of the limbs of the claimant, and, hence concomitant loss of enjoyment of life, and, permanent loss of income, permanent loss of enjoyment, of, marital bliss, rather besetting him (g) thereupon, in the learned tribunal hence meteing 10% deductions, vis-a-vis, the loss of earning capacity, vis-a-vis, the hitherto income derived by the claimants, as a class-C contractor, or as agriculturist, rather is, amenable for interference.

4. The learned counsel appearing, for the insurer, (i) does not contest the factum of the claimant, prior to the befallment of the disability, upon, him, being an enlisted class-C contractor with the HPPWD, factum whereof, is, pronounced in the deposition of PW-8. (ii) Though, the petitioner/claimant, has contended, that, he was drawing an income

of Rs.65,000/- per month, from, his avocation. However, the learned tribunal, in respect of the afore avocation, and, on anvil of Ex.PW5/A to Ex.PW5/J, has determined, qua his apposite income therefrom, being pegged in a sum of Rs.20,000/- per month. However, the afore exhibits respectively, pronounce qua the works awarded to the claimants rather standing respectively comprised, in, a sum of Rs.3,75,215/-, Rs.32,000/-, Rs.40,000/-, Rs.45,600, Rs.61,600/-, Rs.26,950, Rs.24,000/-, Rs.2,40,000 and Rs.2,40,000/-. Even though, the awarding of the afore works, hence, occur in close proximity to the accident, and, may constrain this Court, to hold qua the claimant, hence, earning a handsome amount, from his avocation, as, an enlisted Class-C contractor, with the HPPWD department, (a) yet with the afore exhibits rather disclosing the afore awarded works, being comprised in sums of money, lesser than the per mensem income as pleaded, by the claimant, to, stand reared by him, as, an enlisted Class-C contractor, (b) hence it was unbefitting to the learned tribunal, to hold, that, the claimant, is, deriving a sum of Rs.20,000/- per mensem, as an enlisted Class-C contractor, with, the HPPWD department. Nonetheless, it is contended by the learned counsel, for the claimant, that with no evidence hence coming on record, that, during the period of his being, enlisted as a Class-C contractor with the HPPWD department, his being black listed, thereupon, he would in future assuredly stand enlisted, as, a Class-A contractor, and, stand awarded works, holding a sum higher than the one in respect whereof, he stood awarded works, as disclosed in Ex.PW5/A to Ex.PW5/J. However, the afore contention, remains in the realm of conjectures, presumptions, and, assumption, and, it cannot be accepted. Consequently, it is to be concluded, that, the claimant, hence, reasonably deriving an income of Rs.5000/- per month from his avocation, as an enlisted Class-C contractor, and, qua therewith given his being incapacitated, by, perennial disability, to, rear it, hence his being recompensed.

5. The learned counsel for the claimant has contended with much vigour, that, in consonance with the verdict, pronounced by the Hon'ble Apex Court in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700***, (i) even with respect, to, a person employed in a non government organization, and, vis-a-vis, the self employed person, the meteing(s), of hikes towards future prospects, in the relevant income, is, enjoined to be meted, (i) thereupon, the meteing of hikes, towards, future prospects also being meteable to the claimant, who was, at the relevant time, engaged as a Class-C, contractor, and, was also deriving income, from his horticultural and agricultural avocations, as evident, from, his uncontrovertedly, hence, holding five bighas of land, whereon, he has reared an apple orchard, (ii) and, his also making disclosure in his examination-in-chief, qua, his rearing an income of Rs.four lacs therefrom. However, the afore contention cannot be accepted, given, the meteing of hikes towards future prospects, being only, vis-a-vis, employees in a government sector, or, in a non government sector, or, vis-a-vis, self employed person, (iii) or, vis-a-vis, entrepreneurs rearing settled, and, secure incomes, and also all, the afore employment(s) or entrepreneurship(s), necessarily enjoin eruption(s) of certain income(s) therefrom, or eruption(s) of certain income(s), from, any afore employment(s), also, holding an aura of continuity in future. Since, the awarding of works to the claimant, as an enlisted class-C contractor, and, his rearing income, from his orchard, comprised in a sum of Rs. Four lacs per mensem, are both entrenched with an aura of uncertainty, (iv) AND, the rearings, of, income, from, the apple orchard owned by the claimant, is, also subject, to, variations, rather is dependent, upon, vagaries, of,nature (v) thereupon, when the afore hitherto sources, of, incomes hence cannot be concluded to satiate the afore parameters, applicable, to certain, and, settled incomes, reared from, a partnership firm, or from a private limited company, nor when the afore sources can be concluded, to, fall within the category, of, employment, (vi) thereupon, it would be unbefitting to conclude, that, there would be any accretions, in the income(s) reared

therefrom, nor it can be concluded, that, it being appropriate, to mete hikes towards future gains, if any, thereto.

6. Be that as it may, the learned counsel appearing for the insurer has contended, with much vigour while relying, upon, a judgment of the Hon'ble Apex Court rendered in a case titled as ***State of Haryana and another vs. Jasbir Kaur and others***, reported in ***2003 ACJ 1800,*** that, despite 100% disability entailed, upon, the claimant, with, concomitant permanent loss of income, to the claimant, from, his avocation as an horticulturist, and, as an agriculturist, (i) nonetheless, with the land whereon, the, apple orchard exists, yet remaining intact, and, rather it being amenable, for rearing apple crops thereon, rather by engagement of persons, thereupon, a sum of Rs.12,500/- per mensem, assessed as loss of agricultural income, does rather warrant interference. The relevant paragraph No.8, of, the afore verdict, stands extracted hereinafter:-

> "8. It is clear on a bare reading of the Tribunal's decision as affirmed by the High Court that no material was placed before the former to prove as to what was the income. As rightly contended by learned counsel for the appellants, there was not even any material adduced to show type of land which the deceased possessed. The matter can be approached from a different angle. The land possessed by the deceased still remains with the claimants as his legal heirs. There is however a possibility that the claimants may be required to engage persons to look after agriculture. Therefore, the normal rule about the deprivation of income is not strictly applicable to cases where agricultural income is the source. Attendant circumstances have to be considered. Furthermore, there was no material before the Tribunal to arrive at the figure of Rs.4500 per month. No reason has been indicated to arrive at this figure. In the light of what has been discussed above about "just compensation" the income cannot be estimated without any material to justify the estimation. In the normal course, we would have remitted the matter back to the Tribunal for fresh consideration. But considering the fact that one young person lost his life, and the matter was pending before the Tribunal and the High Court for some years, we feel it appropriate to take all relevant factors into consideration, and decide the matter. Gauzing the relevant aspects, noted above, the monthly income is fixed at Rs.3000/- per month, and after deducting Rs.1,000/- for personal expenses, financial contribution so far as the claimants are concerned is fixed at Rs.2,000/- per month. Worked out on the basis of multiplier of 18, the compensation is fixed at Rs.4,32,000/-. The amount of Rs.2,000/- awarded by the Tribunal for funeral expenses is not interfered with and thus the total compensation comes to Rs.4,34,000/-. The rate of interest i.e. 9% per annum as fixed by the Tribunal and affirmed by the High Court is appropriate, and does not need any alteration. After adjusting the sum which was deposited pursuant to the order of this Court dated 14.12.2001, the balance amount along with interest shall be deposited within three months from today before the Tribunal. On the deposit being made along with the amount already deposited, a sum of Rs.3 lakhs shall be kept in the fixed deposit in the name of the claimants and a sum of Rs.50,000/- shall be kept in fixed deposit in the name of Smt. Baldev Kaur, mother of the deceased. They shall be entitled to draw interest on the deposit, which shall be re-deposited for further terms of five years. In case of urgent need, it shall be open to the claimants to move Tribunal for release of any part of the amount in deposit. The Tribunal shall consider the request for withdrawal and shall direct withdrawal in case of an urgent need and not otherwise of such sum as would meet the need. It shall be specifically indicated

to the Bank where the deposits are to be made that no advance or withdrawal of any kind shall be permitted without the order of the Tribunal. It shall be open to the claimants to approach the Tribunal for variance of the order relating to deposit in fixed deposit, if any other scheme would fetch better returns and also would provide regular and permanent income."

The afore decision would be applicable hereat, only when, the claimant, was hitherto evidently hence personally performing, the apt agricultural work, (I) and, upon entailment, of, a disability, upon, him, his, being constrained, to engage hence attendants or supervisors hence for the relevant purpose. Moreover, in the afore extracted portion thereof, no, rigorous principle hence stands propounded qua the learned tribunals, despite, a 100% disability, being encumbered, upon, the claimant, with a concomitant 100% loss of income, from, his agricultural, and, horticultural pursuits, and, with the land yet remaining intact, for rearing crops therefrom, hence, it being unbefitting, to, award compensation, to, the claimant towards loss of income, from, horticultural or agricultural sources, (ii) rather when it impliedly stands propounded therein, that, in the absence of the disabled claimant, hence, personally attending, the, apt horticultural or agricultural work, his, in the face of the disability encumbered upon him, being led to engage other persons, to perform, the apt agricultural work, and, the expenses incurred by him, for his engaging, other persons, being rather befittingly assessable towards loss, of, agricultural income, arising from, a, 100% disability being encumbered, upon, the claimant. Consequently, when in concurrence, with the latter parameter, hence, the claimant in his cross-examination, rather denied the suggestion qua his not engaging attendants, for, attending the apt agricultural or horticultural works, upon, his land, and, his paying them Rs.6000, to, Rs.8000 per mensem, (iii) AND, further, with the claimant in his deposition comprised in his examination-in-chief, making echoings qua, a, caretaker standing engaged by him, on a monthly salary, and, the insurer, omitting to subject him to cross-examination, qua the afore facet, (iv) thereupon, it is to be concluded, that, in the face of the disability encumbered, upon, the claimant, he is defraying to the afore two attendants, a, sum of Rs.15,000/- per mensem.

7. However, the claimant, in his deposition omitted to disclose that prior to his being encumbered with 100% disability, his personally, hence performing the relevant avocation, of, agriculture or horticulture, (i) thereupon, it stands concluded, that, even prior to the relevant mishap, he, was engaging hence labourers, for doing the relevant works, and, when he further discloses, that, thereafter also his engaging attendants, for doing, the relevant works, (ii) AND with his disclosing, in his, testification, that, he was drawing an income of Rs.four lacs per annum, from, his orchard, hence, without his producing any record or bills personifying, qua the apposite sale proceeds rather carrying sums equivalent thereto, hence, after deducting, all the relevant expenditures, rather it deemed fit to infer qua his drawing, an, income of Rs.2 lacs per annum, from, his orchard.

7. In the result, both the appeals are partly allowed, and, the impugned award is modified, and, it is held, that, the appellant, shall be entitled, to compensation under different heads, details whereof, are enunciated hereinafter:-

Head	Calculation	Total
Compensation on account of pain and suffering	As awarded by the learned tribunal	Rs.1,00,000/-
Loss of future earnings on account of permanent	Rs.5000 (monthly income of the claimant from his	Rs.9,00,000/-

disability	avocation as Class-c contractor) x 12 x 15	
Compensation on account of expenditure on medicines	As awarded by the learned tribunal	Rs.16,00,000/-
Compensation on account of Hospitalization charges	As awarded by the learned tribunal	Rs.28,000/-
Compensation on account of attendant charges during hospitalization	As awarded by the learned tribunal.	Rs.30,000/-
Compensation on account of future attendant charges	As awarded by the learned Tribunal	Rs.24,00,000/-
Compensation on account of future medical expenses	As awarded by the learned Tribunal	Rs.9,00,000/-
Compensation on account of amenities and loss of expectation of life	As awarded by the learned tribunal	Rs.1,00,000/-
Loss of enjoyment of connubial bliss		Rs.3,00,000/-
Loss of Agricultural income/ labour charges for performing the agricultural work	Rs.15,000/-x12x15	Rs,27,00,000/-
Total		Rs,90,58,000/-

8. Consequently, the insurer of the offending vehicle is directed to defray to the claimant total compensation of Rs.90,58,000 (Rs. Ninety lacs, fifty eight thousand only) along with interest @ 9% per annum from the date of filing of the petition till deposit thereof, within a period of three months from today. All pending applications also stand disposed of. Records be sent back forthwith.

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

Rameshwar Sharma .....Petitioner.

Versus

State of H.P. & others .....Respondents.

CWP No. 2710 of 2017.
Reserved on : 19th December, 2018.
Decided on : 31st December, 2018.

Himachal Pradesh Judicial Officers (Pay and conditions of service) Act, 2003 – Pensionary benefits - Judicial officers retiring between 1.7.1996 to 31.12.2005 — Grant of enhancement on and with effect from 1.1.2006 - Office memorandum dated 14.10.2009 – Held, for fitment weightage existing pension is to be re-calculated after excluding merged dearness relief of 50 % from pension. (Paras 2 & 3)

For the Petitioner:	Petitioner in person.
For Respondent No.1 and 4:	Mr. Hemant Vaid, Mr. Desh Raj Addl. Advocates General with Mr. Vikrant Chandel and Mr. Y. S. Thakur, Dy. A.Gs.
For Respondent No.2:	Mr. Shashi Shirshoo, Central Government Counsel.
For Respondent No.3:	Mr. J.L. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

Through, the instant petition, the petitioner seeks quashing of Annexure P-12, and, of Annexure P-13.

2. The afore annexures, comprise, the, pension payment orders, prepared by the authorities concerned, and hence, fix the pension disburseable to the petitioner. The afore prayer for quashing of the afore annexures, is, anvilled upon, Annexure P-8, (a) Annexure whereof is issued in pursuance to the directions rendered by the Hon'ble Apex Court, in IA No.339, and, in 336 in WP No. 1022/1989, the apt conspicuous underlined portion, of, the afore annexure, stands, extracted hereinafter:-

> "5. Now, therefore, in compliance to directions dated 14.07.2016 of the Hon'ble Supreme Court of India passed n I.A. No.339 and 336 in WP No. 1022/1989, the Governor, Himachal Pradesh is pleased to implement the order dated 08.10.2012 of the Hon'ble Apex Court, passed in IA No.5 of 2009 in IA No.244 in writ petition (C) NO. 1022/1989 in respect of H.P. State Judicial Officers as under:-
>
> (i) The Pensions of the Himachal Pradesh Judicial Officers retired between the period 01.07.1996 to 31.12.2005 as fixed in terms of Government letter No. Fin (Pen) A(3)-4/2005 dated 20th October 2005 will be revised by raising the same by 3.07 times, w.e.f. 01.01.2006.
>
> Provided, above revised pension shall be subject to minimum of 50% of the revised pay scales applicable from 01.01.2006 corresponding to the pre-revised pay scales from which such pensioners had retired/died in harness."

(b) whereunder, a, peremptory diktat is enjoined, upon, the relevant authorities, to, vis-a-vis, the officers serving, in, the Himachal Pradesh judiciary, rather hence make the apt revision(s), in their pension, hence, by meteing deference, to, the coinage "by raising the same by 3.07 times, w.e.f. 01.01.2006". The trite conundrum which besets, this Court, for, its apt resting, is centered, upon, (c) a comparative reading of the afore underlined portion of Annexure P-8, vis-a-vis, Annexure R-2, appended with the reply of the respondents, annexure whereof, is issued, vis-a-vis, all pensioners/family pensioners, in category whereof, the petitioner uncontrovertedly falls, (d) and, whereunder, in, the apt hereinafter extracted portion thereof, a, mandate is cast qua, vis-a-vis, the afore category of pensioners, the requisite calculations for hence fixing, their pensions, rather enjoining exclusion, of,

merged dearness relief of 50%, reiteratedly, from, the apt calculations. The apt portion of Annexure R-2, annexure whereof, is, an office memorandum, issued on 14th October, 2009, stands extracted hereinafter:-

> "Where the existing pension in (I) above includes the effect of merger of 50% of dearness relief w.e.f. 01.04.2004, the existing pension for the purpose of fitment weightage will be re-calculated after excluding the merged dearness relief of 50% from the pension."

3. Even though, the petitioner, has, contended with vigour before this Court (i) that the afore extracted portion, of, Annexure P-8, rather warranting, the, strictest absolute compliance therewith, (ii) given it being issued in consonance with the verdict pronounced, by the Hon'ble Apex Court. However, for the reasons to be ascribed hereinafter, his contention, is, both frail, and, feeble, given (a) the verdict of the Hon'ble Apex Court, as, directed to be put into force, through, the office memorandum, embodied in Annexure P-8, being rendered in the year 2012, (b) whereas, the afore extracted unfoldments, as, occur in Annexure R-2, being issued in the year 2009, hence visibly earlier therewith, (c) thereupon, the verdict pronounced by the Hon'ble Apex Court, and, as embodied in Annexure P-6/T, was, obviously required to make imperative disclosures, qua all the effect(s) thereof rather being borne in mind, by the Hon'ble Apex Court,(d) also echoings were, to, occur therein, qua the Hon'ble Apex Court also making directions, qua the apt hereinabove extracted portion, of Annexure R-2, neither being enjoined to be borne in mind, nor compliance therewith, being required to be meted by the authorities concerned, in theirs, drawing pension/pension payment orders, of judicial officers serving in the Himachal Pradesh judiciary, reiteratedly, emphasisngly, hence, in, the authorities rather recalculating, the, apposite pensionary benefits, in, compliance therewith. The effect of evident afore reticences therein, hence, constrains this Court to conclude, that, the all unfoldments borne in Annexure R-2 remaining alive, and, acquiring force, (i) and, the pension payment orders, as, prepared by the authorities concerned, and, as embodied in Annexure P-12 and P-13, rather standing validly drawn in consonance therewith, (ii) thereupon, to avoid rendition of a decision, in conflict therewith, and, also to preclude rendition, of a, decision per incuriam therewith, (iii)the might of the apt portion extracted hereinabove of Annexure R-2, also acquires its relevant command, and, clout, and, as a corollary thereof, the impugned annexures, do not, warrant theirs being quashed and set aside.

4. For the foregoing reasons, there is no merit, in the instant petition, and, it is dismissed accordingly. All pending applications also stand disposed of. No costs.

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

Joginder Pal and ors. ....Appellants

Versus

Devki and ors. ....Respondents

RSA No. 555/2016
Decided on : 25.7.2017

Code of Civil Procedure, 1908 – Order XX Rule 18 - Order XXVI Rules 9 and 14 – Final decree – Local Commissioner – Report – Objections thereto – Mode of disposal – Held, in final decree proceedings, party objecting to report of local Commissioner entitled to lead evidence

to substantiate its objections including examination of Commissioner – On that material, court may vary, affirm or set aside report. (Paras 13 to 15)

Cases referred:

Bhupinder Kishore vs. Fateh Singh Yadav and others, (2015-2) 178 P.L.R. 578
Chander Parkash vs. Ved Parkash and others, Punjab Law Reporters (Vol. XCIX-(1991-1
Dhadi Barik and others vs. Arjun Barik and others, AIR 1986 ORISSA 203
Gopal Dass and others vs. Bismanchali, 2009(2) Shim. LC 250
Gourhari Das and another vs. Jaharlal Seal and another, AIR (44) 1957 CALCUTTA 90
Nasir Ahmad and another vs. Sarfaraz-ur-Rahman Khan and others, AIR 1935 Lahore 501
Om Parkash vs. Ved Parkash and others, AIR 2000 HP 45
Ram Murti Goyal and others vs. Smt. Basant Kaur and others, 1991 PLJ 147
Wazir Kanwal Singh vs. Wazir Baij Nath, AIR 1998 JAMMU AND KHASMIR 94

For the appellants: Mr. Nimish Gupta, Advocate.
For the respondents: Mr. N.K. Sood, Senior Advocate with Mr. Aman Sood, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan (oral):

This Regular Second Appeal under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 27.8.2016, passed by the learned Additional District Judge, Chamba in Civil Appeal No. 768/2014, whereby he affirmed the order and decree dated 9.7.2013, passed by the learned Civil Judge (Junior Division), Chamba, H.P. in CMA No. 14/20005.

2. Briefly stated the facts giving rise to the present appeal are that respondent No.1 filed a suit for partition with respect to the land comprised in Khata/Khatauni No.12/13, Khasra Nos. 124 and 136, measuring 58-6 sq. ft. and Khata/Khatauni No.13/14, Khasra Nos. 117, 122, 123, 124/1, measuring 99.7 sq. yards, situated at Kaswati Bhanjraru, Tehsil Churah, District Chamba, H.P. The appellant No.1 had raised specific plea that he is in possession of the property comprised in Khasra Nos.122 and 136 consisting of three storeyed pucca shops, however, the same was adjudicated and it was held that possession of one co-sharer is the possession of all the co-sharers and accordingly, learned trial court decreed the suit so filed by respondent No.1 vide judgment and decree dated 10.11.2000 and passed the preliminary decree for possession by partition in favour of respondent No.1 to the extent of her share i.e. 1/3rd share in Khata/Khatauni No.13/14, ½ share in Khata/Khatauni No.13/14 and ½ share out of property comprised in Khasra Nos. 124 and 136.

3. Indubitably, the preliminary decree passed by the learned trial court has been upheld uptill the Hon'ble Supreme Court. It appears that during the execution of the preliminary decree, the Local Commissioner was appointed to prepare the mode of partition and to partition the property in question by metes and bounds and to submit the report. The Local Commissioner submitted his report, whereby he suggested a particular mode of partition, which was assailed by the appellants along with proforma respondents, however, the learned executing court vide order dated 9.7.2013 dismissed the objections.

4. Aggrieved by the order dated 9.7.2013 passed by the executing court, the appellants approached the first appellate court, who, too vide judgment and decree dated

27.8.2016 affirmed the order passed by the learned trial court. Hence, the present regular second appeal.

5. Mr. Nimish Gupta, learned counsel for the appellants, has vehemently argued that the impugned judgments and decrees rendered by the learned courts below are liable to be quashed and set aside on the ground that before rejecting the objections so filed by the appellants, it was incumbent upon the courts below to have afforded an opportunity to them to examine the Local Commissioner as per mandate of Order 26 Rule 14 CPC.

6. Sh. N.K. Sood, learned Senior Advocate assisted by Mr. Aman Sood, Advocate, for the respondent would contend that the findings recorded by the learned courts below are strictly in accordance with the provisions envisaged in law, more particularly, the provisions as contained in Order 26 Rule 14 CPC, which do not mandate the examining of the Local Commissioner for the purpose of deciding the objections.

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

8. The following substantial question of law arises for consideration:

Whether the impugned judgments and decrees are vitiated because of non-examination of the Local Commissioner.

9. With the consent of the parties, the appeal is taken up for final hearing.

10. It would be noticed that the learned trial court has rejected the contention of the appellants primarily on the ground that the issue stands adjudicated uptill the Hon'ble Supreme Court and, therefore, the findings with respect to the possession have become final and the appellants, therefore, cannot be permitted to go beyond the decree and agitate the matter. Whereas, insofar as the first appellate court is concerned, even though the provisions of Order 26 Rules 13 and 14 CPC along with the judgment of the Punjab and Haryana High Court ***in Chander Parkash vs. Ved Parkash and others, reported in Punjab Law Reporters (Vol. XCIX-(1991-1)*** and judgment of the division bench of Calcutta High Court in ***Gourhari Das vs. Jaharlal Seal, AIR (44)1957 CALCUTTA 90*** were cited before it to canvass that it was necessary to examine the Local Commissioner before deciding the objections, but the said Court rejected the same by recording following reasons:-

"18. In the present case, no prayer was made by the respondents/objectors to call the Commissioner and to examine him by the objectors. Hence, the submission of the ld. counsel for the appellants, at this stage, that the trial court has decided the objections without examining the local commissioner and affording the opportunity of the appellants/objectors to lead the evidence is no sustainable."

11. Order 26 Rule 14 C.P.C. reads thus:-

"Procedure of Commissioner.- (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person

and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the court; and the court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

12. As early as in the year 1935, similar issue came up for consideration before the Lahore High Court in ***Nasir Ahmad and another vs. Sarfaraz-ur-Rahman Khan and others, AIR 1935 Lahore 501***, wherein it was held that even although there is no provision in CPC entitling a party, who objects to the report of the Commissioner, to produce evidence in support of his objections, Order 26 Rule 14 provides that the Court after hearing any objections, which the parties may make to the report or reports, shall confirm, vary or set aside the same. This implies that the parties are entitled to substantiate their objections, but in such case, as a rule of practice, the Commissioner should first be examined with reference to the objections, if any, and if it appears from the statement of the Commissioner that there is ground for further inquiry into any matter, which is raised in the objections, then the parties should be allowed to produce evidence or the Commissioner directed to amend his report accordingly.

13. In ***Gourhari Das and another vs. Jaharlal Seal and another, AIR (44) 1957 CALCUTTA 90***, a division bench of Calcutta High Court held that where in a partition suit, a Commissioner has been appointed, after the preliminary decree, to value the joint family dwelling houses, he should, while submitting his report, give reasons for the recommendations made by him. After the report is received, the parties should be given opportunity to file objections to the Commissioner's report. If any one of the parties prays for the examination of the Commissioner in Court that is to be allowed. As to what further evidence will be allowed to be adduced, it at all is to be determined by the Court after the Commissioner has been examined, and the Judge has formed an opinion as regards the objections raised by the parties.

14. In ***Dhadi Barik and others vs. Arjun Barik and others, AIR 1986 ORISSA 203***, it was held by a single Judge of Orissa High Court that a plain reading of Order 26 Rule 14(2), particularly the expression 'after hearing any objections which the parties may make to the report or reports' gives the impression that there is no embargo disabling a party raising objection to the report of the Commissioner in the final decree proceeding of a suit for partition to adduce evidence to substantiate the same. It cannot be interpreted that besides examining the Commissioner, no other witnesses can be examined. In other words, a party raising objection to the report of the Commissioner in the final decree proceeding of a suit for partition, can, besides examining the Commissioner, examine other witnesses to substantiate his objection and does not suffer from any legal disability therefor. It is apt to reproduce paras 6,7 and 8 of the judgment, which read thus:-

> *"6. A plain reading of Order 26 Rule 14(2) quoted above, particularly the expression 'after hearing any objections which the parties may make to the report or reports' gives the impression that there is no embargo disabling a party raising objection to the report of the Commissioner in the final decree proceeding of a suit for partition to adduce evidence to substantiate the same. It cannot be interpreted that besides examining the Commissioner, no other*

witnesses can be examined. In other words, a party raising objection to the report of the Commissioner in the final decree proceeding of a suit for partition, can, besides examining the Commissioner, examine other witnesses to substantiate his objection and does not suffer from any legal disability therefor.

7. Authorities to throw light on the subject of discussion are very scarce. No decision of this Court could be cited at the bar to illuminate on the subject of controversy, perhaps because of the uniformity of practice in the Civil courts of the State of examining the Commissioner alone to substantiate objections to his report in final decree proceeding in partition suits. Two decisions reported in AIR 1935 Lah 501, Nazir Ahmed v. Sarfraz-ur-Rahman Khan and AIR 1957 Cal 90, Gourhari Das v. Jaharlal Seal were cited. A Division Bench of Lahore High Court in the case of Nazir Ahmad examined the provisions of Order 26 Rule 14 of the Code and observed : --

"This implies that the parties are entitled to substantiate their objections but in such cases as a rule of practice the Commissioner should first be examined with reference to the objections, if any, and if it appears from the statement of the Commissioner that there is ground for further enquiry into any matter which is raised in the objections then the parties should be allowed to produce evidence or the Commissioner directed to amend his report accordingly. In my opinion in the present case the Court should have examined the Commissioner to ascertain from him whether he had excluded from his valuation the improvements if any made by the appellants to the property in dispute. If he had not excluded them, then the Court should have given opportunity to the appellants to prove that They had made improvements or should have directed the Commissioner to report whether any improvements had been made by the appellants and to submit a report as to their value."

A Division Bench of the Calcutta High Court similarly examined the same provisions and observed :--

"From the report submitted by the Commissioner it further appears that no reason, either general or detailed, have been given for fixing the valuations of the different items of property. It is desirable that the Commissioner should submit a supplementary report giving the reasons for the recommendations made by him. After such a supplementary report is received, the parties will be given opportunity to file objections to the Commissioner's report. If any one of the parties prays for the examination of the Commissioner in Court that is to be allowed. As to what further evidence will be allowed to be adduced, if at all, is to be determined by the Court below after the Commissioner has been examined, and the learned Judge has formed an opinion as regards the objections raised by the parties."

8. In both the decisions it has been emphasised that the Commissioner should be first examined and if after his examination the Court will determine that it will be necessary to make further enquiry relating to any particular objection for which parties may be allowed to lead evidence, then nothing will prevent the Court to so direct the parties. Both the decisions have not given unrestricted power to Courts to freely allow parties to adduce evidence to substantiate objections to reports of the Commissioner. The reason therefor, which is not far to seek, seems to be avoidance of unnecessary delay in encouraging parties to fight out a further suit within a suit with all evil incidents connected thereto, such as loss of court's time, expenditure,

continuance of bitterness, as well as, expeditious passing of the final decree, so as to, decide the rights of the parties effectively and completely for all times to come."

15. Similar view was taken by the learned Single Judge of Punjab and Haryana High Court in ***Ram Murti Goyal and others vs. Smt. Basant Kaur and others, 1991 PLJ 147***, wherein, while examining provisions of Order 26 Rule 14 CPC, it was held that the said provisions entitle a party to lis to substantiate its objections. The Commissioner should be examined first with reference to objections and if ground for further enquiry is felt necessary, the parties should be allowed to produce evidence or Commissioner directed to amend his report.

16. Similar reiteration of law can be found in the judgment of the division bench of Jammu and Kashmir High Court, in ***Wazir Kanwal Singh vs. Wazir Baij Nath, AIR 1998 JAMMU AND KHASMIR 94***, wherein ratio of the judgments, as cited above, has been followed.

17. Now, insofar as this Court is concerned, it too has followed the ratio of the judgments laid down by the Lahore High Court and Calcutta High Court in the cases cited above. The first decision on the point is rendered by a learned Single Judge of this Court in ***Om Parkash vs. Ved Parkash and others, AIR 2000 HP 45***. This was followed by another judgment of this Court in ***Gopal Dass and others vs. Bismanchali, 2009(2) Shim. LC 250***.

18. Similar reiteration of law can be found in a recent judgment rendered by the Punjab and Haryana High Court in ***Bhupinder Kishore vs. Fateh Singh Yadav and others, (2015-2) 178 P.L.R. 578***.

19. In view of what has been noticed and discussed above, this Court has no hesitation to conclude that the judgments and decrees rendered by the learned courts below stand vitiated because of non-examination of the Local Commissioner, that too, despite there being authoritative pronouncements on this issue by various High Courts and more importantly, the two judgments rendered by this Court as have been noticed above. Substantial question of law is answered accordingly.

20. For the forgoing discussion, I find merit in the instant appeal and the same is accordingly allowed. Resultantly, the impugned judgments and decrees rendered by the learned courts below are set aside and the matter is remitted back to the learned executing court for deciding the objections afresh in accordance with law, more particularly, in light of what has been observed hereinabove.

21. The parties through their counsel are directed to appear before the learned executing court on 16.8.2017. Records be sent to that court so as to reach well before the date fixed.

22. The appeal is disposed of in the aforesaid terms, so also the pending application(s), if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Pardeep Kumar alias Sunny ....Appellant

Versus

State of H.P. ....Respondent

Cr. Appeal No.491/2016
Reserved on: 26.4.2018
Decided on : 10.5.2018

Indian Penal Code, 1860 (Code) - Sections 302 & 304 Part-II - Murder or culpable homicide not amounting to murder ? – Distinction – Proof - Trial court convicting and sentencing accused for committing murder of 'K'- Appeal against - Accused contending wrong appreciation of evidence by trial court while convicting him of offence of murder - Held, intention or knowledge to cause death can be gathered generally from few or several circumstances, like, nature of weapon used, whether weapon was carried by accused or picked instantly from spot, whether blow aimed at vital part of body, amount of force employed in causing injuries, whether act was in course of sudden quarrel or sudden fight or free for all fight, whether there was any pre-meditation or prior enmity or whether there was sudden or grave provocation etc ? - Facts revealing, (i) beatings were given to deceased with sticks and fist blows, (ii) condition of deceased not so serious so as to shift him to hospital immediately and for this reason he was taken by police personnel to his house, (iii) no motive or previous enmity to commit murder, and (iv) incident taking place in spur of moment - Intention or knowledge to commit murder lacking - Conviction altered to one under Section 304 Part II of Code - Appeal partly allowed - Sentence modified to rigorous imprisonment for 10 years and fine with default clause. (Paras 28-32)

Cases referred:
Gurumukh Singh vs. State of Haryana, (2009) 15 SCC 635
Jagriti Devi vs. State of H.P., (2009) 14 SCC 771
Pulicherla Nagaraju alias Nagaraja Reddy vs. State of A.P., (2006) 11 SCC 444

For the appellant: Mr. R.L. Chaudhary, Advocate.
For the respondent: Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Addl. A.Gs. with Mr. Bhupinder Thakur, Dy.A.G.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J

The appellant has been convicted and sentenced by the learned Additional Sessions Judge, Hamirpur, H.P., vide impugned judgment and order dated 31.8.2016/5.9.2016 in Sessions Trial No.5/2015, to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- and in case of default of payment of fine, to further undergo rigorous imprisonment for six months and aggrieved thereby has filed the instant appeal.

2 The prosecution case, in brief, is that on 26.10.2014 at about 6.35 A.M., PW7 Pritam Singh, Vice President of Gram Panchayat, Bir Bagehra telephonically informed the police of Police Station Sujanpur vide rapat, Ext.PW16/A that one Kashmir Singh, son of Gopal Dass, resident of Bir had been done to death by Sunny Kumar, Krishan Kumar etc. and the dead body was sent to CHC Sujanpur. On receiving this information, a team headed by PW18 ASI Khem Singh was sent to village Bir Bagehra and another team headed by PW15 ASI Sham Lal to CHC Sujanpur. PW18 ASI Khem Singh on visiting village Bir Bagehra met the wife of deceased namely Smt. Piaro Devi, who vide statement, Ext.PW1/A

reported that on 25.10.2014 at about 8.00 P.M., her brother-in-law Krishan Kumar telephonically called her husband Kashmir Singh (deceased) to his house to treat some one. On this, Kashmir Singh left to his house. After some time when she also tried to leave the house to go to the house of Krishan Kumar, she found the door to be bolted from outside. At about 12.00 in night, Ruma Kumari, daughter-in-law of Krishan Kumar, came to her house and on disclosing that Krishan Kumar, his wife Swarna Devi and the appellant were beating Kashmir Singh, asked her to come to their house. On this, she along with her daughter Priyanka accompanied Ruma to her house and on reaching there found the appellant giving beatings to her husband with a stick and Krishan Kumar and his wife with fist and leg blows. Kashmir Singh on account of their beatings had become unconscious and was brought back to the house. At home, she noticed blue marks on his back and that he was crying in pain. PW1 Piaro Devi while stating so also stated that Krishan Kumar and the appellant while giving beatings to Kashmir Singh were saying as to whether he would repeat the act of teasing. She specifically stated that her husband Kashmir Singh had died due to beatings given by the appellant, Krishan Kumar and Swarna Devi.

3 The statement, Ext.PW1/A was sent through Constable Anil Kumar to Police Station, on the basis of which, FIR, Ext.PW16/B was registered. On identification of complainant, i.e. PW1 Piaro Devi, spot map, Ext.PW18/A was prepared. PW15 ASI Shyam Lal on visiting CHC Sujanpur moved an application Ext.PW15/A to the Medical Officer for medical examination of deceased. Medical Officer concerned as per endorsement over said application reported that deceased was brought dead at 7.15 A.M. on 26.10.2014 in an ambulance 108. PW15 then took photographs of the dead body Ext.PW15/B-1 to Ext.PW15/B-4 and filled in inquest forms, Ext.PW15/C, Ext.PW15/D and Ext.PW15/E respectively. The body of the deceased was brought to regional hospital Hamirpur for postmortem and vide application Ext.PW15/F, Dr. Ravi Sharma and Dr. Nikhil on having formal examination vide report, Ext.PW19/A, referred the dead body for postmortem to RPGMC, Tanda, where on moving an application, Ext.PW15/G on 27.10.2014 postmortem was conducted vide report, Ext.PW10/A. PW8 Dheeraj during postmortem took photographs, Ext.PW8/A-1 to Ext.PW8/A-16 and handed over the same along with CD, Ext.PW8/B and certificate to that effect, Ext.PW8/C to the police. The appellant, Krishan Kumar and Swarna Devi were arrested.

4 The appellant on 28.10.2014 vide disclosure statement, Ext.PW6/A in the presence of PW6 Kusuma Kumari and Jyoti Parkash got stick Ext.P2 recovered from a field in the back of his house, which on being sealed in a cloth parcel was taken into possession vide memo Ext.PW1/C. Spot map of recovery, Ext.PW18/D, was also prepared. On the very same day, the appellant vide memo, Ext.PW6/B on identifying the spot in the room of the house of his father Krishan Kumar where alleged beatings were given to the deceased, also got recovered his shirt, Ext.P7 from the room in presence of PW6 Kusuma Devi and Jyoti Parkash vide memo, Ext.PW6/C. Photographs qua recovery of danda and shirt were taken and exhibited as Ext.PW18/F-1 to Ext.PW18/F-7.

5 PW1 Piaro Devi vide memo, Ext.PW1/C in presence of PW6 Kusuma and Jyoti Parkash also produced torn pants of her deceased husband, Ext.P4 and pieces of broken mobile, Ext.P5, which was in the pocket of deceased at the relevant time. The said parcels containing clothes of the appellant, deceased and danda were deposited with PW16 HC Ravi Kumar, MHC Police Station Sujanpur. PW13 Constable Lalit Kumar on being handed over by PW10 Dr. Vijay Arora the parcels containing viscera, clothes of deceased, blood sample, one sealed envelop along with CD and photographs deposited the same with PW16 HC Ravi Kumar. On deposit of aforesaid articles vide Malkhana register entry Ext.PW16/D, on 30.10.2014 PW16 sent the same along with copy of postmortem report, FIR

etc. with PW12 Constable Yogesh Chauhan to RFSL, Mandi vide RC Ext.PW16/E for chemical analysis. Ext.PW10/B, Ext.PW10/C and Ext.PW10/N are the reports to that effect from RFSL, Mandi. On going through reports, Ext.PW10/B and Ext.PW10/C, PW10 Dr. Vijay Arora gave his final opinion about the cause of death vide report Ext.PW10/D to be haemorrhagic shock due to multiple injuries sustained by multiple blunt force impacts. On 9.2.2015 PW10 on seeing stick Ext.P2 gave his opinion, Ext.PW10/E that the injuries sustained by the deceased could be possible with the same.

6 On moving an application, Ext.PW9/A, copies of jamabandi and Aks Shajra of the place of occurrence Ext.PW9/B and Ext.PW9/C were obtained. Copies of consumer application forms of mobile No.86269-39547, Ext.PW14/B, mobile No.88944-05795 Ext.PW14/C along with copies of billing address Ext.PW14/D and call details Ext.PW14/E on being obtained from the office of Bharti Airtel Shimla were taken into possession. The mobile No. 86269-39547 was found to be used by the deceased.

7 The statements of the witnesses were recorded as per their respective version. On completion of investigation, PW18 ASI Khem Singh handed over the case file to PW20 ASI Parkash Chand, who on preparing challan, filed the same in the court for the trial of the accused and after finding a *prima facie* case, the appellant alongwith Krishan Kumar and Swarna Devi was charged and put to trial for commission of offences punishable under Section 302 read with Section 34 IPC, to which they pleaded not guilty and claimed trial.

8 In order to prove its case, the prosecution examined as many as 20 witnesses. After closer of the prosecution evidence, statements of the appellant along with Krishan Kumar and Swarna Devi under Sections 313 Cr.P.C. were recorded, in which they denied the prosecution case in its entirety and claimed false implication. They tendered copies of rapat Nos. 4 and 5 dated 26.10.2014 Ext.DA in evidence, but did not examine anyone in defence.

9 The learned Additional Sessions Judge after evaluating the evidence vide impugned judgment and order dated 31.8.2016/5.9.2016 acquitted Krishan Kumar and Swarna Devi; and convicted and sentenced the appellant, as aforesaid. It is against the aforesaid judgment/order of conviction and sentence, the appellant has preferred the instant appeal.

10 It is vehemently argued by the learned counsel for the appellant that the appellant has been falsely implicated in this case and on the basis of the evidence led by the prosecution he was required to be acquitted as no case whatsoever has been proved against him. He would further argue that if the prosecution case is taken to be proved even then only a case under Section 304, part-II IPC can be said to have been made out and therefore, conviction and sentence under Section 302 IPC by the learned Additional Sessions Judge is unwarranted and deserves to be set aside. On the other hand, the learned Additional Advocate General would vehemently argue that impugned judgment convicting and sentencing the appellant under Section 302 IPC is based on correct appreciation of oral as well as documentary evidence and cannot be faulted with, therefore, calls for no interference.

11 We have heard the learned counsel for the parties and have also gone through the record of the case carefully.

12 In order to appreciate the rival contentions of the parties, it would be necessary to refer to the evidence that has come on record.

13 PW1 Piaro Devi is the wife of Kashmir Singh and stated that on 25.10.2014, at about 7.30-7.45 P.M. Krishan Kumar telephonically called the deceased to his house for treatment of someone. At about 3.30-3.45 A.M., Ruma Kumari, wife of the appellant came to her house and told that she was being called to her house. On this, she along with her daughter PW2 Priyanka accompanied Ruma Kumari to her house. On reaching there, they found Krishan Kumar standing on the door of his house and the appellant beating her husband with a danda inside the room. When he was requested not to give beatings to her husband, the appellant also tried to assault them with danda. She along with Priyanka then went to the house of her sister-in-law PW4 Hira Devi (Nanad) and called her on the spot. When they returned to the spot, by that time the police had also reached there. She found her husband lying inside the room in an unconscious state and thereafter, the appellant and one police personnel brought him to their house. The police personnel while returning home asked them to visit the police station in the morning. She checked the body of her husband and found some injuries on his back, which had turned blue in colour. She then visited the house of her brother-in-law PW3 Ranjeet Singh and on telling him that the condition of her husband was serious requested to take her husband to the hospital. The ambulance 108 was called and when they were proceeding to hospital, her husband died on the way. Thereafter, the police visited her house and recorded her statement, Ext.PW1/A.

14 PW2 Priyanka is daughter of PW1 Piaro Devi. She stated that on 25.10.2014 at about 12.00 in midnight, Krishan Kumar called her father to his house for the purpose of treatment and thereafter Ruma Devi came to their house and on her calling she along with her mother visited the house of the appellant. On reaching there, she saw the appellant giving beatings to her father and when they objected to, he showed the stick to them. Thereafter, she along with her mother returned to their house and whereafter her father was brought by the police and the appellant to their house. Having not supported the case of the prosecution in its entirety, this witness was then examined by the Public Prosecutor and during the course whereof, she admitted that stick which was shown to her by the appellant was the same with which he was giving beatings to her father. She also stated that when they reached the house of the appellant, her father was lying down inside the room. She admitted that Krishan Kumar and Swarna Devi were also giving beatings to her father.

15 Before discussing the statement of PW3 Ranjeet Singh it would be noticed that during the course of investigation, he had claimed to have heard noise on the midnight of 25/26.10.2014 at about 12.00, which according to him, was coming from the house of Kashmir Singh. On hearing this, firstly, his wife came out and she alongwith PW1 Piaro Devi and PW2 Priyanka started moving towards the house of Krishan Kumar. He also followed them and on reaching the house of Krishan Kumar, he saw that the appellant was giving beatings to the deceased with a stick, whereas Krishan Kumar and Swaran Lata were giving fist and leg blows inside their house. However, when this witness entered into the witness box, he did not support the prosecution case and stated that on 26.10.2014 at about 4.00 A.M. when he was sleeping in his house, he was got awaken by PW1 Piaro Devi, who told to him that Kashmir Singh on being beaten up had been left at home by the police and the appellant and his condition was critical. On hearing this, he went to the house of Piaro Devi, where she showed him back of Kashmir Singh, which had turned black in colour. He was lying in an unconscious state. He thereafter went to the house of his sister Hira Devi and returned along with her and 3-4 persons of the village. Ambulance 108 was called in which Kashmir Singh was removed to hospital at Sujanpur, where he was declared brought dead by the doctors.

16 PW4 Hira Devi is another witness who has not supported her statement recorded by the police under Section 161 Cr.P.C. As per prosecution, this witness on

hearing noise along with her son Sanjeev Kumar went to the house of Krishan Kumar and on reaching there found appellant giving sticks blows, Krishan Kumar and Swaran Lata leg and fist blows to Kashmir Singh. By that time, PW1, PW2 and PW3 and Sita Devi had already reached there and thereafter Piaro Devi took her husband Kashmir Singh to her house. However, while appearing in the witness box this witness gave a contrary version by stating that on the relevant day when she was at home Piaro Devi came there during night time and told that the appellant was giving beatings to her husband and requested to accompany her to the house of Krishan Kumar. On this she along with her son Sanjeev Kumar accompanied PW1 to the house of accused Krishan Kumar but by that time police had already reached there.

17 This is the entire evidence of the so-called eye witnesses.

18 As per the prosecution, stick (danda) Ext.P2 is stated to be the weapon of offence with which beatings were given to the deceased by the appellant. The same was got recovered from the appellant after he having made a disclosure statement to this effect. PW6 Kusuma Kumari and Jyoti Parkash are the witnesses to the recovery proceedings. As regards Jyoti Parkash, he was not examined in the court as witness being repetitive in nature. Kusuma Kumari while appearing as PW6 stated that on 28.10.2014, they were called to the police station by the then SHO, where the appellant after being taken out from the lock-up made a disclosure statement, Ext.PW6/A, to the effect that he could get the danda recovered and in pursuance of such statement, he got recovered the danda from the backside of his house vide memo, Ext.PW1/B. Stick, Ext.P2 on being shown to her was stated to be the same which had been got recovered by the appellant. However, PW6 in her cross-examination stated that she did not go to the backside of the house at the time when the appellant had brought the stick, but denied the suggestion of the defence that the stick was not recovered at the instance of the appellant in her presence. Ext.PW18/F-1 to Ext.PW18/F-7 are the photographs regarding recovery of stick.

19 PW 19 Dr. Ravi Sharma had conducted a preliminary medical examination of the deceased before referring his dead body for postmortem to RPGMC Tanda. In his cross-examination, he stated that at the time of examination, there was no blood stained injuries on the person of the deceased. On being shown the stick, Ext.P2, he admitted that possibility of causing blood stained injuries with the same could not be ruled out. He further stated that the injuries mentioned in Ext.PW19/A could be caused by kick blows and by way of fall on hard surface. However, his statement is not of much significance in view of the postmortem having been conducted by a team of doctors at RPGMC Tanda. In this background, it is the testimony of PW10 Dr. Vijay Arora, Professor and Head of the Forensic Medicine Department, RPGMC, Tanda, who had conducted the postmortem on the dead body of the deceased, which goes relevant.

20 PW10 Dr. Vijay Arora, found the following ante-mortem injuries on the person of the deceased:

> e) *An abrasion 4x1 cm, linear, vertical was present at right side of front of chest bluish reddish discoloured.*
>
> f) *An abrasion, 8 x 0.5 cm, reddish bluish was present at right forearm back aspect.*
>
> g) *A grazed abrasion, 3 x 2 cm, bluish red discoloured at right shoulder region.*
>
> h) *Multiple crusted, abraded laceration size varies 3 x 2 m to 2 x 2 cm, muscle deep present at right knee region.*

i) *Contusion bluish discoloured in an area 30 x 25 cm was present at right buttock, outer leg region.*

j) *Contusion, reddish blue discoloured, 15 x 10 cm was present at right upper outer leg region.*

k) *Contusion, reddish blue discoloured, 30 x 25 cm, tram track in appearance, at left thigh outer aspect and left buttock region.*

l) *A tram track appearance contusion, 12 x 3 cm was present at left lower flank region, reddish blue discoloured.*

m) *Contusion 30 x 20 cm, at upper half of back, reddish blue discoloured.*

n) *Abrasion 3 x 2 cm, reddish blue discoloured at left knee and adjoining area.*

21 On internal examination, he found the following injuries:-

Scalp and vertebrae were grossly intact. A thin 3 x 2 cm minor sub scalp haematoma was present at frontal aspect. Membranes and brain were pale. Spinal cord was not opened.

In thorax –left 6th and 7th ribs were fractured associated with haematoma at chest wall. Pleurae, larynx, trachea and both lungs were pale. Weight of lungs was 700 gms. Pericardium was pale. Coronary arteries were patent. Rest – NAD.

In abdomen – walls NAD. Peritoneum was pale. Mouth, pharynx and esophagus were pale. Mouth, lips and teeth were intact. Stomach contained about 50 ml yellowish fluid, mucosa was pale and any peculiar smell was not ascertained.

All other abdominal organs were pale. Right kidney contained 3.5 x 3.4 cm blackish hard stone. Bladder was empty. Genitalia –NAD.

The opinion regarding cause of death was kept pending till viscera analysis report. The probable time elapsed between injury and death was about few hours and between death and postmortem examination was about 24-36 hours.

22 He deposed that as per reports, Ext.PW10/B and Ext.PW10/C, he opined that cause of death was haemorrhagic shock due to multiple injuries sustained by multiple blunt force impacts and the injuries mentioned in post mortem report could be possible by stick, Ext.P2.

23 It would be evidently clear from the testimonies of the aforesaid prosecution witnesses that the appellant in fact had given beatings to the deceased. This is so stated by all the prosecution witnesses and there is nothing on record which may impeach their credibility. Even though PW3 and PW4 did not wholly support their statements as were recorded by the police under Section 161 Cr.P.C., but nonetheless they have fully supported their version that it was the appellant who had given beatings to the deceased.

24 The presence of the deceased earlier in the house of the appellant and thereafter in his own house has already been duly established and proved by the prosecution particularly in the evidence of PW1 to PW4. This aspect of the matter has been minutely and meticulously analyzed and discussed by the learned Additional Sessions Judge and, therefore, we see no reason to differ with such findings in view of the clear, cogent and convincing evidence led by the prosecution. However, nonetheless the question still remains as to whether the appellant could have been convicted for offence punishable

under Section 302 IPC or could have been convicted for lesser offence more particularly under section 304 Part II IPC.

25 At this stage, it would be necessary to refer to certain provisions of IPC, which are as under:-

> ***300. Murder***
>
> *Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or-*
>
> *Secondly- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or-*
>
> *Thirdly- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or-*
>
> *Fourthly,- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.*
>
> ***Exception 1****- When culpable homicide is not murder- Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*
>
> *The above exception is subject to the following provisos:-*
>
> *First- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing. or doing harm to any person.*
>
> *Secondly- That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.*
>
> *Thirdly- That the provocation is not given by anything done in the lawful exercise of the right of private defense.*
>
> ***Explanation****- Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.*
>
> ***Exception 2****- Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defense of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defense without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defense.*
>
> ***Exception 3****- Culpable homicide is not murder if the offender, being a public servant or aiding. a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.*
>
> ***Exception 4****- Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel*

and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation*- It is immaterial in such cases which party offers the provocation or commits the first assault.*

Exception 5*- Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.*

302. Punishment for murder

Whoever commits murder shall be punished with death, or imprisonment for life and shall also be liable to fine.

304. Punishment for culpable homicide not amounting to murder

Whoever commits culpable homicide not amounting to murder shall be punished with [104][imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death,

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

26 At the outset, it is relevant to setout some of the factors, which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive and each case has to be seen from its special perspective. The relevant factors are as under:-

a) Motive or previous enmity;
b) Whether the incident had taken place on the spur of the moment;
c) The intention/knowledge of the accused while inflicting the blow or injury;
d) Whether the death ensued instantaneously or the victim died after several days;
e) The gravity, dimension and nature of injury;
f) The age and general health condition of the accused;
g) Whether the injury was caused without pre-meditation in a sudden fight;
h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;
i) The criminal background and adverse history of the accused;
j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;
k) Number of other criminal cases pending against the accused;
l) Incident occurred within the family members or close relations;
m) The conduct and behaviour of the accused after the incident.

[Refer: Gurumukh Singh vs. State of Haryana, (2009) 15 SCC 635]

27 Whether the case falls under Section 302 or 304 Part I or 304 Part II IPC is the question, which is required to be decided on the facts of each case. The intention to

cause death can be gathered generally from a combination of a few or several following, among other, circumstances:

(21) nature of the weapon used;

(22) whether the weapon was carried by the accused or was picked up from the spot;

(23) whether the blow is aimed at a vital part of the body;

(24) the amount of force employed in causing injury;

(25) whether the act was in the course of sudden quarrel or sudden fight or free for all fight;

(26) whether the incident occurs by chance or whether there was any pre-meditation;

(27) whether there was any prior enmity or whether the deceased was a stranger;

(28) whether there was any grave and sudden provocation, and if so, the cause for such provocation;

(29) whether it was in the heat of passion;

(30) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner;

(31) whether the accused dealt a single blow or several blows.

[Refer: Pulicherla Nagaraju alias Nagaraja Reddy vs. State of A.P., (2006) 11 SCC 444]

28 Adverting to the facts, it would be noticed that the beatings alleged to have been given to the deceased were by stick, Ext.P2, kick and fist blows. That apart, even at the time when the police had come on the spot, the condition of the deceased was not so serious so as to shift him to hospital and it was for this reason that the deceased was taken by the appellant along with accompanying police personnel to his house. Lastly, even the injuries that were noticed on the person of the deceased apparently did not seem to be so serious, whereby one could have thought that he would succumb to the same. The prosecution has failed to prove any intention on the part of the appellant to cause death of the deceased.

29 It is more than settled that culpable homicide without the special characteristics of murder is culpable homicide not amounting to murder falling under Section 304 IPC.

30 In ***Jagriti Devi vs. State of H.P.,(2009) 14 SCC 771***, it was held that the expressions “intention” and “knowledge” postulate the existence of a positive mental attitude, which is absent in the instant case.

31 There is no evidence of motive or previous enmity and the incident has taken place on the spur of the moment. There is also no evidence regarding the intention behind the fatal consequence of the beatings.

32 Thus, considering all these aspects, we are of the view that the appellant is guilty of commission of an offence under Section 304 Part II and not under Section 302 IPC. Accordingly, the impugned judgment and order dated 31.8.2016/5.9.2016, convicting and sentencing the appellant to undergo life imprisonment with a fine of Rs. 10,000/- under Section 302 IPC is altered and the appellant is convicted and sentenced to undergo 10 years’ rigorous imprisonment with a fine of Rs.50,000/- and in default of payment of fine to further

undergo 2 years' rigorous imprisonment under Section 304 Part II IPC. Since the deceased has left behind a family, the fine thus recovered shall be paid as compensation to his family members.

33 The appeal is partly allowed to the extent mentioned hereinabove. Pending application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Tanuja Dogra .....Petitioner
Versus
National Institute of Technology & others .....Respondents

CWP No. 2095/2018
Reserved on. 28.09.2018
Decided on :01.10.2018

Constitution of India, 1950 - Articles 14 and 15 – Reservation in educational institutions – Rule of carry forward – Applicability – Held, rule of carry forward of vacancies to next year as applicable in matter of recruitment is unknown to admissions in professional courses like Medical and Engineering – When candidate from reserved category is not available endeavour should be made to fill such seats from other eligible students – NIT directed to dereserve seat lying vacant for want of eligible reserved candidate and admit petitioner in Ph.D. programme in Electronics and Communication Engineering. (Paras 7 to 13)

Cases referred:
Bikash Sarkar vs. State of Tripura, 2015 SCC Online Tri 827 : AIR 2016 (NOC 548) 266
Faiza Choudhary vs. State of Jammu and Kashmir and another, (2012) 10 SCC 149
P.V. Indiresan and others vs. Union of India, (2009) 7 SCC 300

For the petitioner: Mr. Bimal Gupta, Sr. Advocate, with Ms. Rubeena Bhatt, Advocate.
For the respondents: Mr. K.D.Sood, Senior Advocate with Mr. Het Ram, Advocate, for respondent No. 1.
Nemo for respondents No. 2 and 3.

The following judgment of the Court was delivered:

***Per* Justice Tarlok Singh Chauhan, J. :**

The petitioner having been denied the seat in Full Time Institutional Fellowship (FTIP) in Ph.D. programme in the subject of Electronics and Communication Engineering has filed the instant petition for grant of following substantive reliefs:-

> *i) Respondent No. 1 may kindly be directed to fill up all 8 seats allocated for Full Time institutional fellowship in Ph.D Programme in the subject of Electronics and Communication Engineering by de-reserving the four sears,*

reserved of SC, ST and OBC candidates which are lying vacant for the current session or in alternatively treat the admission of Sh. Dilip Singh under reserved category, and allot the unreserved seat out of four to the petitioner.

ii) That further in alternative the respondent No. 1 may kindly be directed to admit the petitioner in Ph.D Programme in the subject of Electronics and Communication Engineering by settling and breaking the tie of marks between the petitioner and respondents No. 2 and 3 on the basis their respective age.

2. The information brochure with respect to Ph.D. admissions (Annexure P-2) envisages three types of Ph.D. programmes -(a) Full Time with Institutional Fellowship (FTIF), (b) Full Time Sponsored (FTS); and (c) Part Time Sponsored (PTS). The petitioner's case falls under first category i.e. FTIF as per clause 3 of the information brochure.

3. In the information brochure, it is provided that the number of seats available in the Institute depends on the number of available research guides in the Institute, vacancies available with the guide and research infrastructure in the concerned Department/Centre. It is also provided that the admission of the candidates to Ph.D. programme would depend on the expertise available in a Department/Centre and the willingness of the candidate to work in the corresponding research areas. Lastly, it is provided that reservation would be as per the reservation policy of the Government of India.

4. It is not in dispute that there were eight seats available for Ph.D. under MHRD Fellowship Scheme out of which four seats were un-reserved, whereas one seat each was reserved for Scheduled Castes and Scheduled Tribes respectively and the remaining two seats were reserved for OBC.

5. According to the respondent-Institute, the petitioner secured overall 6th position in the merit list and, therefore, could not be enrolled in the Ph.D. programme as one Dilip Singh who although belongs to the reserved category was alloted unreserved seat on the basis of his 1st position in the merit list. Further, according to the respondent-Institute, the petitioner was standing at 5th position in the merit list of unreserved category after excluding Ms. Amandeep Kaur, Ms.Anita Mudgal and Singh Maharana Pratap against the seat allocated for FTIF scheme and, therefore, could not have been appointed since only four seats were there in the open category.

6. Indubitably four seats falling in the reserved category are still available with the respondent-Institution, but the justification for not filling up these seats by the respondent-Institution is that as per the provisions of reservation policy of Government of India, the reserved category posts/seats whether it is in the recruitment process or in the admission process where sufficient number of candidates belonging to SC/ST/OBC are not available to fill up the vacancies reserved for them, the vacancies should not be filled by candidates belonging to other communities. This is so mentioned in para 21 of the reply, which reads as under:-

21. That para No. 21 of writ petition is totally denied. As per the provisions of reservation policy of government of India the reserved category post/seats whether it is in the recruitment process or in the admission process, there is a well settled law that where sufficient number of candidates belonging to SC/ST/OBC are not available to fill up the vacancies reserved for them, the vacancies should not be filled by candidates not belonging to these communities. (Clause 6.5 of Annexure R-7). In other words, there is a ban on de-reservation of vacancies reserved for SCs, STs and OBCs in direct recruitment.

7. To say the least, the stand taken by the respondent-Institution is fallacious for, it is more than settled that principles of reservation in matter of admissions to educational institutions is entirely different from those applicable to reservations in recruitment process.

8. With regards to admissions, an endeavour has always to be made to fill up seats at the earliest from the other eligible students especially when the candidates from the reserved category are not available. (Refer: ***P.V. Indiresan and others vs. Union of India, (2009) 7 SCC 300)***

9. That apart, while the carry-forward principle that is applicable in the matters of recruitment, the said principle is unknown to admission in the professional courses like medical, engineering, etc. as has been clearly held by the Hon'ble Supreme Court in ***Faiza Choudhary vs. State of Jammu and Kashmir and another, (2012) 10 SCC 149,*** which reads thus:-

> *14. A medical seat has life only in the year it falls, that too only till the cut-off date fixed by this Court i.e. 30th September in the respective year. Carry-forward principle is unknown to the professional courses like medical, engineering, dental, etc. No rule or regulation has been brought to our knowledge conferring power on the Board to carry forward a vacant seat to a succeeding year. If the Board or the Court indulges in such an exercise, in the absence of any rule or regulation, that will be at the expense of other meritorious candidates waiting for admission in the succeeding years.*

10. Above all, as per office memorandum dated 25.5.2012 (Annexure R-6) annexed by the respondent-Institution itself with the reply, it is clearly provided that only when OBC candidates (including Minorities covered within the quota) possessing the minimum eligibility marks/qualifying marks are not available in the OBC merit list, the OBC seats shall be converted into general category seats. The relevant observation reads thus:

> *"d) CEIs will have the discretion to fix minimum eligibility marks/qualifying marks separately for OBC Candidates eligible under 4.5% sub-quota (in case sufficient candidates are not available) and for the remaining 22.5% quota (i.e. 27% - 4.5%) subject to the limits on the differential already mentioned above, and which are somewhere midway between those for SC/ST and the unreserved category. The minimum eligibility marks refers to the minimum marks a candidate is required to have in the last qualifying examination (for example,10+2 examination for admissions to a Bachelor's degree programme or the graduation examination for admissions to a postgraduate programme). The qualifying marks refer to the minimum marks in an entrance examination. The seats for the Candidates belonging to the Central lists of SEBCs/OBCs are to be filled up on the basis of inter-se merit amongst them. The definition of inter-se merit is very clear and therefore, any attempt to determine the merit of SC/ST/OBC with reference to general merit list would go against the spirit of Hon'ble Supreme Court order. Only when OBC candidates (including Minorities covered within the quota) possessing the minimum eligibility marks/qualifying marks are not available in the OBC merit list the OBC seats shall be converted into general category seats. Similarly, the seats meant for OBC (Minority non-creamy layer) should not be diverted to other categories if eligible candidates are available."*

11. Therefore, once seat, even though falling to the share of the reserved category of OBC is available with the respondent-Institution and candidate of the said category(ies) is

not available, then obviously the respondent-Institution was required to fill up the seats on the basis of merit from the open category in accordance with the aforesaid memorandum/ instructions as the principle of carry forward is not applicable to admission case.

12. The view taken by us is otherwise supported by the judgment rendered by the Division Bench of Tripura High Court in ***Bikash Sarkar vs. State of Tripura, 2015 SCC Online Tri 827 : AIR 2016 (NOC 548) 266***.

13. For all the reasons stated above, the petition is allowed and the respondent-Institution is directed to admit the petitioner in FTIF in Ph.D. programme in the subject of Electronics and Communication Engineering.

14. Since, the petitioner has now been directed to be admitted as aforesaid, therefore, all the other contentions and issues raised in the petition are only academic and, therefore, need not be adverted to.

15. The writ petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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

Manasi Sahay Thakur ...Petitioner
Versus
Madan Lal Sharma ...Respondent

C.R. No. 202/2017
Reserved on: 13.11.2018
Date of decision: 19.11.2018

Code of Civil Procedure, 1908 – Order VII Rule 11 – Rejection of plaint – Duty of court – Held, court should go through contents of plaint to ascertain whether suit can be entertained by it before issuing notices to defendants. (Para 1)

Right to Information Act, 2005 (Act) - Section 15 - Appellate Authority – Nature of functions – Held, appellate authority constituted under Act, discharges quasi – judicial functions while excercing appellate jurisdiction. (Para 11)

Right to Information Act, 2005 (Act) - Section 21 – **Judges (Protection) Act, 1985** – Sections 2 and 3 – "Judge" - Meaning – Held, expression "judge' means person who is empowered by law to give in any legal proceedings a definitive judgment which, if confirmed by some other authority, would be definitive – It includes appellate authority constituted under Section 15 of Act – Such persons will be immune from legal action in respect of anything done or purported to be done in discharge of appellate jurisdiction (Paras 17 to 19).

Suit for damages - Maintainability – Held, plaintiff must plead minimal provisions of law i.e., torts or general or special law under which he is entitled to claim damages from defendant – Plaint lacking such particulars liable to be rejected. (Paras 8 and 22)

Cases referred:

N.V. Shamsunder, Civil Judge (Senior Division) vs. Savitabai, 2006 LawSuit (BOM) 1230
Rachapudi Subba Rao vs. The Advocate-General, Andhra Pradesh, AIR 1981 SC 755

For the petitioner: Mr. B. C. Negi, Senior Advocate with Mr. Raj Negi, Advocate.
For the respondent: Mr. Naresh K. Sharma, Advocate.

The following judgment of the Court was delivered:

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o) ***Tarlok Singh Chauhan, Judge***

The instant revision petition reflects dismal picture, where the subordinate courts without even caring to go through the contents of the plaint(s), especially with regard to its maintainability, not only entertain such suits, but randomly issue notices to the opposite parties, thereby compelling them to incur unnecessary and otherwise avoidable expenses in defending such litigation(s) and making them unnecessary go through the ordeal and agony of a full fledged trial. Not only this, at times, the appeals arising out of such frivolous and otherwise not maintainable litigation(s) are carried forward not only to the first appellate court, but examples are not wanting, where such kind of cases have even reached the Hon'ble Supreme Court.

2 The background of this case is that the respondent (hereinafter referred to as the "plaintiff") had filed three appeals under the Right to Information Act, 2005 (for short, R.T.I. Act) before the petitioner (hereinafter referred to as the "defendant"), who being the then Deputy Commissioner was exercising the powers of an appellate authority under the R.T.I. Act, and the same were decided vide order dated 23.7.2015. The plaintiff thereafter issued a legal notice to the defendant stating therein that the latter, while exercising the powers of an appellate authority under R.T.I. Act, had denied the plaintiff's right to engage a counsel and, therefore, she was liable to pay damages to the tune of Rs. 1,00,000/-along with interest @ 15% till the realization of payment along with the legal notice fee to the tune of Rs.2200/-.

3 The defendant responded to the legal notice by filing a reply, however the reply did not deter the plaintiff from filing the suit for recovery of the aforesaid amount, which he did before the learned trial court. The defendant, after putting in appearance before the learned trial court, filed an application under Order 7 Rule 11(d) CPC for rejection of the plaint as the same was barred under law.

4 However, the learned trial court dismissed the application vide order dated 4.9.2017 by observing that since the plaintiff had not assailed the order passed by the defendant under R.T.I. Act and had rather filed a suit on the basis of violation of his legal right, whereby the defendant had refused to accept the power of attorney of the counsel for the plaintiff, therefore, the suit was maintainable.

5 It is against this order that the defendant has filed the instant petition on various grounds including the ground that the learned trial court while passing the impugned order had failed to take into consideration the provisions of the Judges (Protection) Act, 1985.

6 I have heard the learned counsel for the parties and have also gone through the material placed on record.

7 Adverting to the relative merits of the case, it would be necessary to reproduce the plaint and the same reads as under:-

"IN THE COURT OF LD. CIVIL JUDGE SR. DIVISION BILASPUR (H.P.)

IN THE MATTER OF :-

Madan Lal Sharma S/O Shri Hari Ram R/O village Bagtheru P.O. Bhager, Tehsil Ghumarwin, District Bilaspur, H.P.. .....Plaintiff

Versus

Mansi Sahay Thakur, the then Deputy Commissioner, District Bilaspur, H.P. at present posted as Director Woman and Child Devlopment Department, Shimla, Himachal Pradesh. .....Defendant

Suit for recovery of damages to the tune of Rs. 1,00,000/- along with interest @18% P.A. accrued thereon till realization, in favour of the plaintif and against.

Hon'ble Sir,

The plaintiff respectfully submits as under:

1. That the plaintiff had engaged a counsel/Advocate Shri Rajesh Kumar Mishra, Advocate District Courts Bilaspur, Himachal Pradesh for representing/contesting three appeals titled as Madan Lal Sharma Versus PIO office of Deputy Commissioner, District Bilaspur, H.P. filed under section 18(1) of Right to Information Act, 2005.

2. That the plaintiff had engaged the counsel for placing/representing/contesting his version as an expert before defendant in the above mentioned appeals after paying him fee to the tune of Rs. 15,000/- for each appeal totaling to the tune of Rs. 45,000/- as the plaintiff was not well aware about technicalities and legal complication/technicalities for these appeal.

3. That thereafter the plaintiff along with his engaged counsel appear before defendant on date 13.7.2015 And filed a power of attorney to contest three appeals, but defendant refused to accept the power of attorney of the counsel of the plaintiff which had been duly signed by the plaintiff and at the same time defendant used hot, harass and insulting words to the counsel of the plaintiff. As a result of which counsel of the plaintiff had to leave defendant's office.

4. That by doing so defendant has deprived the plaintiff of availing expertise legal services and violated his legal rights besides the damages in the form which the plaintiff had paid to his counsel as fee for his engagement for contesting the above mentioned appeals.

5. That in this way defendant have committed a tort under 'Damnum sine injuria' which has caused damaged to the plaintiff in two way i.e. the fee which the plaintiff has to pay to his counsel and secondly, the deprivation of the plaintiff from his legal assistance of expertise. In this way the defendant has violated the legal right of the plaintiff willingly with malafide intentions.

6. That by doing so the defendant has put the plaintiff in the loss of reputation, unnecessary harassment, mental agonies, discomforts, for which he is bound to pay additionally.

7. That thereafter the plaintiff sent a legal Notice through counsel to the defendant to pay the damages to the plaintiff, but the defendant denied the legitimate claim of the plaintiff.

8. That the cause of action arose to the plaintiff on date 13.7.2015 when the defendant refused to accept the power of attorney of the counsel of the plaintiff which had been duly signed by the plaintiff and at the same time defendant used hot, harass and insulting words to the plaintiff. As a result of which counsel of the plaintiff had to leave defendant's office. And further on date 6.5.2016 when the defendant replied the Legal Notice of the plaintiff and denied the legitimate claim of the plaintiff.

9. That the value of the suit for the purpose of court fee and jurisdiction is assessed at Rs.1,00,000/- and a court fee of Rs. 3,560/- is being paid thereon.

10. That there is no other suit pending between the same parties with regard to the same subject matter in any other court of law.

11. That the Hon'ble Court had got jurisdiction to hear and decide the present suit. That plaint in duplicate is filed along with the affidavit.

PRAYER:-

It is therefore, respectfully prayed that:-

I. A decree for recovery of damages to the tune of Rs. 1,00,000/- i.e. along with interest @ 18% P.A. accrued thereon from the date of the damages caused till the realization of the payment along with the cost of this suit may kindly be passed in favour of the plaintiff and against the defendant.

II. A decree for any other appropriate relief which the Hon'ble Court deems fit and proper in the light of the facts and circumstances of the suit be also passed in favour of the plaintiff and against the defendant.

Date:06.8.2016

Place: Bilaspur

Plaintiff

Through Counsel.

VERIFICATION:

Verified that the contents of the para No. 1 to 11 of this plaint are true and correct to the best of my knowledge and belief and that nothing has been concealed therein which is ture.

Date:06.8.2016

Place: Bilaspur *Plaintiff"*

8 The perusal of the plaint would show that the same does not contain any provision of law under which it has been filed. Even before this Court, the learned counsel for the plaintiff was not in a position to state as to under which provisions of law, the same has been filed. How, therefore, such plaint came to be entertained by the learned trial court is not at all understandable. After all, for claiming damages, one has to plead the bare minimal facts of the law, under which he is entitled to claim damages, be it under law of torts or the general law or any special law etc.

9 Apart from above, it would be noticed that the sole ground for claiming damages from the defendant is that she did not accept the power of attorney of the counsel for the plaintiff and is alleged to have used "hot, harass and insulting" words to the counsel for the plaintiff, who had to leave the defendant's office.

10 Even if the version of the plaintiff is accepted as such, the mere non-acceptance of the power of attorney *per se* could not be a ground to file a suit and claim

damages as the plaintiff had remedy to file an appeal before the H.P. State Information Commission.

11 It is not in dispute that the damages sought for by the plaintiff relate to the so called act(s) that was performed by the defendant in quasi-judicial capacity while discharging the duties of the appellate authority under R.T.I Act and was, thus, protected not only under the Judicial Officers' Protection Act, 1850, but even under the Judges (Protection) Act, 1985.

12 Section 1 of the Judicial Officer's Protection Act, 1850, reads as under:-

> *1.Non-liability to suit of officers acting judicially, for official acts done in good faith, and of officers executing warrants and orders.- No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time, in good faith, believed himself to have jurisdiction to do or order the act complained of ; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.*

13 It would be noticed that Section 1 of the Judicial Officer's Protection Act, 1850 , as reproduced above, contains the common law rule of immunity of Judges, which is based on the principle that a person holding a judicial office should be in a position to discharge his/her functions with complete independence and, what is more important, without there being, in his/her mind, fear of consequences.

14 This section affords protection to two broad categories of acts done or ordered to be done by a judicial officer in his/her judicial capacity. In the first category fall those acts, which are within the limits of his/her jurisdiction and the second category encompasses those acts, which though may not be within the jurisdiction of Judicial Officers, but are nevertheless done or ordered to be done by him/her believing in good faith that he/she had jurisdiction to do them or order them to be done. If the Judicial Officer is found to have been acting in the discharge of his/her judicial duties, then, in order to exclude him/her from the protection of this statue, the complainant has to establish that - (i) the Judicial Officer complained against was acting without any jurisdiction whatsoever; and (ii) he/she was acting without good faith in believing himself/herself to have jurisdiction.

15. Here, it shall be opposite to refer to the judgment of the Hon'ble Supreme Court in R***achapudi Subba Rao vs. The Advocate-General, Andhra Pradesh, AIR 1981 SC 755***, wherein it was observed as under:-

> *9. As pointed out by this Court in Anwar Hussain v. Ajoy Kumar Mukerjee & Ors the Section affords protection to two broad categories of acts done or ordered to be done by a judicial officer in his judicial capacity. In the first category fall those acts which are within the limits of his jurisdiction. The second category encompasses those acts which may not be within the jurisdiction of the judicial officer, but are, nevertheless, done or ordered to be done by him, believing in good faith that he had jurisdiction to do them or order them to be done.*

10. In the case of acts of the first category committed in the discharge of his judicial duties, the protection afforded by the statute is absolute, and no enquiry will be entertained as to whether the act done or ordered to bed done was erroneous, or even illegal, or was done or ordered without believing in good faith.

11. In the case of acts of the second category, the protection of the statute will be available if at the time of doing, ordering the act, the judicial officer acting judicially, in good faith believed himself to have jurisdiction to do or order the same. The expression "jurisdiction" in this Section has not been used in the limited sense of the term, as connoting the "power" to do or order to do the particular act complained of, but is used in a wide sense as meaning "generally the authority of the Judicial Officer to act in the matters". Therefore, if the judicial officer had the general authority to enter upon the enquiry into the cause, action, petition or other proceeding in the course of which the impugned act was done or ordered by him in his judicial capacity, the act, even if erroneous, will still be within his `jurisdiction', and the mere fact that it was erroneous will not put it beyond his "jurisdiction". Error in the exercise of jurisdiction is not to be confused with lack of jurisdiction in entertaining the cause or proceeding. It follows that if the judicial officer is found to have been acting in the discharge of his judicial duties, then, in order to exclude him from the protection of this statute, the complainant has to establish that (1) the judicial officer complained against was acting without any jurisdiction whatsoever, and (2) he was acting without good faith in believing himself to have jurisdiction.

16 In order to make position of Judges, Judicial Officers and Magistrates, more secure, the Parliament has enacted the Judges (Protection) Act, 1985.

17 Section 2 of the Judges (Protection) Act, 1985 defines a “Judge” in the following terms:

2. Definition- In this Act, “Judge” means not only every person who is officially designated as Judge, but also every person-

(a) who is empowered by law to give in any legal proceeding a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment, which if confirmed by some other authority, would be definitive; or

(b) who is one of a body of persons which body of persons is empowered by law to give such a judgment as is referred to in Cl.(a).

18 Since a person, who is empowered by law to give in any legal proceeding a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment, which if confirmed by some other authority, would be definitive would include the appellate authority under R.T.I. Act and, therefore, such person performing his duties as the appellate authority would obviously be immune from legal action.

19 Apart from above, Section 21 of the R.T.I. Act, itself provides as under:-

21. Protection of action taken in good faith – No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act or any rule made thereunder.

20 This Section provides complete protection to the appellate authority for the things done or intended to be done by him/her in good faith under R.T.I. Act.

21 Finally, it would be necessary to advert to the order that was passed by the defendant on 13.7.2015, which forms the foundation of the plaintiff's suit and reads thus:-

> *Case called. Appellant Madan Lal Sharma present in person. Sh. Rajesh Kumar Mishra, ld. Counsel also present for appellant. The appellant was told that as per Rule 6 of Himachal Pradesh Right to Information Rules, 2006, there is no provision of counsel and he was urged to plead his case himself. As per the spirit of the Act, the aggrieved person needs to be given a complete and fair hearing in person and provided relief, unless and until he is unable to speak for himself due to some grave reason, which is not the present case. It is further clarified that as per RTI Act, PIO is custodian of Information which is to be furnished to the applicants and providing of information is not litigation. The First Appellate Authority is not a court but it is only a departmental authority to ensure that information is not denied to the rightful applicant. Before the First Appellate Authority under RTI Act, neither any evidence is recorded nor two parties are involved, because the appeal is filed by the appellant on dissatisfaction of the information given by the PIO who is the custodian of the information as well as official record. Moreover, no penalty can be imposed by the First Appellate Authority. Therefore, it is clear that there is no necessity to allow the advocate for pleading the RTI appeals before the First Appellate Authority. The appellant was thus asked to plead the present matter. If he is dissatisfied he can go in appeal to the next higher authority. It was also told that his counsel can remain present during the proceedings. However, the appellant refused saying that either his counsel would plead or else he would leave the court, and he left the Court.*
>
> *Taking a lenient view in the matter and in order to address the appellant's grievance, he was asked telephonically to be present today on 13.7.2015 at 4.00 P.M. along with his ld. Counsel but he stated that he has left for Shimla. Therefore, the case is now fixed for 17.7.2015 at 10.30 A.M. The appellant be summoned for 17.7.2015 at 10.30 A.M. If the service is not effect in person upon the appellant then the service may be done through affixation. He should also be informed telephonically.*

22 A bare perusal of the aforesaid order would clearly go to show that the same was based upon the understanding of the defendant of the R.T.I. Act and the Rules framed thereunder. Even if it is assumed that the aforesaid order was not based upon the correct interpretation of the provisions of the R.T.I. Act and the Rules framed thereunder, even then the only remedy with the plaintiff was to file an appeal before the State Information Commission and under no circumstances, the suit of the instant kind could have been filed much less entertained.

23 The entire sequence of events, as narrated above, only go to show that the plaintiff all throughout the proceedings was trying to browbeat, terrorize and intimidate the Presiding Officer, i.e. the defendant.

24 No affront to the majesty of law can be permitted. The fountain of justice cannot be allowed to be polluted by disgruntled litigants. The protection is necessary for the Courts and quasi-judicial authorities to enable them to discharge their functions without fear. Even the quasi- judicial authorities like the Judges need to be insulated so that they are able to perform their duties freely and fairly or else, the administration of justice would

become a casualty and Rule of Law would receive a set back. Even the quasi-judicial authorities are obliged to decide cases impartially and without any fear or favour. Therefore, litigants cannot be allowed to terrorize or intimidate these authorities with a view to secure orders which they want. This is basic and fundamental and no civilized system of administration of justice can permit it.

25 Section 3 of the Judges (Protection) Act, 1985 reads as under:-

> *3. Additional protection to Judges.—(1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of sub-section (2), no court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function.*
>
> *(2) Nothing in sub-section (1) shall debar or affect in any manner the power of the Central Government or the State Government or the Supreme Court of India or any High Court or any other authority under any law for the time being in force to take such action (whether by way of civil, criminal, or departmental proceedings or otherwise) against any person who is or was a Judge.*

26 Any person, aggrieved by the order, which, according to him, is not in accordance with law, has legal remedy or approaching the next higher authority or the writ Court etc. for redressal of the grievances, but cannot file a suit for damages against the Officer and such suit is obviously barred under Section 3 of the Judges (Protection) Act, 1985.

27 Admittedly, even as per the case set up by the plaintiff, there was no personal involvement of the defendant in the matter, therefore, the suit as filed is obviously misconceived and, therefore, liable to be dismissed.

28 Similar issue came up before the Bombay High Court in ***N.V. Shamsunder, Civil Judge (Senior Division) vs. Savitabai, 2006 LawSuit (BOM) 1230***, where suit for compensation had been filed against the Civil Judge (Senior Division) for not investing the amount of compensation, as directed by the appellate authority, awarded in land acquisition matter, which resulted in loss of interest amount to successful party. The Court held the suit to be barred by observing as under:

> *6. I have considered the submissions made by the learned Counsel and perused the record. Since the immunity is claimed by the defendant No. 1 under the above two Acts, it would be appropriate to quote Section 1 of the Judicial Officers' Protection Act of 1850 and Section 3 of the Judges (Protection) Act, 1985. Section 1 of the Judicial Officers Protection Act of 1850 reads as under:*
>
> *1. Non-liability to suit of officers acting judicially, for official acts done in good faith and of officers executing warrants and order:- No Judge, Magistrate, Justice of Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction: Provided that he at the time in good faith, believed himself to have jurisdiction to do or order the act complained of; and no officer of any Court or other person, bound to execute the lawful warrants or orders of any such judge, Magistrate, Justice of the Peace, Collector or other person acting*

judicially shall be liable to be sued in any Civil Court, for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same.

Section 3 of the Judges (Protection) Act, 1985 reads as under:

Additional protection to Judges :- (1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of Sub-section (2), no Court shall entertain or continue any civil or criminal proceeding against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of acting or purporting to act in the discharge of his official or judicial duty or function. (2) Nothing in Sub-section (1) shall debar or affect in any manner the power of the Central Government or the State Government or the Supreme Court of India or any High Court or any other authority under any law for the time being in force to take such action (whether by way of civil, criminal or departmental proceedings or otherwise) against any person who is or was a Judge.

7. From the bare perusal of the Section 1 of The 1850 Act, it is clear that the Judicial Officer acting judicially is protected in respect of any act done or ordered to be done by him in the discharge of his judicial duty provided he in good faith believed himself to have jurisdiction to do or order the act complained of. Insofar as Section 3 of The 1985 Act, which provides additional protection to Judges clearly stipulates that no Court shall entertain or continue any civil or criminal proceedings against any person who is or was a Judge for any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function. Thus, Section 3 gives complete immunity to a Judge or Ex-Judge in respect of any act, thing or word committed, done or spoken by him when, or in the course of, acting or purporting to act in the discharge of his official or judicial duty or function. Section 4 of the said Act also provides that provision of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force providing for protection of Judges. The conjoint reading of sections 3 and 4 makes it clear that the protection given to a Judge or Ex-Judge for any act, thing or word committed, done or spoken by him while discharging official or judicial function is absolute. Under Section 1 of The 1850 Act the protection from being sued in civil suit is available to a Judge or Magistrate for any act done or ordered to be done by him in the discharge of his judicial duty provided he in good faith believed himself to have jurisdiction to do or order the act complained of. As such the protection available to a Judge under The 1850 Act is in respect of any action taken in good faith whereas the protection available under The 1985 Act is absolute and is even available not only to a sitting Judge but also to an Ex-Judge in respect of the actions taken or words spoken by him while discharging his official or judicial function. The reason behind giving absolute protection by The 1985 Act is quite obvious. If such an absolute protection is not given, the Judge or Ex Judge runs the risk of facing civil action at the instance of the disgruntled litigants who may have been aggrieved by adverse orders passed against them. If such an absolute protection is not given, a Judge or an Ex-judge is likely to face frivolous suits at the instance of the litigants who are aggrieved by adverse orders passed by the Judge or Ex-Judge. Therefore, in order to give absolute protection to the Judge not only during his tenure but even thereafter, the Legislature thought it fit to enact The

Judges (Protection) Act, 1985. A bare reading of Sections 3 and 4 of the said Act makes the intention of the legislature to give complete protection to a Judge sitting or retired clear. That being the position, in my view, there is considerable merit in the submission of Mr. Bhangde that the trial Court exercised jurisdiction illegally in rejecting the application under Order VII, Rule 11 of the Code of Civil Procedure. It is the case of the defendant No. 1 that the suit filed against the defendant No. 1 was clearly barred and, therefore, the plaint was liable to be rejected as against the defendant No. 1 under Order VII, Rule 11(d) of Civil Procedure Code on the ground that there was a bar to file the suit. Since the suit was clearly barred under Section 3 of the 1985 Act, the application filed by the defendant No. 1 ought to have been allowed by the trial Court. I am, therefore, of the opinion that the trial Court exercised jurisdiction illegally in rejecting the application filed by the defendant No. 1. I am unable to accept the submission of Mr. Darda appearing on behalf of the respondents 1 to 6 that the respondents 1 to 6 have filed the suit against the defendants in good faith believing that the suit is the only remedy available in view of the communication of the Registrar and the notice under Section 80 of the Code of Civil Procedure issued to the defendants. The suit must have been filed by the plaintiffs against the defendants after obtaining legal advise and if the plaintiffs have been wrongly advised in filing the suit which is patently not maintainable, they cannot come with the plea that the suit was filed in good faith. Moreover, it is pertinent to note that the application filed under Order VII, Rule 11 of the Code of Civil Procedure by the defendant No. 1 in the trial Court was vehemently contested in the trial Court by respondents 1 to 6. They have also contested the present Revision Application. Therefore, I am unable to accept the submission of Mr. Darda, I am, therefore, of the opinion that the impugned order deserves to be quashed and set aside.

29 Even otherwise, demoralizing of the officers discharging their duties, more particularly, those who are discharging judicial or quasi-judicial functions, needs to be avoided at all costs, as surely, public would not only lose faith, but shall be imparted no justice if those, who are entrusted with discharging public functions, are demoralized.

30 In view of the aforesaid discussions, I find merit in this petition and the same is accordingly allowed and consequently, the impugned order dated 4.9.2017 passed by the learned trial court is set aside. Resultantly, the application filed by the defendant under Order 7 Rule 11(d) CPC is allowed and the plaint of the plaintiff is rejected.

31 Admittedly, the plaintiff has dragged the defendant to unnecessary and otherwise avoidable litigation and has thereby abused process of the Court and has, therefore, made himself liable to pay a special costs to the opposite party, quantified at Rs.25,000/-, which shall be paid to the defendant on or before 15.12.2018 and in case, the same is not paid within the aforesaid period, then it shall be open to the defendant to recover the same by filing an execution petition before this Court.

32 However, before parting it needs to be observed that the learned trial court was equally at fault in entertaining the plaint wherein even the provisions of law had not been mentioned. If the learned trial court would have cared to go through the instructions issued from time to time by this Court, it would have definitely not entertained the plaint.

33 This Court vide notification No. HHC/Rules/Misc.-1/97, dated 21.7.1997 has issued the following instructions:-

13(i) Mention of Provision of Law in the Head Note of the Plaint- Instruction regarding:

It has been observed that many of the plaint(s), petition(s), Application(s) and Misc. Application(s) are being filed in the Court(s) without quoting the provision of law in the Head Note leading thereby to confusion.

I have, therefore, been directed by the Hon'ble Chief Justice to impress upon you to ensure that no plaint(s), petition(s), Application(s) and Misc. Application(s) etc. be entertained unless in the Head Note provision of law is mentioned.

Please ensure that the above instructions be complied with in letter and spirit.

34. The Registrar (Rules) is directed to once again circulate the aforesaid notification throughout the State so as to ensure that no plaint(s), petition(s), application(s) and misc. application(s) are entertained by the courts unless in the head note, provision of law is clearly mentioned.

35. Pending application(s), if any, also stands disposed of.

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

Suresh Kumar ...Petitioner
Versus
Deepak Sood and ors. ...Respondents

C.R. No. 188/2018
Reserved on: 13.11.2018
Date of decision: 26.11.2018

Code of Civil Procedure, 1908 - Order VIII Rules 6-A & 6-B – Provisions of counter claim - Purpose – Held - Purpose for providing provisions of filing counter claim is to avoid multiplicity of judicial proceedings and save upon court's time as also to exclude inconvenience to parties. (Para 9)

Code of Civil Procedure, 1908 - Orders VII Rule 11 and VIII Rule 6-C - Counter claim - Rejection thereof – Justification - Plaintiff filing suit for injunction for restraining defendants from interfering in his user of suit land - Defendants filing counter claim for mandatory injunction and mesne profits against plaintiff for illegal user of suit land – Trial court dismissing plaintiff's application for rejection of counter claim - Petition against – Defendants found pleading with certainty that plaintiff squatting over front portion of his shop owned by them – Also specifically pleading cause of action and claiming use and occupation charges against plaintiff - Order of trial court well reasoned - Application of plaintiff malafide - Petition dismissed with costs assessed at Rs. 25,000/-. (Paras 23 to 26)

Case referred:
Ramesh Chand Ardawatiya vs. Anil Panjwani, (2003) 7 SCC 350

For the petitioner: Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.
For the respondents: Mr. B. R. Verma, Advocate, for respondent No.1.

Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj Vashisht, Advocate,for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The plaintiff is the petitioner, who aggrieved by the order dated 16.8.2018 passed by the learned Civil Judge, Court No.3, Shimla, H.P., whereby his application under Order 7 Rule 11 and Order 8 Rule 6(C) read with Section 151 of the Code of Civil Procedure, 1908 (n for short, the "Code") for rejection of counter claim preferred by the respondents/defendants No. 2 and 3 was dismissed, has filed the instant petition.

2 The parties shall be referred to as the "plaintiff" and "defendants".

3 The plaintiff has filed a suit for permanent perpetual prohibitory injunction against the defendants for restraining them from interfering in any manner in peaceful possession of the plaintiff, illegally dispossessing him or causing any hindrance in the business of the plaintiff being carried out by him as a proprietor of M/s Suresh Boot House in the suit property, which is pending adjudication before the learned trial court. During the pendency of the suit, defendants No. 2 and 3 on 10.5.2019 along with their written statement filed a counter claim seeking a relief of permanent perpetual prohibitory junction and mandatory injunction and for recovery of use and occupation charges from the plaintiff. It is then that the plaintiff filed an application under the aforesaid provisions for rejection of counter claim preferred by defendants No. 2 and 3 on the ground that the same was not legally maintainable in the eyes of law and, thus, was liable to be rejected.

4 It was submitted that as per mandate of Order 8 Rule 6 of the Code, the counter claim is to be treated as plaint and is governed by the Rules applicable to the plaints and since the counter claim has not been drawn up in accordance with law under Order 7 Rule 11 and Order 8 Rule 6(C) of the Code, therefore, it is liable to be rejected.

5 The defendants No. 2 and 3 filed reply to the application, wherein it was averred that the entire set of facts and detailed pleading of counter claim are already contained in para Nos. 2 and 3 of the written statement and since the same was in accordance with the Appendix A mentioned in Order 6 Rules 1 and 4 and order 8 Rules 6A and 6B of the Code, therefore, the application deserves to be rejected.

6 The learned trial court vide a detailed order rejected the application on 16.8.2018 constraining the plaintiff to file the instant petition.

7 I have the learned counsel for the parties and have also gone through the material placed on record.

8 The provisions dealing with counter claim have been spelt out in the Code and order 8 Rule 6(a) to (g) of the same read thus:

> *[6A. Counter-claim by defendant.—*
>
> *(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his*

defence has expired, whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the court.

(2)Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints.

6B.Counter-claim to be stated.— Where any defendant seeks to rely upon any ground as supporting a right of counter-claim, he shall, in his written statement, state specifically that he does so by way of counter-claim.

6C.Exclusion of counter-claim.—Where a defendant sets up a counter-claim and the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, the plaintiff may, at any time before issues are settled in relation to the counter-claim, apply to the Court for an order that such counter-claim may be excluded, and the Court may, on the hearing of such application make such order as it thinks fit.

6D.Effect of discontinuance of suit.— If in any case in which the defendant sets up a counterclaim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with.

6E.Default of plaintiff to reply to counter-claim.—If the plantiff makes default in putting in a reply to the counter-claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him, or make such order in relation to the counter-claim as it thinks fit.

6F.Relief to defendant where counter-claim succeeds.—Wherein any suit a set-off or counter-claim is established as a defence against the plaintiff's claim and any balance is found due to the plaintiff or the defendant, as the case may be the Court may give judgment to the party entitled to such balance.

6G. Rules relating to written statement to apply.—The rules relating to a written statement by a defendant shall apply to a written statement filed in answer to a counter-claim.

9 In order to appreciate the controversy, one needs to understand the purpose for providing provisions enabling filing counter claim, that was for the first time introduced by Act 104 of 1976. The purpose obviously is to avoid multiplicity of judicial proceedings and save upon the court's time as also to exclude the inconvenience to the parties by enabling claims and counter claims, that is, all disputes between the same parties being decided in the course of the same proceedings. This was so held by the Hon'ble Supreme Court in ***Ramesh Chand Ardawatiya vs. Anil Panjwani, (2003) 7 SCC 350***, wherein it was observed as under:

28. Looking to the scheme of Order VIII as amended by Act No. 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under Rule 1 may itself contain a counter-claim which in the light of Rule 1 read with Rule

6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by Rule 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under Rule 9. In the latter two cases the counter-claim though referable to Rule 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under Order VI Rule 17 of the CPC if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under Order VIII Rule 9 of the CPC if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings. If the consequence of permitting a counter-claim either by way of amendment or by way of subsequent pleading would be prolonging of the trial, complicating the otherwise smooth flow of proceedings or causing a delay in the progress of the suit by forcing a retreat on the steps already taken by the Court, the Court would be justified in exercising its discretion not in favour of permitting a belated counter-claim. The framers of the law never intended the pleading by way of counter-claim being utilized as an instrument for forcing upon a re-opening of the trial or pushing back the progress of proceeding. Generally speaking, a counter-claim not contained in the original written statement may be refused to be taken on record if the issues have already been framed and the case set down for trial, and more so when the trial has already commenced. But certainly a counter-claim is not entertainable when there is no written statement on record. There being no written statement filed in the suit, the counter-claim was obviously not set up in the written statement within the meaning of Rule 6-A. There is no question of such counter-claim being introduced by way of amendment; for there is no written statement available to include a counter claim therein. Equally there would be no question of a counter-claim being raised by way of 'subsequent pleading' as there is no 'previous pleading' on record. In the present case, the defendant having felled to file any written statement and also having forfeited his right to filing the same the Trial Court was fully justified in not entertaining the counter-claim filed by the defendant-appellant. A refusal on the part of the Court to entertain a belated counter-claim may not prejudice the defendant because in spite of the counter-claim having been refused to be entertained he is always at liberty to file his own suit based on the cause of action for counter-claim.

10 As would be noticed from the aforesaid observations, there are three modes of pleading for setting up a counter claim in a civil suit, which once filed is to be treated as a cross suit and not a separate suit. In fact, Order 8 Rule 6A(2) clearly provides that counter claim shall have the same effect as a cross suit (not a separate suit) so as to enable the court to pronounce final judgment in the same suit, both on the original claim and the counter claim.

11 A counter claim is a suit, though the same is taken in the written statement. Just as a suit is filed by the plaintiff, the defendant seeks a relief against the plaintiff on a cause of action, which he has against the plaintiff. It is an independent cause of action, which could also be agitated in separate suit. However, in order to avoid multiplicity of

proceedings, the defendant is given liberty to file a counter claim and get adjudication. The counterclaim expressly is treated as a cross suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court-fee. Therefore, the counter claim has to be treated as cross suit only for the purpose of convenience and speedy disposal of rival claims and the counter claim in a suit is made permissible.

12 Once the Rules of the Code are applicable to the counter claim, then obviously the same would include the provisions of Order 7 Rule 11 of the Code.

13 However, does the applicability of Rules as envisaged under the Code include the entire provisions as contained in Orders 6 and 7. The answer to the same is in negative.

14 As observed earlier, the counter claim is not a separate suit, but is only a cross suit. Once that be so, then the defendant is only required to comply mainly with the provisions contained in Rule 1 (d) to 1 (i) of Order 7 as the other particulars are already available with the learned trial court in the suit filed by the plaintiff.

15 Order 7 Rule 1 of the Code reads as under:

> *1. Particulars to be contained in plaint.—The plaint shall contain the following particulars:—*
>
> *(a) the name of the Court in which the suit is brought;*
>
> *(b) the name, description and place of residence of the plaintiff;*
>
> *(c) the name, description and place of residence of the defendant, so far as they can be ascertained;*
>
> *(d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;*
>
> *(e) the facts constituting the cause of action and when it arose;*
>
> *(f) the facts showing that the Court has jurisdiction;*
>
> *(g) the relief which the plaintiff claims;*
>
> *(h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished; and*
>
> *(i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits.*

16 As observed above, the purpose of permitting the defendant to file a counter claim, when he has an independent cause of action and even the limitation has not run out is that instead of filing of the separate suit, he can file a counter claim in order to avoid multiplicity of litigation.

17 Now, in this background, in case heading of the written statement-cum-counter claim is seen, it will be noticed that defendants No. 2 and 3 have specifically raised the counter claim, as is evident from the heading, which reads thus:-

> *Written statement on behalf of Defendants No. 2 & 3 under Order VIII Rules 1 & 2 read with section 27 of the Civil Procedure Code, 1908 along with the Counter claim under Order VIII Rule 6 read with Order VII Rule 1 & 2 and Section 26 of the Civil Procedure Code, 1908 with a prayer for restraining the plaintiff by way of permanent perpetual prohibitory injunction from using the licensed premises i.e. front portion of the shop measuring about 4 feet in depth and 11.5 feet in width in the basement floor of four storied building*

known as Amber Hotel Building also known as Diwana Mall Building in the records of Municipal Corporation, Shimla standing built upon land comprised in Khata/Khatauni No. 147 min/167 Mohal Bazar Ward Bara Tehsil and District Shimla for his business and for mandatory injunction directing the plaintiff to remove himself and his articles, stock, belongings etc. and etc. from the said premises and for recovery of use and occupation charges @ Rs. 5000/- per day till the date he illegally uses the front portion of the shop for his business activity.

18 In addition to the aforesaid, the defendants No. 2 and 3 have spelt out the reasons for filing of the counter claim, cause of action and the relief as would be evident from the perusal of later part of para 3 read with paras 4 and 5 of the written statement-cum-counter claim,which read thus:

"3..... Therefore, left with no other choice defendant No. 2 & 3 are constrained to file a counter claim for injunction restraining the plaintiff from using the front portion of the shop for business purposes. Since the plaintiff has failed remove his display counter, his articles and stock from licensed premises i.e. front portion of the shop measuring about 4 feet in depth and 11.5 feet in width as such he is required to be restrained by way of permanent perpetual prohibitory injunction from suing the said premises for his business and by way of mandatory injunction directing the plaintiff to remove his display counter, his articles, stock etc. and etc. from the said premises. As the plaintiff is illegally using the front portion of the shop without any right, title or interest in the same as such he has rendered the entire shop and property owned by the replying defendant useless therefore he is also liable to pay use and occupation charges @ Rs. 5000% per day till he illegally used the front portion of the shop for business activity or removes himself from the said premises for which present counter claim is preferred along with this written statement.

4. Contents of para No. 4 of the plaint as alleged are absolutely wrong, false and baseless therefore the same are denied. As a matter of fact no case is made out in favour of the plaintiff against the replying defendant. On the other hand it is the plaintiff who is required to be restrained by way of permanent perpetual prohibitory injunction from using the front portion of the shop in the basement floor of four storied building known as Amber Hotel Building also known as Diwana Mall Building in the records of Municipal Corporation,Shimla standing built upon land comprised in Khata/Khatauni No. 147 min/167 Mohal Bazar Ward Bara Tehsil and District Shimla for carrying out his business and by way of mandatory injunction directing the plaintiff to remove his articles, stock etc. and etc. from the said premises.

5. Contents of para 5 of the plaint as alleged are absolutely wrong, false and baseless as such same are denied. It is denied that any cause of action accrued in favour of plaintiff against the replying defendants. On other hand cause of action arose in favour of defendants No. 2 & 3/counter claimants on 31st March, 2018 by which date the plaintiff was required to remove himself, his display, counter stock, belongings and articles from the licensed premises and subsequently on 18th April, 2018 when the plaintiff managed to obtain an ex part injunction and said cause of action is recurring on.

19 It would be noticed that defendants No.2 and 3 not only have with reasonable certainty but with fair purpose set out counter claim along with cause of action

and the relief prayed for as well as valuation of the court fee affixed on the counter claim. The order passed by the learned trial court is a detailed and well reasoned order. Therefore, why then defendants No. 2 and 3 have still chosen to approach this Court by filing the instant petition.

20 The reason is not difficult to guess. The plaintiff is squatting over the commercial property and has sought relief of injunction. Now, defendants No. 2 and 3 themselves have filed a counter claim wherein they have claimed that the plaintiff is illegally using front portion of the shop without any right, title or interest and as such rendered entire shop and property owned by the defendants useless and therefore, he is also liable to pay use and occupation charges @ Rs.5000/- per day till he illegally uses the front portion of the shop for business activity or removes himself from the said premises.

21 Therefore, in the given facts and circumstances of the case, this Court has no hesitation to observe that the instant case is classical one being turned into a fruitful industry by unscrupulous plaintiff, who has been encouraged to persuade the court to pass interlocutory orders in his favour and may have earned huge profit during the course of this litigation.

22 Though, litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a *prima facie* case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle could be even lost at the end. This cannot be countenanced.

23 No doubt, a litigant has every right to approach the Court, but then he must do so where there is a justifiable cause. The plaintiff by getting these proceedings alive has gained and is trying to further gain undeserved and unfair advantage by dragging the proceedings for a long time on one count or the other and thereby delaying the disposal of the case by taking undue advantage of procedural complications. One has only to engage professionals to prolong the litigation so as to deprive the rights of a person and enjoy the fruits of litigation.

24 The Court has been used as a tool by the plaintiff to perpetuate illegalities to prolong the litigation knowing fully well that the petition filed by him was nothing short of being cantankerous and the same was eventually liable to be dismissed, particularly in light of the detailed order already passed by the learned trial court, which in fact has not been seriously challenged before this Court except elaborating what was otherwise averred in the application for rejection of the counter claim. No litigant can derive benefit from mere pendency of case in a court of law and under no circumstances can be allowed to take any benefit of his own wrong. Litigation should not be permitted to turn into a fruitful industry so that the unscrupulous litigants are encouraged to invoke the jurisdiction of the court. The institution of litigation cannot be permitted to confer any advantage on a party by delayed action of courts. All these tendencies have to be curbed.

25 In view of aforesaid discussions, I not only find this petition without any merit, but it am of the considered opinion that the plaintiff has grossly abused the process of this Court and, therefore, has made himself liable to pay costs.

26 Accordingly, the petition is dismissed with costs of Rs.25,000/-to be paid to the defendants before 31.12.2018. Pending application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Vishwas Kumar .....Petitioner
Versus
State of H.P. and another .....Respondents

CWP No. 1534/2018
Reserved on: 24th July, 2018
Decided on: 27th July, 2018

Constitution Of India 1950 – Articles 14, 15 & 226 – Reservation in educational institutions – Essentialities - Petitioner appearing in JEE (Mains) and qualifying in OBC (non creamy layer) category - During counselling, institution cancelling his seat against OBC non creamy layer category and considering him under general category – Petition against – Petitioner contending that he ought to have been admitted against seat meant for OBC non creamy layer – Held, reservation for admission to NITs/IITs and CFTIs in favour of OBC is only available to such of candidates who belong to Non Creamy Layer - Certificate showing that petitioner was not under creamy layer was not filed with institution at time of counselling – Though subsequently such certificate brought on record - But it was issued in favour of petitioner based on parental income in financial year 2013-2014 - It did not indicate or mention about his parental income covering three preceding financial years as required by rules - Petitioner not entitled for admission against OBC non creamy layer category - Petition dismissed. (Paras 6, 7, 11 & 12)

For the petitioner: Ms. Ranjana Parmar, Senior Advocate with Ms. Rashmi Parmar, Advocate.
For the respondents: Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Additional Advocate Generals with Mr. Bhupinder Thakur, Deputy Advocate General for respondent No.1.
Mr. K. D. Sood, Senior Advocate, with Mr. Shubham Sood, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J.

The petitioner appeared in the Joint Entrance Examination (Main)-2018 as Other Backward Classes (OBC)/Non Creamy Layer (NCL) candidate and passed the same. He was called for counselling on 2.7.2018. However, his seat was cancelled because instead of OBC/NCL category, he was treated in the general category. It is in this background that the petitioner has prayed for writ of certiorari for quashing Annexure P-4 seeking further direction to admit him in B. Tech. (Electronics and Communication Engineering), for which he had been selected as OBC candidate.

2 Respondent No.2 has contested the petition by filing reply, wherein preliminary objection regarding maintainability has been raised on the ground that respondent No.2 is just a participating and reporting Institute working under Joint Seat

Allocation Board (JoSAA) and Central Seal Allocation Board (CSAB). As a matter of fact, after framing the scheme/guidelines and criteria, Joint Entrance Examination-2018 for eligibility of admissions in IITs, NITs and IITs etc was conducted by JEE (Main) Secretariat, Central Board of Secondary Education, H-149, Sector 63, Noida, UP 201309 and after declaration of results, all data was transferred to JoSAA and CSAB, formed by Ministry of Human Resources and Development (MHRD), Government of India. JOSAA, who had also made and approved certain Business Rules for Joint Seat allocations for various academic programmes in aforesaid Central Institutes. Whole of the scheme formed for JEE (Main)-2018, (Annexure R-1) was available online and on the basis of such scheme/guidelines/rules, every individual including the petitioner, applied for the examination. In para Nos. 3 and 4, it is made clear that benefit of reservation for admission to NITs/IITs and CFTIs shall be given only to those classes/castes/tribes which are in the respective central lists published by the Government of India. In the case of the petitioner, the list published by National Commission for Backward Classes, with respect to Bihar (Annexure R-2), the caste stated by the petitioner as 'Godi Chhavi' does not find mentioned but it is only there as 'Godi Chhava'. Not only this, but it is made clear in the format of application (Annexure R-3) that the category benefit will be only if candidate falls in central list. Replying respondent being only participating and reporting Institute cannot go beyond the aforesaid Rules. Therefore, claim of the petitioner was rightly rejected.

3 Apart from above, another preliminary objection regarding estoppel has been raised and it is averred that the relevant guidelines/norms had been properly communicated to the petitioner and it was only thereafter he filled-in the application form and could not turn around and assail the action of the replying respondent in rejecting his candidature vide Annexure P-4. Lastly, preliminary objection regarding non-joinder of necessary parties has been raised and it is contended that the CSAB, who had framed and approved the business Rules for joint seat allocation in academic programmes for replying respondent and other IITs and NITs, are necessary party.

4 On merits, it has been contended that the category mentioned in OBC certificate annexed by the petitioner with the petition does not find mentioned in the central list prepared by the Central Board for other Backward Classes. The petitioner has mentioned his caste as 'Godi Chhavi', but in the central list, it is not the same, however, at Sr. No.29 of the central list, it has been mentioned as 'Godi Chhava'.

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

6 In the information bulletin relating to JEE (Main)-2018, reservation of seats has been provided for under clause 3.4, which reads thus:-

> *"As per Government of India rules candidates belonging to certain categories are admitted to seats reserved for them based on relaxed criteria. These categories are:*
>
> *I. Other Backward Classes (OBC) if they belong to Non Creamy Layer (NLC)*
>
> *II. Scheduled Castes (SC)*
>
> *III. Scheduled Tribes (ST)*
>
> *IV. Persons with Disability (PwD) with 40% or more disability*
>
> *Benefit of reservation for admission to NITs/IITs and CFTIs shall be given only to those classes/castes/tribes which are in the respective central list published by the Govt. of India. For admission to State Engineering colleges*

who have opted for admission through JEE (Main)-2018, the reservation rules of that State shall apply. The letter/e-mails/grievances/RTI cases/Court cases regarding reservation criteria will not be entertained by JEE (Main) Secretariat/CBSE."

7 It would be noticed that the reservation for admission to NITs/IITs and CFTIs in favour of OBC is only available to such of the candidates who belong to Non Creamy Layer (NCL) and it is not available to the candidates, who simply belong to OBC category.

8 The form of certificate to be produced by other backward classes (NCL) applying for admission to Central Educational Institutions (CEIs) under the Government of India has been appended as Annexure-V with the Reporting Centre/Help Centre Guidelines, Infrastructure & Budget, issued by the CSAB, which reads thus:-

"(This certificate must have been issued on or after 1st April 2018)

This is to certify that Shri/Smt./Kum_____, Son/Daughter of Shri/Smt._____of Village/Town_____ District/Division_____ in the _____ State/Union Territory_____ belongs to the _____ community which is recognized as a backward class under Government of India, Ministry of Social Justice and Empowerment's Resolution No._____ dtd._____.

Shri/smt./Kum._____and/or his/her family ordinarily reside(s) in the _____District/Division of the _____State/Union Territory. This is also to certify that he/she does not belong to the persons/sections (Creamy Layer) mentioned in column 3 of the Schedule to the Government of India, Department of Personnel & Training O.M. No. 36012/22/93-Estt.(SCT) dated 8/9/93 which is modified vide OM No. 36033/3/2004 Estt. (Res.) dated 9/3/2004, further modified vide OM No. 36033/3/2004-Estt. (Res.) dated 14/10/2008, again further modified vide OM No.36036/2/2013-Estt(Res), dated 30/5/2014.

District Magistrate/
Deputy Commissioner/
Competent Authority"

9 Evidently, certificate that was furnished by the petitioner to the respondent vide Annexure P-2, only certifies the petitioner at best belonging to OBC category, but nowhere has it been certified that the petitioner does not belong to the persons/sections (creamy layer) in column 3 of the Schedule to the Government of India, Department of Personnel & Training O.M. No. 36012/22/93-Estt.(SCT) dated 8/9/93 which was modified vide OM No. 36033/3/2004 Estt. (Res.) dated 9/3/2004, further modified vide OM No. 36033/3/2004-Estt. (Res.) dated 14/10/2008, again further modified vide OM No.36036/2/2013-Estt(Res), dated 30/5/2014.

10 The petitioner, has thereafter obtained and placed on record another OBC-NCL certificate, which reads thus:-

"OBC-NCL Certificate Format

FORM OF CERTIFICATE TO BE PRODUCED BY OTHER BACKWARD CLASSES (NCL) APPLYING FOR ADMISSION TO CENTRAL EDUCATIONAL INSTITUTIONS (CEIs), UNDER THE GOVERNMENT OF INDIA

This is to certify that Shri/Smt./Kum Vishwas Kumar, Son/Daughter* of Shri/Smt.* Sudhir Kumar of Village/Town* Sadhua, District/Division**

*Bhagalpur, in the State/Union Territory Bihar, belongs to the Godi (Chhhaya) community that is recognized as a backward class under Government of India**, Ministry of Social Justice and Empowerment's Resolution No. 12011/68/93-BCC(c), dtd. 10/9/1993****

Shri/Smt./Kum. Vishwas Kumar, s/o Sudhir Kumar and/or his/her family ordinarily reside(s) in the Bhagalpur District/Division of the Bihar State/Union Territory. This is also to certify that he/she does NOT belong to the persons/sections (Creamy Layer) mentioned in Column 3 of the Schedule to the Government of India, Department of Personnel & Training O.M. No. 36012/22/93- Estt. (SCT) dated 08/09/93 which is modified vide OM No. 36033/3/2004 Estt.(Res.) dated 09/03/2004, further modified vide OM No. 36033/3/2004-Estt. (Res.) dated 14/10/2008, again further modified vide OM No.36036/2/2013-Estt (Res) dtd. 30/05/2014.

Sd/-

Zonal Officer

Rangra Chowk

Dated 9/7/2018"

11 Even though, this certificate does not form part of the record and was never submitted to respondent No.2, however taking into consideration the persuasive submission made by the learned counsel for the petitioner to the effect that the petitioner is a meritorious students, we proceed to consider the certificate.

12 Evidently, this certificate has been issued in favour of the petitioner based on the parental income in the financial year 2013-2014 viz. 1st April 2013 to 31st March 2014 and does not even remotely indicate or mention about the income covering three preceding financial years i.e. 2015-16, 2016-17 and 2017-18, as provided in the office memorandum No. F.No. 36036/2/2013-Estt.(Res), issued by the Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, Government of India, which reads thus:-

"F. No. 36036/2/2013- Estt.(Res-I)

Government of India

Ministry of Personnel, Public Grievances & Pensions

Department of Personnel & Training

Establishment Reservation — I Section

North Block, New Delhi

Dated 31st March 2016

OFFICE MEMORANDUM

Subject: Validity period of OBC Certificate in respect of 'creamy layer' status of the candidates.

This Department has received various references on the issue of problems being faced by the candidates on the requirement to obtain multiple non-creamy layer OBC certificates for appearing in various examinations. With a view to address this issue, the following revised procedure is proposed:-

(a) Every candidate seeking reservation in central government posts and services as OBC candidate is required to submit a certificate confirming

his/her status as OBC and also produce Non-creamy layer status issued by an authority mentioned in DOPT Office Memorandum No.36012/22/93-Est(SCT) dated 15.11.1993.

(b)The Non-creamy Layer Certificate would be applicable to OBC candidates who are covered under Income/Wealth Test criterion. The income limit is decided on the basis of income earned during three previous financial years preceding the year of appointment. To illustrate, the validity of non-creamy layer certificate issued during any month of the financial year 2016-17 covering 3 preceding financial years viz. 2013-14, 2014-15 and 2015-16 be accepted by the concerned authorities for any appointments or recruitments which would be valid during the period April 2016 to March 2017. The appointing authorities would accept production of self-attested photo copy of the Non-creamy layer certificate, subject to verification of the original Non-creamy layer certificate, as is the practice being followed for verification of other original documents.

2.On this issue, the National Commission of Backward Classes has suggested a new format for issue of Non-creamy layer certificate, which is enclosed.

3.It is requested that comments on the suggestions made in para 1 of this OM and any other suggestion(s) to streamline the system of issue of Non creamy layer certificate (NCL) may please be furnished.

4. It is also requested that comments on the Non-creamy layer certificate format proposed by NCBC, may also be furnished.

Encl: as above

Sd/-
(Raju Saraswat)
Under Secretary"

13 Therefore, in the given circumstances, respondent No.2 had no option, but to reject the candidature of the petitioner against the reserved seat of OBC-NCL.

14 Having said so, we find no merit in this petition and the same is accordingly dismissed leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

****

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

Sher Singh .....Petitioner
Vs.
The Himachal Pradesh Bus Stands Management
and Development Authority and anr. .....Respondents

CWP No.5369/2014
Decided on: 30.7.2018

Constitution of India, 1950 - Article 14 – **Arbitration and Conciliation Act, 1996**-
Constitution of India, 1950 - Article 14 – **Arbitration and Conciliation Act, 1996**-

Section 8 – Writ jurisdiction – Availability vis-a-vis work contract containing arbitration clause - Held, alternative remedy is not absolute bar to invocation of writ jurisdiction – In appropriate circumstances, without exhausting alternative remedy writ can be filed by aggrieved person – Existence of arbitration clause *ipso facto* can not render writ petition not maintainable. (Para 6, 7 & 9)

Constitution of India, 1950- Article 14 - Principles of natural justice – Breach of – Writ jurisdiction – Held, non-observance of principles of natural justice itself amounts to prejudice to person - Independent proof of prejudice to aggrieved person not necessary – Decision not based on equity, fair play and justice cannot be allowed to stand – Order directing petitioner to stop further construction work awarded under work contract allegedly on account of deviation without affording opportunity to him, set aside – Respondents asked to re-negotiate with petitioner so that work is executed without delay- Writ disposed of. (Paras 13, 18 to 20)

Cases referred:

M/s Ram Barai Singh & Co. vs. State of Bihar & ors. JT 2014 (14) SC 357

Mahanadi Coalfields Ltd. & Ors. vs. M/s Dhansar Engineering Co. Pvt. Ltd. & Anr. JT 2016 (9) SC 385

S. L. Kapoor vs. Jagmohan, AIR 1981 SC 136

Union of India and others vs. Tantia Construction Private Limited (2011) 5 SCC 697

For the petitioner: Mr. Surinder Saklani, Advocate.

For the respondents: Mr. D.N. Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan (oral)

This is one of the glaring cases where, by single stroke of a pen, construction work of Bus Stand, Barchhwar, Sarkaghat, District Mandi, awarded to the petitioner, was stopped by the respondents as far as back on 12.4.2013 vide Annexure P-8 and the same despite being of great public utility has still not been resumed.

2 What is even more shocking is that no enquiry was held in the matter, even though the evident reason as set out in the communication dated 12.4.2013 for stopping the construction work of the bus stand was that the then Transport Minister had desired that an enquiry as to the deviations of quality work be conducted by the Executive Engineer level Officer. Though, ironically even the amount spent by the petitioner on the construction work has even been paid to him.

3 It is in this background that the petitioner has filed the instant writ petition for grant of the following substantive reliefs:-

> *1. A writ in the nature certiorari may very kindly be issued and impugned letter dated 12.4.2013 as contained in Annexure P-8 may very kindly be quashed and set aside.*
>
> *2. That this Hon'ble Court may very kindly be pleased to issue a writ in the nature of mandamus, directing the respondents to immediately issue the orders of resumption of work by the petitioner at bus stand Barchwar, Tehsil Sarkaghat, District Mandi, H.P. as per the letter of award dated 16th June, 2012 (Annexure P-1).*

> *3. That the respondents may very kindly be directed to pay damages to the tune of Rs.10,000/- per day and Rs.12,000/- per month separately for the salary of two Chowkidars.*
>
> *4. That the respondents may further be directed to renegotiate the terms of the contract with the petitioner, keeping in view of the escalation of costs, which has resulted from the illegal commissions on the part of the respondents.*

4 The respondents in their reply have raised preliminary objection regarding non-maintainability of the instant writ petition on the ground of there being an arbitration clause in the award contract. As regards factual averments, the same have not been seriously disputed by the respondents.

5 I have heard the learned counsel for the parties and have also gone through the material placed on record carefully.

6 Adverting to the preliminary objections regarding non-maintainability of the instant writ petition on the ground of there being an arbitration clause in the agreement in question, the Hon'ble Supreme Court in ***Union of India and others*** *vs.* ***Tantia Construction Private Limited (2011) 5 SCC 697***, while making observation on arbitration clause held that it is now well settled that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, writ petition would be maintainable. It is further held that injustice whenever and wherever takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution. The relevant observation reads thus:

> *"33. Apart from the above, even on the question of maintainability of the writ petition on account of the Arbitration Clause included in the agreement between the parties, it is now well-established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution."*

7 In ***M/s Ram Barai Singh & Co.*** *vs.* ***State of Bihar & ors. JT 2014 (14) SC 357*** the Hon'ble Supreme Court set aside the order passed by the Division Bench of Patna High Court, which had dismissed the writ petition on the ground of maintainability in view of existence of an arbitration clause. It was held that though existence of alternative remedy can be a ground of refusal to exercise writ jurisdiction, but the same cannot *ipso facto,* render a writ petition not maintainable and it was held as follows:-

> *"9. We find ourselves in agreement with case of the appellant that the Division Bench failed to notice the relevant facts including the history of earlier litigation. It also failed to notice that the agreement itself had worked out long back and in the earlier round of litigation as well as in the present round the respondents never raised any objection on the basis of arbitration clause.*
>
> *10. The Division Bench noticed the judgment of this Court in the case of State of U.P. & Ors. v. Bridge & Roof Company (India) Ltd.(1996) 6 SCC 22 as well as in the case of ABL International Ltd. & Anr. v. Export Credit*

Guarantee Corporation of India Ltd. & Ors. (2004) 3 SCC 553 for coming to the conclusion that where the contract itself provides an effective alternative remedy by way of reference to arbitration, it is good ground for declining to exercise extraordinary jurisdiction under Article 226 of the Constitution of India and that the Court will not permit recourse to other remedy without invoking the remedy by way of arbitration, "unless, of course, both the parties to the dispute agree on another mode of dispute resolution."

11. In our considered view, the aforesaid two decisions did not warrant setting aside of the judgment of learned Single Judge without going into merits and dismissing the writ petition at appellate stage on ground of alternative remedy when no such objection was taken by the respondents either before the writ court or even in the Memorandum of Letters Patent Appeal.

12. "In our view, a constitutional remedy by way of writ petition is always available to an aggrieved party and an arbitration clause in an agreement between the parties cannot ipso facto render a writ petition "not maintainable" as wrongly held by the Division Bench". Availability of alternative remedy is definitely a permissible ground for refusal by a writ court to exercise its jurisdiction in appropriate cases. But once the respondents had not objected to entertainment of the writ petition on ground of availability of alternative remedy, the final judgment rendered on merits cannot be faulted and set aside only on noticing by the Division Bench that an alternative remedy by way of arbitration clause could have been resorted to."

8 Similar reiteration of law is found in a recent judgment of the Hon'ble Supreme Court in ***Mahanadi Coalfields Ltd. & Ors. vs. M/s Dhansar Engineering Co. Pvt. Ltd. & Anr. JT 2016 (9) SC 385***, wherein after quoting the ***Tantia Construction*** (supra), it was held as under:

"25. Similarly, it is not necessary for us to burden this judgment with the decisions relied on by the respondents, to contend that existence of alternative remedy is no bar to entertain a Writ Petition under Article 226 of the Constitution of India, as held in the cases of ***Popcorn Entertainment vs. City Development Corporation*** *[JT 2007 (4) SC 70: 2007 (9) SCC 593],* ***Harbanslal Sahnia & Anr. V. Indian Oil Corporation Ltd. & Ors****. [JT 2002 (10) SC 561 : 2003(2) SCC 107],* ***Union of India & Ors. vs. Tantia Construction Pvt. Ltd.*** *[JT 2011 (5) SC 59 : 2011 (5) SCC 697],* ***M.P. State Agro Industries Development Corpn. & Anr. Vs. Jahan Khan*** *[JT 2007 (10) SC 571] and* ***Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai*** *[JT 1998 (7) SC 243: 1998 (8) SCC 1]."*

9 From the conspectus of the above judgments of the Hon'ble Supreme Court, what emerges is that a constitutional remedy by way of writ petition is always available to an aggrieved party and an arbitration clause in an agreement between the parties cannot *ifso facto* render a writ petition "not available". Though availability of alternative remedy is definitely a permissible ground for refusal by a writ court to exercise its jurisdiction in appropriate case, but the same is a rule of discretion and not one of the compulsion.

10 Thus, it can safely be held that an alternative remedy is not an absolute bar to the exercise of extraordinary jurisdiction under Article 226 of the Constitution of India but where the statute provides efficacious and alternative remedy, the High Court will do well in not entertaining a petition under Article 226 of the Constitution of India because of misplaced consideration, statutory procedure cannot be allowed to be circumvented.

11 However, in the present case, as noticed above, there is no statutory bar and it is only on account of the arbitration clause that the respondents have challenged the maintainability of the writ petition. This contention in view of the aforesaid discussion cannot be upheld and accordingly the writ petition despite there being an arbitration clause in the agreement is held to be maintainable.

12 Now, adverting to the merits of the case, as already observed above, without the petitioner being put to any reasonable notice, the construction work was abruptly stopped by the respondents. Not even a show cause notice was served upon the petitioner.

13 It is more than settled that non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It is here then that the action of the official respondent is required to be tested on the touchstone of justice, equity, fair play and in case its decision is not based on justice, equity and fair play and has been taken after taking into consideration other material, then even though on the face of it, the decision may look to the legitimate, but as a matter of fact the reasons are not based on values but on extraneous consideration that decision cannot be allowed to stand.

14 In this connection, the decision in ***S. L. Kapoor vs. Jagmohan, AIR 1981 SC 136*** is relevant. In paragraph 16 of the judgment, their Lordships of the Hon'ble Supreme Court have held as follows:-

> *"....In our view, the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based if it is furnished in a casual way or for some other purpose. We do not suggest the opportunity need be a 'double opportunity' that is one opportunity on the factual allegations and another on the proposed penalty. Both may be rolled into one. But the person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. If that is made known the requirements are met. ..."*
>
> *(Emphasis added)*
>
> *..... In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal."*
>
> *(Emphasis supplied)*

15 In ***Wade & Forsyth*** --'Administrative law', the learned Authors have said thus:-

"A proper hearing must always include a 'fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view'. Lord Denning has added :

'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them....."

(Emphasis supplied)

16 Apart from above, it would be noticed that in case the respondents felt that the construction work being carried out by the petitioner was not as per the award contract, then they were free to hold enquiry against the petitioner and if there was any adverse finding against the petitioner, steps in accordance with law could have been taken for termination of the contract.

17 In absence of either of the above, the respondents could not have kept the petitioner in lurch for so many years. After all, the petitioner was also to earn something out of the award contract that had been legally awarded to him.

18 What clearly appears to have been overlooked by the respondents and their officers is that they are holding public offices, which are sacrosanct. Such offices are meant for use and not for abuse and in case repositories of such offices spoil the rule, then the law is not powerless and would step in to quash such arbitrary orders. The respondent(s) being a creation of a statute is admittedly the "State" within the meaning of article 12 of the Constitution of India and cannot, therefore, as like a private individual, who is free to act in a manner whatsoever he likes, unless it is interdicted by law. It needs no reiteration that the State or its instrumentalities have to strictly fall within the four corners of the law and all its activities are governed by the rules, regulations, instructions etc.

19 Having said so, the order dated 12.4.2013 (Annexure P-8) passed by the respondents regarding stoppage of construction work cannot sustain and is accordingly quashed and set aside. Since there was a lawful award contract in favour of the petitioner, it would obviously not be possible for the petitioner to execute the contract on the same terms and conditions as have been mentioned in award contract dated 16.6.2012. Therefore, the respondents are directed to re-negotiate with the petitioner and award the contract in his favour so that the remaining construction work of bus stand Barchhwar, which is of utmost public importance, is completed without there being an undue delay.

20 Needless to say that the respondents shall, while carrying out the negotiations with the petitioner, take into consideration the escalation of costs, rise in inflation etc.

21 At this stage, learned counsel for the petitioner prays that the petitioner may be permitted to file a suit for damages against the respondents. Though, no such permission is required, however the petitioner is at liberty to institute a suit and needless to say that the same shall be decided by the concerned Court in accordance with law.

22 The writ petition is disposed of in the aforesaid terms, leaving behind the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Om Parkash Rahi .....Petitioner
Versus
Union of India and ors. .....Respondents

CWP No. 413/2018 along with CWP Nos. 414, 415, 416 and 515/2018
Reserved on: 26th July, 2018
Decided on: 31stJuly, 2018

National Institute of Technology Act, 2007 – General - Held, Authorities thereunder are identified - Powers and jurisdiction of said authorities have also been specifically spelt out - Under Act, Ministry of Human Resource Development (MHRD) has no power to issue instructions or guidelines to any National Institute of Technology (Institute). (Para 20)

National Institute of Technology Act, 2007- Section 17 - **1st Statute For All National Institutes of Technology, 2009** - Powers of Director - Explained – Held, even though Director of Institute is one of Authorities who can be appointed in prescribed manner but he can discharge his duties only within prescribed norms – He cannot constitute committee of his own atleast with regard to teachers with respect to whom he is not Appointing Authority - He has limited jurisdiction as regards, academic staff in posts of lecturers or above - His power is confined to take decisions of non-academic staff in any cadre where maximum of pay scale is less than of Rs. 10,500/-. (Paras 27 & 28)

Constitution of India, 1950 - Articles 14 and 16 - Grant of promotion/placement/fitment – Withdrawal – Challenge - Petitioners duly promoted or given placements as Associate Professors on recommendations of Selection Committee and approved by Board of Governors - On findings of Committee constituted by officiating Director regarding wrong placement of petitioners, MHRD advising Institute to recover excess amount from Petitioners - Challenge – Held, fact that promotions or redesignations of petitioners was subject to verification by Audit Department and MHRD had also advised Institute to recover amount from petitioners is inconsequential - MHRD has no power under Act to issue instructions to Institute - Under Act, Director had no power to constitute Committee asking it to look into anomalies of promotions and pay etc – Constitution of Committee itself illegal so also all consequential actions taken thereafter - Petitions allowed. (Paras 6, 10,25 & 26)

Cases referred:

Dipak Babaria vs. State of Gujarat and others 2014 AIR SCW 1425

Selvi J. Jayalalithaa and others vs. State of Karnataka and others JT 2013 (13) SC 176

For the petitioner(s):	Mr. Shrawan Dogra, Senior Advocate with Mr. Deven Khanna and Mr. Harsh Kalta, Advocate, for the petitioner(s) in CWP Nos. 413, 414, 415 and 416/2018. Mr. Adarsh K. Vashista, Advocate, for the petitioner(s) in CWP No. 515/2018
For the respondents:	Mr. Shashi Shirshoo, Central Government Counsel, for respondent No.1, in all the petitions.

Mr. K. D. Sood, Senior Advocate, with Mr. Shubham Sood, Advocate, for respondents No.2 to 4 in all the petitions.
None for respondents No. 5 to 12 in CWP No. 515/2018

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J.

Since common questions of law and facts arises for consideration in these petitions, the same were taken up together for hearing and are being disposed of by a common judgment.

2 The petitioner(s) in CWP Nos. 413, 414, 415 and 416/2018 have prayed for the following substantive reliefs:

1. *That communication dated 12.2.2018 (Annexure P-24) may be quashed and set aside;*
2. *That the communication dated 15.6.2016 (Annexure P-13), report dated 6.12.2016 (Annexure P-14), resolution of respondent No.3 item No. 12 of meeting held on 13.12.2016 under new item (Annexure P-15) may also be quashed and set aside;*
3. *That the respondents No. 2 and 3 may be directed to consider the claim of the petitioner(s) for mapping in AGP of Rs.9500/- in accordance with rules and grant consequential benefits from due date;*
4. *That respondents No. 1 to 3 may be restrained from withdrawing promotional/placement benefits given to the petitioner(s) up to the post of Associate Professor in implementation of communication dated 12.2.2018 issued by respondent No.1 and petitioner(s) may be held entitled to all benefits as he was drawing at present and to which the petitioner(s) would be entitled in future as per rules;*
5. *That the petitioner(s) may be directed to be considered to the post of Professor in consequence to his application submitted in reference to Advertisement No. 06/2017 (Annexure P-29) and consequently the recommendations in favour of the petitioner(s) may be implemented from due date with all consequential benefits;*
6. *That the Officiating Director may be restrained from taking any material decision affecting interests of the teaching faculty and should confine only to routine matters as directed by respondent No.1 vide communication dated 29.8.2016 (Annexure P-31).*

3 The petitioner(s) in CWP No. 515/2018 have prayed for the following substantive reliefs:

1. *That a writ in the nature of certiorari may kindly be issued for quashing the impugned communication dated 12.2.2018, Annexure P-17;*
2. *That the respondents may kindly be directed to grant due and admissible benefits of 7th Central Pay Commission in favour of the petitioner(s) along with consequential benefits, in the interest of justice.*

4 For the sake of convenience and in order to maintain clarity, facts of CWP No. 413/2018 are being referred to.

5 Even though, various averments have been made in the writ petition, however, long and short of the matter is that the petitioner(s) was offered appointment as Lecturer in the pay scale of Rs.8000-13500 in Electrical Engineering Department, NIT, Hamirpur, the then Regional Engineering College, Hamirpur on 28.6.2000 (Annexure P-1) and he joined the Institute on 25.7.2000. On the recommendations of Staff Selection Committee, the petitioner(s) was designated as Lecturer (Senior Scale) in the pay scale of Rs. 1000-15200 with the approval of Board of Governors w.e.f 25.7.2005 vide letter dated 31.12.2005 (Annexure P-2). Purusant to the recommendations of 6th Central Pay Commission notified vide letter No. F. No. 23-1/2008-TS.II, dated 18.8.2009 (Annexure P-5) and letter No. 1-32/2006-U.II/U.I(i) dated 31.12.2008 (Annexure P-4), the petitioner(s) was placed as Assistant Professor in AGP of Rs.6000/- w.e.f. 1.1.2006 and granted AGP of Rs.7000/- w.e.f. 1.7.2006 vide pay fixation order No. NIT/HMR/Admn./Pay Revision-270/2009/342-57 dated 20.1.2010 (Annexure P-6). The Institute had conducted the Career Advancement Scheme (CAS) interviews as one time measure for the eligible faculty members on 5/6. 6.2013 at IIT Delhi and the petitioner(s) was placed in the AGP of Rs.8000/- w.e.f. 1.7.2011 vide office order No.NIT/HMR/Admn./Rev-270/Vol.-17/2013/6967-77, dated 12.11.2013 (Annexure R-1). On the representation, dated 29.9.2014 (Annexure R-2), made by the petitioner(s), the Institute placed him in PB-IV in AGP of Rs. 9000/- in light of Ministry of Human Resource Development (MHRD) letter dated 31.12.2008. The petitioner(s) was given advantage of re-designation to the post of Associate Professor in AGP of Rs.9000/- from 25.7.2013 subject to verification by Audit Department and subsequent direction if any received from the MHRD in this regard and the MHRD issued its letter dated 12.2.2018 to clarify the matter by setting aside the re-designation of the petitioner(s) to the post of Associate Professor as the same, according to it, was not in order.

6 It is the case of respondent No.2 that it received numerous representations of faculty/non-faculty staff (verbal/written) with regard to their issues relating to anomalies in promotion/placement/up-gradation/movement/ pay fixation and MACPs etc. and accordingly, the officiating Director constituted a committee to look into the matter.

7 It is the powers of the officiating Director that have been questioned in these petitions and it is claimed that all further actions after constitution of the committee be it final recommendations of the Committee (Annexure P-14) or thereafter the decision taken by the Board of Governors in its 31st meeting held on 13.12.2016 are liable to be quashed and set aside as it is more than settled that in casevery foundation on which an edifice built collapses along with it falls the entire edifice.

8 As regards respondents No. 2 to 4, they have tried to justify their action by referring to certain clarifications/directions of respondent No.1, however further question is as to whether the MHRD itself had the authority to issue letters/instructions as have been relied upon by respondents No. 2 to 4 in support of their case, which too have been assailed on the ground of its competence.

9 As regards respondent No.1, it has justified its action by stating that the committee constituted by the officiating Director had examined the cases of six faculty members of the Institute, i.e. the petitioner(s) and the similarly situated persons and the benefit extended to them being not in order and contrary to the guidelines issued by respondent No.1 from time to time, after examining the report of the anomaly committee, the MHRD vide its letter dated 12.2.2018(Annexure P-24), had conveyed its observations that the CAS promotions given to the six faculty members including the petitioner(s) were

not in order and advised respondent No.2 to recover the excess amount that had been paid due to wrong pay fixation.

10 As observed earlier, one of the moot questions is also as to whether the officiating Director of respondent No.2 had at the first place authority to constitute the committee and in case he did not have the authority, then concededly the recommendations made by the said committee are of no consequence.

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

12 At the outset, it may be observed that initially, the institute of respondent No.2 was one of the Regional Engineering Colleges, which was converted into National Institute of Technology and the status of a deemed University was accorded to it in exercise of powers conferred by Section 3 of U.G.C. Act by the Central Government on the advice of U.G.C. with cent-percent Central Government funding w.e.f. financial year 2003-04. The institute in question thereafter was brought within the scope and ambit of National Institute of Technology Act, 2007(in short, the NIT Act, 2007).

13 However, before we advert to the merits of the case, certain provisions of the NIT Act, 2007 as amended from time to time, need to be noticed.

14 The object and reasons of the NIT Act, 2007 are as under:-

> *"An Act to declare certain institutions of technology to be Institutions of national importance and to provide for instructions and research in branches of engineering, technology, management, education, sciences and arts and for the advancement of learning and dissemination of knowledge in such branches and for certain other matters connected with such institutions."*

15 Sections 3(g), 6(i), 9 10, 11, 13, 17(1) and (2), 19, 24, 25(g), 26, 27, 30, 32, 36 and Schedule entry No.5 of the NIT Act, 2007 are as under:-

> ***3. Definitions:***
>
> *(a) to (f) xxx xxx xxx*
>
> *(g) "Institute"means any of the Institutions mentioned in column (3) of the Schedule;*
>
> *(h) to (n) xxx xxx xxx*
>
> ***6. Power of Institutes :-***
>
> *(1) Subject to the provisions of this Act, every Institute shall exercise the following powers and perform the following duties, namely:--*
>
> *(a) to (h) xxx xxx xxx*
>
> *(i) to frame Statutes and Ordinances and to alter, modify or rescind the same;*
>
> *(j) to (o) xxx xxx xxx*
>
> ***9. Visitor :-***
>
> *(1) The President of India shall be the Visitor of every Institute.*
>
> *(2) The Visitor may appoint one or more persons to review the work and progress of any Institute and to hold inquiries into the affairs thereof and to report thereon in such manner as the Visitor may direct.*
>
> *(3) Upon receipt of any such report, the Visitor may take such action and issue such directions as he considers necessary in. respect of any of the*

matters dealt with in the report and the Institute shall be bound to comply with such directions within reasonable time.

10. Authorities of Institutes :-

The following shall be the authorities of an Institute, namely:--

(a) a Board of Governors;

(b) a Senate; and

(c) such other authorities as may be declared by the Statutes to be the authorities of the Institute.

11. Board of Governors :-

The Board of every Institute shall consist of the following members, namely:--

(a) the Chairperson to be nominated by the Visitor;

(b) the Director, ex officio;

(c) two persons not below the rank of the Joint Secretary to the Government of India to be nominated by the Central Government from amongst persons dealing with technical education and finance;

(d) two persons to be nominated by the Government of the State in which the Institute is situated, from amongst persons, who, in the opinion of that Government, are technologists or industrialists of repute;

(e) two persons, at least one of whom shall be a woman, having special knowledge or practical experience in respect of education, engineering or science to be nominated by the Council; and

(f) one professor and one assistant professor or a lecturer of the Institute to be nominated by the Senate.

13. Power and functions of Board :-

(1) Subject to the provisions of this Act, the Board of every Institute shall be responsible for the general superintendence, direction and control of the affairs of the Institute and shall exercise all the powers of the Institute not otherwise provided for by this Act, the Statutes and the Ordinances, and shall have the power to review the acts of the Senate.

(2) Without prejudice to the provisions of sub-section (1), the Board of every Institute shall,--(a) take decisions on questions of policy relating to the administration and working of the Institute;

(b) institute courses of study at the Institute;

(c) make Statutes;

(d) institute and appoint persons to academic as well as other posts in the Institute;

(e) consider and modify or cancel Ordinances;

(f) consider and pass resolutions on the annual report, the annual accounts and the budget estimates of the Institute for the next financial year as it thinks fit and submit them to the Council together with a statement of its development plans;

(g) exercise such other powers and perform such other duties as may be conferred or imposed upon it by this Act or the Statutes;

(3) The Board shall have the power to appoint such committees, as it considers necessary for the exercise of its powers and the performance of its duties under this Act.

17. Director and Deputy Director :-

(1) The Director and Deputy Director of an Institute shall be appointed by the Visitor, on such terms and conditions of service and on the recommendations of a Selection Committee constituted by him in such manner, as may be prescribed by the Statutes.

(2) The Director shall be the principal academic and executive officer of the Institute and shall be responsible for the proper administration of the Institute and for the imparting of instruction and maintenance of discipline therein.

(3) to (5) xxx xxx xxx

19. Other authorities and officers :-

The powers and duties of authorities and officers other than those mentioned above shall be determined by the Statutes.

24. Appointments :-

All appointments of the staff of every Institute, except that of the Director and Deputy Director, shall be made in accordance with the procedure laid down in the Statutes, by--

(a) the Board, if the appointment is made on the academic staff in the post of Lecturer or above or if the appointment is made on the non-academic staff in any cadre the maximum of the pay scale for which exceeds rupees ten thousand five hundred;

(b) the Director, in any other case.

25. Statutes :-

Subject to the provisions of this Act, the Statutes may provide for all or any of the following matters, namely:--

(a) to (f) xxx xxx xxx

(g) the classification, the method of appointment and the determination of the terms and conditions of service of teachers and other staff of the Institute;

(h) to (n) xxx xxx xxx

26. Statutes how made :-

(1) The first Statutes of each Institute shall be framed by the Central Government with the prior approval of the Visitor and a copy of the same shall be laid as soon as may be before each House of Parliament.

(2) The Board may, from time to time, make new or additional Statutes or may amend or repeal the Statutes in the manner provided in this section.

(3) Every new Statute or addition to the Statutes or any amendment or repeal of Statutes shall require the previous approval of the Visitor who may grant assent or withhold assent or remit it to the Board for consideration. (4) A new Statute or a Statute amending or repealing an existing Statute shall have no validity unless it has been assented to by the Visitor.

27. Ordinances :-

Subject to the provisions of this Act and the Statutes, the Ordinances of every Institute may provide for all or any of the following matters, namely:--

(a) the admission of the students to the Institute;

(b) the courses of study to be laid down for all degrees and diplomas of the Institute;

(c) the conditions under which students shall be admitted to the degree or diploma courses and to the examinations of the Institute, and shall be eligible for degrees and diplomas;

(d) the conditions of award of the fellowships, scholarships, exhibitions, medals and prizes;

(e) the conditions and mode of appointment and duties of examining bodies, examiners and moderators;

(f) the conduct of examinations;

(g) the maintenance of discipline among the students of the Institute; and

(h) any other matter which by this Act or the Statutes is to be or may be provided for by the Ordinances.

30. Establishment of Council :-

(1) With effect from such date as the Central Government may, by notification, specify in this behalf, there shall be established for all the Institutes specified in column (3) of the Schedule, a central body to be called the Council.

(2) The Council shall consist of the following members, namely:--

(a) the Minister in charge of the Ministry or Department of the Central Government having administrative control of the technical education, ex officio, as Chairman;

(b) the Secretary to the Government of India in charge of the Ministry or Department of the Central Government having administrative control of the technical education, ex officio, as Vice-Chairman;

(c) the Chairperson of every Board, ex officio;

(d) the Director of every Institute, ex officio;

(e) the Chairman, University Grants Commission, ex officio;

(f) the Director General, Council of Scientific and Industrial Research, ex officio;

(g) four Secretaries to the Government of India, to represent the Ministries or Departments of the Central Government dealing with biotechnology, atomic energy, information technology and space, ex officio;

(h) the Chairman, All India Council for Technical Education, ex officio;

(i) not less than three, but not more than five persons to be nominated by the Visitor, at least one of whom shall be a woman, having special knowledge or practical experience in respect of education, industry, science or technology;

(j) three members of Parliament, of whom two shall be chosen by the House of the People and one by the Council of States:

Provided that the office of member of the Council shall not disqualify its holder for being chosen as or for being, a member of either House of Parliament;

(k) two Secretaries to the State Government, from amongst the Ministries or Departments of that Government dealing with technical education where the Institutes are located, ex officio;

(l) Financial Advisor, dealing with the Human Resource Development Ministry or Department of the Central Government, ex officio;

(m) one officer not below the rank of Joint Secretary to the Government of India in the Ministry or Department of Central Government having administrative control of the Technical Education, ex officio, as Member-Secretary.

32. Function of Council :-

(1) It shall be the general duty of the Council to co-ordinate the activities of all the Institutes.

(2) Without prejudice to the provisions of sub-section (1), the Council shall perform the following functions, namely:--

(a) to advise on matters relating to the duration of the courses, the degrees and other academic distinctions to be conferred by the Institutes, admission standards and other academic matters;

(b) to lay down policy regarding cadres, methods of recruitment and conditions of service of employees, institution of scholarships and freeships, levying of fees and other matters of common interest;

(c) to examine the development plans of each Institute and to approve such of them as are considered necessary and also to indicate broadly the financial implications of such approved plans;

(d) to advise the Visitor, if so required, in respect of any function to be performed by him under this Act; and

(e) to perform such other functions as are assigned to it by or under this Act.

36. Power to remove difficulties :-

(1) If any difficulty arises in giving effect to the provisions of this Act the Central Government may, by order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as may appear to it to be necessary or expedient for removing the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the date on which this Act receives the assent of the President.

(2) Every order made under this section shall, as soon-as may be after it is made, be laid before each House of Parliament.

The schedule

List of Central Institutions Incorporated into the NIT Act, 2007

1. to 4. xxx xxx xxx

5. National Institute of Technology, Hamirpur Society.

6. to 20. xxx xxx xxx

16 Though, anamendment was carried out in the NIT Act, 2007, on 7.6.2012, called as the National Institutes of Technology (Amendment) Act, 2012, (No. 28 of 2012) however, no significant change, as is relevant for the adjudication of these petitions was made, therefore, no reference qua the said amendment is necessary. Similar is the situation with regard to the amendment carried out in the NIT Act, 2007 on 4.3.2014 called as the National Institutes of Technology, Science Education and Research (Amendment) Act, 2014 (No.9 of 2014).

17 Adverting to the statutes for all National Institutes of Technology, the following are some of the provisions, which need to be noticed:

> ***2. Definitions:-***
>
> *(b). "Authorities", "Officers" and "Faculty Members" in relation to an Institute mean, respectively, the authorities, officers and faculty members of the Institute.*
>
> ***3. Authorities:-***
>
> *The following shall be the authorities of the Institute, namely:-*
>
> *i. the Board of Governors as constituted under Section 11 of the Act;*
>
> *ii. the Senate as constituted under Section 14 of the Act;*
>
> *iii. the Finance Committee as constituted under First Statute 10; and*
>
> *iv. the Building and Works Committee as constituted under First Statute No. 12.*
>
> ***17. The Directors and his Powers***
>
> *(7). The Director, where he is the appointing authority, shall have the power to fix, on the recommendations of the Selection Committee, the initial pay of an incumbent at a stage higher' than the minimum, of the scale, but riot involving more than five increments, in respect of posts to which appointment can be made by him under the powers vested in him by the provision of the Act or these statutes.*
>
> *(14) The Director may, at his discretion constitute such committees, as he may consider appropriate for smooth functioning of the Institute.*
>
> ***23. Appointments***
>
> *(5) Selection Committees for filling up of posts under the Institute (other than on contract basis) by advertisement or by promotion from amongst the members of staff of the Institute shall be constituted in the following manner, namely:*
>
> *(a) The Selection Committee for recruitment of Academic Staff (excluding the Director and the Deputy Director), or for promotion shall be as under:*
>
> *(1) Director of Deputy Director - Chairman*
>
> *(2) Visitor's nominee -Member*
>
> *(3) Two nominees of the Board one being an expert, but other than a member of the Board -Member*
>
> *(4) One expert nominee of Senate from outside the Institute. -Member*
>
> *(5) Head of Department concerned (for other than the post of Professor)*

18 Noticeably, even though the first statute was amended vide notification dated 21.7.2017, called as the First Statute of National Institutes of Technology (Amendment) Statutes, 2017, however, no significant change, as is relevant for the adjudication of these petitions was made, therefore, is not required to be referred to.

19 Adverting to the facts, there is no dispute that the petitioner(s) joined respondent No.2 after being selected by a duly constituted selection committee as Lecturer, which nomenclature was in existence at the relevant point of time. Such selection was made after following Rules, which were based on the norms and guidelines of the All India Council For Technical Education (AICTE) and University Grants Commission (UGC). It was only after enactment of the NIT Act, 2007 and framing of 1st Statute in the year 2009 that a provision was incorporated in Statue 23 that the teaching staff would be governed by the Rules applicable to the employees of Central Government. Thus, the necessary inference is that whatever Rule of appointment or promotion was being followed by respective NITs/RECs, was the one applicable to the staff of NIT till such time the NIT has framed its own Rules. The petitioner(s) had been applied such existing Rules and had been granted promotion/placement from time to time under these norms and Rules.

20 That apart, it would be noticed from the scheme of the NIT Act, 2007 that the authorities thereunder are identified and their powers and jurisdiction have also been specifically spelt out. Noticeably, no power is given to the MHRD as such to issue instructions or guidelines *dehors* the power given to the it under the scheme of the NIT Act, 2007.

21 After respondent No.2 had declared the Rules to be applied for the purpose of promotion/placement/fitment in new scales, grant of AGP etc., the selection committee as constituted under the scheme of the NIT Act,2007 was thereafter required to carry out consequential selection process. In the case of the petitioner(s), the duly constituted selection committee had recommended his name for particular promotion/placement and, therefore, no unauthorized interference could have been made by any unauthorized agency, more particularly, when the recommendations as per the procedure had been placed and approved by the Board of Governors.

22 At this stage, it would be necessary to take note of the fact that the Rules relating to promotion of the teachers in the NITs, for the first time, were incorporated through amendment to Statutes 23(5)(a) on 21.7.2017,whereby Schedule 'E' was added providing for qualification and other terms and conditions of academic staff for NITs. Before this, the only provision relating to such matters was the un-amended provision of Statue 23(5) under the 1st Statute, 2009, which provided applicability of Rules applicable to Central Government employees.

23 Thus, it is only after 2017 that the amended Rules would come into operation and would obviously apply prospectively to future cases and the old cases would continue to be governed by the old Rules or uniform practice being followed by respondent No.2 in the cases of the teachers.

24 Noticeably, when the petitioner(s) was given an opportunity for promotion/up-gradation in June 2013, he had exercised the option of AICTE/5th CPC norms after his option was sought by respondent No.2 under CAS, which was allowed by respondent No.1 as one time measure for the institutions, who had not conducted such exercise for the last three or more years. Therefore, in such circumstances, there was no reason to give so called relaxation as one time measure as CAS was in routine applicable till the same was discontinued by way of statutory measures brought about in the year 2017.

25 The petitioner(s) was rightly promoted to the post of Lecture (Selection Grade)/Assistant Professor in the pay scale of Rs.12000-18300/- and placed at the appropriate stage in the pay band of Rs.15600-39100/- with AGP of Rs.8000/- in 6th CPC as per the provisions in para 2(a) (x) of communication dated 31.12.2008 (Annexure P-4).

The petitioner(s) was to wait for three years' service in the grade of Lecturer (Selection Grade) and then was entitled to be placed in the pay band of Rs.37400-6700/- with AGP of Rs.9000/-; and entitled to be re-designated as Associate Professor.

26 It would be also noticed that these promotions and subsequent placements were given by respondent No.2 uniformly to its teachers in different departments. The mere fact that the promotion/re-designation of the petitioner(s) was subject to verification by the Audit Department and subsequent instructions received from the MHRD is inconsequential as this Court has held that the MHRD did not have any power to issue instructions/guidelines *dehors* the power given to it under the scheme of the NIT Act,2007.

27 Now, adverting to the powers of the Director, as have been questioned in these petitions, it would be noticed from the scheme of the NIT Act, 2007, 1st Statute, that the authorities competent to act and take defined decisions have been specifically mentioned. The power to appoint such authority is also provided under the Statute. Even though, the Director of respondent No.2 is also one of the authorities, who can be appointed in a prescribed manner, but then he can discharge his duties only within the defined norms. He cannot constitute the committee(s) of his own at least with regard to the teachers with respect to whom he admittedly is not the appointing authority.

28 As a matter of fact, the Director has limited jurisdiction as regards academic staff in the post of Lecture or above and is in fact confined to take decisions for non-academic staff in any cadre that too where the maximum of pay scale is less than Rs. 10,500/- as per Section 24 of the NIT Act, 2007. Therefore, he could not have of his own constituted the committee(s).

29 It is cardinal rule of interpretation that where a statute provides for a particular thing, it should be done in the manner prescribed and not in any other way. Meaning thereby, that when a statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. In ***Selvi J. Jayalalithaa and others vs. State of Karnataka and others JT 2013 (13) SC 176*** wherein it has been held as under:

> *"29.1. There is yet an uncontroverted legal principle that when the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. In other words, where a statute requires to do a certain thing in a certain way, the thing must be done in that way and not contrary to it at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "Expressio unius est exclusio alterius", meaning thereby that if a statute provides for a thing to be done in a particular way, then it has to be done in that manner and in no other manner and following any other course is not permissible.*
>
> *In State of Uttar Pradesh v. Singhara Singh & Ors. [AIR 1964 SC 358], this Court held as under:*
>
> > *"8. The rule adopted in Taylor v. Taylor [(1876) 1 Ch D 426] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted."*

(See also: Accountant General, State of Madhya Pradesh v. S.K.Dubey & Anr. [JT 2012 (3) SC 210 : (2012) 4 SCC 578]).”

30 The same principle has also been reiterated in a later judgment of the Hon’ble Supreme Court in ***Dipak Babaria vs. State of Gujarat and others 2014 AIR SCW 1425***,wherein it has been held as under:

“53. It is well settled that where the statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. This proposition of law laid down in Taylor v. Taylor (1875) 1 Ch D 426, 431 was first adopted by the Judicial Committee in Nazir Ahmed v. King Emperor, reported in AIR 1936 PC 253 and then followed by a Bench of three Judges of this Court in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, reported in AIR 1954 SC 322. This proposition was further explained in paragraph 8 of State of U.P. v. Singhara Singh by a Bench of three Judges, reported in AIR 1964 SC 358 in the following words:

“8. The rule adopted in Taylor v. Taylor is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted.....”

This proposition has been later on reiterated in Chandra Kishore Jha v. Mahavir Prasad, reported in 1999 (8) SCC 266 : (AIR 1999 SC 3558), Dhananjaya Reddy v. State of Karnataka, reported in 2001 (4) SCC 9 : (AIR 2001 SC 1512) and Gujarat Urja Vikas Nigam Limited v. Essar Power Limited, reported in 2008 (4) SCC 755: (AIR 2008 SC 1921).”

31 Therefore, once the constitution of the committee at the instance of the Director is held to be illegal, then obviously all consequential actions taken thereafter would also be illegal as it is more than settled that once the infrastructure collapses, the superstructure on which the edifice is built is bound to collapse and hence, the orders passed by the various authorities thereafter have to pave the path of extinction. Therefore, report submitted by such illegally constituted committee on 6.12.2016 (Annexure P-14) is also illegal and consequently, no reliance upon it can be placed even by respondent No.2 and it could not have been placed before respondent No.3, therefore, resultantly even the decision taken by respondent No.3 dated 13.12.2016 (Annexure P-15) dealing with this report is also liable to be quashed and set aside and all consequential communications thereafter be it communication dated 24.5.2017 or 7.7.2017 or 12.2.2018 (Annexure P-4) wherein respondent No.1 declared the CAS promotion given to the petitioner(s) being not in order and further directed respondent No.3 to consider this matter and decide it in a particular manner are also illegal and without any authority; and are thus liable to be quashed and set aside.

32 In view of the aforesaid discussions, we find merits in these petitions and the same are accordingly allowed. Consequently, communication dated 15.6.2016 (Annexure P-13), report dated 6.12.2016 (Annexure P-14), resolution of respondent No.3, item No.12 of meeting held on 13.12.2016 under new item (Annexure P-15) are quashed and set aside. Respondents No. 2 and 3 are directed to consider the claim of the petitioner(s) for mapping in AGP of Rs.9500/- in accordance with the Rules and if found eligible to grant all consequential benefits from due date. Further respondents No. 2 and 3 are restrained from

withdrawing promotional/placement benefits given to the petitioner(s) upto the post of Associate Professor and are further restrained from implementing the communication dated 12.2.2018 (Annexure P-24) and the petitioner(s) is held entitled to all benefits that he is drawing at present. Needless to say that respondents No. 2 and 3 shall consider the case(s) of the petitioner(s) for further promotion to the post of Professor in consequence to the application submitted by him in reference to advertisement No.6/17 (Annexure P-29) and if found eligible, the promotion be given from the due date with all consequential benefits. As regards the Director/Officiating Director of respondent No.2, he shall take only those decisions, for which he has been authorized under the NIT Act, 2007, Statutes and Regulations etc.

33. Since all the other petitioner(s) in the connected writ petitions are similar situated like the petitioner in CWP No. 413/2018, their petitions are also allowed in the aforesaid terms.

34. The petitions are disposed of in the aforesaid terms leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

35. The registry is directed to place on record of all connected writ petitions the copy of this judgment.

****

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

Khazana Ram and anr. .....Appellants

Versus

Land Acquisition Collector and ors. .....Respondents

RFA No. 287/2009 along with RFA No.321/2009
Reserved on: 7.8.2018
Decided on: 13.8.2018

Land Acquisition Act, 1894 – Sections 11 and 18 – Consent award – Nature – Whether land owners entitled to file reference? – Held, when Collector has passed award with consent of land owners and aggrieved parties have also accepted compensation without any protest, they are not entitled to prefer reference before District Judge - On facts, award passed by Collector found to be with consent of land owners – District Judge went wrong in allowing reference and enhancing compensation with respect to acquired land – RFA allowed – Award of District Judge set aside. (Paras 12 to 17)

Cases referred:

IshwarLal Premchand Shah and others vs. State of Gujarat and others, (1996) 4 SCC 174
Ranveer Singh vs. State of Uttar Pradesh through Secretary and others, (2016) 14 SCC 191
State of Gujarat and others vs. Daya Shamji Bhai and others, (1995) 5 SCC 746
State of Karnataka and another vs. Sangappa Dyavappa Biradar and others (2005) 4 SCC 264

For the appellant(s):	Mr. Vinay Kuthiala, Senior Advocate with Mr. Diwan Singh Negi, Advocate, for the appellants in RFA No.287/2009. Mr. Neeraj Gupta, Advocate, for the appellant in RFA No. 321/2009 in RFA No. 321/2009.
For the respondent(s):	Mr. Vinod Thakur and Mr. Sudhir Bhatnagar, Additional Advocate Generals for respondents No. 1 and 2 in RFA No. 287/2009 and for respondents No. 3 and 4 in RFA No. 321/2009. Mr. Vinay Kuthiala, Senior Advocate with Mr. Diwan Singh Negi, Advocate, for respondents No. 1 and 2 in RFA No.321/2009. Mr. Neeraj Gupta, Advocate, for respondents No. 3 and 4 in RFA No. 287/2009.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J:

Since both these appeals arise out of the same award as passed by the learned District Judge, Solan, H.P., on 5.6.2009 in L. Ref. No. 3-S/4 of 2008/2004, the same were taken up together for hearing and are being disposed of by a common judgment.

2 The brief facts of the case are that the Government of Himachal Pradesh issued a notification dated 26.12.1990 under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the "Act") for acquisition of 591 bighas of land in villages Bated, Suli, Khata, Dwaroo, Rauri and Pachhyour, Tehsil Arki, District Solan, for establishment of cement factory by M/s Ambuja Cements Ltd., formerly known as Gujarat Ambuja Cements Ltd., (hereinafter referred to as the "beneficiary company"). The proclamation of this notification was made in the the related villages on 5.1.1991 and it was also published in newspaper on 6.1.1991 and 8.1.1991 respectively.

3 It is the case of the beneficiary company that the Land Acquisition Collector, Arki, after holding an enquiry as per provisions of the Act, announced a consent award No. 1/91 for 448-14 bighas of land on 18.5.1992 and provided compensation @ Rs. 62,000/- per bigha (inclusive of solatium and interest) for cultivated land and Rs. 19,000/- per bigha (inclusive of solatium and interest) for un-cultivated land. It is claimed that the land of the appellants in RFA No. 287/2009 (hereinafter referred to as the "claimants") was also acquired under the aforesaid award, however, despite that, the claimants disputed the award and filed a reference petition, which was decided by the learned District Judge, Solan on 31.10.1998 by returning the reference to the Land Acquisition Collector, Arki, to adjudicate as to whether the claimants were consenting parties or not.

4 The Land Acquisition Collector, Arki, after holding an enquiry found the claimants to be consenting parties and accordingly, rejected the prayer for making a reference to the Court vide order dated 30.6.1999. The claimants then filed a writ petition before this Court challenging the orders passed by the learned District Judge, Solan and the Land Acquisition Collector, Arki, which was allowed by this Court vide order dated 27.12.2006 by quashing both the orders and the learned District Judge, Solan, was directed to decide the reference in accordance with law. However, it was made clear that while disposing of the petition, this Court had not expressed any opinion on the merits of the rival contentions of the parties. The learned District Judge, Solan, passed his award on 5.6.2009

by enhancing the compensation to Rs.66,666/- per Bigha in favour of the claimants irrespective of the nature of the land and in addition thereto, the claimants had been held entitled to all statutory benefits like solatium, additional compulsory charges under Section 23(1-A) of the Act and the interest etc.

5 As noted above, the claimants assailed the award being inadequate and have claimed a sum of Rs.12,25,000/- towards enhanced compensation along with statutory benefits and on the other hand, the beneficiary company also assailed the award on various grounds including non-maintainability of the appeal against the consent award.

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

7 At the outset, it may be observed that the proposition that the claimants would not be entitled to seek reference to the civil court against a consent award is no longer *res integra* as would be evident from various decisions of the Hon'ble Supreme Court, some of which are being referred to below.

8 In ***State of Gujarat and others vs. Daya Shamji Bhai and others, (1995) 5 SCC 746***, it was held by the Hon'ble Supreme Court that once the claimants agreed to accept the compensation determined by the Land Acquisition Officer and 25% more in addition thereto and also agreed to forego their right to seek reference, then the contract is conclusive and binding and the claimants are not entitled to seek reference to the civil court.

9 Similar reiteration of law can be found in the judgment of the Hon'ble Supreme Court in ***IshwarLal Premchand Shah and others vs. State of Gujarat and others, (1996) 4 SCC 174***.

10 In addition to the above, there can be no quarrel with the proposition that an award under the Act can be passed either on consent of the parties or on the adjudication of rival claims. However, in case the award is passed on the basis of the consent, then the parties to the award cannot assail the same. ***(Refer: State of Karnataka and another vs. Sangappa Dyavappa Biradar and others (2005) 4 SCC 264)***

11 In fact, the entire law on the subject has been elaborately and eloquently considered by the Hon'ble Supreme Court in its recent judgment in ***Ranveer Singh vs. State of Uttar Pradesh through Secretary and others, (2016) 14 SCC 191***, wherein it was observed as under:-

> *"9. In Daya Shamji Bhai after the notification for acquisition under Section 4(1), the land owners agreed in writing to accept the compensation determined by the Land Acquisition Officer along with 25% enhancement. With such consent they also agreed that they will not go to any court under Section 18 of the Act. Accordingly the land owners were paid in terms of the agreement. In spite of such agreement the land owners sought a reference to which the State objected. The reference court rejected the contention of the State on the ground that the agreements were not registered under the Registration Act and the land owners could not contract out from statute. In the background facts noted above this Court held in favour of the State that the agreement was permitted under sub- section 2 of Section 11 which gives right to the parties to enter into an agreement to receive compensation under Section 11 in terms of the contract. Such contract was held to be conclusive and binding on the parties and therefore the land owners were not entitled to seek any reference for enhancement of the compensation. It was clarified*

that when compensation is received under protest only then Section 18 gets attracted. In paragraph 8 of the report the issue of awarding interest and statutory benefits was also decided against the land owners in following terms:-

> *"8. The question of awarding interest and statutory benefits arises when the civil court finds that the amount of compensation awarded to the landowners by the Collector is not adequate and the prevailing market value is higher than the market value determined by the Land Acquisition Officer under Section 23(1). For entitlement to solatium under Section 23(2) "in addition to" market value the court shall award solatium. Under Section 28, if the court gets power to award interest, when court opines that the Collector "ought to have awarded compensation in excess of the sum which the Collector did award (sic) the compensation". In other words, valid reference under Section 18 confers jurisdiction on the civil court to consider whether the compensation awarded by the Collector is just and fair. Thereafter, when it finds that the Collector ought to have awarded higher compensation, the civil court gets jurisdiction to award statutory benefits on higher compensation from the date of taking possession only. In view of the specific contract made by the respondents in terms of Section 11(2), they are not entitled to seek a reference. Consequently, the civil court is devoid of jurisdiction to go into the adequacy of compensation awarded by the Collector or prevailing market value as on the date of notification under Section 4(1) to determine the compensation under Section 23(1) and to grant statutory benefits."*
>
> *(emphasis added)*

10. In Sangappa Dyavappa Biradar reliance was placed upon Daya Shamji Bhai and the same principles were reiterated by holding that an application for reference to civil court is maintainable only if there is non- acceptance of the award by the awardee. Once parties agree to the compensation payable and consent award is passed, the same would bind the parties unless it is set aside in appropriate proceedings by a court of competent jurisdiction. The consent award accepted without protest extinguishes the legal right to maintain a reference for enhancement of compensation, more so when the land owners agreed not to seek any enhancement. In that case also the land owners had agreed that they would not approach any court for enhancement of compensation and had received the amount of compensation in terms of the consent award in full satisfaction of their claim. After being unsuccessful before the reference court and in writ petition before the Single Judge, the land owners got relief by the Division Bench of the High Court on the ground that in any event they could not be deprived of their statutory right of obtaining solatium and interest in terms of the Act. The High Court's direction for payment on the basis of such statutory provisions was set aside by this Court by holding that applications under Section 18 were not maintainable. The land owners having accepted the award, were estopped from maintaining the applications.

11. This Court in Sangappa Dyavappa Biradar case further held that the High Court also had no jurisdiction under Article 226 to substitute the consent award by directing payment of statutory solatium and interest. It

flows from this judgment that by virtue of the agreement, right to receive solatium and interest can be waived. Further, when the land owners agreed that they would not seek enhancement of compensation by claiming any amount in addition to the amount agreed upon and that they would accept the agreed amount without any protest, the High Court could not have substituted the award by permitting further enhancement on any ground.

12. The main thrust of arguments advanced on the behalf of the appellant, particularly to get rid of the difficulty in his way on account of the aforesaid two judgments is that the land owner agreed not to claim any amount beyond the agreed amount as compensation and therefore the appellant is free to claim any further amount as interest under Section 34 of the Act because such interest is not and cannot be included as a component of compensation which is determined by the Collector under Section 11 of the Act while making the award. Further submission on behalf of the appellant is that various matters which require consideration in determining compensation by court under Section 23 of the Act do not include interest contemplated by the Section 34 of the Act which is payable when the compensation is not paid or deposited on or before taking the possession to the land.

13. On its face the aforesaid contentions appears to be attractive but on a closer analysis of Section 11 as well as Section 23 it is found to have no merits. Section 23 is for guidance of the court which gets jurisdiction to determine compensation afresh only if there is a protest against the award and the payment is received with protest. This section does not control the determination of just compensation by the Collector under Section 11 which requires the Collector to enquire into objections (if any) on different issues such as measurement and interests of the person claiming compensation and then further requires the collector to make an award which is required to reflect, interalia, "the compensation which in his opinion should be allowed for the land." But it is more appropriate and relevant to notice sub-section 2 of Section 11 which is as follows:

> *"11.(2) Notwithstanding anything contained in sub-section (1), if at any stage of the proceedings, the Collector is satisfied that all the persons interested in the land who appeared before him have agreed in writing on the matters to be included in the award of the Collector in the form prescribed by rules made by the appropriate Government, he may, without making further enquiry, make an award according to the terms of such agreement."*

14. This sub-section begins with a non-obstante clause which makes it free of the requirements of sub-section (1) if all the persons interested in the land agree in writing as to what matters should be included in the award of the Collector. Thereupon the Collector is competent to make an award as per agreement without making further enquiry. In view of such clear provision that permits agreement to determine all the matters to be included in the award, all the inclusions and omissions in the consent award must be treated as based upon agreement of the parties and the final amount determined by way of agreement must be taken as a completely just compensation inclusive of the statutory interest payable to the claimant for the concerned land at least on the date of agreement. Since the agreed compensation amount is accepted without protest with a clear stipulation not

to claim any additional amount, it has to be deemed that the compensation reflected in the consent award has taken into account all relevant factors including interest till the date of agreement. Moreover the right to seek reference for enhancement itself gets lost by accepting the compensation without protest especially when there is an agreement that the land owner shall not claim any amount in addition to the amount agreed upon as compensation and shall accept the compensation without any protest. In such circumstances agreed amount has to be treated as a just compensation permitting no addition or substitution whatsoever. In other words, not only the remedy under the Act of seeking enhancement is lost but the substantive cause of action also vanishes when the land owner agrees for a consent award and the amount of compensation is accepted without any protest.

15. Equitable considerations also cannot help the appellant because the agreed amount was paid without any delay, on the date of agreement itself. Notably, the award passed on the basis of agreement with the appellant stipulates the amount of compensation at Rs. 329.76p. per Sq.Yd. However, in the case of other claimants under the same Notification who had not entered into such agreement, the rate was fixed at Rs. 50.57p. per Sq.Yd. with 30% solatium and 12% interest from the date of taking possession. Thus, the agreement with the appellant was a package with regard to the compensation amount voluntarily accepted by the appellant without any demur. The argument of equitable consideration is, therefore, misplaced and ill- advised."

12 It is, thus, clear that right to seek reference would arise only when the amount of compensation was received under protest in writing, which would manifest the intention of the owner of non-acceptance of the award and further no reference would otherwise be maintainable against a consent award.

13 Now, adverting to the records, it would be noticed that according to the Land Acquisition Collector, Arki, award No.1/91 was passed on the basis of the consent. Initially, the objections and arguments were heard on 9.8.1991 after giving wide publicity. The names of persons, who attended the proceedings, were recorded in the register and the same includes the claimants, whose names are mentioned at Sr. No.7 and 8 respectively of village Khata. It is thereafter that on 11.8.1991 that the parties entered into an agreement in accordance with provisions of Section 11(2) of the Act, according to which, all the landowners of the area under acquisition agreed to accept the rates @ Rs. 62,000/- per bigha for cultivated land(s) recorded in the revenue records as Barani Awal, Barani Dom Land, Barni Som etc. and @ Rs.19,000/- per bigha for uncultivated land(s) recorded in the revenue records as Banjar Kadeem, Banjar Jadeed, Ghasni, Banjar etc. Actual cost of fruit trees and non-fruit trees was agreed to be paid as per the valuation norms followed by the Horticulture and Forest Departments of the State Government and actual cost of houses/sheds etc. as per the valuation norms followed by the Public Works Department of the State Government was also agreed to be paid to the concerned owners. All the above rates were agreed to be paid inclusive of solatium and interest charges as payable under the Act.

14 As stated above, it is the specific case of the claimants that they were not privy to the agreement and had accepted the compensation under protest, However, this plea is belied from the record as both the claimants (Khazana Ram and Devki Devi) had accepted compensation of Rs.58,565/- each without any protest as is evident from part-VI of the register (Award No.1/91) relating to Village Khata, wherein their names are mentioned at

Sr. No. 43 and 44 respectively. Not only this, the receipt of claims have been signed on revenue receipts by Khazana Ram for himself and Devki Devi, being her power of attorney. Likewise, the record pertaining to payment of compensation of Village Rouri is also available in part-VII of the register and here again, compensation to the tune of Rs.49,782/- in favour of Khazana Ram and compensation to the tune of Rs.49,781/- in favour of Devki Devi has been received by Khazana Ram without protest as an individual interest holder and as power of attorney holder of Devki Devi.

15 Now, the question is as to whether there was an agreement between the parties or not.

16 The beneficiary company has produced register, Part-I, which again pertains to the Award No.1/91,wherein the agreement between the parties, known as, "SAHMATI KA GYAPAN" is duly available on pages159/160 onwards. To this agreement, list of persons is appended, who were signatories to the agreement and the same includes name of the claimants Khazana Ram, son of Kana Ram, Devki Devi, daughter of Kana Ram and Parvati, widow of Kana Ram.

17 Thus, it stands duly proved on record that the claimants not only had received the compensation without any protest, but as a matter of fact, the claimants were consenting party to the award. Thus, the reference on their behalf was not at all maintainable under the Act. Therefore, the findings recorded by the learned District Judge that the award passed by the Land Acquisition Collector was not a consent award are totally perverse and contrary to the record and are accordingly quashed and set aside.

18 At this stage, in order to be fair with the claimants, it has been strongly urged by Mr. Vinay Kuthiala, learned Senior Advocate that now in view of the latest judgments of the Hon'ble Supreme Court, the identically situated land owners are entitled to the same compensation and in support of this contention, he would bank upon the following judgments:-

i. Ajay Pal and others vs. State of Haryana and another, (2015) 14 SCC 462;

ii. Chandra Bhan (Dead) through legal representatives and others vs. Ghaziabad Development Authority and others (2015) 15 SCC 343; and

iii. Narendera and others vs. State of Uttar Pradesh and others, (2017) 9 SCC 426.

19 Obviously, there can be no quarrel with the proposition as laid down in the aforesaid cases, but the ratio laid down therein does not apply to the instant case as this Court has already held that not only the claimants had accepted the award without protest, but in addition thereto, the award was a consent award, against which no reference to the civil court is otherwise maintainable. In none of the judgments cited above has the Hon'ble Supreme Court held that an appeal would lie against a consent award.

20 In view of the aforesaid observations, the appeal (RFA No. 321/2009) filed by the beneficiary company is allowed and the appeal (RFA No. 287/2009) filed by the claimants is dismissed. Consequently, the impugned award dated 5.6.2009 passed by the learned District Judge, Solan, is quashed and set aside. Resultantly, the consent award passed by Land Acquisition Collector, is upheld. The parties are left to bear their own costs. Pending application(s), if any, also stands dismissed.

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

Sadhu Singh and ors. .... Petitioners
Versus
Surjeet Singh ... Respondent

C.R. No.182 of 2015 a/w C.R. No.183/2015
Reserved on: 17.9.2018
Date of decision: 24.9.2018

Himachal Pradesh Tenancy and Land Reforms Act, 1972 – Sections 104 & 112 – Bar of jurisdiction of civil court -Applicability – Held, bar of jurisdiction of civil court in entertaining suit as contemplated under Section 112 of Act is attracted only when order of conferment of proprietary rights on tenant is sought to be challenged before it - When relationship of landowner and tenant is in dispute, jurisdiction of civil court is not barred. (Paras 23 to 25, 31 & 34)

Himachal Pradesh Tenancy and Land Reforms Act, 1972 – Sections 104 & 112 – Bar of jurisdiction of civil court - Applicability – Plaintiffs filling suit for possession against defendants by averring themselves as owners of suit land and alleging defendants to be trespassers over it – Trial court holding plaintiffs to be owners of suit land and defendants trespassers but returning plaint on ground that latter having already instituted proceedings before AC 1st grade for conferment of proprietary right upon them and civil court having no jurisdiction to entertain suit - District Judge dismissing appeal on ground that plaintiffs had no cause of action since matter was pending before AC 1st grade regarding conferment of proprietary rights on defendants – Revision – Held, plaint clearly indicating planitiffs' disputing revenue entries showing defendants as sub-tenants under 'G'- Relationship of landowner and tenant in dispute inter-se parties - Cause of action accrued in plaintiffs' favour independent of proceedings before AC 1st grade - Jurisdiction of civil court not barred in view of pleadings raised in plaint & replication - Revision allowed - Order of District Judge set aside - Matter remanded to District Judge for decision on merits. (Paras 23 to 25, 31 & 34)

Cases referred:

Chatter Singh and another vs. Hem Raj and others, RSA No. 57/2003 decided on 15.11.2012
Chuhniya Devi vs. Jindu Ram, 1991(1) Shim.L.C. 223
Gaurju vs. Sham Singh and others, RSA No. 157/1996 decided on 11.9.2009
Giano Devi (dead) LRs Ranjit Singh and ors. vs. Munshi Ram and another, RSA No. 405/1995 decided on 19.5.2008
Gurdev Singh vs. Narain Singh and others, 2016(3) ILR(HP) 1656
Jaswant Singh and others vs. Sant Nirankari Mandal, RSA No. 323/2002 decided on 14.5.2014
Joginder Singh vs. Smt. Dropti Devi and others, RSA No. 205/1996 decided on 13.3.2009
Krishan Chand and ors. vs. Jeet Ram and another, 2009(2) Latest HLJ 978
Prita vs. Baldev Singh and others, 2016(5) ILR (HP)595
Sarv Dayal vs. Oma Devi and others, RSA No. 192/2002 decided on 14.7.2008
Shankar vs. Smt. Rukmani and others, 2003(1) Shim.L.C. 300
Sheetla Devi and ors. vs. Hara Dassi and ors., 2008(1) Latest HLJ 220
Suram Singh and ors. vs. Narsh Kumar and ors, FAO No. 314/2002 decided on 29.12.2007

Swaran Singh (deceased) vs. Darshan Singh (deceased), 2016(5) ILR (HP) 620
Tajdin vs. Milkho Devi and ors., 2006(1) RCR (Civ) 790
Udham Singh Vs. Ram Singh and Another, 2007 (15) SCC 529

For the petitioner(s): Ms. Jyotsna Rewal Dua, Senior Advocate with Mr. Tijender Singh, Advocate.
For the respondent(s): Mr. R.K. Gautam, Senior Advocate with Mr. Gaurav Gautam and Ms. Megha Kapur Gautam, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

These revision petitions at the instance of owners/plaintiffs/petitioners of the land take exception to the judgment and decree dated 31.7.2015 passed by the learned Additional District Judge, Sirmaur at Nahan, whereby their appeal preferred against the judgment and decree dated 24.7.2012 passed by the learned trial court was ordered to be dismissed and the cross-objections filed by the defendants/respondents were allowed and consequently, the suit of the petitioners for possession of the suit land on the strength of their title came to be dismissed on the ground of jurisdiction.

2 The brief facts leading to filing of the present petition are-

a) That the petitioners along with others (non-parties) are the recorded owners of the suit land bearing Khata Khatauni No. 25/118, Khasra No. 300, measuring 1045 sq. mtrs. Suit land bore Khata Khatauni No. 26 min./76, Khasra No.145/1 measuring 2-18 bigha as per Missal haquiat consolidation 1956-57. Suit was filed by the petitioners seeking possession of the aforesaid land on the strength of their title.

b) Suit was defended by the respondents primarily on the ground that the suit land was given by the owners/petitioners to their (respondents) predecessors-in-interest on tenancy in 1960. It was further pleaded that they were tenants under the petitioners. And that they in 2002 initiated proceedings before A.C. 1st Grade Paonta Sahib, District Sirmour for conferment of proprietary rights to them. It was further pleaded that since the proceedings for conferment of proprietary rights are pending before the A.C. 1st Grade wherein the relationship of landlord and tenant between the parties was being adjudicated therefore the civil suit had no jurisdiction over the subject matter.

c) Plaintiffs/petitioners contested the above defence of the respondents by submitting that they never created any tenancy in favour of the respondents. It was pleaded that suit land was given by them to one Sh. Geeta Ram, s/o Sh. Chuni Lal as a licensee. Geeta Ram without any consent of the owners used to cultivate the land through one Sh. Arjun Singh and Sh. Sohan Singh, predecessor in interest of the respondents. This action was contrary to the license. There was no agreement of tenancy between the petitioners and the respondents. Petitioners never ever received or were paid any rent by the respondents. The respondents came to be recorded in possession of the suit land as Gair Morusi Doyam under Geeta Ram recorded as Gair Morusi Avval. No rent was ever paid to the petitioners. The jamabandis only showed that ¼ batai was paid by respondents for a year to Geeta Ram. This

in no way would mean that the respondents are tenants of the petitioners. It was submitted that the respondents have no right, title or interest in the suit land and they were cultivating the suit land on behalf of Sh. Geeta Ram, licensee and therefore they have no better title than Sh. Geeta Ram or his successors.

Petitioners are entitled to get the possession of the suit land on the strength of their title. Pendency of the proceedings before the Court of A.C. 1st Grade would not affect the present suit. It was further pleaded that A.C. 1st Grade had no jurisdiction to decide the application of the respondents moved by them for conferment of proprietary rights. And in any case it would not affect the present suit which was for possession and for this reason, the facts in respect of pendency of proceedings before the A.C. 1st Grade, were not mentioned in the plaint.

That the learned trial court framed issued on merits as well as on maintainability of the suit. This Court vide its order dated 11.4.2008 in incidental proceedings resulting from frame of issues held that findings are required to be given on all the issues. This order attained finality. The learned trial court vide its judgment dated 24.7.2012 held following:-

i) the petitioners are the recorded owners of the suit land.

ii) the respondents/defendants are trespassers over the land. There is no relationship of landlord and tenant between the parties. Respondents at best can be said to be cultivating land under Geeta Ram who was inducted as licensee over the suit land by the petitioners. Petitioners neither inducted the respondents as their tenants nor the respondents ever paid any rent/batai to the petitioners. The stand taken by the respondents in the written statement regarding they being tenants of the petitioners was belied from a perusal of the documents brought on record by the petitioners.

iii) despite the above findings given on merits of the matter, the suit of the petitioners was not decreed as the jurisdiction of the civil court was held to be barred by the learned trial court. It was held that proceeding for conferment of proprietary rights was pending before the A.C. 1st Grade-cum-Land Reforms Officer and during pendency of these proceedings dispute of relationship of landlord and tenant had cropped up.

Therefore, it was held that despite holding the petitioners/plaintiffs entitled for the relief of possession on the strength of their title, suit could not be decreed in view of pendency of the proceedings before the A.C. 1st Grade. Plaint was ordered to be returned for presentation before competent authority i.e. Asstt. Collector 1st Grade-cum-Land Reforms Officer Paonta Sahib, District Sirmour.

That appeal was preferred by the petitoners before the learned District Jude against return of their plaint by the learned trial Court. Cross-objections were preferred by the respondents against findings give by the learned trial court on merits of the case wherein they were held to be trespassers over the suit land and whereby it was held that they were not tenants under the petitioners. Learned first appellate court initially vide judgment dated 9.1.2014 held that the suit was maintainable. The decree of the learned trial court was set aside to the extent it held that suit was not maintainable. Suit for possession on the strength of title was held to be

maintainable however it was held that petitioners did not have any cause of action to file suit for possession. It was observed that at the time of filing the suit, the proceedings were already initiated by the respondents claiming proprietary rights over the suit land therefore there was no occasion for the petitioners to claim possession. Appeal was thus partly allowed but suit was dismissed for alleged want of cause of action. The cross objections were allowed and the findings of the learned trial court on merits of the case were set aside on the ground that said issue is pending adjudication before the A.C. 1st Grade.

That feeling aggrieved against the judgment and decree, the petitioners preferred the second appeal RSA No. 254/2014 before this Court. The appeals were allowed by this Court vide judgment dated 12.11.2014. The matter was remanded to the learned first appellate court to decide the matter afresh after treating it as civil miscellaneous appeal. On remand, the learned court heard the matter afresh and took a different view from the one taken by his learned Predecessor inasmuch as appeal filed by the petitioners was dismissed in entirety holding that the suit of the petitioners was not maintainable whereas the cross-objections were allowed in entirety.

3 The petitioners have filed these petitions on various grounds and the main ground being applicability/non-applicability of the Full Bench Decision of this Court in ***Chuhniya Devi vs. Jindu Ram, 1991(1) Shim.L.C. 223***.

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

5 In Chuhniya Devi's case (supra), the Full Bench after reviewing various decisions on the subject and the relevant provisions of the H.P. Land Revenue Act, 1954 and H.P. Tenancy and Land Reforms Act, 1972 formulated the following questions:-

Whether the civil court has jurisdiction, in respect of an order -

(a) made by the competent authority under the H. P. Land Revenue Act, 1954, and

(b) of conferment of proprietary rights under section 104 of the H. P. Tenancy and Land Reforms Act, 1972.

which has not been assailed under the provisions of these Acts.

and thereafter the questions were answered as follow:-

(a) that an order made by the competent authority under the H. P. Land Revenue Act, 1954, is open to challenge before a civil court to the extent that it relates to matters falling within the ambit of section 37 (3) and section 46 of that Act ; and

(b) the civil court has no jurisdiction to go into any question connected with the conferment

of proprietary rights under section 104 of the H. P. Tenancy and Land Reforms Act, 1972, except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the pro visions of the Act had not been complied with.

6 During the course of the judgment, Full Bench has made various observations in paras 39 and 40, which read thus:-

"Who decides

39. True it is that Rule 29 contemplates determination of disputes of the nature contemplated by section 104 (4) of the Act on a summary inquiry on the file', yet, it cannot be over-looked that the dispute is envisaged about the question ' whether a person cultivating the land of a landowner, is a tenant or not ; as is clear from the language in which section 104 (4) is couched. The Legislature must be deemed to know its own mind when enacting a provision of this nature It is not possible to say, as was canvassed before us by Shri B K. Malhotra, that section 104 (4) only lays down a rule of evidence when it says that "the burden of proving that such a person is not a tenant of the landowner shall be on the latter" whenever a dispute arises whether a person cultivating the land of a landowner is a tenant or not. It is implicit in sub-section (4) of section 104 that the Legislature envisaged that a dispute may arise whether a person cultivating the land of a landowner is a tenant or not, when proceedings were in progress under Chapter X, and provided that it shall be decided by the authorities contemplated under this Chapter who shall require the landowner to establish that a person cultivating his land is not a tenant.

Not the Civil Court

40. Any enquiry by a Civil Court on the question was barred by the Legislature by specifically providing in sections 112 and 115, both occurring in Chapter X that the validity of my order made under the Chapter shall not be called in question in any court and that the order shall be final except as expressly provided in the Chapter. The Legislature knew its mind fully well. Where it wanted a dispute to be determined by the Civil Court, it provided so in Chapter X itself. One has only to look at sections 107 and It9 (2). Not only that the Legislature ruled out any determination by a Civil Court, by necessary implication, of other matters, it expressly said so in sections 112 and 115.

7 This judgment was being interpreted differently by various learned single Judges of this Court. However, a learned Division Bench of this Court in ***Shankar vs. Smt. Rukmani and others, 2003(1) Shim.L.C. 300***, culled out the precise ratio laid down in Chuhniya Devi's case (supra), which is as follows:-

"9. After analysing the judgment in Chuhniya Devi v. Jindu Ram's case (supra), we have no doubt that the jurisdiction of the Civil Court is barred under the Act if the dispute pertaining to the relationship of landlord and tenant arises during the proceedings of conferment of proprietary rights upon the tenant and resumption of land by the land owner and the order in respect thereof has been passed by the authorities under the Act except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with. <u>But if the dispute of landlord and tenant arises independent of the proceedings under the Act, the Civil Court has the jurisdiction</u>."

8 Thereafter, the matter was considered by a single Judge of this Court (Hon'ble Justice Deepak Gupta, his Lordship the then was) in ***Tajdin vs. Milkho Devi and ors., 2006(1) RCR (Civ) 790*** wherein, it was observed as under:-

[5] The second question raised before the Full Bench was specifically with regard to conferment of proprietary rights under Section 104 of the H.P. Tenancy and Land Reforms Act. This is apparent from various observations made in the judgment. The Full Bench in Para 44 of the judgment has observed as follows :

"44. The exclusion of the jurisdiction of the Civil Court, in the matter of determination of the question whether a person cultivating the land of a landowner is his tenant or not for purposes of Chapter-X, is both reasonable and understandable. Permitting such a question to be determined by the Civil Court also would have introduced an element of unpredictability, spread over a long period while the matter was under adjudication before the Civil Court at the trial or an appellate stage, which could have made the effective implementation of measures of land reform aimed at by the Act, uncertain. The Legislature could legitimately think of ruling out such a situation. It has done so by excluding the jurisdiction of the Civil Court expressly in that matter."

[6] In para 45 of the judgment the Full Bench Observed as follows :

"45. Shri K.D. Sood, who also assisted Court during the hearing, urged that where there was no dispute about the relationship of landowner and tenant, the Civil Court would have no jurisdiction in the matter but where there was such a dispute, the Civil Court would have jurisdiction to go into the matter. The reasons which we have mentioned earlier rule out acceptance of the plea that the Civil Court would have jurisdiction where there is a dispute about the status of a person cultivating the land of a landowner being his tenant. The acceptance of the plea would negate the accomplishment of the object of securing to the actual tiller proprietary rights in the land under his cultivation as a measure of land reforms envisaged in the Act."

[7] A similar question came to be considered by a single Judge of this Court in Babu Ram (deceased) through L.Rs. Smt. Sita Devi v. Pohlo Ram, 1992 AIR(HP) 8 This case was decided after the decision was rendered by the Full Bench. It appears that the decision of the Full Bench was not brought to the notice of the Court. Relying upon a judgment of the Apex Court in Raja Durga Singh v. Tholu and others, 1963 AIR(SC) 361 the Single Judge held as follows :

"8. In view of the specific pleadings and as observed by the Supreme Court in Durga Singh's case , Civil Court undoubtedly had jurisdiction to entertain and decide the suit. Moreover, plaintiff had felt aggrieved by an entry made in the revenue records on the basis of an order passed by Revenue Officer. Section 46 of the Himachal Pradesh Land Revenue Act provides that if a person considers himself aggrieved as to any right of which he is in possession by an entry in a record of right or any periodical record he can institute a suit for declaration of the rights under Chapter-VI of the Specific Relief Act, 1963. The Courts below, as such, were right in their view that Civil Court had jurisdiction to entertain and decide the suit."

[8] A Division Bench in Ram Chand and other v. Jagat Ram and others, 1997 1 ShimLC 164 following the judgment of the Full Bench held that since the Land Reforms Officer had sanctioned the mutation granting proprietary rights in favour of the alleged tenants behind the back of the owners on the basis of the entries existing prior to the enforcement of the Act and not at the time of sanction, the Civil Court had jurisdiction.

[9] A single Judge of this Court in Shri Pritam Chand and others v. Shri Krishan Kumar and others, 1997 1 ShimLC 255, was dealing with a case where a suit had been filed for declaration that the plaintiffs were entitled to proprietary rights in their favour. The defendants did not accept the plaintiffs to be tenants on the suit land. It was held that in this situation the ratio of the Full Bench was not applicable.

[10] In Malkiat Singh and another v. Hardial Singh,1994 Supp1 ShimLC 77 following the judgment of the Full Bench a Single Judge of this Court held that the Civil Court had no jurisdiction to go into any question connected with the conferment of proprietary rights pertaining to the land in dispute.

[11] In Inder Dutt and others v. Kala and another, 1997 2 ShimLC 274, it was held that the entry in the revenue records regarding the tenancy rights and the consequential proprietary rights conferred upon the Judgment-Debtors had been done ex-parte without any inquiry whatsoever. It was held that the Decree-Holders were not aware of such entries. The Court held that in such a situation, it cannot be said, by any stretch of imagination, that the Civil Court had no jurisdiction to decide the question. In fact, the proposition laid down by the Full Bench, as aforesaid, itself governed the case and the matter fell within the scope of the jurisdiction of the Civil Court, as laid down by the Full Bench.

[12] In Roshan Lal v. Krishan Dev, 2010 159 PunLR 701 a Single Judge held that where primary relief of declaration claimed by the plaintiff was directly connected with the conferment of proprietary rights under the H.P. Tenancy and Land Reforms Act, the Civil Court had no jurisdiction. In that case the plaintiff had filed a suit seeking declaration to the effect that he was a tenant in possession of the land in dispute and had become an owner by virtue of the H.P. Tenancy and Land Reforms Act.

[13] A Division Bench of this Court in Shankar v. Smt. Rukmani and others,2003 1 ShimLC 300, considered the question with regard to the interpretation of the judgment of the Full Bench and held as follows :

"9. After analyzing the judgment in Chuhniya Devi v. Jindu Rams case, 1991 1 ShimLC 223, we have no doubt that the jurisdiction of the Civil Court is barred under the Act if the dispute pertaining to the relationship of landlord and tenant arises during the proceedings of conferment of proprietary rights upon the tenant and resumption of land by the land owner and the order in respect thereof has been passed by the authorities under the Act except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with. But if the dispute of landlord and tenant arises independent of the proceedings under the Act, the Civil Court has the jurisdiction."

[14] This judgment appears to have settled all the matters about which there was some conflict with regard to the interpretation of the judgment of the Full Bench in Chuhniya Devi v. Jindu Rams case, 1991 1 ShimLC 223. One factor which has to be kept in mind and should not be lost sight of while considering the import of the judgment of the Full Bench is that the question before the Full Bench was whether the Civil Court had jurisdiction in respect of an order conferring proprietary rights under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972 which had not been assailed under the provisions of the said Act. The Full Bench in para 39 again made it clear that a dispute may arise where the person cultivating the land of a land owner is a tenant or not,

when proceedings were in progress under Chapter-X. Full Bench was dealing with the impact of the bar to the jurisdiction of the Civil Court under Sections 112 and 115 of the H.P. Tenancy and Land Reforms Act both of which occur in Chapter-X and it is in this context that the observations, made in para 40 have to be read. Again in para 44 (quoted above) the Full Bench has clearly held that the exclusion of the jurisdiction of the Civil Court in the matter of determining the question whether a person cultivating the land of the land owner is a tenant or not for the purposes of Chapter-X is both reasonable and understandable. It is thus clear that the question before the Full Bench and its answer and the various observations were confined to disputes pertaining to the relationship of landlord and tenant arising out of and during the course of proceedings of conferment of proprietary rights on the tenant under Chapter-X of the H.P. Tenancy and Land Reforms Act. The observations made in Chapter 45 have to be read in this context only.

[15] This has been amply clarified by the Division Bench in Shankars case,2003 1 ShimLC 300 wherein after analyzing the entire law and the judgment in Chuhniya Devi s case, 1991 1 ShimLC 223 the Division Bench held that if a dispute pertaining to the relationship of landlord and tenant arises during the proceedings of conferment of proprietary rights upon the tenant and the resumption of land by the land owner and the order in respect thereof has been passed by the authorities under the Act the Civil Court will have no jurisdiction except in a case where it is found that the competent authority has acted either in violation of the Rules of Natural Justice or contrary to the provisions of law laid down in the Act or the Rules. If the dispute regarding the relationship of landlord and tenant has no connection with the proceedings under Chapter-X of H.P. Tenancy And Land Reforms Act the Civil Court would have jurisdiction to hear and decide this dispute.

[16] I am not only bound but am in respectful agreement with the observations of the Division Bench in Shankars case,2003 1 ShimLC 300 quoted hereinbefore. The bar to the jurisdiction of the Civil Court under Section 112 of the Tenancy and Land Reforms Act will only apply when the validity of proceedings or order made under Chapter-X are called in question in any Civil Court. Similarly under Section 115 of the said Act the order in appeal or revision passed by the Collector, Commissioner or Financial Commissioner can also not be challenged before the Civil Court unless the same is in violation of the principles of Natural Justice or is contrary to the provisions of the Rules or the Act. The foundation for this must be laid in the plaint. It is the averments made in the plaint which will show the Civil Court has or does not have jurisdiction to entertain the suit.

9 The ratio in the aforesaid judgment was thereafter followed by the same learned Single Judge in ***FAO No. 314/2002, titled as Suram Singh and ors. vs. Narsh Kumar and ors, decided on 29.12.2007*** and in ***RSA No. 405/1995, titled as Giano Devi (dead) LRs Ranjit Singh and ors. vs. Munshi Ram and another, decided on 19.5.2008***.

10 In ***Sheetla Devi and ors. vs. Hara Dassi and ors., 2008(1) Latest HLJ 220***, another learned single Judge of this Court (Justice Kuldip Singh) held that where the status of the tenant has been specifically denied by the landlords, the jurisdiction of the civil court to entertain the suit would not be barred. It is apt to reproduce the observations as contained in paras 6 to 10, which read thus:-

[6] The learned Sub Judge found respondents No.1,2/plaintiffs in possession as owners of the suit land. It has been held that civil Court has jurisdiction to try the suit and ultimately the suit was decreed on 29.4.1994. Paras Nath filed Civil Appeal No.29/94. Smt.Chander Kaura and Mahavir Parsad filed Civil Appeal No.33/94 against the judgment and decree dated 29.4.1994, both the appeals were dismissed by common judgment by learned Additional District Judge, Kullu on 13.6.1995. Paras Nath filed RSA No.27 of 1996, Smt. Chander Kaura and Mahavir Parshad filed RSA No.179 of 1996 against common judgment and decree dated 13.6.1995. Both appeals have been heard on the following substantial question of law:-

Whether the Courts below erred in holding that Civil Court has jurisdiction and that judgment of this Hon'ble Court in Chuhniya Devi Vs. Jindu Ram and others, 1991 1 ShimLC 223, is not applicable in the present case.

[7] I have heard Shri Ajay Mohan Goel, Advocate for the appellants and Mr.Ashwani Kumar Sharma, Advocate for respondents No.1,2/plaintiffs and gone through the record. The learned counsel for the appellants has submitted that in view of Chuhniya Devi Vs. Jindu Ram and others, 1991 1 ShimLC 223, the civil Court has no jurisdiction to try the case and, therefore, judgment and decree passed by the trial Court and upheld by lower appellate Court are not sustainable. The learned counsel for the respondents No.1, 2 has submitted that Civil Court has jurisdiction to try the suit. The decision of this Court in Chuhniya Devi's case is not applicable in the facts and circumstances of the present case.

[8] The controversy in the present case in view of substantial question of law framed above is very short regarding the jurisdiction of the civil Court to try the suit. In Chuhniya Devi's case the question before the Full Bench was whether the civil Court has jurisdiction in respect of an order of conferment of proprietary rights under Section 104 of the H.P.Tenancy and Land Reforms Act which has not been assailed under that Act. In Para-64 of the judgment, the Full Bench has held the civil Court has no jurisdiction to go into any question connected with the conferment of proprietary rights under Section 104 of the Act, except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with.

[9] In the present case, the suit has not been filed questioning the conferment of proprietary rights. The suit has been filed by the respondents No.1,2/plaintiffs simply on the ground that earlier their predecessor Khewa Ram was the tenant in possession of the suit land and after his death they are tenants in possession of the suit land and they have become owners of the suit land after coming into force of the Act. The case of ownership of the suit land has been pleaded by the respondents No.1,2/plaintiffs on the ground that conferment of proprietary rights under the Act is automatic. In Daulat Ram etc. Versus The State of H.P. etc., 1978 7 ILR(HP) 742 and in Mohan Singh Versus Manju Devi and others, 1997 1 SLJ 304, it has been held that conferment of proprietary rights is automatic.

[10] In Pritam Chand and others Versus Krishan Kumar and others, 1997 1 ShimLC 255, the plaintiffs filed a suit for declaration and injunction that they are tenants on the suit land and entries showing defendants in owners in possession are wrong, a prayer for injunction was also made. The learned

Single Judge of this Court in Para-7, after noticing Chuhniya Devi's case , held as follows:-

"The learned first appellate Court proceeded on the assumption that the plaintiffs in the present case were entitled for the declaration of proprietary rights in their favour and consequently, the suit involved a question connected with it. It may be noticed that the defendants who claim themselves to be the owners in possession of the suit land, at no point of time accepted the plaintiffs to be the tenants of the suit land. In this situation, the ratio of the Full Bench decision could not be made applicable to the present case. Here in the present case, the status of the plaintiffs tenants has been specifically denied by the landlords except on a small piece of land. The legislature has barred only such types of cases from the purview of the Civil Court where there was no dispute between the parties and the tenant cultivating the land was accepted to be in possession of it as a tenant. In the present case, the facts are totally different. It would thus be seen that the learned first appellate Court fell into an error in holding that the Civil Court's jurisdiction to try the present suit was barred."

11 In ***RSA No. 192/2002, titled as Sarv Dayal vs. Oma Devi and others, decided on 14.7.2008***, while answering substantial question of law regarding jurisdiction of civil court in light of Chuhniya Devi's case, it was observed as under:-

Further the relationship between the parties that of landlord and tenant has not been admitted. Therefore, in my view, the suit filed by the plaintiffs is totally maintainable and has been rightly entertained by the Court below. The Courts below have concurrently held that the entries in question have been effected behind the back of the plaintiffs. The plaintiffs have been able to prove on record their uninterrupted possession and ownership, which is evident from the Jamabandies and Khasra Girdawaries placed on record and noticed hereinabove. The revenue record is clear and consistent. During the course of hearing, learned counsel for the appellant has not been able to dislodge the findings returned by the Courts below, therefore, the contention that the Courts below could not have entertained the suit is rejected.

12 Dealing with the ratio of the judgment in Chuhniya Devi's case, learned single Judge of this Court (Justice Kuldip Singh) in ***RSA No. 205/1996, titled as Joginder Singh vs. Smt. Dropti Devi and others, decided on 13.3.2009*** held that it is settled law that jurisdiction of the civil court is to be seen on the basis of averments made in the plaint and not on the basis of defence set up in the case and observed as under:-

8. It is settled law that jurisdiction of the civil court is to be seen on the basis of averments made in the plaint and not on the basis of defence set up in the case. In the present case, the appellant has nowhere pleaded that Bhajna was the tenant on the suit land under him nor he has challenged any order conferring the proprietary rights in favour of Bhajna of the suit land under the H.P. Tenancy and Land Reforms Act, 1972. Bhajna had, however, taken the plea of tenancy on the suit land. On merits, whether the appellant has proved his case or Bhajna succeeded in establishing his case that has not been considered by the learned lower appellate court. The appeal has been allowed simply on the point of jurisdiction. There is no issue of jurisdiction. The learned lower appellate court has wrongly applied Chuhniya Devis case, which in my opinion, in the facts and circumstances of the case is not applicable in the

present case. In these circumstances, substantial questions of law No. 1 and 2 are decided in favour of the appellant. In view of my findings on substantial questions of law No.1 & 2, I do not think it proper to decide substantial questions of law No. 3 and 4 so that it may not prejudice the case of either side, inasmuch as, I intend to remand the matter to the learned District Judge, Una to decide the appeal afresh in accordance with law. The substantial questions of law No. 3 and 4, are therefore, disposed of accordingly.

13 Another learned single Judge of this Court (Justice Dev Darshan Sud) while dealing with same question in ***Krishan Chand and ors. vs. Jeet Ram and another, 2009(2) Latest HLJ 978*** held that where the proceedings have been conducted without jurisdiction, where the question of tenancy is disputed, independent of the proceedings under the HP Tenancy and Land Reforms Act, there is no finality to the adjudication of the revenue officials and the jurisdiction of the Civil Court is not barred, as observed in paras 13 and 14, which read thus:

[13] This question is answered against the appellants. The jurisdiction of the Civil Court is not ousted as pleaded. The decisions in Pritam Singh vs. Krishan Kumar, 1997 1 ShimLC 255, Birbal vs. Udhami, 1992 1 ShimLC 153 and Shankar vs. Rukmani,2003 1 ShimLC 300 are clear and unequivocal that where the proceedings have been conducted without jurisdiction, where the question of tenancy is disputed, independent of the proceedings under the HP Tenancy and Land Reforms Act, there is no finality to the adjudication of the revenue officials and the jurisdiction of the Civil Court is not barred.

In Rukmani's case this Court held:-

"After analyzing the judgment in Chuhniya Devi v. Jindu Ram's case , we have no doubt that the jurisdiction of the Civil Court is barred under the Act if the dispute pertaining to the relationship of landlord and tenant arises during the proceedings of conferment of proprietary rights upon the tenant and resumption of land by the land owner and the order in respect thereof has been passed by the authorities under the Act except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with. But if the dispute of landlord and tenant arises independent of the proceedings under the Act, the Civil Court has the jurisdiction."

[14] In the present case the very basis and foundation of conferment of proprietary rights has been questioned. The case pleaded by the plaintiffs is one of suppression of facts, exercise of powers by an officer not competent to do so and the very basis of tenancy has been challenged. This question is, therefore, answered against the appellants.

14 In ***RSA No. 157/1996, titled as Gaurju vs. Sham Singh and others, decided on 11.9.2009***, it was reiterated by learned Single Judge of this Court (Hon'ble Justice Deepak Gupta, his Lordship the then was) that Chuhniya Devi's case will have no applicability where the orders passed by the revenue authorities are not challenged.

15 Dealing with question of ouster of jurisdiction on the basis of Chuhniya Devi's case, learned Single Judge of this Court (Justice Sanjay Karol) in ***RSA No. 57/2003, titled as Chatter Singh and another vs. Hem Raj and others, decided on 15.11.2012*** observed as under:-

17.The conferment of proprietary rights upon tenant was not an issue. Hence, the lower appellate Court, by taking into account the decision rendered by this Court in Shri Lajpat Rai (supra), held the jurisdiction of the Civil Court not to be barred, more so, for the reason that the plaintiff had filed a suit for injunction being in possession of the suit land.

18. In Babu Ram (deceased) through LRs Smt. Sita Devi and others versus Pohlo Ram (deceased) through LRs Smt. Vidya Devi and others, this Court has taken the view that where relationship with respect to tenancy is in dispute, Civil Court would have jurisdiction.

19.A Coordinate Bench of this Court in Ramesh Kumar and others vs. Mandir Thor (Math Thor), 2007 (2) Shim.L.C. 422, has held as under:-

[6] The learned Courts below have relied on a Full Bench Judgment of this Court in Chuhniya Devi v. Jindu Ram, 1991 1 ShimLC 223, holding that the jurisdiction of the Civil Court was barred. This case was subsequently considered by this Court in Shankar v. Rukmani and Ors.,2003 1 ShimLC 300. While disposing of the appeal, this Court has held:

3. After hearing the learned Counsel for the parties and going through the record, we find that the District Judge has wrongly applied the ratio of judgment in Chuhniya Devi v. Jindu Ram's case (supra) to the facts and circumstances of the present case. From the pleadings of the parties it is clear that the plaintiff claimed himself to be in "continuous possession of the suit land as tenant for the last 20 years, whereas the defendants denied his claim and asserted that they are owners in possession. Therefore, admittedly the relationship of landlord and tenant is in dispute despite the revenue entries in favour of the plaintiff and such kind of disputes are triable by the Civil Court.

10. Coming to the case in hand, it is not averred by the either party that either the proceedings were initiated or the order was passed under Chapter X of the Act. Therefore, we have no hesitation to hold that the ratio of judgment in Chuhniya Devi v. Jindu Ram's case is not applicable to the facts and circumstances of the present case and the Civil Court has the jurisdiction to decide the suit of the plaintiff.

[7] Similarly, in Amur Chand v. Thakri Devi Latest,2005 LLJ 1108, this Court, following the ratio in Shankar v. Rukmani and Ors. (supra) held:

9. The dispute whether a given person is a tenant or not would arise when in the proceedings regarding resumption of land, the person cultivating the land claims that he is tenant qua that land and the owner of the land denies that claim. Such a question would be determined by the Land Reforms Officer, appointed for the purpose of Chapter X. A question which arises between two persons, each claiming to be tenant in respect of a given extent of land, as in the present case, cannot be said to be a dispute between the owner of the land and the tenant, nor has such a question arty relevance to the proceedings required to be conducted under Chapter X of the Act and hence the Land Reforms Officer does not have jurisdiction in respect of such a dispute. To such matters, the provision of Section 112 of the Act barring the jurisdiction of the Civil Court is not attracted.

[8] I see no reason to differ with the ratio laid down in these judgments. Even otherwise these judgments follow the established precedent of the Hon'ble Supreme Court in Dhulabhai etc. v. State of Madhya Pradesh and Anr., 1968 3 SCR 662 , holding that exclusion of jurisdiction of a Civil Court is not to be

inferred readily unless the conditions precedent barring such jurisdiction are strictly established.

20. This Court further in Krishan Chand and others vs. Jeet Ram and another, Latest HLJ 2009 (HP) 978, has held:

Question No.5:

[9] This question is answered against the appellants. The jurisdiction of the Civil Court is not ousted as pleaded. The decisions in Pritam Singh vs. Krishan Kumar, 1997 1 ShimLC 255, Birbal vs. Udhami, 1992 1 ShimLC 153 and Shankar vs. Rukmani,2003 1 ShimLC 300 are clear and unequivocal that where the proceedings have been conducted without jurisdiction, where the question of tenancy is disputed, independent of the proceedings under the HP Tenancy and Land Reforms Act, there is no finality to the adjudication of the revenue officials and the jurisdiction of the Civil Court is not barred.

In Rukmani's casethis Court held:-

"After analyzing the judgment in Chuhniya Devi v. Jindu Ram's case , we have no doubt that the jurisdiction of the Civil Court is barred under the Act if the dispute pertaining to the relationship of landlord and tenant arises during the proceedings of conferment of proprietary rights upon the tenant and resumption of land by the land owner and the order in respect thereof has been passed by the authorities under the Act except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with. But if the dispute of landlord and tenant arises independent of the proceedings under the Act, the Civil Court has the jurisdiction."

In the present case the very basis and foundation of conferment of proprietary rights has been questioned. The case pleaded by the plaintiffs is one of suppression of facts, exercise of powers by an officer not competent to do so and the very basis of tenancy has been challenged. This question is, therefore, answered against the appellants.

16 I myself have considered identical question in various cases regarding jurisdiction of civil court and in ***RSA No. 323/2002, titled as Jaswant Singh and others vs. Sant Nirankari Mandal, decided on 14.5.2014*** it was observed as under:-

14. The learned counsel for the appellants has further contended that the tenant automatically became the owner on the appointed day i.e. 03.10.1975 after coming into force the operation of H.P. Tenancy and Land Reforms Act and, therefore, the jurisdiction of the Civil Court was barred in terms of the Full Bench judgment of this Court in Chuhniya Devi versus Jindu Ram 1991 (1) S.L.C.223 which in turn has been followed in a subsequent judgment of this Court in Kala Devi and others versus Sat Pal and others 2011 (1) Shim. LC 137, wherein it has been held as under:

[9] Coming to the evidence led by the parties, the plaintiff had proved on record Ext. P-3, copy of the jamabandi for the year 1965-66, Ext.P-4 jamabandi for the year 1973-74, Ext.P-5 copy of Khasra Girdavari from Kharif 1985 to Ravi 1989, Ext.P-1 copy of jamabandi for the year 1981-82 and Ext.P-2 copy of Khasra Girdavari from Kharif 1982 to Ravi 1988, which showed that the land in suit was entered in the ownership of the defendants and plaintiff and one Rama were shown in possession of the suit land as tenants. Thus,

there were long standing entries in favour of the plaintiff showing him in possession over the suit land as tenant. The plaintiff had taken up the plea that on the basis of these entries, on coming into operation the H.P. Tenancy and Land Reforms Act, from the appointed day i.e. 3.10.1975, the plaintiff had become owner of the suit land and the conferment of the proprietary rights was automatic. According to the provisions of Section 104 of the H.P. Tenancy and Land Reforms Act, 1972, the plaintiff was to be conferred with the proprietary rights and this conferment was automatic. The plaintiff pleaded that he has become owner by operation of law and the defendants in their written statement took up a specific plea that the mutation under Section 104 of the H.P. Tenancy and Land Reforms Act was entered in favour of the plaintiff but it was rejected by the Assistant Collector 1st Grade on 9.2.1984. Thus, the defendants admitted that the proprietary rights were conferred upon the plaintiff under Section 104 of the H.P. Tenancy and Land Reforms Act. Once the proprietary rights had been conferred upon the plaintiff under these provisions, the jurisdiction of the Civil Court was barred to look into the question of conferment of proprietary rights according to the Full Bench decision of this Court in Chuhniya Devi v. Jindu Ram, 1991 1 ShimLC 223. This question was not considered by the Courts below since the copy of the mutation entered was not placed on the record by both the parties. However, the defendants admitted that such a mutation was entered into/but it was pleaded that the same was rejected by the Assistant Collector 1st Grade on 9.2.1984. Once the defendants admitted the factum of conferment of proprietary rights, it was for them to have proved that it was rejected by the Assistant Collector 1st Grade on 9.2.1984 as pleaded by them, but the said document never saw the light of the day and there is nothing on the record to show that any such order was passed by the Assistant Collector 1st Grade canceling the mutation entered in favour of the plaintiff.

15. To similar effect is the judgment in Shamsher Singh and others versus Roshan Lal and others 2011 (1) Shim. LC 570, wherein it has been held as under:

[9] The point involved in the appeal is very short. The perusal of the plaint indicates that the appellants have specifically challenged the mutation No. 1266 dated 15.6.1981 conferring ownership rights in favour of respondents No. 1 to 4 which has been placed on record by appellants/plaintiffs as Ex.P-6 and by defendants as Ex.D-17. The conferment of proprietary rights under Section 104 of the H.P. Tenancy and Land Reforms Act cannot be assailed in civil suit as per Chuhniya Devi unless the parameters laid down in Chuhniya Devi are otherwise satisfied. In the plaint there is no averment that statutory authority has not followed mandatory procedure for conferring proprietary rights while attesting mutation. In these circumstances, no fault can be found with the findings returned by the two Courts below that the civil Court has no jurisdiction to try the suit. Similarly the direction for return of plaint by the learned District Judge is also correct. The civil Court has no jurisdiction to try the suit. In case, the appellants opt to file appropriate proceedings before statutory authority under the H.P. Tenancy and Land Reforms Act regarding their grievance then such authority shall decide the same in accordance with law un-influenced by any findings given by learned District Judge and learned Senior Sub Judge on all issues except the issue of jurisdiction. There is no merit in the appeal. The substantial question of law is decided against the appellant.

16. On the question of jurisdiction, the learned counsel for the appellants has further placed reliance upon the judgment delivered by this Court in Brij Bihari Lal versus Smt. Sarvi Devi and others 2011 (3) Him.L.R. 1515, wherein it has been held as under:

15. It is clear from the above decision that the question of proprietary rights could be looked into by the Civil Court in case there were specific allegations that statutory authorities envisaged by that act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with. There were no allegations made in the plaint in this regard and though the suit was filed on 13.4.1971 and decided on 8.9.1976, appeal was filed on 26.5.1981 and decided on 21.9.2000 and by that time this judgment had already been passed by the Hon'ble Full Bench on 21.9.1990. The plaintiff could have withdrawn the suit and filed it afresh on the lines of the directions given in the above Paras under which the challenge could be led to the order of the Compensation Officer which was never done, though the parties continued to contest the suit, which was ultimately decided on 8.9.1976 and before that it must be clear to both the parties that such law has been laid down by the court.

17 Once again this question came up for consideration before me in ***Prita vs. Baldev Singh and others, 2016(5) ILR (HP)595*** and it was observed as under:-

[9] As regards question No.1, there is no difficulty in concluding that since the dispute was not one between landlord and tenant and was rather inter se two persons claiming themselves to be the tenant, therefore, it was the civil court alone which had the jurisdiction to determine the said issue. This court in Tulsa Singh Vs. Agya Ram & ors,1994 2 SimLC 434, was confronted with a similar issue and the same was repelled with the following observations:

"8. Learned counsel for the appellant has contended vehemently that as the appellant had already been granted proprietary rights under Section 104 or the Act and therefore the civil court will have no jurisdiction whatsoever to entertain and decide the case of present nature, where the rights of tenancy in favour of appellant stood legally decided under the provisions of the Act by the competent authority and civil court will have no jurisdiction to again go into that controversy. The learned counsel in support of the aforesaid contention has tried to rely upon Chuhniya Devi v. Jindu Ram, 1991 1 ShimLC 223.

9. In the reported case the appellants came up before the Full Bench for answer to the question whether civil court had jurisdiction in respect of an order:

(a) made by the competent authority under the H.P. Land Revenue Act, 1954, and

(b) of conferment of. proprietary rights under Section 104 of the H.P. Tenancy and Land Reforms Act, 1972.

10. In so far as present case was concerned point (b) above was more relevant.

11. In this Chuhniya Devi case their Lordships answered to the question as under :

(a) that an order made by the competent authority under the H. P. Land Revenue Act, 1954, is open to challenge before a civil court to the extent that it

related to matters falling within the ambit of Section 37(3) and Section 46 of that Act; and

(b) the civil court has no jurisdiction to go into any question connected with the conferment of proprietary rights under Section 104 of the Act, except in a case where it was found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with.

12. I think the applicability of the principle disposed of in the aforesaid case on the basis of the facts involved and proved on record in the present case was not at all called for.

13. Firstly, in Chuhniya Devi v. Jindu Ram, 1991 1 ShimLC 223 referred to above the dispute was between the landlord and tenant but in the present case the dispute is between the two persons alleging themselves to be the tenant,

14. Secondly, in the aforesaid reported case the proprietary rights had been granted in favour of the tenant by the competent officer under the Act and that too in the presence of the landlord. In the case under reference the suit Was filed on February 4, 1977 and the proprietary rights were granted initially through mutation No. 2649 Ex. D-5 on record sanctioned on December (sic).

15. Thirdly, it may be pointed out that the suit was filed on February 4, 1977 and the written statement was filed by the defendant-appellant on March 25, 1977 while replication was filed on April 12, 1977, meaning thereby the present appellant was in full knowledge of the present suit where his tenancy rights were being assailed in so far as on the date when the proprietary rights were conferred in his favour. The appellant did not bring .to the notice of the Revenue Officer under the Act sanctioning of mutation of proprietary, rights in his favour, pertaining to the alleged civil suit. Thus, the order of proprietary rights in favour of the appellant was granted in the absence of the present plaintiffs.

16. Fourthly, it may again be referred that the landlord preferred an appeal before the Collector, Una, assailing the order of grant of proprietary rights in favour of the present appellant which appeal was accepted and the case was remanded back to the Assistant Collector, for decision, afresh as is evident from Ex. P-5, certified copy of the order of the Collector. Order of the Collector is dated April 5, 1978 and thereafter finally the proprietary rights in favour of the appellant were granted behind the back of the present plaintiff-respondent, though later mutation granting proprietary rights has not been brought on record.

17. The aforesaid facts which have been proved on record clearly make the present case of an altogether different nature than the facts involved in Chuhniya Devi v. Jindu Ram, 1991 1 ShimLC 223 referred to above. The applicability of the ratio of that judgment as such on the basis of dissimilarity of the facts in the two cases is not at all called for.

[10] In Babu Ram (deceased) through L.Rs Smt. Sita Devi & ors Vs. Pohlo Ram (deceased) through L.Rs Smt. Vidya Devi & ors, 1991 2 ShimLC 211, this court has categorically held that the Legislature barred only those suits from cognizance of Civil Courts where there is no dispute between parties about relationship of landlord and tenant and where such relationship was

disputed, it was the civil court alone which had the jurisdiction to entertain and decide the case. Relevant observations read as under:

"5. I have heard the learned counsel for the parties. Learned counsel for the appellants urged before me that in view of the averments made in the plaint, in which the plaintiff had claimed a decree for declaration that he was a tenant on the suit land, civil court had no jurisdiction to entertain and decide the suit. It was further urged that there was cogent and convincing evidence adduced by the defendant on record to show that plaintiff was not in possession of the suit property and before the Panchayat the plaintiff had, on April 3, 1974, admitted by giving a document in writing that he was not in possession of the property and on the basis of this document, an order Ex D- 1 was passed on April 25, 1976, by the Assistant Collector Second Grade, ordering the correction of entries in revenue records by showing the defendant to be in possession. It was on the basis of this order that change was effected in Khasra Girdwari in Rabi 1976 and for which report in Roznamcha Waquati was also made by the Patwari on May 11, 1976 vide copy Ex D-3. The learned counsel for the appellant further urged that the courts below were not right in discarding the order passed by the Assistant Collector Second Grade on the ground that it was based upon the report of Girdawar Kanungo, who had not been produced in the witness box. It was for this reason that application under order 41 Rule 27 of CPC had been made seeking to produce by way of additional evidence the report of Field Kanungo dated December 11, 1975 along with a copy of summon dated November 18, 1976, by which Assistant Collector Second Grade had asked the plaintiff to appear before him to show cause as to why the correction in revenue records be not made in favour of the defendant.

6. Learned counsel for the respondents, on the other hand, urged that the status of the plaintiff was not admitted by defendant and, therefore, there was no bar for civil court to entertain and decide the suit and moreover incorrect entry had appeared in the revenue record against the plaintiff, therefore, suit for declaration in a civil court was competent and maintainable in view of section 46 of the HP Land Revenue Act. It was further contended that defendant could not be permitted to lead additional evidence merely to fill in the lacunae in the case especially when such evidence was within the knowledge of the defendant and could have been easily produced in the trial court.

7. I see much force in the arguments advanced by the learned counsel for the respondent-plaintiff. The argument of the learned counsel for the appellants that the suit is barred under Section 58 of the H.P. Tenancy and Land Reforms Act (hereinafter to be called as the Tenancy Act) is not tenable. There is no clause in section 58 of the Tenancy Act which provides for a suit by or against a person claiming himself to be a tenant and whose status as a tenant is not admitted by the land owner. The legislature barred only those suits from the cognizance of civil court where there is no dispute between the parties about the relationship of landlord and tenant. It was a suit filed by the plaintiff claiming himself to be in possession of the property as a tenant under the defendant and defendant had not admitted the status of the plaintiff, as such, rather, it was pleaded that the plaintiff was not at all in possession. The provisions contained in the Punjab Tenancy Act, as applicable to Himachal Pradesh, which are parimateria with the provisions of section 58 of the

Tenancy Act came up for consideration before the Supreme Court in Raja Durga Singh V. Tholu and others, 1963 AIR(SC) 361. The Supreme Court observed init report as under:

" There is no entry or item relating to a suit by or against a person claiming to be a tenant and whose status as a tenant is not admitted by the landlord. It would, therefore, be reasonable to infer that the legislature barred only those suits form the cognizance of a civil court where there was no dispute between the parties that a person cultivating land or who was in possession of land was a tenant "

8. In view of the specific pleadings and as observed by the Supreme Court in Durga Singh's case , Civil Court undoubtedly had jurisdiction to entertain and decide the suit. Moreover, plaintiff had felt aggrieved by an entry made in the revenue records on the basis of an order passed by Revenue Officer. Section 46 of the Himachal Pradesh Land Revenue Act provides that if a person considers himself aggrieved as to any right of which he is in possession by an entry in a record of right or any periodical record, he can institute a suit for declaration of the rights under Chapter VI of the Specific Relief Act, 1963.

The courts below, as such, were right in their view that Civil Court had jurisdiction to entertain and decide the suit."

This question is answered against the appellant.

18 Again, similar issue regarding jurisdiction of civil court came up before me in ***Swaran Singh (deceased) vs. Darshan Singh (deceased), 2016(5) ILR (HP) 620*** and it was observed as under:

[7] At the outset, it may be observed that the jurisdiction of Civil Court cannot be readily inferred or easily excluded. While determining such jurisdiction, it is the pith and substance of the plaint's allegations that have to be kept in mind, so also the pith and substance of the relief sought and the jurisdiction does not depend upon the defence taken by the defendant in the written statement.

[8] Adverting to the facts of the case, it would be noticed that the only reason which weighed with the learned lower Appellate Court to conclude that the jurisdiction of the Civil Court was excluded is the judgment rendered by Hon'ble Full Bench of this Court in Chuhniya Devi Vs. Jindu Ram, 1991 1 ShimLC 223, as would be evident from para 9 of the judgment, which reads thus:

"9. The facts of the case are not disputed that the plaintiffs and proforma-defendants No. 2 to 19 having been recorded as occupancy tenants of the suit land shall be deemed to have become its owners.

However, the suit land is alleged to be admittedly in possession of the defendant No. 1. Though it is alleged in the plaint that the defendant No. 1 has dispossessed the plaintiffs and came in illegal possession of the suit land in May, 1990, but the long standing entries in the revenue records commencing from the Jambandies 1960-1961 (Ext.DW1/A) todate show the possession of the defendant No. 1 over the suit land as non-occupancy tenant on payment or rent of Rs.150/- per annum. The presumption of correctness having been attached to the entries of the revenue records he shall prima facie be deemed to be in possession of the suit land as non-occupancy tenant. However at the worst it can be taken that there is a dispute between the parties if the possession of the defendant No. 1 over the suit land has been as

a non-occupancy tenant or not. But such dispute is triable by the revenue Courts under the H.P. Tenancy and Land Reforms Act. The order of the Land Reform Officer to that effect is appealable to the higher revenue courts. Even the revision and review lies to the higher Authorities. Therefore, it is not disputed that the H.P. Tenancy and Land Reforms Act is a complete Code in itself with regard to the dispute in question. Therefore, I do agree with the learned counsel for the appellant that in view of the Chuhniya Devi's case referred to above the jurisdiction of the Civil Court in this matter is barred. This point as such is decided in favour of the appellants."

[9] To say the least, the learned lower Appellate Court has not at all applied its judicial mind and has further not even cared to have a glance, much less, read the judgment passed in Chuhniya Devi's case or else the learned lower Appellate Court would not have passed such an order.

[10] In Chuhniya Devi's case , the Hon'ble Full Bench of this Court had categorically held that the jurisdiction of the Civil Court was barred only when both the parties admit about the status of landlord and tenant, but when there is dispute about such status, then the Civil Court alone would have the jurisdiction. This position of law has been consistently maintained by this Court and reference in this regard can conveniently be made to Babu Ram (deceased) through L.Rs. Smt. Sita Devi and others Vs. Pohlo Ram (deceased) through L.Rs. Smt. Vidya Devi and others, 1991 2 ShimLC 211, wherein it has been held as under:-

"6. Learned counsel for the respondents, on the other hand, urged that the status of the plaintiff was not admitted by defendant and, therefore, there was no bar for civil court to entertain and decide the suit and moreover incorrect entry had appeared in the revenue record against the plaintiff, therefore, suit for declaration in a civil court was competent and maintainable in view of section 46 of the HP Land Revenue Act. It was further contended that defendant could not be permitted to lead additional evidence merely to fill in the lacunae in the case especially when such evidence was within the knowledge of the defendant and could have been easily produced in the trial court.

7. I see much force in the arguments advanced by the learned counsel for the respondent-plaintiff. The argument of the learned counsel for the appellants that the suit is barred under Section 58 of the H.P. Tenancy and Land Reforms Act (hereinafter to be called as the Tenancy Act) is not tenable. There is no clause in section 58 of the Tenancy Act which provides for a suit by or against a person claiming himself to be a tenant and whose status as a tenant is not admitted by the land owner. The legislature barred only those suits from the cognizance of civil court where there is no dispute between the parties about the relationship of landlord and tenant. It was a suit filed by the plaintiff claiming himself to be in possession of the property as a tenant under the defendant and defendant had not admitted the status of the plaintiff, as such, rather, it was pleaded that the plaintiff was not at all in possession. The provisions contained in the Punjab Tenancy Act, as applicable to Himachal Pradesh, which are parimateria with the provisions of section 58 of the Tenancy Act came up for consideration before the Supreme Court in Raja Durga Singh V. Tholu and others, 1963 AIR(SC) 361. The Supreme Court observed init report as under:

" There is no entry or item relating to a suit by or against a person claiming to be a tenant and whose status as a tenant is not admitted by the landlord. It would, therefore, be reasonable to infer that the legislature barred only those suits form the cognizance of a civil court where there was no dispute between the parties that a person cultivating land or who was in possession of land was a tenant "

8. In view of the specific pleadings and as observed by the Supreme Court in Durga Singh's case , Civil Court undoubtedly had jurisdiction to entertain and decide the suit. Moreover, plaintiff had felt aggrieved by an entry made in the revenue records on the basis of an order passed by Revenue Officer. Section 46 of the Himachal Pradesh Land Revenue Act provides that if a person considers himself aggrieved as to any right of which he is in possession by an entry in a record of right or any periodical record, he can institute a suit for declaration of the rights under Chapter VI of the Specific Relief Act, 1963. The courts below, as such, were right in their view that Civil Court had jurisdiction to entertain and decide the suit."

[11] On the same preposition, reliance can be placed on the judgment rendered in Birbal Vs. Udhami and others, 1992 1 ShimLC 153, wherein this Court held as under:-

"8. The close perusal of section 58 (3) of the Act shows that there is no clause therein providing for a suit by or against a person claiming himself to be a tenant and whose status as a tenant is not admitted by the land owner. The legislature barred only those suits from the cognizance of civil courts where there is no dispute between the parties about the relationship of landlord and tenant. It was a suit filed by the plaintiff claiming himself to be in possession of the property as a tenant under the defendant and defendant had not admitted the status of the plaintiff as such, rather, it was pleaded that the plaintiff was not at all in possession. The provisions contained in the Punjab Tenancy Act, as applicable to Himachal Pradesh, which are pari material with the provisions of section 58 of the Tenancy Act came up for consideration before the Supreme Court in Raja Durga Singh V. Tholu and others, 1963 AIR(SC) 361. The Supreme Court observed as under:

" .There is no entry or item relating to a suit by or against a person claiming to be a tenant and whose status as a tenant is not admitted by the landlord. It would, therefore, be reasonable to infer that the legislature barred only those suits from the cognizance of a civil court where there was no dispute between the parties that a person cultivating land or who was in possession of land was a tenant .."

In view of the specific pleadings and as observed by the Supreme Court in Durga Singh's case , civil court undoubtedly had jurisdiction to entertain and decide the suit. In the instant case, admittedly, both the parties are at loggerheads with respect to the status of the plaintiff. The plaintiff claims to be the owner in possession of the suit land. The point involved in the instant case is covered by the facts and circumstances of the case of Raja Durga Singh . Accordingly, the point being devoid of any merit is rejected. Even otherwise, no interference is called for in the second appeal keeping in view the peculiar facts and circumstances of the case which are covered by the observations made in V. Ramachandra Ayyar and another Vs. Ramalingam Chettiar and another, 1963 AIR(SC) 302. The observations, in fact, pertain to the Regular Second appeal under section 100, C.P.C. prior to its amendment by C.P.C.

(Amendment) Act, 1976. Defendant Birbal has no legs to stand up irrespective of the plea of relinquishment of tenancy land by the plaintiff in view of section 31 of the Act."

[12] Above all, the question posed for consideration is no longer resintegra in view of the judgment rendered by the Hon'ble Supreme Court in Udham Singh Vs. Ram Singh and Another, 2007 (15) SCC 529, wherein it was observed as under:-

"11. The observations of the High Court on the point of jurisdiction may be quoted, which read as under:

"It may be very specifically pointed out here that so far as the present case is concerned, as per the allegations made in the plaint, the plaintiff filed a suit for possession against a trespasser on the basis of title. Such a suit primarily is triable by the civil court and in the present case the plaintiff has failed to prove his plea that he was the owner and the defendants were the trespassers. Suit, as discussed above, has to be disallowed. In the present case, relationship of landlord and tenant between the parties existed and stood established during the trial of the present suit. On the basis of the ratio of Chuhniya case the plaintiff otherwise has not been successful to make out a case for civil court's interference. ON that account also, the plaintiff has not been successful."

12. According to the own observations of the High Court on the basis of the averment made in the plaint the suit was cognizable by the civil court. The averments and prayers made in the plaint, are relevant for purpose of deciding the forum where the cause will lie. Looking to the plaint case, the High Court was itself of the opinion that the civil court was competent to take cognizance of the suit. But we feel that the High court went wrong while holding otherwise on the basis of the findings ultimately arrived at by the High Court on facts that the defendants were not the trespassers. The jurisdiction is not to be decided on the basis of the ultimate findings arrived at by the Court.

We have already held earlier that the High Court erred in upsetting the concurrent findings of fact arrived at by the two courts of fact, namely, the trial court and first appellate court after detailed and elaborate discussion of the oral as well as documentary evidence on the record.

The High court misread the documents and thereby upset the findings of courts below."

[13] In view of the aforesaid exposition of law, the findings rendered by the learned lower Appellate Court on the point of jurisdiction cannot be sustained and are liable to be set aside. The learned Lower Appellate Court has not gone into the merits of the case and therefore, it would not be advisable for this Court to go into the factual matrix of the case, lest it defeats one's valuable right of appeal to the aggrieved party. The substantial question of law is answered accordingly and it is held that it is only the Civil Court which has the jurisdiction to entertain the instant lis.

19 The principles, which can be deduced out of the aforesaid cases clearly, are as follow:-

1. If the dispute pertaining to the relationship of landlord and tenant arises during the proceedings of conferment of proprietary rights upon the tenant

and resumption of land by the land owner and the order in respect thereof has been passed by the authorities under the Act except in a case where it is found that the statutory authorities envisaged by that Act had not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act had not been complied with, the jurisdiction of the civil court would be barred. But if the dispute of landlord and tenant arises independent of the proceedings under the Act, the Civil Court has the jurisdiction. ***(Refer: Shankar's case)***

2. The bar to the jurisdiction of the Civil Court under Section 112 of the Tenancy and Land Reforms Act will only apply when the validity of proceedings or order made under Chapter-X are called in question in any Civil Court. Similarly under Section 115 of the said Act the order in appeal or revision passed by the Collector, Commissioner or Financial Commissioner can also not be challenged before the Civil Court unless the same is in violation of the principles of Natural Justice or is contrary to the provisions of the Rules or the Act, for which, the foundation must be laid in the plaint.

3. It is the averments made in the plaint which will show the Civil Court has or does not have jurisdiction to entertain the suit. ***(Refer: Joginder's and Tajdin's cases)***

4. Only such types of cases are barred from the purview of the Civil Court where there was no dispute between the parties and the tenant cultivating the land was accepted to be in possession of it as a tenant. ***(Refer: Sheetla Devi's case)*** Meaning thereby, where the relationship between the parties that of landlord and tenant has not been admitted, the Civil Court has jurisdiction. **(Refer: Sarv Dayal's case)**

5. Where the proceedings have been conducted without jurisdiction, where the question of tenancy is disputed, independent of the proceedings under the HP Tenancy and Land Reforms Act, there is no finality to the adjudication of the revenue officials and, therefore, the jurisdiction of the Civil Court is not barred. **(Refer: Krishan Chand's case)**

6. Chuhniya Devi's case will have no applicability where the orders passed by the revenue authorities are not challenged. **(Gaurju's case).**

7. Apart from above, where the dispute is inter se the landlords or inter se the tenants, obviously then also, the same would not be barred and rather the same would be triable only by the civil court and not the revenue court.

20 Bearing in mind the aforesaid principles, one would now is required to advert to the plaint in order to find out whether the relationship between the parties that of landlords and tenants has been admitted and to further find out whether the dispute arises independent of the proceedings that have been initiated by the respondents under the Act.

21 The amended plaint is available in the records of the learned trial court at page 69 and shows that the petitioners have filed simpliciter suit for possession on the basis of the title, as is evident from the head note of the plaint, which reads thus:-

"Suit for possession on the basis of title of the land bearing Khata Khatauni No. 25/117 Khasra No. 299 measuring 892.25 sq. mt., situated in Mauza Shub Khera Tehsil Paonta Sahib Distt. Sirmour H.P. as described in missal Haquiat for the year 2001-02."

22 In para 1 of the plaint, the petitioners have claimed themselves to be owners along with other co-sharers of the suit land.

23 Paras 2 and 3 of the plaint, which are relevant for the adjudication of this case,read thus:-

> 2. That the suit land was bearing Khata Khatauni No. 26 min/76 Khasra No. 145/1 measuring 2.18 bigha as described in missal Haquiat consolidation for the year 1956-57. The copy of which is attached herewith and the said land was given as licensee to Sh. Geeta Ram, s/o Chunni Lal, who was a rich and influential person of Paonta Sahib having flourishing business at Paonta Sahib. The predecessor in interest of the plaintiffs had family relation with Sh. Geeta Ram, therefore, gave the suit land on license to him. Said Sh. Geeta Ram started cultivation of the said land through Sh. Arjun Singh,the father of the defendants and Sh. Sohan Singh who with the passage of time got theirs names recorded in the revenue record and made separate arrangement themselves for the cultivation of the suit land themselves thus the suit land in the possession of defendants is denoted by Khasra No. 299 measuring 892.25 sq.mts. (old Khasra No.145/1 min) in the missal Haquiat for the year 2001-02. The defendants has no right, title and interest in the suit land but are cultivating the suit land on behalf of Geeta Ram licensee and therefore they have no better title or right than Sh. Geeta Ram or his successors.
>
> 3. That Lt. Sh. Geeta Ram gave the suit land to Sh. Arjun Singh and Sohan Singh without the consent of the plaintiffs or their predecessors therefore the defendants have no right to remain in possession.

24 In para 4 of the plaint, it is claimed that the petitioners on 15.11.2004 requested the respondents to hand over the vacant possession of the suit land, but they refused to the request, hence the suit. Thereafter, mandatory paras regarding cause of action etc. have been set out from paras 5 to 8 and thereafter it has been prayed that a decree for possession on the basis of title as aforesaid be passed.

25 Thus, it would be clear from the aforesaid that the dispute of the landlord and tenants arises independent of the proceedings under the Act and further more, the petitioners have not admitted the respondents to be their tenants and rather the same has been specifically denied and in replication the status of the respondents is claimed that of trespassers, therefore, jurisdiction of the civil court could not have been held to be barred by both the learned courts below. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Udham Singh Vs. Ram Singh and Another, 2007 (15) SCC 529***, relied upon by me in Swaran Singh's case *(supra)*, wherein it was observed as under:-

> *"11. The observations of the High Court on the point of jurisdiction may be quoted, which read as under:*
>
> *"It may be very specifically pointed out here that so far as the present case is concerned, as per the allegations made in the plaint, the plaintiff filed a suit for possession against a trespasser on the basis of title. Such a suit primarily is triable by the civil court and in the present case the plaintiff has failed to prove his plea that he was the owner and the defendants were the trespassers. Suit, as discussed above, has to be disallowed. In the present case, relationship of landlord and tenant between the parties existed and*

stood established during the trial of the present suit. On the basis of the ratio of Chuhniya case the plaintiff otherwise has not been successful to make out a case for civil court's interference. ON that account also, the plaintiff has not been successful."

12. According to the own observations of the High Court on the basis of the averment made in the plaint the suit was cognizable by the civil court. The averments and prayers made in the plaint, are relevant for purpose of deciding the forum where the cause will lie. Looking to the plaint case, the High Court was itself of the opinion that the civil court was competent to take cognizance of the suit. But we feel that the High court went wrong while holding otherwise on the basis of the findings ultimately arrived at by the High Court on facts that the defendants were not the trespassers. The jurisdiction is not to be decided on the basis of the ultimate findings arrived at by the Court.

We have already held earlier that the High Court erred in upsetting the concurrent findings of fact arrived at by the two courts of fact, namely, the trial court and first appellate court after detailed and elaborate discussion of the oral as well as documentary evidence on the record.

The High court misread the documents and thereby upset the findings of courts below."

26 Learned counsel for the respondents would then place reliance upon a judgment rendered by me in ***Gurdev Singh vs. Narain Singh and others, 2016(3) ILR(HP) 1656***, but I wonder how the said judgment is of any assistance to the respondents, as therein I was dealing with a case where the order passed by the settlement authorities had attained finality and had not been assailed by the defendant therein. It was in this background that this Court after relying upon explanation VIII to Section 11 CPC observed as under:-

[9] Section 11 Explanation VIII of the Code of Civil Procedure reads as under:

"An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

[10] It cannot be disputed that the Settlement Collector had the jurisdiction to entertain the application for correction. Therefore, in such circumstances, whether the order was right or wrong or in accordance with law or not in accordance with law, would not make the order coram non judice or void and the respondents/defendants, if at all aggrieved, were required to assail the same before the competent authority.

[11] To be fair to the learned counsel for the respondents/defendants, he has vehemently argued that once it is proved on record that no proper procedure was followed by the Settlement Collector while ordering the correction of entries and also bearing in mind that these corrections were carried out at the back of the respondents without affording proper and reasonable opportunity of being heard to them, these findings cannot be held to be binding much less operate as res judicata against the respondents/defendants.

[12] It is more than settled that where a court or Tribunal is having authority or jurisdiction to decide a particular dispute, but in exercise of such

jurisdiction, comes to a wrong conclusion then it is difficult to hold that such an order is void. The correctness of the order has nothing to do with the jurisdiction of the court. It is equally settled that where a quasi judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion whether it is wrong in law or facts and if decides wrongly, the party wronged can only take the recourse prescribed by law for setting the matters right and if that course is not taken, the decision, however, wrong, cannot be disturbed.

[13] Similar issue came up before a Constitution Bench of Hon'ble Supreme Court in Ujjam Bai Vs. State of Uttar Pradesh& anr, 1962 AIR(SC) 1621 and it was held as under:

"15.Now, I come to the controversial area. What is the position with regard to an order made by a quasi-judicial authority in the undoubted exercise of its jurisdiction in pursuance of a provision of law which is admittedly intra vires? It is necessary first to clarify the concept of jurisdiction. Jurisdiction means authority to decide. Whenever a judicial or quasi-judicial tribunal is empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding until reversed on appeal. Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion whether it is wrong in law or in fact. The question, whether a tribunal hat; jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable "at the commencement, not at the conclusion, of the enquiry".

(Rex v. Bolten,1841 1 QB 66 at p.74).. Thus, a tribunal empowered to determine claims for compensation for loss of office has jurisdiction to determine all questions of law and fact relating to the measure of compensation and the tenure of the office, and it does not exceed its jurisdiction by determining any of those questions incorrectly but it has no jurisdiction to entertain a claim for reinstatement or damages for wrongful dismissal, and it will exceed its jurisdiction if it makes an order in such terms, for it has no legal power to give any decision whatsoever on those matters. A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required, (i. e.) has jurisdiction to determine. The strength of this theory of jurisdiction lies in its logical consistency. But there are other oases where Parliament when it empowers an inferior tribunal to enquire into certain facts intend to demarcate two areas of enquiry, the tribunal's findings within one area being conclusive and with in the other area impeachable.

"The jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some particular fact. Such a, fact is collateral to the actual matter which the tribunal has to try and the determination whether it exists or not is logically prior to the determination of the actual question which the tribunal has to try. The tribunal must itself decide as to the collateral fact when, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that

purpose to arrive at some decision on whether it has jurisdiction or not. There may be tribunals which, by virtue of legislation constituting them, have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends; but, subject to that an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess."

(Halsbury's Laws of England, 3rd Edn. Vol. II page 59). The characteristic attribute of a judicial act or decision is that it binds, whether it be right or wrong. An error of law or fact committed by a judicial or quasi judicial body cannot, in general, be' impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends.

These principles govern not only the findings of inferior courts strito sensu but also the findings of administrative bodies which are held to be acting in a judicial capacity.

Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions must be accepted as valid unless set aside on appeal. Even the doctrine of res judicata has been applied to such decisions. (See Living stone v. Westminister Corporation, 1904 2 KB 109 Re Birkenhead Corporation, 1952 Ch 359 Re 56 Denton Road Twickenham, 1953 Ch 51 Society of Medical Officers of Health v. Hope, 1959 2 WLR 377. In Burn & Co. Calcutta v. Their Employees, 1957 AIR(SC) 38 this Court said that although the rule of res judicata as enacted by s. 11 of the Code of Civil Procedure did not in terms apply to an award made by an industrial tribunal its underlying principle which is founded on sound public policy and is of universal application must apply. In Daryao v. The State of U. P.,1961 2 SCA 591 this Court applied the doctrine of res judicata in respect of application under Art. 32 of the Constitution. It is perhaps pertinent to observe here that when the Allahabad High Court was moved by the petitioner under Art. 226 of the Constitution against the order of assessment, passed on an alleged misconstruction of the notification of December 14, 1957, the High Court rejected the petition on two grounds. The first ground given Was that the petitioner had the alternative remedy of getting the error corrected by appeal the second ground given was expressed by the High Court in the following words:

"We have, however, heard the learned counsel for the petitioner on merits also, but we are not satisfied that the interpretation put upon this notification by the Sales Tax Officer contains any obvious error in it. The circumstances make the interpretation advanced by the learned counsel for the petitioner unlikely. It is admitted that even handmade biris, have been subject to Sales Tax since long before the dated of the issue of the above notification. The object of passing the Additional Duties of Excise (Goods of Special Importance) Central Act No. 58 of 1957, was to levy an additional excise duty on certain important articles and with the concurrence of the State Legislature to abolish Sales Tax on those articles. According to the argument of the learned counsel for the petitioner during the period 14th December, 1957, to 30th June, 1958, the petitioner was liable neither to payment of excise duty nor to pay- ment of Sales Tax. We do not know why there should have been such an exemption. The language of the notification might well be read as meaning that the

notification is to 'apply only to those goods on which an addi- tional Central excise duty had been levied and paid".

If the observations 'quoted above mean that the High Court rejected the petition also on merits, apart from the other ground given, then the principle laid down in Daryao v. The State of U. P.,1961 2 SCA 591 will apply and the petition under Art. 32 will not be maintainable on the ground of res judicata. It is,' however, not necessary to pursue the question of res judicata any further, because I am resting my decision on the more fundamental ground that an error of law or fact committed by a judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends.

16. In Malkarjun Narhari,1950 LR 279 the Privy Council dealt with a case in which a sale took place after notice had been wrongly served upon a person who was not the legal representative of the judgment. debtor's estate, and the executing court had erroneously decided that he was to be treated as such representative. The Privy Council said:

"In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right;

and if that course is not taken the decision, however wrong, cannot be disturbed".

17. The above view finds support from a number of decisions-of this Court.

1. Aniyoth Kunhamina Umma v. Ministry of Rehabilitation, 1962 AIR(SC) 1616 Petn No.32 of 1959, D/- 22.3.1961.

In this case it had been held under the Administration of Evacuee Property Act, 1950, that a certain person was an evacuee and that certain plots of land which belonged to him were, therefore, evacuee property and vested. in the Cus- todian of Evacuee Property.' A transferee of the land from the evacuee then presented a petition under Art. 32 for restoration of the lands to her and complained of an infringement of her fundamental right, under Art. 19 (1) (f) and Art. 31 of the Constitution by the aforesaid order under the Administration of Evacuee Property Act.

The petitioner had been a party to the proceedings resulting in the declaration under that Act earliermentioned.

This Court held that as long as the decision under the Administration of Evacuee Property Act which had become final stood, the petitioner could not complain of any infringement of any fundamental right. This Court dismissed the petition observing :

" We are basing our decision on the ground that the competent authorities under the Act had come to a certain decision, which decision has now become final the petitioner not having moved against that decision in an. appropriate court by an appropriate proceeding. As long as that decision stands, the petitioner cannot complain of the. infringement of a fundamental right, for she has no such right".

2. Gulabdas & CO. v. Assistant Collector, of Customs, 1957 AIR(SC) 733. In this case certain imported goods had been assessed to customs tariff. The assessee continued in a petition under Art. 32 that the duty should have been

charged under a different item of that tariff and that its fundamental right was violated by reason of the assessment order charging it to duty under a wrong item in the tariff. This Court held that there was no violation of fundamental right and observed :

"If the provisions of law under which impugned orders have been passed are with jurisdiction, whether they be right or wrong on fact,' there is really no question of the infraction of a fundamental right. If a particular decision is erroneous on facts or merits, the proper remedy is by way of an appeal".

3. Bhatnagar & Co. Ltd. v. The Union of India, 1957 AIR(SC) 478. In this case the Government had held that the petitioner had been trafficking in licences and in that view confiscated the goods imported under a licence. A petition had been filed under Art. 32 challenging this action. It was held :

"If the petitioner's grievance is that the view taken by the appropriate authority in this matter is erroneous, that is not a matter which can be legitimately agitated before us in a petition under Art. 32".

4. The Parbhani Transport Co-operative Society. Ltd. v. Regional Transport Authority, Aurangabad, 1960 AIR(SC) 801. In this case it was contended that the decision of the Transport Authority in granting a permit for a motor carriage service had offended Art. 14 of the Constitution. This Court held that the decision of a quasi-judicial body, right or wrong, could not offend Art. 14."

[14] Once the Settlement Collector had the jurisdiction to make the necessary corrections and such order was affirmed by the Divisional Commissioner who too had the jurisdiction, then even if it is assumed that the order passed was wrong, the same would not make such order a nullity or having been passed without jurisdiction and would , therefore, be binding on the parties.

[15] Accordingly, question No.1 is answered in favour of appellant by holding that the order passed by Collector Settlement was required to be assailed by the respondents before a competent authority or court and in absence of any challenge to the same, the learned lower appellate court could not have gone into the validity of the order passed either by the Settlement Collector or the Divisional Commissioner and thereafter reverse the judgment and decree passed by the learned Trial Court.

27 Reverting to the facts, it would be noticed that the learned trial court had only on 27.6.2005 framed the following issues:-

1. *Whether the plaintiffs are entitled for the decree of possession, as prayed for? OPP*
2. *Whether suit of plaintiffs is barred by law, as alleged ? OPD*
3. *Whether present suit is not maintainable before this Court under the provisions of H.P. Tenancy and Land Reforms Acts, as alleged OPD*
4. *Whether this Court has no jurisdiction to try the present suit, as alleged? OPD*
5. *Whether suit of the plaintiffs is not maintainable as alleged? OPD*
6. *Relief.*

28 Even though issue No.1 was answered in favour of the petitioners, however, the suit was not decreed for want of jurisdiction and after answering issues No. 2 to 5 in affirmative, the plaint was ordered to be returned to the petitioners with a direction to

agitate their claim before the competent authority i.e. Assistant Collector, 1st Grade-cum-Land Reforms Officer, Paonta Sahib. On the other hand, the learned first appellate court did not go into the merits of the case and in fact framed the following points for determination:

> *1. Whether the order passed by the learned trial court qua return of plaint is not legally sustainable in the eyes of law?*
>
> *2. Whether the findings of learned trial court on issue No.1 are liable to be set aside?*
>
> *3. Relief.*

29 After answering point No.1 in negative and point No.2 in affirmative, the appeal filed by the petitioners was ordered to be dismissed, whereas cross-objections filed by the respondents were allowed as per operative portion of the judgment.

30 Evidently, the learned trial court did not pass the decree only on the ground that it lacked jurisdiction. Now, that this Court has held the jurisdiction to be that of civil court to adjudicate and decide the instant lis, therefore, the impugned order passed by the learned trial court is set aside and the suit of the petitioners is accordingly deemed to be decreed.

31 Likewise, since the learned first appellate court has not gone into the merits of the case and has dismissed the suit filed by the petitioners solely on the ground of jurisdiction, the judgment and decree passed by the learned first appellate court is accordingly set aside and the matter is remanded to it with a direction to restore the civil miscellaneous appeal as also the cross-objections to their original number(s) and thereafter decide the same in accordance with law as expeditiously as possible and in no event later than **31.3.2019**.

32 The parties through their respective counsel to appear before the learned first appellate court on **10.10.2018**.

33 Needless to say that if any of the parties want to amend/withdraw the grounds of the appeal/cross-objections in light of this judgment, then at least one opportunity to do the needful shall be afforded to them.

34 This Court has deliberately avoided to render any findings on merits of the case lest it causes prejudice to any of the parties. Therefore, nothing here-in-above shall be considered to be an expression on merits of the case and the learned first appellate court shall decide the appeal and cross-objections uninfluenced by what has been stated or observed above.

35 The petitions are accordingly allowed, in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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

Ranjeet Singh .. Petitioner

Versus

State of H.P. and anr. .. Respondents

CWP No. 2253/2018
Decided on : 26.9.2018

Administrative Tribunals Act, 1985 – Administrative and judicial control – Held, administrative control vests in Chairman of Tribunal – He is master of roster – He alone has prerogative to constitute benches of Tribunal and allocate cases to them – It is for Chairman to decide how best he is to manage administrative work of Tribunal including listing and allocation of cases - And unless and until there are allegations of bias, malafide or irregularities, High Court should be slow to interfere with and direct Tribunal to hear matter in particular manner – Petition seeking direction to Tribunal to decide petition of petitioner within time frame dismissed. (Paras 8 & 9)

Case referred:
L. Chandra Kumar vs. Union of India and ors, 1997 (3) SCC 261

For the petitioner:	Mr. Rajinder Kumar, Advocate,vice Mr. Ramakant Sharma, Advocate.
For the respondents:	Mr. Ajay Vaidya,Senior Additional Advocate General with Mr. J.K. Verma, Ms. Rita Goswami and Mr. Nand Lal Thakur, Additional Advocate Generals.

The following judgment of the Court was delivered:

***Per* Tarlok Singh Chauhan, J. (oral):**

Even though a very innocuous prayer has been made in this petition for directing the learned Himachal Pradesh Administrative Tribunal (for short, "Administrative Tribunal") to decide the petition (TA No. 4360/2015, titled as Ranjeet Singh vs. State of H.P. and others) filed by the petitioner within the stipulated period, however the question is whether such petition is maintainable and should in fact be entertained without there being any justifiable cause carved out by the petitioner.

2 The petitioner after serving in Indian Army was enrolled with Ex-servicemen Cell in the year 2000. Thereafter on 15.10.2008, he came to be appointed as Operation Theater Assistant on contract basis and joined as such at Regional Hospital, Hamirpur on 21.11.2008. It is claimed that the petitioner thereafter sought information under Right to Information Act, 2005 regarding vacancy position of the Operation Theater Assistants and from the information so received, he came to know that as many as 119 posts were lying vacant in the respondent-Department. Accordingly, he filed CWP No. 7931/2013 before this Court claiming therein that he should have been appointed to the regular post of Operation Theater Assistant w.e.f. 2005 with all consequential benefits instead of 2008 when he came to be appointed on contract basis despite there being 11 regular posts available in ex-servicemen quota.

3 The writ petition, on creation of learned Administrative Tribunal, was transferred to the Tribunal and registered as T.A. No. 4360/2015.

4 It is averred that the petitioner had filed an application for early hearing, which was registered as M.A. No. 855/2016, however, the same has not been decided till date and during this period, the respondent-Department has made promotion to the next higher post of Central Sterilization Supply Supervisor on the basis of seniority list as it

stood on 31.3.2016 ignoring preferential claim of the petitioner. It is on the basis of these allegations that the petitioner has sought the aforesaid relief(s).

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

6 It cannot be disputed that it was only after decision of seven Hon'ble Judges of the Hon'ble Supreme Court in ***L. Chandra Kumar vs. Union of India and ors, 1997 (3) SCC 261*** that the powers of judicial review over the decision of the Tribunals were held to be that of High Court and Supreme Court by declaring Clause 2(d) of Article 323A and Clause 3(d) of Article 323B of the Constitution of India to be unconstitutional to the extent they exclude the jurisdiction of the High Courts and Supreme Court under Articles 226,/227 and 32 of the Constitution of India. This was on the premise that the power of judicial review is a basic and essential feature of the Constitution of India and, therefore, cannot be taken away even by way of constitutional amendment. Hence, it will be indeed a rare case where the High Court can hold that a writ petition against an order of inferior Court or Tribunal is not maintainable, however at the same time, it is always open for the High Court, in appropriate cases, to hold that the writ petition is not entertainable on account of proprietary, constitutional scheme, some settled rules of self-restraint or its peculiar facts etc.

7 As regards service matters, Administrative Tribunal has been specifically empowered to entertain at the first instance and adjudicate upon by virtue of its parent statute, which also can be subject to scrutiny only before a Division Bench of the High Court.

8 Adverting to the facts of the case, it would be noticed that the petitioner has not assailed any order of the Administrative Tribunal, but has rather sought directions for early disposal of the petition. The Tribunal, as observed above, is a creation of statute i.e. Administrative Tribunals Act, 1985 and by virtue of the Act, the administrative control vests with the Chairman and in his absence Vice Chairman and in absence of both, senior most member irrespective of whether he is Judicial or Administrative Officer. Even though on the judicial side, however, the Chairman etc. is only the first amongst the equals, however the administrative control vests in the Chairman where he is master of roster. He alone has the prerogative to constitute the benches of Tribunal and allocate the cases to the benches so constituted.

9 Thus, it is for the Chairman to decide how best he is to manage the administrative working of the Tribunal including listing/allocation of the cases. He has the administrative and judicial control of the Tribunal, therefore, unless and until, there are allegations of bias, *mala fides* or some irregularities in the allocation of work or working of the Tribunal, the High Court shall loathe to interfere and direct the Tribunal to hear the matter in a particular manner only because the petitioner desires so. This would virtually amount to interfering in the autonomy, independence and working of the Tribunal, which is impermissible.

10 It is more than settled that the orders passed by the Tribunal are open to judicial review that too on well settled parameters only.

11 Even though, the power conferred upon the High Court under Article 226 of the Constitution of India is extremely vast, yet the Hon'ble Supreme Court has repeatedly laid down certain guidelines and self imposed limitations, subject to which High Court would exercise jurisdiction, but those guidelines may not be mandatory in all circumstances. But one thing is established that the High Court does not act like a

proverbial *"bull in china shop"* in exercise of its jurisdiction under Article 226 of the Constitution of India.

12 "First come first serve" is a normal rule even in the Courts and Tribunals and even though such practice cannot religiously be followed yet, all-out endeavour has to be made by them to decide the cases as per its age i.e. as per date of institution. Therefore, merely because a person feels that his case is more important than the others, he on this ground alone cannot be permitted to jump the cue. To each litigant his case is not only important, but deserves priority. Therefore, p*rima facie*, the writ petition is not maintainable and cannot be entertained as there is no justifiable cause for the same.

13 For all the aforesaid reasons, we find this petition to be totally misconceived and the same is accordingly dismissed in *limine*, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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

Ved Parkash ...Petitioner

Versus

The Kangra Central Co-operative Bank Ltd. and ors. ...Respondents

Civil Revision No. 204/2018
Date of decision: 11th October, 2018

Interpretation of Statutes – Principle of approbate and reprobate – What is ? - Held, a person cannot say at one time that transaction is valid and thereby obtain some advantage under it to which he could only be entitled on footing that it is valid and then turn around and say it is void for securing some other advantage – Operation of this principle must be confined to reliefs claimed in respect of same transaction and parties thereto. (Para 8)

Code of Civil Procedure, 1908 – Section 151 – Order VIII Rule 9 – Written statement - Adoption by co-defendant – Resiling therefrom – Effect – Defendant no. 3 (D3) initially adopting written statement of defendant no. 1 (D1) denying taking of loan from bank by D1 and his (D3) and defendant no. 2 (D2) standing guarantors for D1 – D3 then filing application for adopting written statement of D2 to the effect of D1 having taken loan from bank - Trial court dismissing application by holding that D3 cannot approbate and reprobate by taking inconsistent pleas – Petition against – Held, suit at stage of completion of pleadings – No advantage had been taken by D3 by initially adopting written statement of D1 – Written statement of D1 was denial of suit in toto – By adopting written statement of D2 by D3, it was plaintiff who was in advantageous position – Trial court went wrong in applying principle of estoppel – Petition allowed – Order of trial court set aside. (Paras 16 to 18 & 21)

Cases referred:

C. Beepathuma and others vs. Velasari Shankarnarayana Kadambolithaya and others AIR 1965 SC 241(1)

Commissioner of Income Tax, Madras vs. MR. P. Firm Muar, 1965 AIR (SC) 1216

Halsbury' Laws of England, para 512, Volume XII, page 454

R.N. Gosian vs. Yashpal Dhir, 1192(4) SCC 683

Rajasthan State Industrial Development & Investment Corpn. vs. Diamond & Gem Development Corpn. Ltd., 2013 (5) SCC 470
State of Punjab and others vs. Dhanjit Singh Sandhu, 2014(15) SCC 144

For the petitioner:	Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.
For the respondents:	Mr. Rakesh Thakur, Advocate, for respondent No.1 Nemo for respondents No. 2 and 3

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (oral)

Issue notice, confined to respondent No.1. Mr. Rakesh Thakur, Advocate, appears and waives service of notice on its behalf.

2 With the consent of the parties, the case is taken up for final hearing.

3 The defendant No.3-Guarantor is the petitioner, whose application (CMA No. 153/2018 in Civil Suit No. 7/12) under Order 8 Rule 9, Order 6 Rules 16 and 17 read with Section 151 CPC has been dismissed by the learned trial court vide order dated 4.9.2018, constraining him to file the instant revision petition.

4 The brief facts giving rise to this petition are that respondent No. 1/plaintiff filed a suit for recovery against petitioner/defendant No.3 and proforma respondents No. 2 and 3/defendants No. 1 and 2 (hereinafter, the parties to be referred to as the "plaintiff" and "defendants"). Defendant No.1 is the principal borrower, whereas defendants No. 2 and 3 are guarantors. Defendant No.1 filed his written statement, wherein he denied all the averments contained in the plaint including availing of the loan or defendants No. 2 and 3 having stood guarantors qua the same. This written statement was initially adopted by defendant No.3.

5 During trial, defendants No.1 and 2 were proceeded ex parte, however later on, on an application moved by defendant No.2, ex-parte proceedings against him were set aside and he was permitted to file written statement. In the written statement so filed, defendant No.2 acknowledged the availing of loan amount by defendant No.1, i.e. principal borrower. It is thereafter that defendant No.3 filed an application seeking permission to withdraw the previous written statement adopted by him and further sought permission to adopt the written statement filed by defendant No.2. However, the said application was dismissed by the learned trial court vide impugned order by according the following reasons:-

> *"Perusal of zimini order dated 10.10.2012 shows that the applicant/defendant No.3 had adopted the written statement filed by defendant No.1, vide separate statement of his counsel on record and perusal of that written statement (filed by defendant No.1, which was along being adopted by applicant/defendant No.3) shows that the transaction of loan under reference has been denied vehemently, however, perusal of the proposed written statement (filed by the L.Rs. Of defendant No.2 on 22.2.2018), and intended to be adopted by the applicant/defendant No.3) shows that the transaction of loan has been admitted.*

> *As a sequel to above, it is crystal clear that vide instant applicant applicant/defendant No.3 intends to plead new facts in his pleadings, which are mutually destructive to the facts pleaded by him in his earlier pleadings and hence, the instant application cannot be allowed, as the same would be against the statutory principle of estoppel, as the applicant/defendant No.3 cannot be allowed to blow hot and cold simultaneously. Moreover, it such applications are allowed, it would also be against the intent of legislature, as apparent from Order 6 Rule 15 (4) CPC. Reliance is also placed upon the dictum passed by Apex Court in M/s. Modi Spinning and Weaving Mills vs. M/s Lodha Ram & Co. AIR 1977 SC 680; Haji Mohadded Ishaq vs. Mohammed Iqbal AIR 1978 SC 798: B.K. Narayana Pulai vs. Parameshwaran Pulai (2000) 1 SCC 712; Estralla Rubber vs. Dass Estate 2001 (8) SCC 97, wherein it was held that an application for amendment to the written statement to withdraw the admission is not permissible.*
>
> *Hence, the applicant is dismissed with a cost of Rs.1000/- imposed upon the applicant/defendant No.3 to be paid to respondent/plaintiff."*

6 I have heard the learned counsel for the parties and have also gone through the material placed on record.

7 At the outset, it needs to be stated that the learned trial court has in fact not understood and appreciated the doctrine of estoppel, more particularly, the principle of "approbate and reprobate", which is itself a species of estoppel and is intermediate between estoppel by record and estoppel in pais (***See Halsbury' Laws of England, para 512, Volume XII, page 454)***.

8 The phrase "approbate and reprobate" is apparently borrowed from the Scotch law, where it is used to express the principle embodied in Indian Judicial System in doctrine of election, namely, that no party can accept and reject the same instrument. However, the doctrine of election is not confined to instruments. A person can not say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid and then turn round and say it is void for the purpose of securing some other advantage, which is termed as "approbate and reprobate the transaction". This is only one of the applications of the doctrine of election and its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in ***Halsbury's Laws of England, Volume XII, page 454, para 512***:-

> *"On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it".*

9 In ***C. Beepathuma and others v. Velasari Shankarnarayana Kadambolithaya and others AIR 1965 SC 241(1)*** , it was held by the Hon'ble Supreme Court that a person cannot approbate and reprobate the same transaction. It shall be apposite to refer to observations as contained in paragraphs 17 and 18 of the report, which read thus:

"17. The doctrine of election which has been ap- plied in this case is well-settled and may be stated in the classic words of Maitland-

> *"That he who accepts a benefit under a deed or will or other instrument must adopt the whole contents of that instrument, must con- form to all its provisions and renounce all rights that are inconsistent with it."*

(See Maitland's lectures on Equity Lecture 18).

The same principle is stated in White and Tudor's Leading cases in Equity Vol. 1 8th Edn, at n. 444 as follows:

> *"Election is the obligation imposed upon a party by courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both.....That he who ac- cepts a benefit under a deed or will must adopt the whole contents of the instrument."*

18. The Indian courts have applied this doctrine in several cases and a reference to all of them is hardly necessary. We may, however, refer to a decision of the Mardas High Court in Ramakottayya v. Vi- raraghavayya, ILR 52 Mad 556: (AIR 1929 Mad 502 FB) where after referring to the passage quoted by us from White and Tudor, courts Trotter, G.J. observed that the principle is often put in another form that a person cannot approbate and reprobate the same transaction and he referred to the decision of the Judi- cial committee in Rangaswami Gounden v. Nachiappa Gounden, ILR 42 Mad 523: (AIR 1918 PC 196). Re- cently, this court has also considered the doctrine in Bhau Ram v. Baij Nath Singh, AIR 1961 SC 1327."

10 In *Commissioner of Income Tax, Madras vs. MR. P. Firm Muar, 1965 AIR (SC) 1216*, the Hon'ble Supreme Court held that the doctrine of "approbate and reprobate" is only a species of estoppel and it applies only to the conduct of parties.

11 In *R.N. Gosian v. Yashpal Dhir, 1192(4) SCC 683*, the Hon'ble Supreme Court held as under:

> "*10. Law does not permit a person to both appro- bate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some ad- vantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage."*

12 To the similar effect is the judgment of Hon'ble Supreme Court in *Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd., 2013 (5) SCC 470* where the meaning of "approbate and reprobate" was explained in the following terms:-

> *"15. A party cannot be permitted to "blow hot blow cold", "fast and loose" or "approbate and 3 AIR 1965 SC 1216 4 (1992) 4 SCC 683 5 (2013) 5 SCC 470 reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or con- veyance, or order upon himself. Thus rule is ap- plied to ensure equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good con- science [Vide Nagubai Ammal v. B. Shama Rao, CIT v. V. MR. P. firm Muar (supra), Ramesh Chandra Sankla v. Vikram Cement, Pradeep Oil Corpn. v. MCD,*

Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd. and v. Chandrasekaran v. Administrative Officer.

13 Similar reiteration of law can be found in the judgment of the Hon'ble Supreme Court in *State of Punjab and others vs. Dhanjit Singh Sandhu, 2014(15) SCC 144*.

14 Thus, it can be taken to be well settled that that a a party litigant cannot be permitted to assume inconsistent positions in court to play fast and loose, to blow hot and cold amd to approbate and reprobate to the detriment of his opponents. The principle is "*ALLEGANS CONTARIA NON EST AUDIENDUS"* (he is not to be heard who alleges things contradictory to each other).

15 In view of the aforesaid exposition of law, the question now arises is whether the principle of "approbate and reprobate" could have been applied to the facts and circumstances of the instant case. The answer obviously is in negative.

16 Firstly, the suit is at the stage of completion of pleadings and no advantage has in fact been obtained by defendant No.3 by adopting written statement filed by defendant No.1 so as to dis-entitle him to adopt written statement filed by defendant No.2. It is only when defendant No.3 had obtained some advantage to which he could only be entitled on the basis of his having adopted the written statement of defendant No.1,then he could not have turned around and adopted the written statement filed by defendant No.2.

17 Apart from above, it would also be noticed that in the written statement filed by defendant No.1, which had been adopted by defendant No.3, the claim of the plaintiff had been denied in *toto* including the availing of the loan by defendant No.1 and defendants No. 2 and 3 having stood guarantors, whereas in the written statement filed by defendant No.2, which was sought to be adopted by defendant No.3, the defendant No.2 had specifically acknowledged the availing of loan by defendant No.1 meaning thereby as regards availing of loan, there was a limited admission to that extent subject to of course other defences that had been set up by defendant No.2.

18 Therefore, in this background, it was the plaintiff who otherwise was the only contesting party, who would be placed at some advantageous position when defendant No. 3 is permitted to adopt the written statement filed by defendant No. 2 and that is why I really fail to understand how this particular species of estoppel i.e. "approbate and reprobate" could have been applied to the facts of the instant case.

19 It needs to be reiterated that legal maxims and doctrines are not be mechanically applied, but have to be applied to the fact situation obtaining in a given case.

20 There is yet another reason why the impugned order passed by the learned trial court cannot sustain because the invocation of the provisions as contained in Order 6 Rule 15(4) CPC, to my mind in the given facts and circumstances, is totally mis-placed.

21 Having said so, I find merit in the instant petition and the same is accordingly allowed. Consequently, the impugned order dated 4.9.2018 passed by the learned trial court in CMA No. 153/2018 in Civil Suit No. 7/12 is set aside and defendant No.3 is permitted to adopt the written statement filed by defendant No.2. Pending application(s), if any, also stands disposed of. Parties are left to bear their own costs.

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

Ram Piari and ors. ...Appellants
Versus
Pushpa Devi and ors. ....Respondents

R.S.A. No. 278/2004
Reserved on: 8th October, 2018
Date of decision: 12th October, 2018

Code of Civil Procedure, 1908 – Section 21(2) - Pecuniary jurisdiction - Objection – Raising of at first appellate stage – Permission – Held, objection as to pecuniary jurisdiction of trial court passing decree can not be raised at appellate or revisional stage unless such objection had been taken before trial court itself at earliest possible opportunity and in all cases before settlement of issues – Appellants failing to question decree on ground that there has been prejudice on merits on account of trial court's lack of pecuniary jurisdiction – Objection not permitted to be raised. (Paras 9 & 10)

Limitation Act, 1963 - Articles 64 & 65 - Adverse possession - Possession under agreement to sell – Nature – Possession under agreement to sell inherently permissive and lawful - Adverse possession emanates from denial of title which vests in other – Plea of adverse possession and plea of possession under agreement to sell mutually destructive – Defendants not proved having become owner by adverse possession – RSA dismissed – Decrees of lower courts upheld. (Paras 11 to 14)

Cases referred:

Kiran Singh vs. Chaman Paswan AIR 1954 SC 340
L.N. Aswathama & anr. vs. P. Prakash (2009) 13 SCC 229
Mohan Lal (deceased) vs. Mira Abdul Gaffar and another (1996) 1 SCC 639
P. Periasami (dead) by L.Rs. vs. P. Periathambi and others (1995) 6 SCC 523

For the appellants: Mr. K. S. Banyal, Senior Advocate with Ms. Tanvi Chauhan, Advocate.
For the respondents: Mr. T.S. Chauhan, Advocate, for respondents No.1 and 3.

The following judgment of the Court was delivered:

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p) ***Tarlok Singh Chauhan, Judge***

The appellants are the defendants, who after having lost before both the learned courts below, have filed the instant second appeal.

2 The parties shall be referred to as the "plaintiffs" and "defendants".

3 Briefly stated the facts leading to filing of the present appeal are that the plaintiffs filed a suit for permanent prohibitory injunction and mandatory injunction against the defendants on the ground that they were the owners in possession of the suit land comprised in Khata No. 53 min, Khatauni No. 56 min, Khasra No.655/453, measuring 1 Kanal 2 Marlas, situated in Tikka Tikkar, Mauza Mehalta, Tehsil and District Hamirpur. It was claimed that the plaintiffs were poor and illiterate ladies and defendant No.1, who was private medical practitioner, after taking advantage of this fact was trying to dispossess them forcibly from the suit land. Hence, the suit.

4 The defendants contested the suit by filing written statement taking therein preliminary objections regarding cause of action, locus standi, maintainability, valuation and lastly that the defendants had become owners of the suit land by way of adverse possession. On merits, it was denied that the plaintiffs were in possession of the suit land. It was claimed that defendant No.1 had constructed his house and cattle shed over the suit land in the year 1967 and his possession over the suit land was continuous, un-interrupted, hostile and to the knowledge of the plaintiffs and had become owners of the suit land by eflux of time. It was further claimed that the predecessor-in-interest of the plaintiffs Mahantu had executed an agreement to sell the suit land with the defendants for a consideration of Rs.5000/- on 15.10.1990 and since then they were in possession of the suit land and that being so, the plaintiffs were estopped from filing the suit by their own acts and conduct.

5 On the pleadings of the parties, the learned trial court on 11.10.1993 framed the following issues:-

1. *Whether the plaintiffs are entitled to the relief of injunction as prayed for? OPP*
2. *Whether the plaintiffs are estopped from filing the suit by their act and conduct, as alleged? OPD*
3. *Whether the suit is not maintainable as alleged? OPD*
4. *Whether the defendants are owners of the suit land and have become owners thereof by way of adverse possession? OPD*
5. *Relief.*

6. After recording the evidence and evaluating the same, the learned trial court vide judgment and decree dated 19.6.1996 allowed the suit by passing decree for mandatory injunction by way of demolition of superstructure raised over the suit land by the defendants and further decree for permanent prohibitory injunction against the defendants thereby permanently restraining the defendants from causing any sort of interference over the suit land was also passed. The appeal filed against the said judgment and decree came to be dismissed by the learned first appellate court vide judgment and decree dated 27.3.2004 leading to the filing of the present appeal.

7. On 23.3.2006 the instant appeal came to be admitted on following substantial questions of law:

1. Whether the suit was not valued correctly for the purpose of court fee and therefore, it should not have been tried on merits?

2. Whether any prejudice has been caused to the appellant/defendant on account of non-framing of a specific issue pertaining to his plea that there had been an engagement to sell, executed in his favour by the father of the predecessor-in-interest of the plaintiffs/respondents?

8. I have heard the learned counsel for the parties and have also gone through the material placed on record carefully.

Substantial Question of Law No.1

9. The question as formulated is only academic because even if it is assumed that the value of property is beyond the pecuniary jurisdiction of the learned trial Court, the same will have no bearing on the validity of the judgment and decree passed by it, more particularly when the defendants have failed to question the judgment and decree so passed

on the ground that there has been prejudice on the merits. ***(Refer: Kiran Singh versus Chaman Paswan AIR 1954 SC 340).***

10. This issue has already been considered by this Court in ***RSA No.115 of 2014, titled Surinder Singh Sautha versus Raja Yogindra Chandra, decided on 29.05.2014***, wherein it was held as under:-

> "18.The next point raised by learned counsel for the appellant is that the order passed by a Court lacking pecuniary jurisdiction is void, ab initio and, therefore, the judgment passed by the learned trial Court as affirmed by the learned lower Appellate Court is without jurisdiction and deserves to be set-aside. He referred to number of decisions of the various High Courts on the question viz. *Mamraj Agarwala and others vs. Ahamad Ali Mahamad AIR 1919, Calcutta 984, Mool Chand Moti Lal vs. Ram Kishan and others AIR 1933 Allahabad 249, Shyam Nandan Sahay and others vs. Dhanpati Kuer and others AIR 1960 Patna 244 and Controller of Stores and another vs. M/s Kapoor Textile Agencies, AIR 1975 Punjab 321.*
>
> 19. The judgments relied upon by learned counsel for the appellant would not be of much significance and have lost efficacy in view of the judgment of the Hon'ble Supreme Court in *Kiran Singh and others vs. Chaman Paswan and others AIR 1954 S.C.340* wherein the Hon'ble Supreme Court held that when a case had been tried by a court on merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections of jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits. Further it may be observed that there have been a number of subsequent pronouncements of the Hon'ble Apex Court and also by this Court on this issue which otherwise are binding on this Court. The same are referred to and discussed in detail in the later part of the judgment.
>
> 20. The entire law with regard to the decree passed by a Court lacking pecuniary jurisdiction has been discussed in detail by the Hon'ble Supreme Court in *Subhash Mahadevasa Habib vs. Nemasa Ambasa Dharmadas (dead) by LRs. And others (2007) 13 SCC 650* and the position has been summed up as follows:
>
> > *"33. What is relevant in this context is the legal effect of the so-called finding in OS No. 4 of 1972 that the decree in OS No. 61 of 1971 was passed by a court which had no pecuniary jurisdiction to pass that decree. The Code of Civil Procedure has made a distinction between lack of inherent jurisdiction and objection to territorial jurisdiction and pecuniary jurisdiction. Whereas an inherent lack of jurisdiction may make a decree passed by that court one without jurisdiction or void in law, a decree passed by a court lacking territorial jurisdiction or pecuniary jurisdiction does not automatically become void. At best it is voidable in the sense that it could be challenged in appeal therefrom provided the conditions of Section 21 of the Code of Civil Procedure are satisfied.*
> >
> > *34. It may be noted that Section 21 provided that no objection as to place of the suing can be allowed by even an appellate or revisional court unless such objection was taken in the court of first instance at the earliest possible opportunity and unless there has been a*

consequent failure of justice. In 1976, the existing section was numbered as sub-section (1) and sub-section (2) was added relating to pecuniary jurisdiction by providing that no objection as to competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any appellate or revisional court unless such objection had been taken in the first instance at the earliest possible opportunity and unless there had been a consequent failure of justice. Section 21-A also was introduced in 1976 with effect from 1.2.1977 creating a bar to the institution of any suit challenging the validity of a decree passed in a former suit between the same parties on any ground based on an objection as to the place of suing. The amendment by Act 104 of 1976 came into force only on 1.2.1977 when OS No. 4 of 1972 was pending. By virtue of Section 97 (2) (c) of the Amendment Act, 1976, the said suit had to be tried and disposed of as if Section 21 of the Code had not been amended by adding sub-section (2) thereto. Of course, by virtue of Section 97 (3) Section 21-A had to be applied, if it has application. But then, Section 21-A on its wording covers only what it calls a defect as to place of suing.

35. Though Section 21-A of the Code speaks of a suit not being maintainable for challenging the validity of a prior decree between the same parties on a ground based on an objection as to "the place of suing", there is no reason to restrict its operation only to an objection based on territorial jurisdiction and excluding from its purview a defect based on pecuniary jurisdiction. In the sense in which the expression "place of suing" has been used in the Code it could be understood as taking within it both territorial jurisdiction and pecuniary jurisdiction.

36. Section 15 of the Code deals with pecuniary jurisdiction and, Sections 15 to 20 of the Code deal with "place of This Court in Bahrein Petroleum Co. Ltd. v. P.J. Pappu AIR 1966 SC 634 made no distinction between Section 15 on the one hand and Sections 16 to 20 on the other, in the context of Section 21 of the Code. Even otherwise, considering the interpretation placed by this Court on Section 11 of the Suits Valuation Act and treating it as equivalent in effect to Section 21 of the Code of Civil Procedure as it existed prior to the amendment in 1976, it is possible to say, especially in the context of the amendment brought about in Section 21 of the Code by Amendment Act 104 of 1976, that Section 21-A was intended to cover a challenge to a prior decree as regards lack of jurisdiction, both territorial and pecuniary, with reference to the place of suing, meaning thereby the court in which the suit was instituted.

37. As can be seen, Amendment Act 104 of 1976 introduced sub-section (2) relating to pecuniary jurisdiction and put it on a par with the objection to territorial jurisdiction and the competence to raise an objection in that regard even in an appeal from the very decree. This was obviously done in the light of the interpretation placed on Section 21 of the Code as it existed and Section11 of the Suits Valuation Act by this Court in Kiran Singh v. Chaman Paswan AIR 1954 SC 340 followed by Hiralal Patni v. Kali Nath AIR 1962 SC 199 and Bahrein Petroleum Co. Ltd. v. P.J.Pappu AIR 1966 SC 634. Therefore, there is no justification in understanding the expression "objection as to place

of suing" occurring in Section 21-A as being confined to an objection only in the territorial sense and not in the pecuniary sense. Both could be understood, especially in the context of the amendment to Section 21 brought about by the Amendment Act, as objection to place of suing.

38. It appears that when the Law Commission recommended insertion of Section 21-A into the Code, the specific provision subsequently introduced in sub-section (2) of Section 21 relating to pecuniary jurisdiction was not there. Therefore, when introducing sub-section (2) of Section 21 by Amendment Act 104 of 1976, the wordings of Section 21-A as proposed by the Law Commission were not suitably altered or made comprehensive. Perhaps, it was not necessary in view of the placing of Sections 15 to 20 in the Code and the approach of this Court in Bahrein Petroleum Co. Ltd. AIR 1966 SC 634. But we see that an objection to territorial jurisdiction and to pecuniary jurisdiction, is treated on a par by Section 21. The placing of Sections 15 to 20 under the heading "place of suing" also supports this position. Taking note of the object of the amendment in the light of the law as expounded by this Court, it would be incongruous to hold that Section 21-A takes in only an objection to territorial jurisdiction and not to pecuniary jurisdiction. We are therefore inclined to hold that in the suit OS No. 4 of 1972, the validity of the decree in OS No. 61 of 1971 could not have been questioned based on alleged lack of pecuniary jurisdiction. Of course, the suit itself was not for challenging the validity of the decree in OS No. 61 of 1971 an the question of the effect of the decree in OS No. 61 of 1971 only incidentally arose. In a strict sense, therefore, Section 21-A of the Code may not ipso facto apply to the situation.

39. But the fact that Section 21 (2) or Section 21-A of the Code may not apply would not make any difference in view of the fact that the position was covered by the relevant provision in the Suits Valuation Act, 1887. Section 11 of the Suits Valuation Act provided that notwithstanding anything contained in Section 578 (Section 99 of the present Code covering errors or irregularity) of the Code of Civil Procedure, an objection that a court which had no jurisdiction over a suit had exercised it by reason of undervaluation could not be entertained by an appellate court unless the objection was taken in the court of first instance at or before the hearing at which the issues were first framed or the appellate court is satisfied for reasons to be recorded in writing that the overvaluing or undervaluing of the suit has prejudicially affected the disposal of the suit. There was some confusion about the content of the section.

40. The entire question was considered by this Court in Kiran Singh v. Chaman Paswan, AIR 1954 SC 340. Since in the present case, the objection is based on the valuation of the suit or the pecuniary jurisdiction, we think it proper to refer to that part of the judgment dealing with Section 11 of the Suits Valuation Act. Their Lordships held: (AIR p. 342, para 7)

> *"7. ….It provides that objections to the jurisdiction of a court based on overvaluation or undervaluation shall not be entertained by an appellate court except in the manner and to the extent mentioned in the section. It is a self-contained*

provision complete in itself, and no objection to jurisdiction based on overvaluation or undervaluation can be raised otherwise than in accordance with it.

With reference to objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional court, unless there was a consequent failure of justice. It is the same principle that has been adopted in Section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying Sections 21 and 99 of the Civil Procedure Code and Section 11 of the Suits Valuation Act is the same, namely, that when a case had been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice, and the policy of the legislature has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate court, unless there has been a prejudice on the merits."

In Hiralal Patni v. Kali Nath, AIR 1962 SC 199, it was held that: (AIR p.201, para 4)

"4..... It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure."

In Bahrein Petroleum Co. Ltd. v. P.J. Pappu AIR 1966 SC 634, it was held Section 21 is a statutory recognition of the principle that the defect as to the place of suing under Sections 15 to 20 of the Code may be waived and that even independently of Section 21, a defendant may waive the objection and may be subsequently precluded from taking it."

21. In fact, a similar proposition came up before this Court (Coram : Deepak Gupta, J, as his Lordship then was) in *Tikam Ram and others vs. Purshotam Ram and others 2011 (3) Shim. L.C. 251* wherein again after noticing all the relevant provisions along with law, it was held as under:

"19. To appreciate the rival contentions of the parties, it would be appropriate to refer to Section 21 of the CPC and Section 11 of the Suits Valuation Act which read as follows:

Civil Procedure Code:

"21. Objections to jurisdiction. – [(1) No. objection as to the place of suing shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(2) No objection as to the competence of a court with reference to the pecuniary limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the Court of first

instance at the earliest possible opportunity, and, in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(3) No objection as to the competence of the executing Court with reference to the local limits of its jurisdiction shall be allowed by any Appellate or Revisional Court unless such objection was taken in the executing Court at the earliest possible opportunity, and unless there has been a consequent failure of justice."

Suits Valuation Act

"11. Procedure where objection is taken on appeal on revision that a suit or appeal was not properly valued for jurisdictional purposes.- (1) Notwithstanding anything in [Section 578 of the Code of Civil Procedure (14 of 1882)] and objection that by reason of the over-valuation or under-valuation of suit or appeal a Court of first instance or lower Appellate Court which had no jurisdiction with respect to the suit or appeal exercise jurisdiction with respect thereto shall not be entertained by an Appellate Court unless.-

(a) the objection was taken in the Court of first instance at or before the hearing at which issues were first framed and recorded, or in the lower Appellate Court in memorandum of appeal to that Court, or

(b) the Appellate Court is satisfied, for reasons to be recorded by it in writing, that the suit or appeal was over-valued or under-valued, and that the over-valuation or undervaluation thereof has prejudicially affected the disposal of the suit or appeal on its merits.

(2) If the objection was taken in the manner mentioned in clause (a) of sub-section (1), but the Appellate Court is not satisfied as to both the matters mentioned in clause (b) of that sub-section and has before it the materials necessary for the determination of the other grounds of appeal to itself, it shall dispose of the appeals as if there had been no defect of jurisdiction in the Court of first instance or lower Appellate Court.

(3) If the objection was taken in that manner and the Appellate Court is satisfied as to both those matters and has not those materials before it, it shall proceed to deal with the appeal under the rules applicable to the Court with respect to the hearing of appeals; but if it remands the suits or appeal, or frames and refers issues for trial, or requires additional evidence to be taken, it shall direct its order to a Court competent to entertain the suit or appeal.

(4) The provisions of the Section with respect to an Appellate Court shall, so far as they can be made applicable, apply to a Court exercising revisional jurisdiction under [Section 622 of the Code of Civil Procedure (14 of 1882)] or other enactment for the time being in force.

(5) This Section shall come into force on the first day of July, 1887."

20. The Apex Court in Kiran Singh and others vs. Chaman Paswan and others, AIR 1954 (41), SC 340 was dealing with a case for

recovery of possession of more than 12 acres of land. The suit was dismissed. The plaintiff thereafter filed an appeal in the court of District Judge who also dismissed the appeal. In the second appeal, the plaintiffs for the first time raised an objection that the suit itself had not been properly valued for the purpose of Court fee and jurisdiction and prayed that their appeal should be treated as a first appeal against the order of the learned trial Court. The High Court rejected the plea of the plaintiffs on the ground that the defendants could succeed only when they established prejudice on the merits of the case. An appeal was filed before the Apex Court and it was urged that the decree passed by the District Judge was a nullity because in an original suit having valuation of Rs.9980/-, appeal would lie to the High Court alone and not to the District Judge. The Apex Court held as follows:-

> *"It is a fundamental principle well established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."*

21. Relying upon these observations, Sh. Bhupender Gupta, learned senior counsel for the respondents submits that the decree and judgment of the learned trial Court is a nullity and the learned District Judge was justified in ordering the return of the plaint. This argument cannot be accepted to be correct because it was after making these observations that the Apex Court dealt with Section 11 of the Suits Valuation Act.

22. Dealing with the import of the word prejudice occurring in Section 11, the Apex Court held as follows:-

> *"The language of Section 11 of the Suits Valuation Act is plainly against such a view. It provides that over valuation or undervaluation must have prejudicially affected the disposal of the case on the merits. The prejudice on the merits must be directly attributable to over valuation or under valuation and an error in a finding of fact reached on a consideration of the evidence cannot possibly be said to have been caused by over valuation or undervaluation. Mere errors in the conclusions on the points for determination would therefore be clearly precluded by the language of the Section."*

23. It is also important to note that the aforesaid decision of the Apex Court was rendered much before the amendment of Section 21 of the Code of Civil Procedure. Vide Code of Civil Procedure Amendment Act, 1976, sub-sections 2 and 3 were introduced in Section 21 and sub-section 2 clearly provides that no objection as to the competence of a Court with reference to the pecuniary limits of its jurisdiction shal be allowed by any Appellate Court unless such objection was taken in the court of the first instance at the earliest possible opportunity before

settlement of issues and unless there has been a consequent failure of justice. Sub section 2 clearly envisages that not only should the objections have been taken at the first instance but there should have been consequent failure of justice. If there is no failure of justice then the Court would not entertain the objection as to the competence of the Court with reference to its pecuniary limits. This aspect of the matter has not at all been considered by the lower appellate Court.

24. In Sat Paul and another v. Jai Bhan Ananta Saini, AIR 1973 Punjab and Haryana 58 decided prior to the amendment to Section 21 and only taking into consideration Section 11 of the Suits Valuation Act, a learned Single Judge of the Punjab and Haryana High Court held that without showing that any prejudice has been caused, the Appellate Court could not set aside the judgment only on the ground of the suit being improperly valued.

25. In Harshad Chiman Lal Modi v. DLF Universal Ltd. and another 2005 (7) SCC 791 the Apex Court held as follows:

> *"We are unable to uphold the contention. The jurisdiction of a Court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a Court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a Court having no jurisdiction is a nullity."*

26. The Apex Court further went on to hold that the Courts at Delhi did not have jurisdiction under Section 16 to decide the issue and, therefore, lacked inherent jurisdiction to decide the matter.

27. The then Hon'ble Chief Justice of this Court in Ajay Singh v. Tikka Brijendra Singh and others, 2006 (2) SLC 394 considered this question in detail and after noting the provisions of Sections 21 and 99 of the Civil Procedure Code and Section11 of the Suits Valuation Act held as follows:

> *"A combined reading of the aforesaid three provisions of law clearly suggests, first and foremost that no objection as to the competence of a Court with reference to its pecuniary limits of jurisdiction shall be allowed unless there has been a consequential failure of justice, and secondly, that no decree shall be reversed or substantially varied etc. on account of any error etc. including an error of jurisdiction which does not affect the merits of the case and thirdly, no objection about the jurisdiction of a Court for over valuation or under valuation of a suit etc. shall be entertained by an Appellate Court unless, apart from the objection having been taken in the Court of first*

instance etc., the Appeal Court is satisfied for reasons to be recorded in writing that such overvaluation or under valuation has prejudicially affected the disposal of the suit by the trial Court."

28. In Hasham Abbas Sayyad v. Usman Abbas Sayyad and others, 2007 (2) SCC 355, the Apex Court held as follows:-

"24. We may, however, hasten to add that a distinction must be made between a decree passed by a Court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure, and a decree passed by a Court having no jurisdiction in regard to the subject matter of the suit. Whereas in the former case, the appellate Court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."

29. It would be pertinent to mention that the Apex Court and this Court clearly laid down that so far as objections to the territorial and pecuniary jurisdiction are concerned, the objections must be taken at the earliest possible opportunity and order of the Court not having pecuniary jurisdiction cannot be said to be an nullity. The Court does not lack jurisdiction to decide such a dispute. It only does not have the pecuniary jurisdiction to decide the dispute. Therefore, if it entertains and tries the matter and decides these disputes then the learned Appellate Court cannot set aside its findings unless it comes to the conclusion that prejudice has been caused in terms of Section 11 of the Suits Valuation Act and consequent failure of justice in terms of Section 21 (2) of the Code of Civil Procedure."

This substantial question of law is accordingly answered against the defendants.

Substantial Question of Law No.2

11 It would be noticed that the defendants had raised specific plea to the effect that they had become owners in possession of the suit land by way of adverse possession. In addition to this, they had also pleaded that there had been an agreement to sell executed in their favour by the father of the predecessor-in-interest of the plaintiffs.

12 Both these pleas are conflicting because it is more than settled that the plea of ownership simpliciter is based on the concept of title, which one may acquire through various sources like succession, gift, will, sale, exchange, grant etc. etc. and the person in possession is essentially to be treated as being in lawful possession, whereas on the other hand when the plea of adverse possession is projected inherent is the plea that someone else is in the ownership of the property. ***(See: P. Periasami (dead) by L.Rs. vs. P. Periathambi and others (1995) 6 SCC 523)***. Having said so, it can safely be concluded that the pleas based on title and simultaneously on adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. ***(Ref: Mohan Lal (deceased) vs. Mira Abdul Gaffar and another (1996) 1 SCC 639 and L.N. Aswathama & anr. vs. P. Prakash (2009) 13 SCC 229)***.

13 In such circumstances, it was incumbent upon the defendants to have chosen one line of defence and they could not have raised plea of ownership as also plea of adverse possession at the same time and it is for this reason that the defendants chose the

line of adverse possession and it was for this precise reason that issue No.4(supra) was framed by the learned trial court. Having chosen plea of adverse possession being line of defence, it is now too late in the day for the defendants to claim that specific issue, pertaining to their plea that there had been an engagement to sell executed in their favour by the father of the predecessor-in-interest of the plaintiffs, should have been framed. This substantial question of law is answered accordingly against the defendants.

14. In view of aforesaid discussions, there is no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Smt. Bimla Devi .. Petitioner
Versus
Smt. Tihnu Devi .. Respondent

CMPMO No. 143 of 2018
Decided on: December 5, 2018

Code of Civil Procedure, 1908 – Order VI Rule 17 – Amendment of pleadings - Held, while allowing or rejecting application for amendment of plaint, it is to be seen whether amendment as proposed, constitutionally or fundamentally changes nature and character of case – On facts, suit of plaintiff rests on date of Will as mentioned in revocation deed - Case at stage of rebuttal evidence - Plaintiff seeking amendment to change date of Will pleaded in plaint - As suit based on document(revocation deed), allowing amendment as sought by him, would change its nature and cannot be allowed - Petition allowed - Order of trial court allowing amendment set aside. (Para 9)

Cases referred:
Chakreshwari Construction Private Limited vs. Manohar Lal, (2017)5 SCC 212
State of Madhya Pradesh vs. Union of India and another, (2011) 12 SCC 268

For the petitioner : Mr. Romesh Verma, Advocate.
For the respondent : Mr. Raj Kumar Negi, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:(oral)

Being aggrieved and dissatisfied with the order dated 23.3.2018 passed by the Civil Judge, Anni, District Kullu, Himachal Pradesh in Case No. 26-1 of 2010 titled Tihnu Devi vs. Bimla Devi, whereby an application under Order 6 Rule 17 read with S. 151 CPC, having been filed by the respondent-plaintiff (hereinafter, 'plaintiff') came to be allowed, petitioner-defendant (hereinafter, 'defendant') has approached this court in the instant proceedings filed under Art. 227 of the Constitution of India, praying therein to set aside the aforesaid order.

2. Facts, as emerge from the record are that the plaintiff filed a suit for possession of half share in Khasra No. 29 measuring 11 Bigha in Khewat Khatauni No. 255/307 in Mohal Bari, Tehsil Nirmand, District Kullu, Himachal Pradesh, in the court of learned Civil Judge, Anni, averring therein that after death of father of the plaintiff, when mutation of inheritance was taken up for registration by Assistant Collector 2nd Grade, Nirmand on 23.1.2009, defendant produced a registered Will alleged to have been executed by father of the plaintiff in favour of the defendant, but such Will was turned down by the Assistant Collector 2nd Grade Nirmand, on the ground that the father of the plaintiff, Shri Paras Ram had cancelled the alleged will vide registered document No. 102/2003 dated 16.12.2003, wherein it has been specifically mentioned that the registered Will No. 101 dated 1.12.1999 stands cancelled by the father of the plaintiff. In the suit, plaintiff claimed that since the Will allegedly executed by her father in favour of defendant was revoked, she being legal heir of late Paras Ram is also entitled to half share in the suit property. Defendant by way of written statement, refuted the aforesaid claim and averred that Paras Ram, by way of Will, had bequeathed his entire property in her favour and as such, plaintiff has no right, title or interest over the same.

3. Learned Court below, on the basis of pleadings of parties, framed issues and thereafter, parties led evidence also. After closure of the evidence of defendant, when matter was fixed for rebuttal evidence, plaintiff filed an application under Order 6 Rule 17 read with S.151 CPC, praying therein for amendment of plaint stating that the father of the plaintiff namely Paras Ram, had cancelled the alleged Will No. 101 dated 1.12.1999 vide revocation deed No. 102/03 dated 16.12.2003. Plaintiff further stated in the application that though the Will in question was registered on 13.12.1999, but due to clerical mistake, date of registration was recorded as 1.12.1999 in the revocation deed, as such, she be permitted to carry out amendment in the plaint. Plaintiff prayed in the application that she be allowed to amend the plaint to the extent that the date of execution of Will was 13.12.1999 and not 1.12.1999, which prayer having been made by the plaintiff was opposed by defendant by filing reply. However, the fact remains that the application was allowed by the learned Court below, who permitted the plaintiff to carry out amendment in the plaint, as prayed for in the application.

4. Having heard the parties and perused the material available on record vis-â-vis reasoning assigned by the court below, this court is persuaded to agree with the contention of Mr. Romesh Verma, learned counsel representing the defendant that the plaint having been filed by plaintiff is based upon true facts and documents on record, as such, there is/was no requirement to amend the plaint. While referring to revocation deed i.e. annexure P-5, which otherwise is heavily relied upon by the plaintiff, while contesting the Will put up by the defendant, Mr. Verma contended that in revocation deed, late Paras Ram has categorically stated that the Will in question was executed in favour of Bimla Devi i.e. defendant on 1.12.1999. He further stated that once the pleadings adduced on record by plaintiff are based upon document, being relied upon by her, there is /was no necessity to amend the plaint.

5. Having carefully perused the revocation deed referred to herein above, this court finds that it has been categorically stated by the plaintiff in the plaint sought to be amended, that the Will in favour of the defendant was executed on 1.12.1999. If the case set up by the plaintiff is read in its entirety, it clearly suggests that, in nutshell, case of the plaintiff is that the Will executed by late Paras Ram in favour of the defendant was cancelled/revoked by way of revocation deed, annexure P-5, wherein it has been specifically recorded that the Will dated 1.12.1999, stands revoked and as such this court is in agreement with Mr. Romesh Verma, learned counsel representing the defendant that the

pleadings adduced on record by the plaintiff are strictly based upon annexure P-5 i.e. document sought to be relied upon by her in support of her claim, as such, there is no requirement of amending the plaint. Otherwise also, this court finds that there is no plausible explanation rendered on record by the plaintiff, while seeking amendment in the plaint with regard to date of execution of the Will. Learned Court below, merely on the basis of averments contained in the application permitted plaintiff to carry out amendment in the plaint.

6. At this stage, it is contended by Mr. Raj Kumar Negi, learned counsel representing the plaintiff that bare perusal of the annexure P-6 i.e. Will in question itself suggests that same was executed on 13.12.1999, as such, learned Court below rightly allowed the plaintiff to amend her plaint, but this court is not in agreement with the aforesaid argument having been made by the learned counsel representing the plaintiff for the reason that the question with regard to genuineness and correctness of the aforesaid Will is yet to ascertained by the learned trial Court in the totality of evidence led on record by the respective parties, whereas, careful perusal of the plaint having been filed by the plaintiff itself suggests that her entire claim is based upon annexure P-5 i.e. revocation deed, wherein, it has been stated that the Will in question was executed on 1.12.1999, which factum has been otherwise pleaded in the original plaint. While referring to annexure R-4, i.e. order passed by the Assistant Collector 1st Grade, Mr. Negi made a serious attempt to persuade this court to agree with his contention that since revenue authority has already held that Will No. 101 is dated 13.12.1999, and such order has not been assailed by the defendant, mention of wrong date, if any, in the revocation deed, annexure P-5, has no relevance, also needs to be rejected at this stage. Careful perusal of pleadings adduced on record nowhere suggests that the factum with regard to passing of order dated 29.9.2011, if any, by Assistant Collector 1st Grade, Nirmand, ever came to be incorporated in the plaint or in the application, wherein amendment was sought. Similarly, careful perusal of impugned order nowhere suggests that the factum with respect to passing of order dated 29.9.2011 by Assistant Collector 1st Grade, Nirmand, was taken note of by the learned Court below, while allowing amendment. Needless to say, party can not be allowed to lead evidence, if any, beyond the pleadings.

7. Their Lordships of the Hon'ble Supreme Court in **State of Madhya Pradesh v. Union of India and another** reported in (2011) 12 SCC 268 have held that where an application is filed after the commencement of the trial, it must be shown that despite due diligence, said amendment could not have been sought earlier. Their lordships have held as under:

> 7. The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.
>
> The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not

adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations."

8. The Hon'ble Apex Court in **Chakreshwari Construction Private Limited** vs. **Manohar Lal**, (2017)5 SCC 212, has culled out certain principles while allowing or rejecting the application for amendment, which are as under:-

> "13. The principle applicable for deciding the application made for amendment in the pleadings remains no more res integra and is laid down in several cases. In Revajeetu Builders and Developers vs. Narayanaswamy & Sons, (2009)10 SCC 84, this Court, after examining the entire previous case law on the subject, culled out the following principle in para 63 of the judgment which reads as under: (SCC p.102)
>
> > "63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:
> >
> > (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
> >
> > (2) whether the application for amendment is bona fide or mala fide;
> >
> > (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money.
> >
> > (4) refusing amendment would in fact lead to injustice or lead to multiple litigation.
> >
> > (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
> >
> > (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.
>
> These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

9. In the aforesaid judgment, the Hon'ble Apex Court has clearly held that while allowing/rejecting the application for amendment of the plaint, it is to be seen whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case. In the case at hand, since the entire suit of the plaintiff rests on the date of Will mentioned in the revocation deed, as such, allowing the amendment, as sought by the plaintiff, would change the nature of the suit and as such, amendment, as sought by the plaintiff, could not have been allowed by the learned Court below.

10. Consequently, in view of the discussion made herein above as also in light of law laid down by the Hon'ble Apex Court on the subject, it is clear that the plaintiff has failed to make out a case for allowing her application seeking amendment to the plaint and learned Court below has erred in allowing the same.

11. Consequently, the present petition is allowed. Order dated 23.3.2018 passed by the Civil Judge, Anni, District Kullu, Himachal Pradesh in Case No. 26-1 of 2010 titled Tihnu Devi vs. Bimla Devi, is quashed and set aside. However, it is made clear that the observations made herein above shall remain confined to the decision of the present petition alone and shall have no bearing upon the merit of the main case before the learned Court below.

Pending applications, if any, are disposed of. Interim direction, if any, is vacated.

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

Shaminder Kumar Chaoudhary .. Petitioner
Versus
Sukhdev Chand and others .. Respondents

CMPMO No. 19 of 2015
Decided on: December 19, 2018

Indian Evidence Act, 1872 (Act) – Sections 65 and 66 – Secondary evidence - Adduction of – Notice to opposite party – Purpose – Held, very purpose of notice under Section 66 of Act is only to put other party possessing or having power over document to produce it so as to secure best evidence. (Para 8)

Indian Evidence Act, 1872 (Act) – Sections 65 and 66 – **Code of Civil Procedure, 1908 (Code)** –Order XI Rule 14 – Secondary evidence – Adduction of - Notice, when not required – Circumstances – Trial Court dismissing application of plaintiff to lead secondary evidence on ground of his not having issued notice to defendant to produce original Will – Petition against – Material on record showing execution of Will specifically admitted by defendants in written statement - Earlier plaintiff filed application under Order XI Rule 14 of Code asking defendants to produce Will – Held, in view of pleadings made in written statement and filing of application of Order XI Rule 14 of Code seeking production of original Will was sufficient notice to defendants – No separate notice under Section 66 of Act was required to be given to them – Petition allowed – Order of trial court set aside – Application to lead secondary evidence allowed. (Paras 9, 10 & 12)

Cases referred:

Rakesh Mohindra vs. Anita Beri and others, 2016(16) SCC 483

For the petitioner : Mr. Anup Kumar Rattan, Advocate.
For the respondents : Mr. Dheeraj K. Vashisht, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:(oral)

Being aggrieved and dissatisfied with the order dated 15.12.2014, passed by the learned Civil Judge (Junior Division), Court No.I, Una, District Una, Himachal Pradesh,

whereby an application (CMA No. 387 of 2014) under S.65 of the Indian Evidence Act (hereinafter, 'Act') read with S.151 CPC, having been filed on behalf of the petitioner-plaintiff (hereinafter, 'plaintiff'), seeking therein permission to lead secondary evidence, came to be dismissed, plaintiff has approached this court in the instant proceedings, praying therein to set aside the impugned order referred to herein above and permit him to lead secondary evidence to prove Will, Ext. PW-1/A.

2. Necessary facts, as emerge from the record, are that the plaintiff filed a suit for declaration to the effect that he is owner-in-possession of the estate of deceased Sant Ram son of late Gonda, to the extent of 1/3rd share of suit land (as described in the head note of the plaint), on the basis of registered Will dated 3.6.1996, executed by late Sant Ram. Respondents-defendants (hereinafter, 'defendants'), while refuting the claim put forth by the plaintiff in the plaint, admitted the factum with regard to execution of Will dated 3.6.1996, qua 1/3rd share in favour of the plaintiff by deceased Sant Ram, however, defendants, claimed that subsequently, Will dated 3.6.1996, was cancelled /revoked by the deceased Sant Ram vide another Will dated 7.6.1996, whereby entire estate was bequeathed in favour of his wife, Ram Piari, and defendants.

3. During the pendency of the civil suit, plaintiff filed an application under Order 11 Rule 14 CPC, seeking therein direction to the defendants to produce the original Will dated 3.6.1996. Plaintiff averred in the application that the Will dated 3.6.1996, was lying in possession of the defendants, as such, they be directed to produce the same for proper adjudication of the case. However, defendants resisted the application and claimed that the Will dated 3.6.1996, never came in their possession. Learned Court below, vide order dated 11.4.2014, dismissed the application, which order never came to be assailed, as such, same attained finality. Subsequently, plaintiff filed yet another application under S.65 of the Act read with Section 151 CPC, seeking therein permission of the court to lead secondary evidence, to prove the Will dated 3.6.1996, which otherwise stood exhibited as Ext. PW-1/A. However, the fact remains that such application came to be dismissed on the ground that the plaintiff before filing the application under S. 65, failed to serve defendants with the notice as required under S.66. In the aforesaid ground, plaintiff has approached this court, in the instant proceedings.

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

5. Having heard the learned counsel representing the parties and perused the material available on record vis-à-vis reasoning assigned by the learned Court below, while passing impugned order, this court finds that the plaintiff before filing the application under S.65 of the Act, has not issued notice under S.66 to the defendants, intimating therein his intention to move an application under S.65 of the Act, seeking therein direction to lead secondary evidence to prove factum of existence of Will dated 3.6.1996. Having carefully perused order dated 11.4.2014 passed by the learned Court below, this court is persuaded to agree with the contention of Mr. Anup Rattan, learned counsel representing the plaintiff that since by way of filing application under Order 11 Rule 14 CPC, intention of the plaintiff to seek direction against the defendants to produce Will dated 3.6.1996, had already come to the notice of defendants, there was no requirement, if any, to serve defendants with notice, as contemplated under S.66 before moving application under S.65.

6. Leaving it aside, this court finds that bare perusal of plaint as well as written statement itself suggests that the factum with regard to execution of Will dated 3.6.1996, was very much in the knowledge of both the parties. Plaintiff, in the plaint, specifically claimed that the deceased Sant Ram bequeathed one third of his property in his favour by

way of Will dated 3.6.1996, which fact never came to be disputed in the written statement having been filed by the defendants, rather, defendants acknowledged the factum with regard to execution of Will dated 3.6.1996, in their written statement. Very object and purpose of issuance of notice under S. 66 of the Act is to make a party aware regarding the document, sought to be produced from his/her custody or to be led in secondary evidence. In the case at hand, if averments contained in the application filed under S.65 are read in their entirety, same clearly reveal that the plaintiff sought permission of the court to prove Will dated 3.6.1996, which otherwise stood exhibited as Ext. PW-1/A, by leading secondary evidence. As has been noticed herein above, factum with regard to existence of Will dated 3.6.1996, never came to be disputed, rather same was categorically admitted by the defendants in their written statement.

7. At this stage, provisions of S.66 of the Act may be usefully extracted herein below:

> **"66. Rules as to notice to produce**
>
> Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, 46[or to his attorney or pleader,] such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:
>
> Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:-
>
> (1) when the document to be proved is itself a notice ;
>
> (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;
>
> (3) When it appears or is proved that the adversary has obtained possession of the original by fraud or force;
>
> (4) when the adverse party or his agent has the original in Court;
>
> (5) when the adverse party or his agent has admitted the loss of the document;
>
> (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court."

8. Careful perusal of aforesaid provisions of law suggests that the very purpose of notice under S.66 is only to put other party to notice to produce the document, in whose possession or power, document is, so as to afford opportunity to the party by producing same to secure best evidence of its defence.

9. In the case at hand, though careful perusal of the plaint itself suggests that the factum with regard to the Will in question was very much in the knowledge of the defendants, because, plaintiff in his plaint had categorically stated that by way of Will dated 3.6.1996, deceased Sant Ram bequeathed 1/3rd share of his property in his favour whereas, rest of the property came to be bequeathed in favour of his wife (Ram Piari) and defendants. Apart from above, subsequent to filing of plaint, application under Order 11 Rule 14 CPC, came to be filed whereby plaintiff sought direction to the defendants, to produce the Will, which, in my view, was sufficient notice to the defendants, to produce the Will in question.

10. Though, the application at hand came to be dismissed on the ground of non-issuance of notice under S. 66 but for the reason stated herein above, this court is of the

view that non-issuance of notice under S.66 of the Act could not be a ground for the court below to dismiss the application. But, at this stage, Mr. Dheeraj K. Vashisht, Advocate argued that bare perusal of plaint, nowhere suggests that specific pleadings, if any, came to be made in the plaint that the Will dated 3.6.1996, was in possession of the defendants or same had been lost somewhere by the plaintiff, as such, plaintiff can not be permitted to lead secondary evidence in terms of provisions contained under S. 65, but, having carefully perused the provisions of S.66, this court is not in agreement with the aforesaid argument raised by Mr. Dheeraj K. Vashisht, Advocate, because, bare perusal of averments contained in the plaint and application suggests that there are specific pleadings in the plaint with regard to existence of Will dated 3.6.1996, which fact has been otherwise admitted by the defendants in their written statement. Apart from above, plaintiff, with a view to prove existence of Will, also examined Deed Writer as PW-1, who had scribed the Will and exhibited the same as Ext.PW-1/A, as such, plaintiff has successfully established the factum with regard to existence of the Will in question and rightly moved an application seeking therein permission of the court to lead secondary evidence to prove the contents of Will in question.

11. It is well settled that mere exhibition of document is not sufficient to prove its contents, rather, party intending to prove the same is required to lead specific evidence to prove the contents of the same. In this regard, reliance is placed upon the judgment rendered by the Hon'ble Apex Court in **Rakesh Mohindra** versus **Anita Beri and others**, 2016(16) SCC 483, wherein it has been held as under:-

> "14. Section 65 of the Act deals with the circumstances under which secondary evidence relating to documents may be given to prove the existence, condition or contents of the documents. For better appreciation Section 65 of the Act is quoted herein below:- "65. Cases in which secondary evidence relating to documents may be given: Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-
>
> (a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
>
> (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
>
> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
>
> (d) when the original is of such a nature as not to be easily movable;
>
> (e) when the original is public document within the meaning of section 74;
>
> (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force 40[India] to be given in evidence ;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court and the fact to be proved it the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relied upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted.

16. The High Court in the impugned order noted the following :(Anita Beri vs. Rakesh Mohindra SCC Online HP 4258 para-9)

"9. There is no averment about Ext. DW-2/B in the Written Statement. The Written Statement was filed on 19.2.2007. DW-2/B infact is only a photocopy. The plaintiffs are claiming the property on the basis of a registered will deed executed in her favour in the year 1984. It was necessary for the defendant to prove that in what manner the document dated 24.8.1982 was executed. The defendant while appearing as AW-1 has admitted in his cross-examination that except in his affidavit Ext. AW-1/A, he has not mentioned in any document that the letter of disclaimer was executed by Justice late Sh. Tek Chand in his presence. The statement of DW-2 does not prove that Ext. DW-2/A, ever existed. DW-2 Sh. Gurcharan Singh, has categorically admitted in his cross-examination that he has not brought the original of Ext. DW- 2/B. He has also admitted that on Ext. DW-2/B, the signatures of P.C. Danda were not legible. Volunteered that, those were not visible. The learned trial Court has completely misread the oral as well as the documentary evidence, while allowing the application under Section 65 of the Indian Evidence Act, 1872, more particularly, the statements of DW- 2 Gurcharan Singh and DW-3 Deepak Narang. The applicant has miserably failed to comply with the provisions of Section 65 of the Indian Evidence Act, 1872. The learned trial Court has erred by coming to the conclusion that the applicant has taken sufficient steps to produce document Ext. DW- 2/B."

17. The High Court, following the ratio decided by this Court in the case of J. Yashoda vs. Smt. K. Shobha Rani, AIR 2007 SC 1721 and H. Siddiqui (dead) by lrs. vs. A. Ramalingam, AIR 2011 SC 1492, came to the conclusion that the defendant failed to prove the existence and execution of the original documents and also failed to prove that he has ever handed over the original of the disclaimer letter dated 24.8.1982 to the authorities. Hence, the High Court is of the view that no case is made out for adducing the secondary evidence.

18. The witness DW-2, who is working as UDC in the office of DEO, Ambala produced the original GLR register. He has produced four sheets of paper including a photo copy of letter of disclaimer. He has stated that the original documents remained in the custody of DEO. In cross-examination, his deposition is reproduced hereinbelow:-

> "xxxxxxxx by Sh. M.S. Chandel, Advocate for the plaintiff No.2. I have not brought the complete file along with the record. I have only brought those documents which were summoned after taking up the documents from the file. As on today, as per the GLR, Ex.DW- 2/A, the name of Rakesh Mohindra is not there. His name was deleted vide order dated 29.8.2011. I have not brought the original of Ex.DW-2/B. It is correct that Ex.DW-2/D does not bear the signatures of Sh. P.C. Dhanda. Volunteered.: These are not legible. Ex.DW-2/C is signed but the signatures are not leible. On the said document the signatures of the attesting officer are not legible because the document became wet. I cannot say whose signatures are there on these documents. On Ex.DW-2/E the signatures at the place deponent also appears to have become illegible because of water. Ex.DW-2/F also bears the faded signatures and only Tek Chand is legible on the last page. It is incorrect to suggest that the last page does not have the signatures of the attesting authority. Volunteered: These are faded, but not legible. The stamp on the last paper is also not legible. There is no stamp on the first and second page. In our account, there is no family settlement, but only acknowledgement of family settlement. I do not know how many brothers Rakesh Mohindra has. It is correct that the original of Ex.DW-2/H does not bear the signatures of Sh. Abhay Kumar. I do not know whether Sh. Abhay Kumar Sud and Rakesh Mohindra are real brothers. The above mentioned documents were neither executed nor prepared in my presence. It is incorrect to suggest that the above mentioned documents are forged. It is incorrect to suggest that because of this reason I have not brought the complete file."

19. In Ehtisham Ali v. Jamma Prasad 1921 SCC OnLine PC 65 a similar question came for consideration as to the admissibility of secondary evidence in case of loss of primary evidence. Lord Phillimore in the judgment observed:(SCC Online PC)

> " It is, no doubt, not very likely that such a deed would be lost, but in ordinary cases, if the witness in whose custody the deed should be, deposed to its loss, unless there is some motive suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed."

20. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law."

12. In view of the detailed discussion made herein above and law laid down by the Hon'ble Apex Court (supra), the present petition is allowed. Order dated 15.12.2014 passed by the learned Civil Judge (Junior Division), Court No. I, Una, District Una, Himachal Pradesh in Civil Suit No. 50-I-11 is set aside. Application filed by the plaintiff for leading secondary evidence under S.65 of the Act, is allowed, subject to costs of `10,000/-, to be paid to the defendants, within four weeks from today.

Pending applications, if any, are disposed of. Interim direction, if any, is vacated. Record, if received, be sent back forthwith.

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

Shri Gian Chand ...Petitioner
Versus
Smt. Sheetla Devi ...Respondent

CMPMO No. 195 of 2018
With CrMMO No. 210 of 2018
Decided on: November 30, 2018

Code of Civil Procedure, 1908 - Section 24 - **Code of Criminal Procedure, 1973** - Section 482(Code) - Transfer of cases – Justification - Husband seeking transfer of divorce petition filed by him as well as of revision instituted by him against ex-parte order granting maintenance to wife in proceedings under Section 125 of Code from Court of District and Sessions Judge, Hamirpur to Court of District and Sessions Judge, Kangra at Dharamshala - Husband praying for transfer on ground of his being heart patient and also suffering from 'Herperzoster' – Held - In transfer proceedings, convenience of wife shall have precedence over and above inconvenience of husband - Wife also found suffering from spinal cord injury and having acute back-pain - Petition dismissed. (Paras 8 &15)

Cases referred:

Arti Rani alias Pinki Devi and another vs. Dharmendra Kumar Gupta, (2008) 9 SCC 353
Krishna Veni Nagam vs. Harish Nagam, (2017) 4 SCC 150
Kulwinder Kaur alias Kulwinder Gurcharan Singh vs. Kandi Friends Education Trust and others, (2008) 3 SCC 659
Rajani Kishor Pardeshi vs. Kishor Babulal Pardeshi, (2005) 12 SCC 237
Sumita Singh vs. Kumar Sanjay and another (2001) 10 SCC 41

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondent: Mr. Kush Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Since, both the petitions have been filed by the petitioner seeking transfer of cases pending between the parties from Hamirpur to Kangra at Dharamshala, same were

clubbed together vide order dated 8.8.2018, and were heard together and are being disposed of vide this common judgment.

2. In CMPMO No. 195 of 2018, by invoking provision of S.24 CPC, prayer has been made for transferring HMA No. 95/16 from the court of learned District Judge, Hamirpur to the court of learned District Judge, Kangra at Dharamshala. Similarly, in CrMMO No. 210 of 2018, filed under S.482 CrPC, prayer has been made for transferring Cr. Misc. Application No. 81 of 2016 from the court of learned Single Judge, Hamirpur to the court of learned Single Judge, Kangra at Dharamshala. In both the cases, husband is the petitioner.

3. Facts, as emerge from the pleadings of the parties are that the respondent (wife) left the matrimonial home on 29.1.1985, without information and since then, she has not come back. In the year 2013, respondent filed a case for maintenance in the competent Court of law at Hamirpur. Said case was allegedly decided *ex parte* on 9.7.2015, without any intimation to the petitioner. After having received copy of judgment through the police, petitioner filed a revision petition, which is still pending adjudication. Petitioner also filed a petition for decree of divorce under Section 13 of the Hindu Marriage Act, which has been registered as HMA No. 95/2016 and is pending in the court of learned District Judge, Hamirpur. It is argued on behalf of the petitioner that on more than a dozen occasions, when petitioner reached the premises of the court, respondent with the help of her daughter quarreled with him and even gave beatings to the petitioner with the help of her known ones. Petitioner made complaints to the Superintendents of Police, Hamirpur and Kangra.

4. Apprehending harassment and threat to his life and limb, petitioner has sought transfer of both the cases pending in the courts at Hamirpur to Kangra. Petitioner has further pleaded that he is a heart patient and suffering from 'Herperzoster' (as mentioned in the petition) and because of disease, stress and strain, petitioner finds it difficult even to approach the courts at Hamirpur, after traveling such a long distance from Yol, Kangra.

5. Respondent, by way of reply to CMPMO No. 195 of 2018, has refuted the averments contained in the petition and categorically stated that she being an old lady, cannot go to Dharamshala, which is approximately 150 kms from her residence, to attend the court cases. Respondent has also placed on record, medical record to demonstrate that she is suffering from spinal chord injury and having an acute back-pain.

6. Having heard the learned counsel representing the parties and perused the pleadings, this court finds that the respondent is more that 60 years old whereas, petitioner is 70 years old. It is also not in dispute that respondent also filed a petition under S.125 CrPC, claiming therein maintenance from the petitioner, in the competent Court of law at Hamirpur.

7. Mr. Kush Sharma, learned counsel representing the respondent-wife, in support of his aforesaid contentions placed reliance upon the judgment rendered by this Court in **Urvashi Rana** versus **Himanshu Nayyar,** (CMPMO No. 177 of 2016) decided on 15.7.2016, reported in **Latest HLJ 2016(HP) 925**, to demonstrate that convenience of wife is required to be considered over and above the inconvenience of the husband.

8. Aforesaid judgment passed by this Court is based upon law laid down by the Hon'ble Apex Court in various cases including **Sumita Singh** v. **Kumar Sanjay and another** (2001) 10 SCC 41, wherein the Hon'ble Apex Court has observed that wife's convenience is required to be considered over and above the inconvenience of the husband. In **Rajani**

Kishor Pardeshi versus **Kishor Babulal Pardeshi**, (2005) 12 SCC 237, Hon'ble Apex Court has held that the convenience of wife is of prime consideration.

9. Similarly, Hon'ble Apex Court in **Kulwinder Kaur alias Kulwinder Gurcharan Singh** versus **Kandi Friends Education Trust and others,** (2008) 3 SCC 659, has laid down parameters for transferring the cases i.e. balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceedings, etc. While laying aforesaid broad parameters, Hon'ble Apex Court has further held that these are illustrative in nature and by no means can be taken to be exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a 'fair trial', in the Court from which he/she seeks to transfer a case, it is not only the power, but the duty of the Court to make such order. The Hon'ble Apex Court has held as under:

> "23. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts. They are balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a "fair trial" in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order."

10. Similarly, Hon'ble Apex Court in **Arti Rani alias Pinki Devi and another** versus **Dharmendra Kumar Gupta**, (2008) 9 SCC 353, while dealing with a petition preferred by wife for transfer of proceedings on the ground that she was having minor child and it was difficult for her to attend the Court at Palamu, Daltonganj, which was in the State of Jharkhand and at a quite distance from Patna, where she was now residing, with her child, ordered transfer of proceedings taking into consideration convenience of wife.

11. In the case at hand, from the facts, as have been discussed above, which have not been refuted, it clearly emerges that at present, respondent resides at Hamirpur, which is definitely at a considerable distance from Dharamshala and respondent would be put to unnecessary hardships and difficulties, especially when respondent is more than 60 years old lady.

12. Leaving everything aside, this Court can not lose sight of the fact that in case, prayer of the petitioner is acceded to and cases are transferred to Kangra at Dharamshala, respondent-wife will be burdened with unnecessary expenditure on account of transportation and engaging counsel at Dharamshala. There is also no denial that the

respondent being an old aged lady, will be put to unnecessary harassment in traveling to Dharamshala to attend the court cases.

13. During proceedings of the case, attention of this Court was invited to the judgment passed by Hon'ble Apex Court in **Krishna Veni Nagam** versus **Harish Nagam**, (2017) 4 SCC 150, wherein Hon'ble Apex Court has held as under:

> "We are of the view that if orders are to be passed in every individual petition, this causes great hardship to the litigants who have to come to this Court. Moreover in this process, the matrimonial matters which are required to be dealt with expeditiously are delayed. In these circumstances, we are prima facie of the view that we need to consider whether we could pass a general order to the effect that in case where husband files matrimonial proceedings at place where wife does not reside, the court concerned should entertain such petition only on the condition that the husband makes appropriate deposit to bear the expenses of the wife as may be determined by the Court. The Court may also pass orders from time to time for further deposit to ensure that the wife is not handicapped to defend the proceedings. In other cases, the husband may take proceedings before the Court in whose jurisdiction the wife resides which may lessen inconvenience to the parties and avoid delay. Any other option to remedy the situation can also be considered.
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> x x x x
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> 17. We are thus of the view that it is necessary to issue certain directions which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a place away from their ordinary residence on the ground that if proceedings are not transferred it will result in denial of justice.
>
> 18. We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant/respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can be:-
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> i) Availability of video conferencing facility.
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> ii) Availability of legal aid service.
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> iii) Deposit of cost for travel, lodging and boarding in terms of Order XXV CPC.
>
> iv) E-mail address/phone number, if any, at which litigant from out station may communicate."

14. Recently, the Hon'ble Apex Court in Transfer Petition (Civil) No. 1278 of 2016, titled **Santhini** versus **Vijaya Venketesh**, has overruled the judgment passed in **Krishna Veni Nagam** versus **Harish Nagam**, (2017) 4 SCC 150 (Supra). Relevant paras of aforesaid latest judgment are reproduced below:

> "51. In this context, we may refer to the fundamental principle of necessity of doing justice and trial in camera. The nine-Judge Bench in Naresh Shridhar Mirajkar

and Ors v. State of Maharashtra and Anr.46, after enunciating the universally accepted proposition in favour of open trials, expressed:-

> "While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? If the primary function of the court is to do justice in causes brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal and it is held that it admits of no exceptions whatever, cases may arise where by following the principle, justice itself may be defeated. That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. It is hardly necessary to emphasise that this inherent power must be exercised with great caution and it is only if the court is satisfied beyond a doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold the trial in camera; but to deny the existence of such inherent power to the court would be to ignore the primary object of adjudication itself. The principle underlying the insistence on hearing causes in open court is to protect and assist fair, impartial and objective administration of justice; but if the requirement of justice itself sometimes dictates the necessity of trying the case in camera, it cannot be said that the said requirement should be sacrificed because of the principle that every trial must be held in open court."

52. The principle of exception that the larger Bench enunciated is founded on the centripodal necessity of doing justice to the cause and not to defeat it. In matrimonial disputes that are covered under Section 7 of the 1984 Act where the Family Court exercises its jurisdiction, there is a statutory protection to both the parties and conferment of power on the court with a duty to persuade the parties to reconcile. If the proceedings are directed to be conducted through videoconferencing, the command of the Section as well as the spirit of the 1984 Act will be in peril and further the cause of justice would be defeated.

53. A cogent reflection is also needed as regards the perception when both the parties concur to have the proceedings to be held through videoconferencing. In this context, the thought and the perception are to be viewed through the lens of the textual context, legislative intent and schematic canvas. The principle may had to be tested on the bedrock that courts must have progressive outlook and broader interpretation with the existing employed language in the statute so as to expand the horizon and the connotative expanse and not adopt a pedantic approach.

54. We have already discussed at length with regard to the complexity and the sensitive nature of the controversies. The statement of law made in Krishna Veni Nagam (supra) that if either of the parties gives consent, the case can be

transferred, is absolutely unacceptable. However, an exception can be carved out to the same. We may repeat at the cost of repetition that though the principle does not flow from statutory silence, yet as we find from the scheme of the Act, the Family Court has been given ample power to modulate its procedure. The Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives emphasis on speedy settlement. As has been held in Bhuwan Mohan Singh (supra), the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of the lis, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a witness can be examined in video conferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision. However, we make it clear that in a transfer petition, no direction can be issued for video conferencing. We reiterate that the discretion has to rest with the Family Court to be exercised after the court arrives at a definite conclusion that the settlement is not possible and both parties file a joint application or each party filing his/her consent memorandum seeking hearing by videoconferencing.

55. Be it noted, sometimes, transfer petitions are filed seeking transfer of cases instituted under the Protection of Women from Domestic Violence Act, 2005 and cases registered under the IPC. As the cases under the said Act and the IPC have not been adverted to in Krishna Veni Nagam (supra) or in the order of reference in these cases, we do intend to advert to the same.

56. In view of the aforesaid analysis, we sum up our conclusion as follows :-

(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.

(ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.

(iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.

(iv) In a transfer petition, video conferencing cannot be directed.

(v) Our directions shall apply prospectively.

(vi) The decision in Krishna Veni Nagam (supra) is overruled to the aforesaid extent"

15. Accordingly, perusal of aforesaid judgment clearly suggests that in a transfer petition, video conferencing cannot be directed and hearing of matrimonial disputes is required to be conducted in camera. In the aforesaid judgment, Hon'ble Apex Court has further held that after the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer, but in transfer petition, video conferencing can not be directed.

16. After having carefully considered the material available on record, as well as submissions having been made by the learned counsel representing the parties and law laid down by the Hon'ble Apex Court, this court sees no justification for transferring the cases from Hamirpur to Dharamshala, as prayed for by the petitioner. Accordingly, both the petitions are dismissed being without merits.

17. All pending applications, in both the petitions, are disposed of. Record, if received, be sent back forthwith. Interim directions, if any, are vacated.

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BEFORE HON'BLE MR. JUSTICE SURYA KANT, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Shri Inder Singh ....Petitioner

Versus

State of Himachal Pradesh and another ....Respondents

CWP No. 960 of 2018
Decided on: December 4, 2018

Motor Vehicles Act, 1988 – Section 88(1)- Second proviso – Corridor Inter- State permit– Held, where starting and termination point of route are situated within same State but part of such route lies in other State and length of route lying in other State does not exceed 16 kms, permit shall be valid in other State in respect of that part of route lying in other State notwithstanding such permit has not been counter-signed by State Transport Authority or RTA of other State – Object, area and scope of corridor permit are entirely different vis-a-vis route permit issued under Reciprocal Transport Agreement between States. (Para 7 & 10)
Constitution of India, 1950 – Article 14 - **Motor Vehicles Act, 1988** – Section 88(5) & (6) – Notification regarding Reciprocal Transport Agreement between Himachal Pradesh and Punjab with respect to State Transport Undertakings for plying Inter-State stage carrier service – Challenge thereto - State of H.P. notifying proposal for Reciprocal Transport Agreement on 28.2.2008 – Petitioner not having Corridor Inter-State permit in his name on 28.2.2008 - Such permit stood granted to petitioner only on 9.7.2008 - Held, petitioner has no *locus standi* to challenge notification dated 28.2.2008 issued by State of H.P. (Paras 8 & 13)
Constitution of India, 1950 – Article 14 - **Motor Vehicles Act, 1988** – Section 88(5) and (6)- Notifcation publishing draft proposal of Reciprocal Transport Agreement issued in 2007- Final notification notifying Reciprocal Transport Agreement published on 14.7.2017 - Challenge thereto – Petitioner challenging said notifications having been issued without

affording opportunity to him - Held, material showing that objections to proposal were called for from persons likely to be affected by such agreement within 30 days from publications of notification – Since no objections were filed, draft proposal attained finality – Petition dismissed. (Para 9)

For the petitioner: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Ashok Sharma, Advocate General with Mr. J.K. Verma, Additional Advocate General, for respondent No.1.
Mr. Pranay Pratap Singh, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Being aggrieved and dissatisfied with the publication of Notifications dated 28.2.2008 (Annexure P-1) and dated 14.7.2017 (Annexure P-2), in the official Gazette, petitioner has approached this court in the instant proceedings filed under Art. 226 of the Constitution of India, praying therein to set aside and quash the same.

2. In nutshell, case as projected in the petition and as argued by Mr. Ajay Sharma, learned counsel representing the petitioner, is that Notification in the official Gazette dated 14.7.2017, invoking provisions of Sub-section (5) of Section 88 of the "Punjab Motor Vehicles Act, 1988" thereby notifying Reciprocal Transport Agreement, entered into between respondents No.1 and 2, is unsustainable in the eye of law. As per provisions of Motor Vehicles Act, 1988 (hereafter, 'Act'), State Transport Undertaking (hereinafter, 'STU') in either of the States is a parallel player with private bus operators. Petitioner has averred that as per provisions of the Act, special treatment is available to the STU, in case Government concerned invokes the provisions of Chapter-6 of the Motor Vehicles Act. While invoking provisions contained in Chapter 6, State of Himachal Pradesh had issued Notification for according special permits to the STU, however, same was withdrawn, whereafter Government of Himachal Pradesh, while exercising powers under Section 99 of the Act, again issued Notification, calling for objections. Allegedly, the objections were filed but no further proceedings at any point of time were drawn by the concerned authorities, and as such, STU and private bus operators are same and similarly situate as of today. Petitioner has alleged that grave injustice has been caused to the petitioner and other private bus operators in the State of Himachal Pradesh, details qua which have been given in the body of the petition, because, decision having been taken to their detriment, is at their back, that too contrary to the provisions of the Act and Rules, as such, they are compelled to approach this court in the instant proceedings.

3. Mr. Ajay Sharma, learned counsel representing the petitioner, while referring to Annexure P-2, Gazette Notification dated 14.7.2017, contended that as per provisions of Sub-section (5) of Section 88 of the Act, State of Himachal Pradesh had published the draft of Reciprocal Transport Agreement, proposed to be arrived at between the States of Himachal Pradesh and Punjab, but the same was without complying with provisions of the Act, more particularly, Sub-section 5 of Section 88 of the Act. Aforesaid provision of the Act depicts that every proposal to enter into an agreement between the States to fix the number of permits shall be published by each of the State Governments concerned in the official Gazette and in any one or more of the newspapers in the regional language circulated in the area or routes proposed to be covered by the Agreement. Mr. Sharma, further contended that to the best knowledge of the petitioner, respondent No. 1 had not published Notification

in the official Gazette dated 28.2.2008, in any of newspapers and there is no reference of the newspapers, otherwise given in the official Gazette Notification (Annexure P-1).

4. As per petitioner, Annexure P-1 is not in consonance with the provisions of Sub-section 5 of Section 88 of the Act, because another Notification dated 14.7.2017 (Annexure P-2) stands published after a period of ten years from the date of issuance of Annexure P-1 i.e. 28.2.2008. Mr. Sharma, while referring to both the Notifications i.e. Annexure P-1 and Annexure P-2, contended that since more than ten years have elapsed, much water has flown under the bridge, thereby itself making Annexure P-2 invalid and as such, Notification dated 14.7.2017, can not be given effect to. Mr. Sharma, further contended that Annexure P-2 i.e. Notification dated 14.7.2017, has been issued drawing powers from "Punjab Motor Vehicles Act, 1988", and on the basis of transport Notification of Government of Punjab, dated 23.1.2008 and there is no reference given with regard to Notification by the Government of Himachal Pradesh, whereas, as per provisions of the Act, both the State Governments are required to publish draft Notifications, calling therein for objections and as such, Notifications being not in consonance with the provisions of Sub-section (6) of Section 88 of the Act, deserve to be quashed and set aside.

5. Mr. Ajay Sharma, learned counsel representing the petitioner, while referring to the Notification referred to herein above, contended that about fifty plus permits have not been shown in the official agreement and mileage in kilometres with respect to private bus operators has been reduced from 2407.5 kms to 1364.5 kms i.e. about 1043 kms, as such, decision taken by the respondents to the detriment of the petitioner that too at his back, cannot be allowed to be sustained. Mr. Sharma, further contended that private bus operators, to whom Corridor Inter-State Permits have been allowed, without entering in the Reciprocal Transport Agreement, are being taxed much more than the required tax as per norms in as much as SRT requires to be paid to the Punjab Government of such Corridor Permit at the rate of `6.13 per kilometre, whereas same entered in the Agreement are required to pay `4.13 per kilometre and not only this, when permits of private bus operators are not added in the Reciprocal Transport Agreement, it becomes difficult to get a time table. As per petitioner, respondents have issued about a hundred Corridor Permits during the years 2002 to 2008 and buses are being plied but the respondents have not included the same in the Reciprocal Transport Agreement and such buses are running from Una to Terrace via Talwara, one side distance of which is 19 kms, however, these buses have been put in Corridor Permit by showing 16 kms, which is totally wrong and arbitrary, as these permits were to be included in the Inter-State routes, thereby grave miscarriage of justice has been caused to the private bus operators.

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

7. This court, with a view to ascertain the correctness and genuineness of the aforesaid averments contained in the petition and arguments advanced by the learned counsel representing the petitioner, carefully perused the material adduced on record by the respective parties, as well as various provisions of the Motor Vehicles Act, perusal whereof suggests that actually the petitioner is aggrieved by non-inclusion of his stag carrier permit against corridor permit allegedly issued for plying three return trips on Sri Naina Devi Ji-Toba-Anandpur Sahib-Ganguwal-Guru Ka Lahore route. It is not in dispute that the corridor permit is issued in accordance with the provisions of the Act. Second proviso to Section 88 of the Act suggests that where both, starting point and termination point, of the route are situated within the same State, but part of such route lies in other State and length of route does not exceed 16 kilometres, permit shall be valid in other State in respect of that part of route, which is in the other State as well, notwithstanding that such permit has not been

counter-signed by the STU or the RTA of other State. In the case at hand, it is not in dispute that the petitioner itself has a stage carrier only for 6 kms, within the territory of respondent No.2.

8. Careful perusal of the response having been filed by the respondents suggests that stage carriage permit No. ST-S 184/REG/STG/08 was actually issued in favour of one Shri Prabhat Singh Chandel son of Shri Anant Ram, resident of Village and Post Office Bhakra, Tehsil Sri Naina Devi Ji, District Bilaspur, Himachal Pradesh by RTO Bilaspur on 9.7.2008 and such permit was issued on route namely Shri Naina Devi Ji-Toba-Anandpur Sahib-Ganguwal-Guru Ka Lahore with three return trips. Subsequently, such permit came to be transferred in the name of petitioner in the year 2010. It is also not in dispute that Notification dated 28.2.2008 (Annexure P-1) came to be issued in the year 2008, whereas, permit, as has been noticed herein above, came to be transferred in the name of petitioner in the year 2010, when he was not holder of above mentioned permit, as such, there appears to be considerable force in the argument of Mr. Pranay Pratap Singh, learned counsel representing respondent No.2 that there is no *locus standi* in favour of the petitioner to file the present petition, challenging Annexure P-1. Perusal of the Notification, Annexure P-1 dated 28.2.2008, suggests that the same was issued by respondent No.1, proposing therein to enter into a reciprocal agreement with respondent No.2 i.e. State of Punjab. Aforesaid agreement was to be entered into in terms of Sub-section (5) of Section 88 of the Act for plying stage carrier service in the territory of each other, as such, draft Reciprocal Transport Agreement was published by respondent No.2.

9. Though, the petitioner has categorically stated in the petition that after issuance, no notice was issued to the persons likely to be affected by such proposed agreement, but careful perusal of the reply having been filed by respondent No.2, clearly suggests that in pursuance to agreement referred to herein above, objections/suggestions qua the proposal were invited within thirty days from the date of publication of notice in the official Gazette, but, since no objections were filed by the petitioner at the relevant time, it attained finality. Similarly, a close scrutiny of Notification (Annexure P-2) reveals that the same being draft proposal of Reciprocal Transport Agreement between the State of Himachal and Punjab under Sub-section (5) of Section 88 of the Act for plying stage carriage service into the territory of each State, which was issued on 28.2.2008 came to be published in the official Gazette on 14.3.2008. Replies having been filed by the respondents clearly suggest that both the Notifications as referred to above, were finalized after complying with the conditions contained in Section 88(6) of the Act. Notification was published on 13.7.2017 in the official Gazette, after completion of the necessary codal formalities. As far as mentioning of "Punjab Motor Vehicles Act, 1988" in Notification (Annexure P-2) is concerned, that appears to be a clerical mistake, which fact has been otherwise specifically mentioned in para-6 of the reply filed by respondent No. 2. Respondent No.2, in para-6 of the reply has categorically stated that there is no such Act, as mentioned in this para i.e. "Punjab Motor Vehicles Act, 1988". It has been stated that on account of typographical error in the Reciprocal Transport Agreement, "Motor Vehicles Act, 1988" was erroneously mentioned as "Punjab Motor Vehicles Act, 1988". Otherwise also, this court finds that bare perusal of Annexure P-2, clearly suggests that Gazette Notification being referred is actually issued by the State of Himachal Pradesh, wherein only draft Notification proposed to be issued by the State of Punjab is actually reproduced, wherein, inadvertently, words, "Punjab Motor Vehicles Act, 1988" were mentioned.

10. Respondent No.1, State of Himachal Pradesh, while defending Notifications, Annexures P-1 and P-2, has categorically stated in its reply that the petitioner was never granted permit for the route, which was governed by Reciprocal Transport Agreement

between the States of Himachal Pradesh and Punjab, as contemplated under Sub-sections (5) and (6) of Section 88, and the petitioner was granted Corridor Permit under Second proviso to Section 88(1) of the Act, where both, starting point as well as terminal point, of the route are situate in the same State but part of such route lies in other state, length of which part does not exceed 16 kms. Reply having been field by the respondent No.1 reveals that actually the petitioner was granted Corridor Permit on the route Sri Naina Devi Ji-Toba-Anandpur Sahib-Ganguwal-Guru Ka Lahore, on 9.7.2008, for a period of five years, which was renewed for a further period of five years and the object, area and scope of Corridor Permit are entirely different vis-à-vis route permit issued under the Reciprocal Transport Agreement between the States of Himachal and Punjab. Respondent No.1 has specifically denied the allegations of the petitioner that the respondents never resorted to publication in the newspaper nor given any notice before excluding route permit from the category of Reciprocal Transport Agreement between the States of Himachal Pradesh and Punjab. Respondent No.1 has categorically stated that proposal for notification of Reciprocal Transport Agreement was issued on 28.2.2008 and petitioner was not permit holder as on 28.2.2008.

11. This court is in agreement with the learned Advocate General that once provisions of Sub-sections (5) and (6) of Section 88 of the Act were not applicable to the case of petitioner, there was no question of giving any notice with respect to publication or entering into Reciprocal Transport Agreement in the State of Himachal Pradesh and Punjab to the petitioner. In para-7 of the reply, respondent No.1 has categorically stated that before publishing the Notification in official Gazette, a press note of intimation for the general public was published in two Hindi newspapers i.e. "*Amar Ujala*" and "*Dainik Jagran*" on 10.10.2017, which fact totally belies the allegations put forth by the petitioner in the petition at hand.

12. Having heard the learned counsel representing the parties and perused the material available on record, this court is not persuaded to agree with Mr. Ajay Sharma that the Notifications, Annexures P-1 and P-2 are not sustainable, in as much as same have not been issued in consonance with Sub-section (6) of Section 88 of the Act, which provides for its publication in any of the newspapers having circulation in the area or route covered by it, in regional language, because replies having been filed by respondents, which have been otherwise taken note of, clearly suggest that before publication of the Notification, not only objections were invited rather, press note of intimation for the general public was published in two Hindi newspapers i.e. *"Amar Ujala"* and "*Dainik Jagran*".

13. Leaving everything aside, this court, having perused the record, is convinced and satisfied that since petitioner was granted Corridor Permit under Second proviso to Sub-section (1) of Section 88 of the Act and there was no permit as on 28.2.2008, rather petitioner was granted the same on 9.7.2008, and as such, plea of giving no notice, having been raised by the petitioner, is devoid of any merit and deserves outright rejection.

14. As far as publication of notification after a delay of ten years from the date of issuance of Annexure P-1 is concerned, this court having noticed such glaring discrepancy on the part of the respondents, summoned the Principal Secretary (Transport) to the Government of Himachal Pradesh, vide order dated 13.9.2018, to explain the circumstances, which led to delay in issuance of Notification (Annexure P-2). On 14.9.2018, this court was informed that the matter is being looked into and compliance shall be reported on the next date of hearing. On 28.9.2018, this court was informed that the respondent-State has filed an application praying therein for extension of time, wherein it has also stated that the Reciprocal Transport Agreement, which was executed on 29.8.2016, is in existence till date in the State of Himachal Pradesh as well as State of Punjab. All the inter-State buses now

are plying on the basis of aforesaid agreement hence a meeting has been fixed for 29.9.2018 at 11.00 AM, in the chamber of the Principal Secretary (Transport) to the Government of Himachal Pradesh with his counterpart in the Government of Punjab, to re-look into the matter for the further action. This court, while expressing its displeasure and dissatisfaction with regard to the explanation rendered on record by the respondents, reluctantly granted time to the respondents for doing the needful. On 26.10.2018, this court was informed that a meeting of the Secretaries Transport of three States i.e. Punjab, Haryana and Himachal Pradesh is scheduled to be held on 1.11.2018.

15. Today, during the proceedings of the case, while inviting attention of this court to the communication issued by Principal Secretary (Transport) to the STA, learned Advocate General contended that the authority concerned has been directed to furnish draft of revised agreement, as such, necessary action with regard to revision of Reciprocal Transport Agreement shall be taken on priority basis.

16. Having carefully considered the submissions made by the learned counsel representing the petitioner as well as material adduced on record, this court has no hesitation to conclude that the grounds taken in the petition as well as reasons assigned/taken for declaring the Notifications, Annexures P-1 and P-2, to be illegal, are not sufficient to hold aforesaid Notifications invalid, especially when very *locus standi* of the petitioner is under a clout. However, this court would have definitely proceeded to quash the aforesaid Notifications on the ground of delay, because, admittedly, Notification publishing draft Reciprocal Transport Agreement, proposed to be entered *inter se* States of Punjab and Himachal Pradesh in terms of Sub-section (5) of Section 88 of the Act, was issued on 28.2.2008. As per aforesaid Notification, notices to the affected persons with regard to proposed Reciprocal Transport Agreement were to be called and sent to the Principal Secretary (Transport) to the Government of Himachal Pradesh within thirty days from the date of publication of the notice in the initial Gazette, so that final Notification notifying therein Reciprocal Transport Agreement entered inter two Governments could be published. In the case at hand, second Notification, dated 14.7.2017 (Annexure P-2) and the Reciprocal Transport Agreement between the States of Himachal Pradesh and Punjab, came to be published after approximately ten years. It is strange and astonishing that the Governments, after issuance of first Notification dated 28.2.2008, whereby objections with regard to draft of Reciprocal Transport Agreement were called, kept on permitting vehicles to be plied inter-State without there being a valid Reciprocal Transport Agreement inter se them for long ten years. Though, vide Notification dated 14.7.2017, respondent No. 1 has now published Reciprocal Transport Agreement between the States of Himachal and Punjab, but that is also not in accordance with law, as has been noticed herein above, that is why, during the pendency of the petition, this court repeatedly asked the Government of Himachal Pradesh to take up the matter with the Government of Punjab for rectification/revision of Reciprocal Transport Agreement.

17. In the aforesaid scenario, we would not have hesitated to quash the aforesaid Notifications of our own having noticed aforesaid glaring discrepancies and incompetence on the part of the officers, who were in the helm of the affairs when such Notifications were issued, but, having taken note of the fact that in the event of such a harsh decision being taken by the court, public at large would suffer, we restrain ourselves from passing such an order. However, we put a word of caution to the respondents to be more cautious, while dealing with such matters, which directly relate to the public at large.

18. Consequently, in view of the above, present petition is disposed of with a direction to the Principal Secretaries (Transport) to the Governments of Himachal Pradesh and Punjab to jointly take steps for revision of Reciprocal Transport Agreement signed on

19.8.2016, within a period of three weeks from today and thereafter give effect to the same, so that no ambiguity is left in the same.

Pending applications, if any, are disposed of.

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

Dharam Singh .. Petitioner
Versus
Pawna Devi and others .. Respondents

CrMMO No. 390 of 2018
Decided on: December 10, 2018

Code of Criminal Procedure, 1973 – Section 125 – Interim maintenance – Quantum – Justification – Held, lower courts must not apply their own knowledge regarding income of respondent – They must decide matter on basis of material adduced on record. (Para 5)

Code of Criminal Procedure, 1973 – Section 125 **–** Interim maintenance – Quantum – Justification – Additional Chief Judicial Magistrate granting interim maintenance to wife, children and parents of respondent at rate of Rs. 750/- p.m. each – Court of Sessions enhancing maintenance to Rs. 1000/- p.m. each in revision – Petition against – Income certificate of respondent placed on record clearly indicating his income at Rs. 2500/- p.m. - Held, when income of respondent is Rs. 2500/- p.m., he cannot be directed to pay maintenance at rate of Rs. 1000/- p.m. each – Petition allowed – Order of Court of Sessions set aside and of Additional Chief Judicial Magistrate restored. (Paras 5 & 6)

Code of Criminal Procedure, 1973 – Section 125 – Interim maintenance – Married daughter – Held, married daughter not entitled for maintenance under Section 125 of Code. (Para 5)

For the petitioner : Mr. Sanjay K. Sharma, Advocate.
For the respondents : Mr. Neeraj Maniktala, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:(oral)

Being aggrieved and dissatisfied with the order dated 16.3.2018 passed by the learned Sessions Judge, Hamirpur, District Hamirpur, Himachal Pradesh in Cr. Revision No. 24 of 2014, modifying order dated 27.9.2014, passed by the learned Additional Chief Judicial Magistrate, Hamirpur, Himachal Pradesh in Cr.M.A. No. 138-IV-2012 in Crl. Petition No. 12/2012, whereby the court below, while allowing the application filed under S.125(1)(d)CrPC for grant of interim maintenance, held respondents-complainants (hereinafter, "complainants") entitled to maintenance to the tune of Rs. 1000/- each per month from the date of filing of the petition till final disposal of the main petition, petitioner has approached this court, in the instant proceedings, filed under S.482 CrPC, praying therein to set aside the order passed by the learned Court below.

2. Facts, as emerges from the record are that the complainants filed a petition under S.125 CrPC, alongwith another application under S.125 (1)(d) CrPC, praying therein to grant interim maintenance allowance at the rate of Rs. 2500/- per month to each of the complainants and Rs. 25,000/- as litigation expenses. Complainants averred in the application that the petitioner-respondent (hereinafter, 'Petitioner') is a driver by profession and failed to maintain them, as such, they are entitled to maintenance under S.125(1)(d) CrPC during the pendency of the main petition under S.125 CrPC.

3. Complainants claimed that after marriage, petitioner started maltreating, beating and insulting them under the influence of liquor. On the other hand, petitioner, while refuting aforesaid claim put forth by the complainants, alleged that the marriage *inter se* him and complainant No.1 was dissolved on 20.12.2012 by a decree of divorces in a petition filed by the complainant No. 1 in the court of learned District Judge, Hamirpur, wherein complainant No.1 had categorically stated/admitted that she will not claim any maintenance for herself and on behalf of other complainants. Petitioner also claimed before the court below that the complainant No.1 has solemnized second marriage and at present she is residing with her second husband, as such, is not entitled for any compensation/maintenance under S.125 CrPC. Petitioner also claimed that his monthly income is Rs. 2500/- and as such, he can not pay maintenance as awarded by the learned Court below. Learned trial Court, on the basis of material adduced on record by the parties, held complainants entitled to a sum of Rs. 750/- per month each, as maintenance from the date of petition till final disposal of the same

4. Being aggrieved and dissatisfied with the aforesaid order passed by the learned Additional Chief Judicial Magistrate, Hamirpur, complainants preferred a criminal revision petition under S.397 CrPC, in the court of learned Sessions Judge, Hamirpur, which came to be allowed vide order dated 16.3.2018, whereby the learned Sessions Judge enhanced the amount of maintenance from Rs. 750/- to Rs. 1000/- per month each, from the date of application. In the aforesaid background, petitioner has approached this court in the instant proceedings, praying therein to set aside the impugned order passed by the learned Court below.

5. Having heard the parties and perused the material available on record, this court is persuaded to agree with the contention of Mr. Sanjay K. Sharma, learned counsel representing the petitioner that though the factum with regard to dissolution of marriage *inter se* petitioner and complainant No.1 remained unrebutted, but even if, for the sake of arguments, it is presumed that the petitioner was unable to place on record any document to prove dissolution of marriage, even in that situation, learned Court below, while taking cognizance of the income certificate produced on record by petitioner, could not have awarded a sum of Rs. 1000/- per month as compensation in favour of the complainants. Careful perusal of the material available on record vis-à-vis reasoning assigned by the court below, compels this court to conclude that both the learned Courts below were swayed by emotion, while passing impugned orders, because, it is a matter of record that the petitioner, while contesting the claim put forth by the complainants, categorically stated in his reply that his monthly income is Rs. 2500/- and in this regard, he also placed on record, certificate issued to the petitioner, which never came to be rebutted by the complainants. However, learned Court below, imported its own knowledge and returned a finding, that," by no stretch of imagination, it can be believed that the petitioner was earning Rs. 2500/- per month." In such like proceedings, courts below ought not have applied their own knowledge/information, rather, ought to have decided the matter on the basis of material adduced on record by the respective parties. In the case at hand, income certificate adduced on record by the petitioner remained unrebutted, as such, court below erred in awarding a

sum of Rs. 1000/- per month, to each of the complainants. This court also can not lose sight of the fact that the petitioner, whose monthly income is Rs. 2500/-, can not be compelled to pay a maintenance of Rs. 1000/- per month to each of the complainants, which comes to Rs. 4000/- per month. However, there is yet another aspect of the matter that complainant No.2 namely Ms. Santosh has been married off and as such, is not entitled to any maintenance in terms of S.125 CrPC.

6. Consequently, in view of the discussion made herein above, present petition is allowed. Order dated 16.3.2018 passed by the learned Sessions Judge, Hamirpur, H.P. in Cr. Revision No. 24 of 2014 is set aside. Order dated 27.9.2014 passed by Additional Chief Judicial Magistrate, Hamirpur, Himachal Pradesh, is restored. However, it is clarified that the observations made herein above, shall remain confined to the disposal of the present petition and shall have no bearing on the merit of the main petition pending before the learned Court below. Needless to say, if there are arrears on account of maintenance as awarded by the learned Additional Chief Judicial Magistrate, same shall be paid within a period of two months from today.

Pending applications, if any, stand disposed of. Interim direction, if any, is vacated.

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

Naresh Kumar .. Petitioner
Versus
Reena Kumari .. Respondent

CrMMO No. 446 of 2018
Decided on: December 10, 2018

Code of Criminal Procedure, 1973 - Section 362 - Alteration of judgment or final order - Permissibility - Husband compromising complaint filed by a wife under Domestic Violence Act and agreeing to pay maintenance and provide separate accommodation to wife - Court passing judgment on basis of compromise - Husband filing application almost six years thereafter and praying for alteration of judgment on ground that he never agreed for payment of maintenance to wife - Court dismissing application -Petition against – Held, statement of wife made at time of passing order suggests that she had prayed for maintenance and monthly expenditures - Order in knowledge of petitioner but he never challenged it for almost six years - Wife and children fully dependent on petitioner - Trial court cautiously passed order having taken note of compromise - Petition dismissed. (Paras 1, 2, 4, 5 & 6)

For the petitioner : Mr. Balwant Kukreja, Advocate.
For the respondent : Mr. Tanuj Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:(oral)

Being aggrieved and dissatisfied with the order dated 4.9.2018 passed by the learned Judicial Magistrate 1st Class, Court No. III, Hamirpur, District Hamirpur, Himachal Pradesh in Cr.M.A. No. 196-IV/2017 in D.V. Act-3-I/11 titled Reena Kumari vs. Naresh Kumar, whereby an application under Section 362 CrPC, having been filed by the present petitioner-respondent (hereinafter, "petitioner") for rectifying the error occurred in the order dated 5.9.2012 in DV Act Petition No. 13-I-2011, came to be dismissed, petitioner has approached this court in the instant proceedings filed under S.482 CrPC, praying therein to quash and set aside the order dated 4.9.2018, consequently allowing the application for correction of error.

2. In nutshell, case as has been projected in the petition and as argued by Mr. Balwant Kukreja, learned counsel representing the petitioner, is that the respondent, who happens to be the wife of the petitioner, filed a petition under the Protection of Women from Domestic Violence Act against the petitioner in the court of learned Judicial Magistrate 1st Class, Court No. III, Hamirpur, which was disposed of on the basis of amicable settlement *inter se* parties with the intervention of the respectable members of the family. Mr. Balwant Kukreja, learned counsel representing the petitioner, while referring to Annexure P-1 i.e. statement of the respondent recorded at the time of passing of order dated 5.9.2012, contended that the respondent, while compromising matter with the petitioner, claimed before the court below that she is ready and willing to live in the company of her husband (petitioner), subject to the condition that she would be provided a separate accommodation. As per compromise, respondent prayed that maintenance be provided to her and her children and petitioner be directed to deposit a sum of Rs. 15,000/- in the name of their children, within a period of one month, as such, learned Court below, while passing order dated 15.9.2012, wrongly ordered that petitioner shall pay a sum of Rs. 15,000/- per month to the respondent and her children as maintenance. Mr. Kukreja, further contended that since factum with regard to deposit of Rs. 15,000/- per month in favour of the respondent and her children was not in terms of the compromise arrived *inter se* parties, petitioner moved an application for correction of error under S.362 CrPC, but the same was dismissed, without there being any cogent and convincing reason, as such, present petition deserves to be accepted.

3. However, having heard the learned counsel representing the parties and perused the material available on record, this court is not persuaded to agree with the contention of Mr. Kukreja, because a careful perusal of the order dated 5.9.2012 clearly suggests that the learned Court below, having taken note of the compromise arrived *inter se* parties, specifically ordered that the petitioner would pay a sum of Rs. 15,000/- per month to the respondent and her children. Learned Court below, further directed the petitioner to deposit a sum of Rs. 15,000/- in the name of petitioner and her children, within a period of one month from the date of order.

4. No doubt, perusal of statement of respondent made at the time of passing of order dated 5.9.2012 suggests that she had prayed that the petitioner be directed to deposit a sum of Rs. 15,000/- on account of maintenance to her and her children, in the Bank, but in the same statement, she also stated that as per agreed terms, monthly expenditure of her and her children would also be borne by the petitioner. Accordingly, the learned Court below, vide order dated 5.9.2012, directed the petitioner to pay Rs. 15,000/- per month to the respondent and her children, as maintenance.

5. Leaving everything aside, order dated 5.9.2012 was very much in the knowledge of the petitioner but he never laid challenge, if any, to the same for almost six years, whereafter, he moved an application for correction of error on the ground that the petitioner at no point of time agreed before the learned Court below to pay a sum of Rs.

15,000/- per month to the respondent and her children, as maintenance, however, this court, having carefully perused the material available on record vis-à-vis impugned order passed by the learned Court below, is not inclined to accept the aforesaid explanation rendered on record on behalf of the petitioner. Rather, this court, is convinced and satisfied that the learned Court below, cautiously passed order dated 5.9.2012, having taken note of the fact that the respondent and her children are fully dependent upon the petitioner, thereby directing the petitioner to pay a sum of Rs. 15,000/- per month to the respondent and her children, as maintenance.

6. Consequently, in view of the discussion made herein above, petition is devoid of merit and is dismissed accordingly, alongwith all pending applications.

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

Savitri Devi .. Petitioner

Versus

Ramu (deceased) through LR's Karnail Singh and others .. Respondents

CMPMO No. 58 of 2018
Decided on: December 12, 2018

Code of Civil Procedure, 1908 – Order VI Rule 17 – Amendment of pleadings – Permissibility – Trial court dismissing application of plaintiff seeking correction of measurements of disputed land – Petition against – No averment in application that plaintiff could not seek such amendment before commencement of trial despite exercise of due diligence – Held – In absence of specific averments no amendment of pleading can be permitted – Amendment, if allowed, would change the entire complexion and nature of suit - No merit in petition – Order of trial court upheld – Petition dismissed. (Paras 8, 11 to 13)

Cases referred:

Chakreshwari Construction Private Limited vs. Manohar Lal, (2017)5 SCC 212

State of Madhya Pradesh vs. Union of India and another, (2011) 12 SCC 268

For the petitioner : Mr. Sanjay Jaswal, Advocate.

For the respondents : Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:(oral)

Instant petition filed under Art. 227 of the Constitution of India, is directed against order dated 7.12.2017 (Annexure P-5) passed by the learned Civil Judge, Indora, District Kangra, Himachal Pradesh in Civil Suit No. 220/11 titled Savitri Devi vs. Ramu, whereby an application under Order 6 Rule 17 CPC i.e. CMA No. 356 of 2017, having been filed by the petitioner-plaintiff (hereinafter, 'plaintiff') for amendment of plaint came to be dismissed.

2. Facts, as emerge from the record are that the plaintiff filed a suit in the court of learned Civil Judge, Indora, for declaration to the effect that the plaintiff is owner-in-possession of land comprised in Khata No. 129, Khatauni No. 273, Khasra Nos. 421-429, measuring 00-04-85 Hec, out of total land measuring 0-67-82 Hec situated in revenue estate of Mohal and Mauza Tiora, Tehsil Indora, District Kangra, Himachal Pradesh being legal heir of Nikku son of Haria, resident of Village Tiora, Tehsil Indora, District Kangra, Himachal Pradesh, who was a tenant in the suit land and became owner of the suit land by virtue of provisions of Himachal Pradesh Tenancy and Land Reforms Act. Respondent-defendant (hereinafter, 'defendant') refuted the claim put forth in the plaint by the plaintiff, by way of written statement.

3. During the pendency of the suit, plaintiff filed an application under Order 6 Rule 17 CPC (Annexure P-3), praying therein for amendment of plaint. Plaintiff averred in the application that he has filed the suit qua Khasra Nos. 421 and 429, measuring 0-67-82 Hec, which the predecessor-in-interest of the plaintiff Shri Nikku was cultivating as tenant and as such suit land is comprised of Khata No. 129, Khatauni No. 273, Khasra Nos. 421 and 429, land measuring 00-67-82 Hec situated in Village Tiora, Tehsil Indora, District Kangra, Himachal Pradesh but inadvertently in the heading of plaint in line No. 3, after the words, "land measuring" it has been wrongly typed/written as "0-04-85 Hec out of total land measuring 0-67-82 Hec", whereas after the words "land measuring" it should have been "0-67-82 Hec", as such, it was prayed that the words/figures "0-04-85 Hect out of total land measuring 0-67-82 Hec" may be permitted to be deleted/struck off in line Nos. 3 and 4 of head note and in line No.3 of head note of the plaint, after the words "land measuring" the figures/words, "0-67-82 Hect" may be inserted.

4. Aforesaid prayer having been made by the plaintiff came to be resisted by the original defendant by way of filing reply to the application, on the ground that the amendment, as prayed for, if allowed, would change the entire complexion of the suit. Defendant also stated in the reply thatteh amendment as prayed for in the application can not be allowed at this belated stage, especially when no plausible explanation qua the delay has been rendered in the application.

5. Learned Court below, vide order dated 7.12.2017, rejected the application on the ground that no material evidence has been adduced by the plaintiff to show that despite due diligence, plaintiff was unable to move an application for amendment of plaint qua the facts pleaded in the application, before commencement of trial.

6. Having heard the learned counsel representing the parties and perused the material available on record vis-à-vis impugned order, this court is not persuaded to agree with the contention of Mr. Sanjay Jaswal, learned counsel representing the plaintiff that the impugned order passed by learned Court below is not based upon correct appreciation of facts and law applicable, rather, this court finds from the record that amendment, as has been sought by plaintiff, if allowed, would change the entire complexion of the suit, as such, learned Court below rightly rejected the application. Otherwise also, this court finds that there is no plausible explanation rendered in the application that what prevented the plaintiff from seeking declaration of ownership and possession qua the total land measuring 0-67-82 Hectares, in the original plaint, prior to commencement of trial, when he had specific knowledge that he being legal heir of Nikku son of Haria, is entitled to the same.

7. Interestingly, in the case at hand, careful perusal of plaint reveals that there is no mention of suit land in the body of the plaint, rather, details, if any, have been given in the head note of the plaint. Even in the prayer clause, prayer has been made on behalf of the plaintiff to grant a decree of declaration of suit land as described in the head note of the

plaint. Impugned order reveals, and, which fact has not been otherwise refuted by the learned counsel representing the plaintiff, that prior to filing of application at hand, plaintiff had filed similar applications under Order 6 Rule 17 CPC on two different occasions but the amendment sought by way of application at hand was never incorporated in the earlier applications despite knowledge of the same.

8. Leaving everything aside, there is no specific averment in the application that despite due diligence, plaintiff was unable to make an application for amendment of plaint before commencement of trial. In the case at hand, plea of due diligence has been taken in a very casual manner without there being any specific reason attached to it. Otherwise also, this court sees substantial force in the arguments of Mr. Ajay Sharma, learned counsel representing the defendant that in case plaintiff is allowed to amend the plaint, as has been prayed for, the entire complexion of the suit would change because, admittedly, in the original plaint, plaintiff has sought declaration to the effect that he be declared owner-in-possession of the land comprised in Khata No. 129, Khatauni No. 273, Khasra Nos. 421 and 429, measuring 0-04-85 Hectares, out of total land measuring 0-67-82 Hectares, whereas, as per proposed amendment, plaintiff wants to delete words "land measuring 0-04-85 Hms out of total land" meaning thereby in case amendment is allowed, plaintiff would be claiming declaration qua the land measuring 0-67-82 Hms, which was never the case put forth by the plaintiff in the original plaint. Otherwise also, it is well settled proposition of law that amendment, which proposes to change the very nature of suit, can not be allowed.

9. Their Lordships of the Hon'ble Supreme Court in **State of Madhya Pradesh v. Union of India and another** reported in (2011) 12 SCC 268 have held that where an application is filed after the commencement of the trial, it must be shown that despite due diligence, said amendment could not have been sought earlier. Their lordships have held as under:

> 7. The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.
>
> The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations."

10. The Hon'ble Apex Court in **Chakreshwari Construction Private Limited** vs. **Manohar Lal**, (2017)5 SCC 212, has culled out certain principles while allowing or rejecting the application for amendment, which are as under:-

> "13. The principle applicable for deciding the application made for amendment in the pleadings remains no more res integra and is laid down in

several cases. In Revajeetu Builders and Developers vs. Narayanaswamy & Sons, (2009)10 SCC 84, this Court, after examining the entire previous case law on the subject, culled out the following principle in para 63 of the judgment which reads as under: (SCC p.102)

> "63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:
>
> (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
>
> (2) whether the application for amendment is bona fide or mala fide;
>
> (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money.
>
> (4) refusing amendment would in fact lead to injustice or lead to multiple litigation.
>
> (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
>
> (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.
>
> These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

11. In the aforesaid judgment, the Hon'ble Apex Court has clearly held that while allowing/rejecting the application for amendment of the plaint, it is to be seen whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case.

12. In the case at hand, since allowing of the prayer made by the plaintiff would lead to change of entire complexion of suit, therefore, the learned Court below has rightly rejected the application of the plaintiff.

13. Consequently, in view of the discussion made herein above as also in light of law laid down by the Hon'ble Apex Court on the subject, it is clear that the plaintiff failed to make out a case for allowing his application seeking amendment of the plaint and as such learned Court below has rightly rejected the same.

14. Consequently, the present petition is dismissed being devoid of any merit. Impugned order passed by the learned Court below is upheld.

Pending applications, if any, are disposed of. Interim direction, if any, is vacated.

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

Jaswant Rai Verma ...Petitioner/Non-applicant
Versus
State of HP and another ...Respondents/Applicants

OMP No. 45 of 2017 in
Arbitration Case No. 57 of 2015
Decided on: December 13, 2018

Arbitration and Conciliation Act, 1996 – Section 34 (2) (b) – Objections to award – Justiciablity – Subsequent developments – Relevancy - Department seeking dismissal of objections of Contractor on ground of these having become infructuous pursuant to amicable settlement of all claims by him - Department claiming to have deposited sum of Rs. 74,65,652/- into Contractor's account pursuant to said compromise after making statutory deductions - Contractor resisting application and denying settlement of all pending claims - Facts revealing that matter was taken before Amicable Settlement Committee of Department - As per terms, Contractor was to furnish affidavit attested by Magistrate of first class, if satisfied with settlement to be done after joint measurement of work – Department found having released aforesaid amount into Contractor's account without first obtaining his affidavit regarding settlement and withdrawal of all claims - Held, material on record doesn't suggest contractor having agreed to settle and withdraw all pending matters pertaining to that work - Application of State dismissed - Contractor also directed to refund amount deposited in his account to Department. (Paras 6, 8, 14, 15,18 to 20)

Cases referred:
Cauvery Coffee Traders vs. Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420
T.N. Magnesite Ltd. vs. S. Manickam, (2010) 4 SCC 421

For the petitioner: Mr. J.S. Bhogal, Senior Advocate with Mr. Parmod Negi, Advocate.
For the respondents: Mr. Ashok Sharma, Advocate General with Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant application filed under Sub-section (2)(b) of S. 34 of the Arbitration and Conciliation Act, 1996 (hereinafter, 'Act'), prayer has been made on behalf of applicants/ respondents for disposing of the objections having been filed by the non-applicant/petitioner on account of subsequent developments, as having become infructuous.

2. Facts as emerge from the record are that the non-applicant/petitioner entered into a contract with the applicants-respondents for execution of work relating to "Construction of Kandhar-Beral (non-connected Panchayat) road under PMGSY with the assistance of the World Bank) Package No. HP-11-22. A formal contract was executed between the parties on standard form adopted by respondents. After execution of aforesaid agreement, work in question came to be awarded to non-applicant/petitioner, who executed

the work on the spot, however, since there was some dispute with regard to payments due towards the non-applicant/petitioner, matter came to be referred to the Adjudicator in terms of Clauses 24 and 25.2 of the Contract. Adjudicator gave his decision on 29.1.2010, in favour of the non-applicant/petitioner, but the applicants/respondents being aggrieved and dissatisfied with the same, invoked arbitration clause.

3. Since the applicant-Department failed to invoke arbitration clause within the prescribed period of 28 days, non-applicant/petitioner approached this court, praying therein for execution of decision of the Adjudicator, however, this court ordered on 18.7.2010, that the matter is required to be decided by an Arbitrator on the following points:

1. Whether reference made for arbitration is within the parameters of Clause 25.2.

2. If not, then in such event, all proceedings are *void ab initio*."

4. This court further directed that without entering into controversy of limitation at this stage, it will be the duty of the Arbitrator to adjudicate on the question of jurisdiction not by mere expression of opinion but on the settled law.

5. Accordingly, the matter came to be referred to the arbitration of arbitral tribunal comprising of three persons namely Shri Satish Sagar, Retired Chief Engineer, HP PWD, as Presiding Arbitrator and Shri B.S. Parmar and Shri Megh Singh Chauhan, both retired Superintending Engineers of HPPWD, as the arbitrator nominees of the parties.

6. Both the parties filed their claims/counter claims before the learned arbitral tribunal, but the tribunal refused to consider all the claims of the petitioner and restricted to two claims i.e. Claims No.1 and 2. Aforesaid tribunal made award dated 29.4.2015, which is under challenge in the instant proceedings filed under S.34 of the Act. For adjudicating remaining disputes/ claims of the non-applicant/petitioner, another arbitral tribunal comprising of Shri Naresh K. Markanda as Presiding Arbitrator and Shri B.S. Parmar and Shri Y.R. Sharma as nominee arbitrators of contractor and Department, respectively, came to be constituted. In the second arbitration, contractor raised claim amounting to Rs.12,28,80,234/-. As per material available on record, learned arbitral tribunal referred to hereinabove adjudicated two claims only and during the pendency of the proceedings before the second arbitral tribunal, both the parties agreed to refer the matter to the Departmental Litigation Monitoring Committee for amicable settlement. First meeting of amicable settlement committee was held on 20.11.2015 in the chamber of Engineer-in-Chief, HPPWD, Shimla, wherein, petitioner-contractor gave an undertaking to the applicants/ respondents for joint measurement of work and he also made a statement that in case settlement is arrived on joint measurement, he shall withdraw all the claims pending before this court and learned arbitral tribunal. (Annexure R-1, annexed to the application). Aforesaid plea of the contractor was accepted by the amicable settlement committee, whereafter, it was sent to the Government and the Government, after convening meeting of the Departmental Litigation Monitoring Committee conveyed its sanction, copy of minutes of meeting and approval of the Government are annexed as Annexure R-2 and Annexure R-3 to the application at hand. Applicants have averred in the application that since as per offer of the non-applicant, Annexure R-1 and approval of the Government, Annexure R-3, full and final payment stands released to the non-applicant, objection petition under S.34 filed by him deserves to be disposed of as having become infructuous. Applicants have further averred that the full and final payment of Rs.75,64,242/-, after deducting 5% statutory deductions i.e. sales tax, income tax and labour cess, as per concurrence of the competent authority at the government level and also as per own offer and undertaking of the non-

applicant/petitioner, stands remitted to the bank account of the non-applicant/petitioner, as such petition has been rendered infructuous.

7. Non-applicant/petitioner, while refuting the aforesaid claim put forth by the respondents has stated in his reply to the application that the dispute pending before the arbitral Tribunal comprising of Mr. Naresh K. Markanda, Senior Advocate and Mr. B.S. Parmar and Mr. Y.R. Sharma, was referred for amicable settlement to the amicable settlement committee constituted by the respondents and at no point of time, petitioner had ever agreed for amicable settlement of the claims, which stood already adjudicated by the learned arbitral tribunal comprising of Shri Satish Sagar, Shri B.S. Parmar and Shri B.S. Chauhan, which is otherwise subject matter of the present petition. In support of aforesaid contention, non-applicant/petitioner also placed on record, certain letters/communications, to demonstrate that it was clarified to the Executive Engineer, who had called upon the petitioner to submit affidavit that he is settling the matter in the amicable settlement committee only with regard to the disputes relating to arbitration pending before the arbitral tribunal comprising of Mr. Naresh K. Markanda, Mr. B.S. Parmar and Mr. Y.R. Sharma.

8. Mr. Ashok Sharma, learned Advocate General, while inviting attention of this court to Annexures R-1, R-2, R-3 and R-4 annexed with the application at hand, vehemently argued that since all the disputes *inter se* parties stand settled amicably and a sum of Rs. 75,64,242/- has been paid in terms of the settlement arrived *inter se* parties, present arbitration petition filed under S.34 has been rendered infructuous and same deserves to be disposed of accordingly. While referring to communication dated 20.11.2015 (Annexure R-1 of the application), Mr. Sharma, learned Advocate General contended that the non-applicant himself agreed that in case of settlement *inter se* parties, he would withdraw all the claims submitted before the High Court and the learned arbitral tribunal and applicants, acting upon such assurance, convened a meeting for amicable settlement on 15.10.2016, whereby it was agreed that a sum of Rs. 79,62,052/- would be paid to the non-applicant against demand of Rs. 80,00,000/- made by him, as full and final settlement. He further contended that the amount as agreed *inter se* parties came to be remitted into the bank account of the non-applicant through RTGS on 24.1.2017 (Annexure R-4 of application) and as such, at this stage, non-applicant can not be allowed to backtrack from his commitment given to the Department that in the event of amicable settlement, he would withdraw all the cases including arbitration case pending before this court. While referring to the communication dated 1.8.2016 (Annexure R-1, Page 95) annexed with the supplementary affidavit dated 7.6.2017, learned Advocate General contended that the non-applicant furnished undertaking to the Executive Engineer, HPPWD, Arki that the non-applicant would close the case on the whole, if amount of Rs. 80.00 Lakh is paid within next thirty days. While referring to Annexure A (page 120) annexed with the affidavit dated 16.7.2018 filed in terms of order dated 6.7.2018, Mr. Sharma, learned Advocate General contended that the first meeting of the Committee was held on 16.10.2015, in the chamber of the Engineer-in-Chief, HPPWD, Shimla-2, in which, non-applicant also participated and agreed for joint measurement for the work in question. He contended that bare perusal of the minutes of the meeting referred to above clearly suggests that the contractor agreed that if settlement is arrived at with the joint measurement, both the parties shall withdraw their respective claims submitted before the arbitral tribunal and this court. Lastly, Mr. Sharma, contended that since despite repeated requests, non-applicant failed to furnish the affidavit/undertaking on an affidavit attested by Magistrate first class, to the extent that he shall withdraw all pending cases before this court and the arbitral tribunal or any other case against the work in question, applicants were left with no option but to remit the amount into the bank account of the non-applicant and accordingly, in the meeting held on 4.1.2017, Committee decided that the amount settled during the meeting of the amicable

settlement committee be paid to the contractor and application may be filed through the Superintending Engineer in this court with the request to finally dispose of the objection petition filed by the contractor. Mr. Sharma, learned Advocate General argued that since entire process for amicable settlement *inter se* parties had started pursuant to the undertaking given by the contractor, he cannot be allowed to take a U-turn at this juncture, especially when he has received a sum of Rs. 75,64,242/- in terms of the settlement. He contended that the non-applicant is now estopped from taking the plea that he had only settled the matter qua one part of dispute which was pending before the arbitral tribunal headed by Mr. Naresh Markanda. He contended that the non-applicant is bound by the doctrine of promissory estoppel because entire exercise towards amicable settlement was carried out on the assurance given by the non-applicant that in the event of joint measurement, he would withdraw all the cases pending before this court and arbitral tribunal. In support of his contention, he placed reliance upon judgment rendered by the Hon'ble Apex Court in **T.N. Magnesite Ltd.** v. **S. Manickam**, (2010) 4 SCC 421 and **Cauvery Coffee Traders** v. **Hornor Resources (International) Co. Ltd.**, (2011) 10 SCC 420.

9. Mr. J.S. Bhogal, learned Senior Advocate duly assisted by Mr. Parmod Negi, Advocate appearing for the non-applicant/petitioner, while refuting the aforesaid submissions having been made by the learned Advocate General strenuously argued that the application having been filed by the applicant is wholly misconceived and not maintainable in the facts and circumstances of the case, as such, same may be dismissed. Mr. Bhogal, learned Senior Advocate, while referring to the documents available on record, contended that though at the initial stage, non-applicant had agreed for joint measurement of the work in question and had agreed that in case, he is satisfied with the joint measurement, he would withdraw all the claims submitted before the High Court and arbitral tribunal but since there was no agreement between the parties, non-applicant refused to give undertaking. While referring to the minutes of meeting held on 16.10.2015, wherein non-applicant was also present, Mr. Bhogal, learned Senior Advocate contended that on 16.10.2015, non-applicant stated in the meeting that he has issue with the Department only with regard to measurement portion of earth work and accordingly, joint measurement of the cutting work was decided to be taken within fifteen days in the presence of the non-applicant and Executive Engineer, Arki Division. Non-applicant, in the aforesaid meeting, had agreed that if some settlement is arrived *inter se* parties with regard to joint measurement, both the parties would withdraw their respective claims submitted before the arbitral tribunal and this court, but, no final settlement *inter se* parties could be arrived as such, non-applicant thereafter did not participate in the meeting dated 15.10.2016 held under the Chairmanship of the Additional Chief Secretary (PW) to the Government of Himachal Pradesh, wherein the Department, unilaterally, decided to pay a sum of Rs. 80.00 Lakh as full and final settlement to the non-applicant qua all his claims pending before this court as well as arbitral tribunal. Lastly, Mr. Bhogal, learned Senior Advocate contended that bare perusal of the minutes of 8th meeting held on 15.10.2016, clearly suggests that in the said meeting, it was proposed that a sum of Rs. 80.00 Lakh would be paid to the claimant-contractor as full and final payment, subject to the condition that he would make an undertaking on an affidavit duly attested by Magistrate first class to the extent that all the claims pertaining to this work against the agreement in dispute are fully and finally settled and nothing is due from the Executive Engineer, Arki and he shall withdraw all pending cases from this court, arbitration tribunal or any other statutory authorities against this work and besides this he shall also undertake that in future against this work in case any labour/worker payment, damage claim by private owners/complaint are received by the Executive Engineer Arki, the contractor shall be bound to make payments of all such claims. Mr. Bhogal, learned Senior Advocate, contended that since aforesaid settlement

allegedly arrived *inter se* parties was not acceptable to the non-applicant, he despite repeated communications sent by the Executive Engineer, HPPWD, Arki, refused to furnish the undertaking in the shape of affidavit duly attested by the Magistrate, first class stating therein that he would be withdrawing all pending cases from this court and arbitral tribunal, but despite that the Department, unilaterally, of its own, remitted a sum of Rs. 75,64,642 on 24.1.2017, to compel the non-applicant to withdraw cases pending adjudication before arbitral tribunal including the present petition. Lastly, Mr. Bhogal, learned Senior Advocate contended that the judgments relied upon by the learned Advocate General, are not applicable in the present case because, at no point in time, promise, if any, was ever made by the non-applicant to withdraw the cases filed by him. Assurance, if any, was conditional and non-applicant had repeatedly informed the Department that he would be withdrawing cases in case, he is satisfied with the joint measurement, but at no point in time, he recorded his satisfaction, but the Department unilaterally, solely with a view to pressurize the non-applicant to withdraw the cases, amicably settled the matter for Rs. 80.00 Lakh and thereafter, without there being any affidavit having been filed by the claimant, applicants deposited the aforesaid sum into the bank account of the non-applicant.

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

11. Having heard the learned counsel for the parties and perused material available on record, this court finds that initially, vide communication dated 20.11.2015, Mr. Jaswant Rai Verma, non-applicant had shown his willingness for joint measurement of earth work and had agreed that in case some settlement is arrived *inter se* parties, he would withdraw all the claims submitted before this court and the arbitral tribunal. Pursuant to aforesaid undertaking given by the non-applicant, a Committee came to be constituted under the Chairmanship of the Engineer-in-Chief, HPPWD, Shimla, which, in its meeting held on 16.10.2015, resolved to conduct joint measurement of the cutting work within a period of fifteen days, in the presence of the claimant/contractor and Executive Engineer, Arki. Perusal of minutes of such meeting (available at page 120 of the paper-book) reveals that the non-applicant was present in the meeting and he had given an undertaking that in case, some settlement is arrived at after the joint measurement, both the parties shall withdraw claims pending before this court and the arbitral tribunal. Documents available on record further reveal that subsequently, vide communication dated 1.8.2016, (page 149 of the paper-book), non-applicant informed the Executive Engineer, HPPWD Division Arki, that he is ready to close the case on the whole if a sum of Rs. 80.00 Lakh, is paid within next thirty days including statutory deduction at the rate of 5%. Perusal of aforesaid communication suggests that pursuant to the meeting held on 16.10.2015, some joint measurement was conducted and amicable settled was arrived *inter se* parties, but there is no document adduced on record by either of the parties qua joint measurement conducted on the spot in terms of decision taken in the meeting held on 16.10.2015. Another communication dated 12.9.2016 (page-150 of the paper-book) further reveals that pursuant to joint measurement, meetings continued to be held *inter se* department and the claimant-contractor, but on one count or the other, amount agreed *inter se* parties could not be released. Communication dated 12.9.2016 referred to herein above, suggests that the amount offered by the non-applicant i.e. Rs. 80.00 Lakh was not agreeable to the Department and it was insisting upon the non-applicant to negotiate further, who vide this communication expressed his inability to do further negotiations.

12. Subsequently, matter came to be placed before the amicable settlement committee of the Department constituted under Litigation Monitoring, meeting whereof came

to be convened on 15.10.2016 (Annexure R-2, page 76), wherein the Committee, having taken note of the various claims of the non-applicant, decided that a sum of Rs. 79,62,052/- be paid against Rs. 80.00 Lakh, demanded by the contractor (non-applicant), as full and final settlement. However, the Committee while taking aforesaid decision unanimously decided that the amicably settled proposal would be subject to specific condition that the contractor shall make an undertaking on an affidavit, duly attested by a Magistrate, first class to the extent that all the claims pertaining to the work against agreement in dispute are fully and finally settled and nothing is due from the Executive Engineer, Arki and he shall withdraw all pending cases from this court and the arbitral tribunal or any other statutory authority against this work. Committee also resolved that the non-applicant would also undertake that in case, in future, any labour /worker payment damage claims by private owners/complaints are received by the Executive Engineer, Arki against this work, the contractor (non-applicant) would be bound to make payment of such claims.

13. Minutes of such meeting nowhere suggest that the non-applicant was present in such meeting and as such, there appears to be force in the argument of Mr. J.S. Bhogal, learned Senior Advocate that the decision in the meeting dated 15.10.2016, to pay Rs. 79,62,052/- was taken by the Department unilaterally in the absence of the non-applicant. Though there is no document adduced on record by the applicants that pursuant to the meeting held on 15.10.2016, communication, if any was sent by the Department, calling upon the non-applicant to furnish undertaking on the affidavit duly attested by magistrate first class, that in view of the amicable settlement *inter se* parties, he would be withdrawing all the cases pending before this court and arbitral tribunal, but, the documents placed on record by the non-applicant suggest that on 19.12.2016, Executive Engineer, Arki, had asked the non-applicant to file undertaking in terms of decision taken in the meeting of Litigation Monitoring held on 15.10.2016 but non-applicant, vide communications dated 26.11.2016, 8.12.2016 and 30.12.2016 (available at pp. 110-112 of the paper-book) informed the Executive Engineer that the Amicable Settlement Committee was formed as per office order issued from the office of the Chief Engineer (SZ), HP PWD, Shimla vide order No. PW-CTR-29-29-637/2007-12431-37 dated 4.11.2015 with respect to the arbitration (under the Presiding Arbitrator, Shri Naresh Markanda) between the non-applicant and the Executive Engineer, Arki and therefore, amicable settlement was initiated /negotiated with respect to the pending arbitration matter only and as such he would furnish the undertaking accordingly. Vide aforesaid communications, non-applicant also stated that action of the Department in compelling the non-applicant to file affidavit, undertaking therein to withdraw arbitration cases pending before the arbitral tribunal as well as this court, is not justified. Record reveals that vide communication dated 8.12.2016, non-applicant requested the Department to convey its decision at the earliest, failing which he would be free to proceed with the arbitration proceedings.

14. Having carefully perused aforesaid communications placed on record by the non-applicant, this court finds considerable force in the argument of Mr. Bhogal, learned Senior Advocate that though at one point of time, non-applicant had agreed for joint measurement of the work and had assured that in the event of his being satisfied with the joint measurement, he would withdraw all the cases but since the non-applicant was not satisfied with the joint measurement, he chose not to remain present in further proceedings, wherein, Department unilaterally decided to pay a sum of Rs. 79,62,052/- against Rs. 80.00 Lakh.

15. Leaving everything aside, this court finds that even if for the sake of arguments, it is presumed that the Amicable Settlement Committee of the Department proceeded for amicable settlement, pursuant to assurance given by the non-applicant and

then in its meeting held on 15.10.2016, decided to pay a sum of Rs. 79,62,052/- against a sum of Rs. 80.00 lakh demanded by the non-applicant as full and final settlement, amount could not be remitted /released till the time, undertaking in the form of affidavit, duly attested by magistrate, was not filed by the non-applicant, specifically stating therein that he (non-applicant) would withdraw all the cases pending before this court as well as arbitral tribunal, but, interestingly, in the case at hand, applicants without obtaining the affidavit, which was condition precedent for amicable settlement, unilaterally deposited the amount in the bank account of the non-applicant, who, in turn, has now taken a somersault that he had never agreed for amicable settlement qua the work which is subject matter of the present proceedings.

16. In the present proceedings, this court need not go into the question, whether the non-applicant had agreed for amicable settlement, in both the matters, one pending adjudication before this court in the instant proceedings and the other pending adjudication before the arbitral tribunal headed by Mr. Naresh Markanda, especially in view of the fact that the Departmental Litigation Monitoring Committee, while amicably settling the matter for Rs. 79,62,052/- against total claim of Rs. 80.00 Lakh demanded by the non-applicant, had made amicable settlement subject to the condition that the contractor (non-applicant) shall give an undertaking on an affidavit duly attested by Magistrate, first class, to the extent that all claims pertaining to this work against the agreement in dispute are fully and finally settled and nothing is due from the Executive Engineer, Arki, and he shall withdraw all cases pending before the arbitral tribunal and this court or any other statutory authority against this work. Said undertaking, which was a condition precedent for amicable settlement never came to be executed/filed by the non-applicant, rather, he immediately after having received communication from Executive Engineer, Arki in this regard, intimated him that since he has entered into compromise with regard to work which is pending adjudication before the arbitral tribunal headed by Mr. Naresh Markanda, he shall file undertaking only to that effect. Three communications dated 26.11.2016, 8.12.2016 and 30.12.2016, (Pp. 110-112 of paper-book) which have been already taken note herein above, clearly suggest that the non-applicant repeatedly expressed his disagreement for the settlement and refused to furnish undertaking in terms of the decision taken in the meeting held on 15.10.2016, but, astonishingly, Department despite knowing fully well that the amicable settlement arrived in the meeting held on 15.10.2016, is not agreeable to the non-applicant, of its own, without waiting for the non-applicant to file such undertaking, in terms of the amicable settlement, decided to remit a sum of Rs. 79,62,052/- in the account of the non-applicant, for the reasons best known to the Department. Meeting of the Committee came to be held on 4.1.2017, under the chairmanship of the Engineer-in-Chief, HPPWD (Page-151 of the paper-book), who, despite knowing fully well that the non-applicant has taken a U-turn, terming the settlement arrived at only qua case pending before arbitral tribunal, decided to remit the amount into the bank account of the non-applicant and moved extant application before this court for disposal of the present petition. Subsequently, on 24.1.2017, by way of RTGS, aforesaid sum came to be remitted into the bank account of non-applicant.

17. Having noticed aforesaid glaring discrepancy and hot haste shown by the Department in remitting amount into the bank account of non-applicant, this court directed the Engineer-in-Chief, HPPWD, on 6.7.2018, to file a supplementary affidavit specifically indicating therein why and under what circumstances, payment was remitted into bank account of non-applicant without obtaining his affidavit as per agreed terms. Explanation rendered on record pursuant to aforesaid direction passed by this court, is totally unacceptable. In the affidavit, it has been stated that delay in settlement making payment was delaying the financial closure of the PMGSY Project and it was becoming difficult for the

State Government to get other projects sanctioned under PMGSY without closure of the old projects, as such, a meeting of the DLC was convened on 4.1.2017 in which the members of the Committee unanimously decided that non-release of payment may burden the public exchequer with multiplier of interest and can cause delay in getting other projects sanctioned from the Union Government.

18. I am afraid that aforesaid explanation rendered on record can be accepted, rather, this court having noticed the hot haste shown by the Department in the matter that too after having received repeated communications from the non-applicant that he would not furnish affidavit in terms of settlement arrived in the meeting held on 15.10.2016, has no hesitation to conclude that the amount was released to the non-applicant under some extraneous considerations. Since the non-applicant did not file any undertaking in terms of amicable settlement arrived, if any, pursuant to meeting held on 15.10.2016, this court is not persuaded to agree with Mr. Ashok Sharma, learned Advocate General that the present petition filed by the non-applicant can be disposed of as having been rendered infructuous, because, there is nothing to suggest that the matter *inter se* parties was amicably resolved, rather, material available on record, specifically the facts placed on record by the contractor clearly reveal that he(non-applicant), while refusing to file undertaking in terms of the decision taken in the meeting dated 15.10.2016, disputed the claim of the department that he had undertaken to close both the cases i.e. one pending adjudication before this court and the other pending adjudication before the arbitral tribunal headed by Mr. Markanda.

19. Judgments having been relied upon by the learned Advocate General in support of his contention that the doctrine of estoppel is applicable in the present case against the non-applicant, are not applicable because, admittedly, the amount came to be deposited by the Department without waiting for undertaking to be furnished by the contractor (non-applicant) in terms of the alleged settlement dated 15.10.2016. Non-applicant before release of the amount repeatedly made it clear to the Department that he has not settled the matter qua both the disputes and as such, he would not file the undertaking. Amicable settlement, if any, *inter se* parties could only be said to have been concluded /finalized, had the non-applicant filed undertaking on the affidavit duly executed by the magistrate, first class, stating therein that he would withdraw all the cases pending before this court and arbitral tribunal, but, in the case at hand, despite having received communications from the non-applicant that he would not furnish the undertaking, as per agreed terms, applicants proceeded to deposit the amount in the bank account of the non-applicant, of its own, as such, it can not be said that non-applicant is now estopped from pursuing the present matter, which definitely stood filed prior to filing of the instant application.

20. Consequently, in view of the detailed submissions made hereinabove, present application is dismissed. The non-applicant is directed to refund the amount of Rs. 74,65,652/- to the Department immediately.

****

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

Meera Dewan and another ....Appellants.
Versus
Neelam Rana ...Respondent.

RFA No. : 288 of 2017

Reserved on: 20.09.2018
Decided on : 19.12.2018

Code of Civil Procedure, 1908 – Order III Rules 1 and 2 and Order VIII Rule 1- Power of attorney holder – Engaging counsel and filing of written statement without annexing power of attorney – Effect - Person engaging counsel, verifying and signing written statement on behalf of defendant - Person not holding any power of attorney on behalf of defendant authorizing him to do such acts at relevant time - Held, written statement so filed cannot be construed to be written statement of defendant. (Paras 6, 26 & 27)

Code of Civil Procedure, 1908 - Order XVIII Rules 1 & 2 – Evidence of power of attorney holder - Appreciation thereof – Facts revealing person having no power of attorney in his favour on day he verified, signed and filed written statement on behalf of defendant - Filing power of attorney executed by defendant only on day his evidence was recorded - Held, once there is no legal and valid written statement on behalf of defendant in *lis*, evidence given by power of attorney holder is inconsequential. (Paras no. 29 & 31)

Code of Civil Procedure, 1908 – Order XVIII Rules 1, 2 & 3-A - Non-appearance of party as witness - Held, when party does not appear as witness in case, court may draw adverse inference against it. (Para 32)

Himachal Pradesh Tenancy and Land Reforms Act, 1972 (Act) - Section 118 – Bar of - Specific performance of agreement to sell – Applicability - Held, bar contemplated under Section 118 of Act is attracted only when registration of sale deed is sought to be effected in favour of non-agriculturist of Himachal Pradesh - There is no bar in decreeing suit for specific performance - Decree of trial court declining specific performance of agreement to sell on ground of its being contrary to provisions of Section 118 of Act not correct - Appeal allowed – Decree set aside – Suit decreed for specific performance. (Paras 59 to 61)

Cases referred:

Janki Vashdeo Bhojwani and Another versus Indusind Bank Ltd. and Others, (2005) 2 SCC 217

Man Kaur (Dead) by LRs. Versus Hartar Singh Sangha, (2010) 10 SCC 512

Rahul Bhargava vs. Vinod Kohli and others, (2008) 1 SLC 385

Shyam Singh Vs. Daryao Singh and others, (2003) 12 SCC 160

For the appellants	Mr. R.L. Sood, Senior Advocate with Mr. Arjun K. Lall, Advocate.
For the respondent	M/s Dinesh Sharma, & Vipin Pandit, Advocates.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this appeal, the appellants have challenged judgment and decree passed by the Court of learned Additional District Judge-I, Solan, in Civil Suit No. 10-S/01 of 2017/2007, titled as Mrs. Meera Dewan and another versus Mrs. Neelam Rana, whereby the suit for specific performance of agreement of sale dated 9th May, 2004, as also supplemental agreement dated 1st October, 2004 and for permanent perpetual prohibitory injunction filed by the present appellants against the respondent stood dismissed by the learned Court below.

2. Brief facts necessary for the adjudication of the appeal are as under:

The appellants/plaintiffs (hereinafter referred to as 'the plaintiffs') filed a suit praying for the following reliefs:-

> *"(a) Grant a decree in favour of the Plaintiffs and against the Defendant and call upon her to execute and register a Sale Deed in favour of Plaintiff No. 2, in respect of land and building comprising Khewat No. 50 Min, Khatauni No. 52 Min and Khasra No. 191/188/137/12, measuring One Bigha situate in Mauza Mashobra, Tehsil Kasauli, Distt. Solan, H.P.*
>
> *(b) Grant a decree of permanent perpetual and prohibitory injunction in favour of Plaintiff No 2, and against the defendant restraining her from interfering in any manner whatsoever in his peaceful exclusive use, occupation and possession of the suit property i.e. land and building comprising Khewat No. 50 Min, Khatauni No. 52 Min and Khasra No. 191/188/137/12, measuring One Bigha situate in Mauza Mashobra, Tehsil Kasauli, Distt. Solan, H.P.*
>
> *(c) Allow any other relief deemed fit by this Hon'ble Court, in favour of the Plaintiffs and against the defendant, in the peculiar facts and circumstances attending to the case."*

3. The case of the plaintiffs was that plaintiff No. 1 and defendant executed an agreement of sale dated 9th May, 2004, which was followed by a supplemental agreement dated 1st October, 2004, in respect of land and building bearing Khewat No. 50 Min, Khatauni No. 52 Min and Khasra No. 191/188/137/12, measuring One Bigha, situated in Mauza Mashobra, Tehsil Kasauli, District Solan, H.P. After the execution of the agreement dated 9th May, 2004, an application was filed by plaintiff No. 1 seeking permission for purchase of land under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act. The total sale consideration of two agreements, i.e. Rs.27.00 lac stood received by the defendant as per the following details mentioned in para 4 of the plaint:-

> *"(a) Demand Draft No. 303529, dated 3rd October, 2003, issued by State Bank of Saurashtra, New Delhi, and drawn on the State Bank of Patiala, Kasauli. Rs. 7,00,000/-*
>
> *(b) Pay Orders/ Manager's Cheques, dated 28.9.2004, drawn on the Citibank Jeewan Bharti, Connaught Circus, New Delhi, as per details hereinbelow:-*

Sr. No.	Pay Order No.	Amount (Rs.)
1.	848550	3,00,000/-
2.	848551	4,00,000/-
3.	848552	5,00,000/-
4.	848553	3,00,000/-
5.	848554	5,00,000/-

> ....."

4. Receipt dated 01.10.2004 was also executed by the defendant as an acknowledgment of the payments. Though, plaintiff No 1 applied for the grant of requisite permission under Section 118 of 1972 Act, in May, 2004, yet neither any permission stood granted by the Authorities in her favour, nor it stood rejected. Therefore, sale deed in favour

of plaintiff No. 1 could not be executed. As per the plaintiffs, time was never the essence of the agreement. Plaintiff No. 1 received a notice dated 21.02.2007 from Shri M.P. Kanwar, Advocate, on the instructions of the defendant, whereby defendant resiled from the aforesaid agreement by falsely claiming that "the Agreement was mutually cancelled orally and the accounts were adjusted". Said notice was replied to by plaintiff No. 1, who while denying the contents of the same called upon the defendant to withdraw the notice. Thereafter, plaintiff No. 1 assigned her rights in the aforesaid agreement(s) in favour of plaintiff No. 2 and intimation to this effect was given to the defendant vide reply dated 19th March, 2007 itself, which was sent in response to notice dated 27.02.2007. Both the plaintiffs, as a matter of abundant precaution, issued notice dated 3rd April, 2007, informing the defendant of the said fact, more particularly that plaintiff No. 1 has assigned all her rights, title and interest under the Agreement(s) in favour of plaintiff No. 2, who was and is her nominee. Defendant was called upon to execute and register sale deed in favour of plaintiff No. 2 qua the suit property. Plaintiffs had performed their part of the contract/agreement and were ready and willing to further perform any other act in furtherance of the Agreement. Further as per the plaintiffs, despite having received the complete sale consideration of Rs.27.00 Lac, defendant was not willing to come forward to execute the sale deed qua the suit property. In this background, the suit was filed with the prayers already enumerated herein above.

5. Vide purported written statement dated 28th June, 2007, the claim of the plaintiff was contested by the defendant. As per the said written statement, on 30th September, 2003, an agreement for sale of 26 biswas of land alongwith entire building in Khata Khatauni No 41/42 and Khasra No. 137/12/2, situated at Mauza Mashobra, Pargna Dharthi, Tehsil Kasuali, District Solan (HP), was entered between plaintiff No. 1 and defendant for a total consideration of Rs.27.00 Lac. An amount of Rs.7.00 Lac was paid as advance to the defendant on 03.10.2003 and balance amount was to be paid at the time of execution and registration of the sale deed. It was agreed that as the land was under lien with a finance corporation, the same would be discharged by the defendant in 45 days from the date of the agreement. Plaintiff No. 1, being a non-agriculturist agreed to apply to the Government of Himachal Pradesh for necessary permission to purchase the land. It was agreed that since considerable time would be consumed in obtaining the permission, plaintiff No. 1 would intimate the defendant in writing as and when the permission was granted. It was also agreed that necessary permission to purchase the land was to be obtained by plaintiff No. 1 within 120 days of the execution of the agreement or such further time, as may be mutually agreed. In case, despite intimation of permission by plaintiff No. 1 to defendant, plaintiff No. 1 failed to execute sale deed within 45 days of receiving such permission, the advance paid to the defendant was liable to be forfeited. Similarly, in case of failure on the part of the defendant to execute the sale deed within the above-mentioned time, plaintiff No. 1 was entitled to get the sale deed executed through Court of Law. As per the written statement, plaintiff No. 1 failed to get necessary permission within the time stipulated and within extension being granted by the defendant. Therefore, the agreement between the parties stood cancelled and amount received by the defendant stood adjusted and plaintiff No. 1 was intimated the same vide registered notice dated 27th February, 2007, issued to her through an Advocate by the defendant. Further, as per the written statement, in order to seek necessary permission to purchase the land under the agreement, plaintiff No. 1 obtained signatures of the defendant on some blank non-judicial stamp papers as well as on some other papers, representing to the defendant that same were required by plaintiff No. 1 for getting the permission. Since the defendant was not keeping good health and it was not possible for her to come to Kasauli time and again, she in good faith signed the papers, which appeared to have been used by plaintiff No. 1 for executing forged and false agreement. Plaintiffs had intentionally and deliberately not disclosed the execution of agreement dated 30.09.2003 and therefore, the suit was not maintainable as defendant did

not execute any agreement of sale either on 09.05.2004 or on 01.10.2004. On the dates when the above-mentioned agreements were allegedly executed, she was undergoing treatment at Delhi. It was further stated in written statement that there was no privity of contract between the defendant and plaintiff No. 2 and plaintiff No. 1 was *estopped* from filing the suit on the basis of agreement dated 30.09.2003 on account of her acts, deeds, conduct and acquiescence. As per written statement, plaintiff No. 1 being a non-agriculturist and non-Himachali, any agreement executed by her, was void *ab initio* and hit by the provisions of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act.

6. This written statement was neither signed nor verified by defendant Neelam Rana. Same was signed and verified by one Brigadier (Retd.) Bikram Rana, son of late Shri Salig Ram, as the Special Power of Attorney of the defendant. The written statement was also not supported by any affidavit of the defendant but was supported by the affidavit of Brigadier (Retd.) Bikram Rana, in his capacity as Special Power of Attorney of the defendant. The contents of para 1 to 6 of the preliminary objections and para 1 to 11 of the written statement were deposed to be true, on the basis of personal knowledge of the deponent and paras 12 to 15 of the same were stated to be true on legal advise received.

7. By way of replication, the plaintiffs reiterated their case and denied the stand taken in the written statement. According to the plaintiffs, no agreement was executed between the parties on September 30, 2003. Though one agreement was executed on 3rd October, 2003, upon which, the date was wrongly reflected as 30.09.2003. It was then, that an advance payment of Rs.7.00 Lac was paid by plaintiff No. 1 to the defendant by means of a Demand Draft dated 3rd October, 2003. It was further mentioned by the plaintiffs that said agreement was superseded/replaced by agreement dated 09.05.2004, which was further supplemented by supplemental agreement dated 1st October, 2004. According to the plaintiffs, there was a reduction in the area of the land by six biswas out of total area of 26 biswas, which was originally agreed to be sold to the plaintiffs and despite the aforementioned reduction in the area, the sale consideration of Rs.27.00 Lac continued to remain unchanged due to the insistence of the defendant who refused to reduce the amount. Plaintiff No. 1 agreed to the same and thereafter on the execution of the supplemental agreement dated 01.10.2004, defendant admittedly received complete balance sale consideration of Rs.20.00 Lac. Thus on 01.10.2004, complete balance sale consideration was received by the defendant from plaintiff No. 1. It was denied that time was the essence of the agreement. It was also denied that plaintiff No. 1 got signatures of the defendant on any blank non-judicial stamp paper or any other paper as alleged. Plaintiff No. 1 denied use of any such paper for executing of any forged or false agreement. It was also denied that defendant was undergoing treatment on 9th May, 2004. it was reiterated by plaintiff No. 1 that plaintiff No. 2 was her nominee as per the contents of agreement dated 9th May, 2004 and supplemental agreement dated 01.10.2004. It was further reiterated that suit for specific performance was maintainable even without permission under Section 118 of the H.P. Tenancy and Land Reforms Act.

8. On the basis of pleadings of the parties, which included the above mentioned written statement filed through the Special Power of Attorney holder, learned trial Court framed the following issues:-

> *"Issue No. 1* *Whether the defendant execute agreement of sale on May 9, 2004 and supplementary agreement dated 1st October, 2004? OPP.*

Issue No. 2	*In case issue No. 1 is proved, whether the plaintiffs were and are ready and willing to perform their part of contract, as alleged? OPP.*
Issue No. 3	*Whether the power of attorney execute in favour of Kishore Singh is forged, as alleged, if so, its effect? OPD.*
Issue No. 4	*Whether the defendant never execute any power of attorney in favour of Shri Tikkar Ram? OPD.*
Issue No. 5	*What plaintiff No. 1 failed to perform his part of contract and the amount paid to defendant stood mutually adjusted, if so, its effect? OPD.*
Issue No. 6	*Whether the suit, as framed, is not maintainable? OPD.*
Issue No. 7	*Whether the suit is barred by limitation? OPD.*
Issue No. 8	*If issue No. 1 is proved, whether the agreements is void ab initio and is hit by provisions of Section 118 of H.P. Tenancy and Land Reforms Act? OPD. (framing of issue is objected to by the learned Counsel for the plaintiffs).*
Issue No. 9	*Whether the plaintiffs have no locus standi to file the present suit? OPD.*
Issue No. 10	*Relief."*

9. On the basis of evidence led by the parties, both ocular as well as documentary in support of their respective cases, which includes the above mentioned written statement, as also the deposition of the so called power of attorney holder of the defendant, and two documents exhibited purportedly on behalf of the defendant, the issues framed were answered by the learned Trial Court as under:

"Issue No.1	*: No.*
Issue No. 2	*: No.*
Issue No. 3	*: No.*
Issue No.4	*: No.*
Issue No. 5	*: Partly in affirmative.*
Issue No. 6	*: Yes*
Issue No. 7	*: No.*
Issue No. 8	*: Yes*
Issue No. 9	*: Yes*
Issue No. 10 (Relief)	*: The suit of the plaintiffs for specific performance of contract and permanent injunction is dismissed and it is held that plaintiff No. 1 is entitled to refund of Rs.27,00,000/- (Rupees Twenty Seven Lacs.) being earnest money from defendant."*

10. Learned trial Court, thus, dismissed the suit of the plaintiffs for specific performance of contract and permanent injunction, however, plaintiff No. 1 was held entitled to refund of Rs.27.00 Lac being earnest money from the defendant.

11. Feeling aggrieved, the plaintiffs have filed this appeal.

12. It is an admitted position that defendant has not assailed that part of the judgment and decree, wherein she has been directed to refund the earnest money of Rs.27.00 Lac to plaintiff No. 1.

13. The reasonings assigned by learned trial Court while deciding Issues No. 1, 2 and 8 against the plaintiffs primarily were that execution of agreements Ext. PW5/A and Ext. PW5/B was not free from suspicion as there was no mention of agreement Ext. DW1/B by the plaintiffs in the plaint. Learned trial Court believed the averments made in the written statement that plaintiff had obtained signatures of the defendant on blank papers on which agreements Ext. PW5/A and Ext. PW5/B were prepared. It held that as plaintiff No. 1 was a non-agriculturist and it required permission from the State Government to purchase agricultural land, the possibility that signatures of the defendant were obtained on blank papers could not be ruled out. It also held that there were certain cuttings on Ext. PW5/A, which had gone unexplained. It further doubted as to why the stamp papers were purchased from Dharampur when the same were available at Kasauli itself where the alleged agreements were stated to have been executed. It also held the factum of execution of Ext. DW1/B not having been disclosed in the plaint to be a factor, which raised suspicion about the execution of agreements Ext. PW5/A and Ext. PW5/B. Learned trial Court also held that there was discrepancy in the description of the suit property in agreement Ext. PW5/A. Learned trial Court held that stamp papers of Ext. PW5/A did not bear the signatures of defendant Neelam Rana or her husband. Even the sale consideration was deleted with the help of fluid and filled by using ball pen without signatures of the executant. Learned trial Court held that Ext. PW5/B was surrounded by suspicious circumstances as stamp papers for preparing the said agreement seem to have been purchased at Shimla by the husband of the defendant whereas the contents indicate that the same was executed in pursuance of earlier agreement Ext. PW5/A. It also held that as Ext. PW5/A did not pertain to the suit property but pertained to some property situated in Mauja Gumma, Pargana Bhaget, therefore, Ext. PW5/B was of no help to the plaintiffs. Learned trial Court also held that agreements Ext. PW5/A and Ext PW5/B were *void ab initio* being hit by the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, as, plaintiff No. 1 being a non-agriculturist, could not have entered into the said agreements to purchase agricultural land in the State of Himachal Pradesh by circumventing the public policy so provided under Section 118 of the H.P. Tenancy and Land Reforms Act. It however held that the plaintiff was entitled for refund of Rs. 27.00 Lac alongwith interest @ 8% per annum from the date of filing of the suit.

14. Feeling aggrieved, the plaintiffs have filed this appeal.

15. Mr. R.L. Sood, learned Senior Counsel appearing for the appellants has strenuously argued that the judgment and decree passed by learned trial Court were not sustainable in the eyes of law and liable to be quashed and set aside and the suit of the appellants/plaintiffs was liable to be decreed as prayed for. He *inter alia* argued that the written statement filed to the suit was purposely not signed or verified by the defendant/respondent and on the contrary, it was signed and verified by her husband Bikram Chand Rana, who was not competent to sign or verify the same. He argued that Bikram Chand Rana was not authorized to engage any Counsel or to impart any instructions to the Counsel. As per learned Senior Counsel, there was no written statement on record to answer the plaint, contents of which, in law, stood admitted by the defendant and therefore, learned Court below ought to have had decreed the suit of the plaintiffs. He argued that even in the unauthorized written statement, signed and verified by Sh. Bikram Rana, not only the receipt of entire sale consideration stood admitted, it was also admitted in the same that agreement to sell dated 09.05.2004, Ext. PW5/A as also supplemental

agreement dated 01.10.2004, Ext. PW5/B, were signed by the defendant. He further argued that written statement dated 28th June, 2007, was neither prepared on the instructions or at the instance of defendant Neelam Rana. As per him, admittedly Neelam Rana had neither signed nor verified the written statement nor she had executed any *vakalatnama* in favour of any Counsel who had purportedly appeared on her behalf and all the above-mentioned acts were unauthorizedly done by Bikram Chand Rana on behalf of defendant who incidentally while appearing in the Court as DW1 had admitted it to be correct that his wife had never instructed him to engage any Lawyer in the case.

16. Mr. Sood further argued that the judgment passed by the learned Trial Court is otherwise also not sustainable, as learned Trial Court has erred in not appreciating that the execution of agreement dated 9th May, 2004, Ex. PW5/A and supplemental agreement dated 1st October, 2004, Ex. PW5/B stood duly proved by the plaintiff by way of testimony of not only the plaintiff, but also the persons who had witnessed the execution of the said agreements. According to Mr. Sood, learned Trial Court erred in holding that the execution of these documents was shrouded with suspicion, whereas their execution stood duly proved, in accordance with law, by the plaintiffs. He further argued that learned Trial Court has also erred in not appreciating that plaintiff No 1 had rightly assigned her rights in favour of plaintiff No. 2 in terms of the agreement entered into between plaintiff No. 1 and defendant, which was permissible in law.

17. In response, Mr. Vipin Pandit, learned Counsel appearing for the respondent has argued that there was no infirmity in the judgment and decree passed by the learned Trial Court. He argued that there was on record duly executed General Power of Attorney in favour of Brigadier Bikram Chad Rana by respondent/defendant, i.e. Ext DW1/A. He further argued that even otherwise there was no infirmity with the written statement having been signed by Brigadier Bikram Chand Rana in view of the provisions of Section 120 of the Indian Evidence Act as he was the husband of the defendant. He further argued that learned Trial Court had rightly held that agreement dated 9th May, 2004, Ex. PW5/A and agreement dated 1st October, 2004, Ex. PW5/B were *non est* in the eyes of law, as they were not only shrouded with suspicion, but even otherwise, even if it was assumed that these agreements were entered into between the plaintiff No. 1 and the defendant, then also they were hit by the provisions of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act. He further argued that the assignments of her rights by plaintiff No. 1 in favour of plaintiff No. 2 was not sustainable in law and therefore also, the suit of the plaintiffs was not liable to be decreed and the judgment and decree passed by the learned Trial Court was liable to be upheld.

18. I have heard learned Counsel for the parties at a considerable length and gone through the record of the case as also the judgment and decree passed by the Court below.

19. Record demonstrates that the Civil Suit was filed on 7th May, 2007. Notice was issued to the defendant on 28th May, 2007 for 15th June, 2007.

20. On 15.06.2007, a Memo of Appearance was filed on behalf of the defendant by Shri Mohinder Gautam, Advocate and he was given three weeks' time to file Power of Attorney, whereas 30 days time was granted to file written statement from the date of service.

21. Record further demonstrates that *Vakalatnama* was filed purportedly on behalf of the defendant by S/Shri Deepak Gupta and Mohinder Gautam, Advocates, signed

by Brigadier (Retd.) Bikram Chand Rana, in his capacity as Special Power of Attorney of the defendant, namely, Neelam Rana.

22. Record further demonstrates that written statement to the plaint was filed in the Court on 10th July, 2007. Same was signed and verified by Brigadier (Retd.) Bikram Chand Rana, son of Sh. Salig Ram, as Special Power of Attorney (hereinafter referred to as 'SPA') of the defendant. He verified paras 1 to 6 of the preliminary objections and paras 1 to 10 of the written statement on merit to be true on the basis of his personal knowledge.

23. Record further demonstrates that on behalf of the defendant, only one witness deposed in the Court and the same was DW1 Brigadier (Retd.) Bikram Chand Rana.

24. Record further demonstrates that two documents were exhibited on behalf of the defendant, i.e. Ext. DW1/A, copy of a general power of attorney and Ext. DW1/B, sale agreement dated 30.09.2003.

25. Ext. DW1/A is the copy of General Power of Attorney dated **27.03.2012** executed by Smt. Neelam Rana wife of Brigadier (Retd.) Bikram Chand Rana to do all acts and deeds mentioned therein on her behalf pertaining to the property referred to therein. This General Power of Attorney has been executed on stamp papers which were purchased on **24th March, 2012**, from Stamp Vendor Shiv Kumar Jain, Licence No. 202, District Court, Sector 10, Dwarka, New Delhi. This Attorney has been attested by the Notary on **27.03.2012**. **This demonstrates that Ext. DW1/A came into existence only on 24th March, 2012.**

26. There is no other exhibited power of attorney executed by defendant Neelam Rana in favour of Brigadier (Retd.) Bikram Chand Rana, either General or Special. In other words, there is no document on record duly exhibited by the defendant to demonstrate that as on the date when Brigadier (Retd.) Bikram Chand Rana either filed the *Vakalatnama* in the civil suit on behalf of the defendant as her SPA or signed, verified and got filed the written statement on behalf of the defendant, in the civil suit, there stood executed an attorney by the defendant in his favour authorizing him to do such acts as were done by Brigadier (Retd.) Bikram Chand Rana purportedly on behalf of the defendant.

27. Thus, there was neither any valid authorization in favour of a Counsel to represent the defendant in the Case, nor there was any duly filed written statement on record on behalf of the defendant. This extremely important aspect of the matter has been ignored by the learned Trial Court, which failed to appreciate that in the absence of there being any valid written statement on behalf of the defendant, refuting the contents of the plaint, the averments made in the plaint have gone un-rebutted.

28. In this background, another fact which gains great importance and which has also not been correctly appreciated by the trial Court is that defendant never entered into the witness box to prove her case. This Court is not suggesting that because the defendant has not entered into the witness box, therefore, the suit was liable to be decreed but the fact of the matter remains that (a) in the absence of there being any valid written statement filed on behalf of the defendant; and (b) defendant herself having not entered into the witness box to contest the case of the plaintiffs; all that learned Trial Court was duty bound to do was to consider whether plaintiffs had made out a case on the basis of pleadings, documents exhibited by them and witnesses produced by them in the Court in their favour.

29. The statement of witness who deposed on behalf of the defendant could not have been used for any purpose in excess of what that particular witness could have had

deposed on the basis of his personal knowledge, keeping in view the fact that there was no valid written statement on record on behalf of the defendant, and a party can not lead evidence beyond pleadings. In this peculiar background of the case, Section 120 of the Indian Evidence Act also does not come to the rescue of the respondent-defendant.

30. Incidentally, neither during the pendency of the Civil Suit nor during the pendency of the appeal, any effort or endeavour was made on behalf of the respondent/defendant to seek liberty of the Court to file a proper written statement.

31. Therefore, the findings which have been returned by the learned Trial Court against the plaintiffs to the effect that agreements Ext. PW5/A and Ext PW5/B were forged, were shrouded with suspicious circumstances, or that the factum of non-mentioning of agreement entered into between plaintiff No. 1 and defendant in the year 2003 in the plaint, created a doubt on the claim of the plaintiffs, stand completely vitiated. The judgment passed by the learned trial Court relying upon the averments made in a non-existent written statement is bad in law.

32. Learned Trial Court erred in not appreciating that it is settled law that where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by other side, a presumption would arise that the case set up by him is not correct. {See (1999) 3 SCC 573}.

33. Hon'ble Supreme Court in **Janki Vashdeo Bhojwani and Another versus Indusind Bank Ltd. and Others**, *(2005) 2 Supreme Court Cases 217*, has held that a general power of attorney holder can appear, plead and act on behalf of a party, but he cannot become a witness on behalf of the said party. He can only appear in his own capacity and no one can delegate the power to appear in the witness box on behalf of himself. Hon'ble Supreme Court further held that to appear in the witness box is altogether a different act and general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff. In my considered view, the same principle would apply even for the defendant.

34. It is relevant to take note of another judgment of the Hon'ble Supreme Court rendered in **Man Kaur (Dead) by LRs. Versus Hartar Singh Sangha**, *(2010) 10 Supreme Court Cases 512*, on this legal issue, relevant paras whereof are reproduced herein under:-

> *15. We may next refer to two decisions of this Court which considered the evidentiary value of the depositions of attorney holders. This Court in Janki Vashdeo Bhojwani v. Indusind Bank Ltd. held as follows:*
>
> *"13. Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.*
>
> * * *
>
> *17. ....In the case of Shambhu Dutt Shastri v. State of Rajasthan, it was held that a general power of attorney holder can appear, plead and act*

on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with the approval in the case of Ram Prasad v. Hari Narain. It was held that the word "acts" used in Rule 2 of Order III of the CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but be cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the CPC.

* * *

21. We hold that the view taken by the Rajasthan High Court in the case of Shambhu Dutt Shastri followed and reiterated in the case of Ram Prasad is the correct view."

16. In Shankar Finance & Investments vs. State of AP, this Court explained in what circumstances, the evidence of an attorney holder would be relevant, while dealing with a complaint under section 138 of the Negotiable Instruments Act, 1881 signed by the attorney holder of the payee. This Court held : (SCC pp. 542-43, paras 15-16)

"15.....A power of attorney holder of the complainant, who does not have personal knowledge, cannot be examined. But where the attorney holder of the complainant is in charge of the business of the complainant and the attorney holder alone is personally aware of the transactions, and the complaint is signed by the attorney holder on behalf of the complainant payee, there is no reason why the attorney holder cannot be examined as the complainant.....

16. In regard to business transactions of companies, partnerships or proprietary concerns, many a time the authorized agent or attorney holder may be the only person having personal knowledge of the particular transaction; and if the authorized agent or attorney-holder has signed the complaint, it will be absurd to say that he should not be examined under Section 200 of the Code, and only the Secretary of the company or the partner of the firm or the proprietor of a concern, who did not have personal knowledge of the transaction, should be examined."

17. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot obviously examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his

readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned.

18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

35. At this stage, it is relevant to take note of the statements of the witnesses who deposed in the Court on behalf of the plaintiffs and defendant.

36. Record demonstrates that plaintiff Meera Dewan examined nine witnesses including herself. PW-1 Deepak Kumar, who was posted as a Registration Clerk in the office of Sub Registrar-cum-Tehsildar, Kasauli, produced original Additional Book No. 4, Volume-108, wherein against Serial No. 258, on pages 15 to 18, Power of Attorney executed by defendant Neelam Rana in favour of Kishore Chand was pasted. The same was exhibited as Ext. PW1/A.

37. PW-2 Narinder Kumar, who was posted in the office of Deputy Commissioner, Solan, proved on record Ex. PW2/A, which was an application received in the office of Deputy Commissioner, Solan, under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act from plaintiff No. 1 Meera Dewan.

38. PW-3 Devinder Kumar Sharma, who was a Stamp Vendor at Kasauli, produced original register, photocopy whereof is Ex. PW3/A to prove that he had sold stamp papers on 01.10.2004 to Smt. Neelam Rana, i.e., the defendant for the purpose of executing an affidavit as also General Power of Attorney.

39. PW-4 Ghanshyam Sharma proved the entries made in Register Ex. PW4/A, which was maintained by him as a Document Writer working at Kasauli in the regular course of his business. He deposed that on 01.10.2004 at the instance of Smt. Neelam Rana, he had written a Power of Attorney and a Will. He stated that entries were made to this effect in his register at Sr. No. 865 qua Power of Attorney and at Sr. No. 866 qua Will, which were signed by Smt. Neelam Rana in his presence.

40. Plaintiff Meera Diwan stepped into the witness box as PW5. She stated in the Court that she knew the defendant since 1978 and they were family friends. Defendant owned property in Kasauli, which was a two storeyed house with adjoining land in Mauja Mashobra, Tehsil Kasauli, District Solan. The defendant intended to sell the said property. Defendant contacted plaintiff No. 1 and thereafter, a document was drawn on 9th May, 2004, original of which is Ext. PW5/A. She identified her signatures on the same as also the signatures of the defendant. She further deposed that supplementary agreement Ext. PW5/B was executed on 1st October, 2004 between the parties and identified her signatures as also the signatures of the defendant upon the same. She further stated that an amount of Rs.27.00 Lac by way of total consideration was paid to the defendant, out of which, an amount of Rs.20.00 Lac was paid on 1st October, 2004 vide receipt Ext. PW5/C, which was duly received by the defendant. She also deposed that she was ready and willing to execute the agreements in issue and had applied for permission before the Collector under Section 118 of the H.P. Tenancy and Land Reforms Act. She deposed that parties met in the house of plaintiff No. 1 in the month of February, 2007. She also deposed that as plaintiff No. 1 had not got permission as required under Section 118 of the Act supra and as defendant pressurized her to get permission at the earliest and in that circumstances, she nominated plaintiff No. 2 by giving Authority Letter in his and defendant agreed for the same. She also deposed that in March, 2007, defendant informed that possession of the said property had been handed over to plaintiff No. 2. She further stated that in 2003, an agreement was executed between the parties regarding a house which was existing on the same land measuring total 26 biswas. She was advised that it was better to go for another agreement as it would be difficult to get permission for land measuring more than one bigha and thereafter, she decided to buy structure and lawn for which consideration amount remained the same. She further deposed that Rs.7.00 Lac stood paid to the defendant at the time of entering into first agreement in the year 2003. She also deposed that she had assigned

property rights in favour of plaintiff No. 2 under the agreement to sell. In her cross examination, she admitted that there was no mention of agreement executed in the year 2003 in subsequent agreements. She however explained that subsequent agreement was necessitated since land more than one bigha could not be purchased by her. She further stated that she was not aware as to why the earlier agreements were not mentioned in the documents which were prepared by the defendant and her husband. She also stated in the cross examination that the stamp papers for preparing the agreement dated 9th May, 2004, were purchased by the husband of the defendant. She also stated that said documents were got typed by the husband of the defendant, at Kasauli. She denied that she had obtained signatures of defendant on non-judicial papers in order to obtain permission under Section 118 of the H.P. Tenancy and Land Reforms Act. She denied that agreement to sell dated 9th May, 2004 and 1st October, 2004, were forged. She denied the suggestion that agreements Ext. PW5/A and Ext. PW5/B, contained the signatures of the husband of the defendant. She also denied that Kishore Singh was not holding the power of attorney on behalf of the defendant. She also explained in her cross examination that the balance amount of Rs.20.00 Lac which was paid on 1st October, 2004, was not in respect of agreement dated 30th September, 2003, but was in respect of agreements dated 09.05.2004 and 1st October, 2004, Ext. PW5/A and Ext. PW5/B respectively.

41. PW-7 Ashok Chopra deposed that he knew both the plaintiff as well as defendant since mid 1970's. He stated that he had seen the suit property. He further deposed that he met defendant in the house of plaintiff No. 1 in the month of February, 2007. He further deposed that plaintiff No. 1 asked him as to whether he was interested in purchase the suit land, as she was finding it difficult to obtain permission from the Government under Section 118 of the H.P. Tenancy and Land Reforms Act, 1972. He also deposed that defendant was insisting that the sale deed be executed. He further deposed that he was a bonafide agriculturist in the State of Himachal Pradesh and could buy the property from defendant No. 1 as a nominee of the plaintiff and, therefore, he told the plaintiff that he was interested in buying the same. He stated that he was appointed nominee by Ms. Meera Dewan to purchase the property and documents were handed over to defendant Neelam Rana, but the letter in issue was scribed by Ms. Meera Dewan. He signed the letter and handed it over to the defendant. He also stated that the possession of the suit land was handed over to him by Neelam Rana through her Power of Attorney Sh. Kishore Singh.

42. PW-8 Mukesh Thareja deposed that agreement dated 1st October, 2004, Ex. PW5/B was executed in his presence. He was signatory to the same. He also identified the signatures of Neelam Rana on the said document. He also deposed that Brigadier Rana was also present at the relevant time.

43. PW-9 Om Parkash Verma, who is a witness to the execution of agreement dated 9th May, 2004, Ex. PW5/A, stated that he knew Brigadier Bikram Rana as also his wife, Neelam Rana (defendant). He recognized his signatures on Ex. PW5/A. He deposed that the document was signed by plaintiff No. 1 and Neelam Rana. He also recognized the signatures of plaintiff Meera Dewan as also those of defendant Neelam Rana on the said document. He deposed that he was called by the defendant and her husband and that the document was already typed when he signed the same. In his cross-examination, he stated that he knew defendant as his land was adjacent to the land of the defendant. He reiterated that the typed document was produced by the defendant. He also reiterated that the document was signed by the parties in his presence. He denied the suggestion that signatures of defendant were obtained on blank document and thereafter the same was typed.

44. PW-10 Sat Pal Rana, who was serving as a Registration Clerk in the office of Sub Registrar, Kasauli, deposed that Power of Attorney Ext.PW7/A, i.e., the Power of Attorney executed by Bikram Chand Rana in favour of Kishore Singh, son of Amrai Singh to deal with the property subject matter of the suit as per the terms mentioned therein, was registered at Sr. No.258 in Book No. 4, Volume-108 at pages 15 to 18.

45. Brigadier (Retd.) Bikram Chand Rana, who entered the witness box as DW1, stated that he was the General Power of Attorney holder of defendant Neelam Rana, his wife. He further stated that his wife was at Delhi and not in a position to travel or appear in the Court for medical reasons. He stated that his wife owned land comprised in Khasra Nos. 137/12/1 and 137/12/2, measuring 13 bighas in Kasauli and that he was looking after the said land. He also stated that plaintiff Meera Dewan and her husband were known to him. He further deposed that his wife had entered into an agreement to sell 26 biswas of land at Kasauli to plaintiff Meera Dewan in September, 2003. He further deposed that Khasra No. 137/12/1 was agreed to be sold for Rs. 27.00 Lac. He further deposed that after 6-8 months, Manager of plaintiff Mukesh Thareja got signed some judicial and non-judicial papers on the pretext that the same were required for obtaining permission. Incidentally, he has not deposed that from whom Mukesh Thareja got the said papers signed. He also stated that Ashok Chopra was owned to him. He further stated that when plaintiff failed to get permission to purchase the land, he served her with legal notice Ext. PW5/D. He stated that Kishore Singh was not known to him and Kishore Singh never remained Attorney to his wife. In his cross examination, he admitted that power of attorney Ext. DW1/A was not registered. He also admitted it to be correct that his wife never instructed any Lawyer in the case to represent her. He admitted it to be correct that written statement was signed by him. He admitted it to be correct that signatures on Ext. PW7/A, power of attorney, were that of his wife Neelam Rana. He also stated that it was not in his knowledge that agreement Ext. PW5/A was executed because it was difficult to get permission of open land to the extent of 27 biswas including the house. He however submitted that signatures on Ext. PW5/A seem to be of his wife or the same may be doubtful. He admitted it to be correct that agreement Ext. PW5/A bears the signatures of his wife, which were encircled at points D,E and F. Then said signatures may be of his wife or may be a clever copy of signatures of his wife.

46. Without going into the details of the statements of above mentioned witnesses, suffice it is to say that the execution of agreements to sell Ex. PW5/A and Ex. PW5/B stood proved by the testimony of plaintiff Meera Dewan as also the testimonies of the witnesses, i.e., PW-8 Mukesh Thareja, who was witness to the execution of Ex. PW5/A and Ex. PW5/B and PW-9 Om Parkash Verma, who was witness to the execution of agreement dated 9th May, 2004, Ex. PW5/A.

47. Veracity of Ext. Ex. PW5/A, has been disbelieved by learned trial Court on uncorroborated version of the defendant, as contained in the purported written statement that this document alongwith Ex. PW5/B was prepared on certain papers, upon which, her signatures were obtained by the plaintiffs.

48. Ex. PW5/B has been ignored by the learned Trial Court on the ground that the same was only supplemental agreement and as agreement dated 09.05.2004, i.e., Ex. PW5/A had not been proved in accordance with law, therefore, the supplemental agreement was of no consequence.

49. As I have already discussed above, there was no written statement on record, as envisaged in law filed by the defendant. The purported written statement was filed by a person on behalf of the defendant, who as on the date when such written statement was filed, was not having any authority in law from the defendant to file any written statement

on her behalf to the suit. Incidentally, even in the said written statement, the factum of the signatures of the defendant on Ex. PW5/A and Ex. PW5/B has not been denied. Allegation therein is of forgery. That being the case, onus was squarely upon the defendant to have had proved that the documents were got forged and were fraudulently prepared on certain papers, on which her signatures were obtained. Incidentally, she has not entered the witness box.

50. Allegation of fraud is personal in nature and the same could have been proved by none else, but the defendant. This extremely important aspect of the matter has been completely ignored by the learned Trial Court. In the absence of defendant deposing in the Court and further in the absence of defendant proving on the strength of some cogent evidence that Ex. PW5/A and Ex. PW5/B were in fact a result of fraud and forgery, such conclusions could not have been arrived at by the learned Trial Court on conjectures and surmises. The inferences which have been drawn by the learned Trial Court to hold that these documents were shrouded with suspicious circumstances, are also completely unsustainable in law. Simply because some papers upon which these documents were prepared, were not purchased at Kasauli, did not render the documents to be shrouded with suspicious circumstances. Simply because the date of execution of Ex. PW5/a was written by hand and the amount was also written by hand, this did not render the documents to be suspicious. Further simply because the stamp papers on which these documents were prepared were purchased sometime before the execution of the agreements, did not render the agreements to be shrouded with suspicion. As far as the description of suit property in Ex. PW5/A is concerned, though it finds mention in para 3 thereof that the suit property is situated in Mauza Gumma, Pargana Bhaget, but this appears to be a typographical error, because in para-2 of the said agreement, correct description of the suit property has been given as situated in Mauza Mashobra, Pargana Dharti and this is again reiterated in supplemental agreement Ex.PW5/B. Besides this, it is not the case of the defendant that she had some other property also at Mauza Gumma, Pargana Bhaget, as mentioned in para-3 of Ex. PW5/A. All these important aspects of the matter have been completely ignored by the learned Trial Court.

51. A perusal of Ex. PW5/B, i.e., supplemental agreement dated 1st October, 2004 demonstrates that as per the same, *inter alia* the following was agreed between the parties:

> *"....That the parties to this agreement specifically agree that the present agreement shall be supplemental to the original agreement to sell dated 9-5-2004. It is further hereby agreed that in the event, permission from the State Government under Section 118 of the H.P. Tenancy and Land Reforms Act, 1972, is not accorded in favour of the Purchaser, then the Purchaser shall have every right to assign her interest in favour of any other person and/or nominee(s). The Seller shall either directly or through her Attorney execute and register the necessary sale deed(s) or any other conveyance deed in favour of any such nominee(s)/assignee(s).*

52. Hon'ble Supreme Court in ***Shyam Singh*** Vs. ***Daryao Singh and others,*** (2003) 12 Supreme Court Cases 160 has held that unless the contents of the document in question and evidence in relation thereto are so clear to infer a prohibition against assignment or transfer, the right of repurchase has to be held to be assignable or transferable and cannot be treated as personal to the contracting parties.

53. As per Ex. PW5/B, it was agreed between plaintiff No. 1 and defendant that purchaser shall have every right to assign her interest in favour of any other

person/nominee and seller shall either directly or through her Attorney execute and register the necessary sale deed(s) or any other conveyance deed(s) in favour of any such nominee(s)/assignee(s). There is no prohibition against assignment in the contents of the documents *(supra)*. Therefore, it cannot be said that the assignment of her rights by plaintiff No. 1 in favour of plaintiff No. 2, as contemplated in Ex. PW5/A and Ex. PW5/B, was not permissible in law.

54. On a query of the Court, learned Counsel for the respondent very fairly submitted that no legal action stood initiated by the respondent-defendant against the appellants/plaintiffs on alleged misuse of signed blank papers of the defendant by plaintiff No. 1. It is also not in dispute that there is no evidence on record that as on the date when agreements Ext. PW5/A and Ext. PW5/B were executed, defendant was in New Delhi and not at Kasauli.

55. Learned trial Court has erred in not appreciating that the contents of agreement dated 09.05.2004, Ext. PW5/A, were self speaking and there was indeed no necessity of referring to any previous agreement having been entered into between plaintiff No. 1 and the defendant, if any, because even in the purported written agreement, it was not the case of the defendant that something more was contemplated in agreement dated 09.05.2004, Ext. PW5/A, with regard to the sale of the suit land than what was contained in the earlier agreement Ext.DW2/B. On the other hand, plaintiff No. 1 has taken the stand that as per the earlier agreement, the total land agreed to be sold was 27 biswas which by way of agreement Ext. PW5/A was reduced to 20 biswas only, though there was no reduction in the sale consideration. This important aspect of the matter has also been ignored by the learned trial Court.

56. The judgment of learned trial Court is otherwise also not sustainable because there are contradictions in the findings returned by it with regard to agreements Ext. PW5/A and Ext. PW5/B. On one hand, learned trial Court says that the said documents are forged, whereas on the other hand, it has thereafter held that these agreements were void *ab initio* being hit by the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act. In my considered view, if as per learned trial Court, these documents were forged, then there was no necessity for learned trial Court to hold that the same were hit by the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act.

57. In fact from the stand taken by learned Counsel for the respondent during the course of arguments, what emerges is that even the respondent was not sure as to what stand was to be taken by her vis-a-vis agreements Ext. PW5/A and Ext. PW5/B. This is for the reason that whereas learned Counsel for the respondent has firstly tried to convince the Court that the findings returned by the learned trial Court that the documents in issue were forged, were correct findings, but in the same breath, he has also made an endeavour to justify the findings returned by the learned trial Court that even if this Court comes to the conclusion that the said agreements were legally executed, then also the defendant was not bound by the same as the same are hit by the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act. This becomes more crucial taking into consideration the fact that there is no challenge made by the defendant to the findings returned by the learned trial Court whereby the defendant has been directed to refund the sale consideration of Rs.27.00 Lac to plaintiff No. 1.

58. The findings returned by the learned trial Court to the effect that agreements Ext. PW5/A and Ext. PW5/B were forged documents, are not based on any cogent evidence on record but are based on conjectures and surmises as learned trial Court has held that there was a possibility that these documents were forged and could have been

prepared on blank papers, upon which signatures of the defendant were procured as plaintiff/appellant No. 1 was required to obtain permission under Section 118 of the H.P. Tenancy and Land Reforms Act to purchase the land. It has not been proved by the defendant that any blank documents or papers were got signed from her by plaintiff No. 1. As such these findings are not sustainable in the eyes of law.

59. Now, I would like to dwell upon the dismissal of the suit by the learned trial Court on the ground that the agreements entered into between plaintiff No. 1 and defendant were void *ab initio* and hit by the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act. It is not in dispute that plaintiff No. 1 is a non-agriculturist and in the absence of there being permission granted in her favour by the Government of Himachal Pradesh as per the provisions of Section 118 of the H.P. Tenancy and Land Reforms Act, she cannot purchase agricultural land in the State. However, the conclusion drawn by the learned trial Court that because plaintiff No. 1 was a non-agriculturist, therefore, agreement to sell entered into between plaintiff No. 1 and defendant for purchase of agricultural land is void *ab initio,* is palpably wrong. Learned Court below has ignored the settled principles of law in this regard as laid down by this Court in **Rahul Bhargava vs. Vinod Kohli and others, (2008) 1 SLC 385,** relevant paras whereof are reproduced hereinbelow:

> *"13. The suit was filed on 7.6.1990, therefore, rights of the parties crystallized on the date of agreement, dated 7.6.1989 and on the date of filing of the suit on 7.6.1990. It has not been pointed out that Section 118 of the Act was further amended after it was substituted vide Section 4 of Act No. 6 of 1988 and before the agreement and filing of the suit. On the date of agreement and the filing of the suit, there was no restriction for entering into an agreement of the nature executed on 7.6.1989 between respondent No.1 and appellant and it cannot be said that the agreement Ex. PW 1/A on the date of its execution was in violation of Section 118 of the Act existing on that date. The suit for specific performance filed on the basis of the agreement, dated 7.6.1989 Ex. PW 1/A is valid and maintainable. It has been proved on record that respondent No.1 got permission to purchase the suit property, vide Ex. PW 3/A dated 31.1.1991, which was valid for 180 days, which expired during the pendency of litigation. The respondent No.1 cannot be blamed for this. The respondent No.1 can obtain fresh permission or she can request for renewal of permission already granted in her favour. In these circumstances, no fault can be found with the agreement and the suit filed by respondents No.1 and 2 for specific performance and injunction on the basis of agreement.*
>
> *14. There is another aspect of the case, for filing a suit for specific performance on the basis of agreement, no permission is required, under Section 118 of the Act. It is only if the suit is decreed such permission may be required at the time of registration of the sale deed on the basis of specific performance decree. In Manzoor Ahmed Magray vs. Ghulam Hassan Aram and others (1999) 7 SCC 703, the Hon'ble Apex Court has held as follows:-*
>
> *"It is to be stated that the appellant has neither raised the said contention in the written statement nor during the trial. However, in the appeal, the appellant sought to raise the contention that the specific performance qua the suit land cannot be granted as the transfer or alienation of the suit property is prohibited under the provisions of the J&K Agrarian Reforms Act, 1972, the J&K Agrarian Reforms Act, 1976 and the J&K Prohibition on Conservation of Lands and Alienation of Orchards Act, 1975. The Court declined to entertain the plea on the ground that it was raised*

almost 24 years after the filing of the suit by the plaintiff and the same, if permitted to be raised, would prejudice the rights of the plaintiff. Even considering that the said plea is a pure question of law, in our view, it is without any substance. The definition under Section 2(4) of the J&K Agrarian Reforms Act, 1972 specifically excludes "land" which was an orchard on the first day of September 1971. Sub-section (5) of Section 2 defines "orchard" to mean a compact area of land having fruit trees grown thereon or devoted to cultivation of fruit trees in such number that the main use to which the land is put is growing of fruits or fruit trees. In the present case, agreement to sell was executed on 14.7.1971 in respect of an orchard land. Therefore, the said Act was not applicable to the land in dispute. Similar provisions are there in the Agrarian Reforms Act, 1976 which gives the definition of the word "land" under Section 2(9) and definition of the word "orchard" under Section 2(10). From the said definition, it is apparent that orchard is excluded from the operation of the Agrarian Reforms Act. Learned counsel for the appellant, however, further referred to Section 3 of the J&K Prohibition on Conversion of Land and Alienation of Orchards Act, 1975 which is as under:-

"3. Prohibition on conversion of land and alienation of orchards.- (1) Notwithstanding anything contained in any other law for the time being in force---- (a) no person shall alienate an orchard except with the previous permission of the Revenue Minister or such officer as may be authorized by him in this behalf; Provided that alienation of orchards to the extent of four kanals only in favour of one or more persons for residential purposes shall not need any permission.

(b) …. …. …. Considering the aforesaid section, it is apparent that prohibition on transfer of orchards is not absolute and the question of obtaining previous permission as contemplated under Section 3(1)(a) would arise at the time of execution of the sale deed on the basis of decree for specific performance. Section 3 does not bar the maintainability of the suit and permission can be obtained by filing proper application after the decree is passed. Therefore, it cannot be stated that decree for specific performance is not required to be passed. Further, under Section 3 of the J&K Prohibition on Conservation of Land and Alienation of Orchards Act, 1975, prohibition on transfer is limited. Firstly, the proviso makes it clear that alienation of orchards to the extent of four kanals only in favour of one or more persons for residential purposes will not require any permission. Secondly, for more than four kanals of land, previous permission of the Revenue Minister or such officer as may be authorized by him in this behalf is required to be obtained. Dealing with similar contention, this Court in Bai Dosabai v. Mathurdas Govinddas [1980 (3) SCC 545] observed that even if the Act prohibits alienation of land, if the decree is passed in favour of the plaintiff, it is required to be moulded suitably."

15. On the point of alienation/ transfer of land after permission Section 3 of J&K Act noticed above and Section 118 of the Act in substance are similar. There is no absolute prohibition, under Section 118 of the Act on transfer of land to non-agriculturist and transfer can be made in favour of non-agriculturist with permission of Government under Section 118 of the Act. This question at the most will arise at the time of execution of sale deed on the basis of decree for specific performance. Section 118 of the Act does not bar the maintainability of the suit for specific performance and injunction on

the basis of agreement. The respondent No.1 had earlier obtained permission from the State Government for purchasing the property vide permission Ex. PW 3/A.

16. It has been submitted that learned District Judge has passed the decree in infinity by ordering that the appellant (defendant No.1) would execute the sale deed in respect of the suit property in favour of respondent No.1 within one month of the renewal of the permission, under Section 118 of the Act. The execution of decree of specific performance is also governed by law of Limitation and, therefore, the plea of learned counsel for the appellant that learned District Judge has passed decree in infinity is not tenable. The learned District Judge has rightly appreciated the material on record. No case for interference has been made out. The substantial questions of law No. 1 to 3 are decided against the appellant and in favour of respondents No.1 and 2. The impugned judgement, decree do not require any interference."

60 Therefore, the findings returned to this effect by the learned Court below are perverse, not sustainable in the eyes of law and are accordingly set aside.

61. In view of discussion held herein above, this appeal is allowed with costs and judgment and decree dated 21.09.2017 passed by learned Additional District Judge-I, Solan, is set aside and the suit of the plaintiffs is decreed by directing the defendant to execute and register Sale Deed in favour of plaintiff No. 2 in terms of Agreement to Sell dated 09.05.2004, Ext. PW5/A and Supplemental Agreement dated 01.10.2004, Ext. PW5/B in respect of land measuring one bigha consisting of two storeyed building bearing Khasra No. 191/188/137/12, situated at Mauja Mashobra, Tehsil Kasauli, District Solan, HP. Decree sheet be prepared accordingly. Pending miscellaneous application(s), if any, also stand disposed of.

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

Sh. Suresh Kumar and others .. Petitioners

Versus

Smt. Sumitra Devi and others .. Respondents

CMPMO No. 268 of 2017
Decided on: December 20, 2018

Indian Evidence Act, 1872 – Section 61- Document – Proof – Held, mere admission of party regarding document or its exhibition does not prove contents of document – Document must be proved in accordance with law. (Para 8)

Indian Evidence Act, 1872 - Section 65- Secondary evidence – Leave of court – Essential requirements – Held, genuineness of document not to be seen while deciding application for grant of leave for leading secondary evidence – Party must show probative value of document and its entitlement to lead secondary evidence by showing loss or destruction of original - Defendants clearly showing destruction of original record by Department concerned – Document sought to be proved by way of secondary evidence material for decision – Order of trial court declining leave to defendants set aside – Petition allowed. (Paras 14 & 15)

Cases referred:
Benga Behera vs. Braja Kishore Nanda, (2007) 9 SCC 728
Nawab Singh vs. Inderjit Kaur, (1994) 4 SCC 413
Rakesh Mohindra vs. Anita Beri and others, 2016(16) SCC 483

For the petitioners : Mr. Deepak Kaushal, Advocate.
For the respondents : Mr. Abhishek Sood, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:(oral)

Being aggrieved and dissatisfied with order dated 31.5.2017, passed by the learned Civil Judge (Senior Division), Nahan, District Sirmaur, Himachal Pradesh in Civil Suit No. 88/1 of 07/16 titled **Sumitra Devi** vs. **Suresh Kumar**, whereby an application under S.65 of the Indian Evidence Act (hereinafter, 'Act') having been filed by the petitioner-defendants (hereinafter, 'defendants'), seeking therein permission to lead secondary evidence, came to be dismissed, defendants have approached this court in the instant proceedings filed under Art. 227 of the Constitution of India read with S.151 CPC, praying therein to set aside the impugned order referred to herein above and to allow their application filed under S.65.

2. Facts, as emerge from the record are that the respondents-plaintiffs (hereinafter, 'plaintiffs') filed a suit for declaration and consequential relief of permanent prohibitory injunction, against the defendants to the effect that the plaintiff No.1 is the legally wedded wife of deceased Roop Singh and co-owner-in-possession to the extent of half share in the land, as described in the plaint (hereinafter, 'suit land'), on the basis of inheritance. Defendants, by way of written statement, refuted the aforesaid claim put forth by the plaintiffs and claimed that Gian Dei, mother of the defendants, was legally wedded wife of Roop Singh as such, plaintiff No.1 Sumitra Devi has no right, title or interest over the suit land.

3. During the pendency of the suit, defendants, with a view to prove the factum with regard to dissolution of marriage *inter se* deceased Roop Singh and plaintiff No.1 Sumitra Devi, filed an application under S. 65 of the Act (Annexure P-1), seeking therein permission of the court to lead secondary evidence. Defendants averred in the application that during the pendency of the suit, defendants summoned pension record from the Army, who sent Photostat copies of the said documents, perusal whereof disclosed that the plaintiff-Sumitra Devi had executed document of divorce (*Reet*) with late Roop Singh. Defendants also averred in the application that document sent by the Army authorities also contained a letter/certificate of authenticity of the divorce deed between Sumitra Devi and Roop Singh, issued by the then Pradhan, Gram Panchayat concerned. It also contained certificate issued by the District Collector, Sirmaur about impounding of divorce deed on charging of stamp duty and penalty.

4. Defendants further averred in the application that they having noticed aforesaid documents, summoned aforesaid record from the Army authorities and accordingly, Naik *Karam*vir Singh (DW-4) appeared on 14.1.2014 and tendered Photostat copies of the documents referred to herein above and stated that the original documents

stand destroyed after expiry of prescribed period of retention. In the aforesaid background, defendants prayed that they be permitted to lead secondary evidence to prove the documents tendered on record by Naik Karamvir Singh (DW-4) by way of secondary evidence. Aforesaid application came to be hotly contested by the plaintiffs, who, by way of reply, seriously disputed the genuineness and correctness of the documents, intended to be proved by leading secondary evidence, especially dissolution deed. Plaintiffs averred that the documents, if any, received by the court can not be said to be genuine being Photostat copies. Plaintiffs also stated in the reply that DW-4 has made unbelievable statement to the effect that the originals have been destroyed because he has not brought any evidence, with regard to destruction of the documents tendered by him in evidence.

5. Learned Court below, on the basis of pleadings adduced on record by respective parties, framed following issues:

> "1. Whether the documents referred above, exist? OPA
>
> 2. Whether those documents have been destroyed, as claimed by the applicants? OPA.
>
> 3. Relef."

6. Subsequently, the learned Court below, after affording opportunity to both the parties to lead evidence in support of their respective claims, passed order dated 31.5.2017, whereby, application having been filed by the defendants under S.65, seeking therein permission to lead secondary evidence, came to be dismissed. In the aforesaid background, defendants have approached this court in the instant proceedings.

7. Having heard the learned counsel representing the parties and perused the material available on record vis-à-vis reasoning assigned by the learned Court below, while passing impugned order, this court finds considerable force in the argument of Mr. Deepak Kaushal, Advocate, that at the stage of filing application under S.65, court below only ought to have seen the evidence with regard to existence of the documents, intended to be proved by way of secondary evidence and not the execution of the same. However, in the instant case, careful perusal of the impugned order suggests that the court below has gone astray, because factum with regard to non-production of evidence by defendants, especially, DW-4, Naik Karamvir Singh, with regard to destruction of documents, after expiry of statutory period of 25 years, has weighed heavily with the court below, while dismissing the application filed by the defendants, for leading secondary evidence.

8. It is not in dispute that DW-4 Naik Karamvir Singh was summoned by the court on the request of the defendants. It is also not in dispute that the documents intended to be proved by way of secondary evidence were tendered in evidence by DW-4, while deposing before the court below, as DW-4, as such, there is no force in the argument having been raised by Mr. Abhishek Sood, learned counsel representing the plaintiffs that very correctness and genuineness of the documents tendered in evidence by DW-4 is doubtful. Veracity /correctness of the documents, if any, is not to be seen at this stage, but that has to be seen at the time of leading secondary evidence, because, admittedly, documents intended to be proved on record by way of secondary evidence are required to be proved in accordance with law. Mere exhibition, if any, of the documents, would not prove the same or correctness thereof, rather, it is to be proved in accordance with law. No doubt, cross-examination conducted by the plaintiffs on DW-4 reveals that DW-4 Naik Karamvir Singh was unable to state that when original record of documents tendered in evidence by him, was destroyed and he was also unable to place on record evidence, if any, with regard to destruction of such documents, but that could not be a ground for the court below to reject

the application. Defendants, by examining DW-4 and making him tender documents, which they intend to prove by secondary evidence, successfully proved on record existence of the documents, having probative value, which is a condition precedent for leading secondary evidence.

9. S.65 of the Act deals with a situation/circumstance under which secondary evidence relating to documents can be given to prove condition or contents of documents. If S.65 is read in its entirety, it reveals that secondary evidence can be led if original of the documents intended to be produced by secondary evidence, is destroyed or lost or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default or neglect, produce it in reasonable time. Party intending to produce secondary evidence requires to establish for the non-production of primary evidence. Unless, it is established that the original document is lost or destroyed or is being deliberately withheld by the party in respect of that document cannot be accepted.

10. In the case at hand, defendants, who intend to prove the document by way of secondary evidence, have successfully established on record that the document intended to be proved by them by way of secondary evidence, have been lost, factum whereof stands duly established by way of statement of DW-4, Naik Karamvir Singh, who in his statement has categorically stated that record pertaining to document stands weeded out, after expiry of prescribed period of 25 years.

11. At the cost of repetition, it may be observed here that though it has come in the statement of Naik Karamvir Singh that he has brought Photostat copies, but, perusal of documents placed on record, suggests that they are duplicate copies of the original, save and except one document i.e. dissolution deed, which has been marked as "DA".

12. At this stage, it would be profitable to place reliance upon the judgment rendered by the Hon'ble Apex Court in **Rakesh Mohindra** versus **Anita Beri and others**, 2016(16) SCC 483, wherein it has been held as under:-

> "14. Section 65 of the Act deals with the circumstances under which secondary evidence relating to documents may be given to prove the existence, condition or contents of the documents. For better appreciation Section 65 of the Act is quoted herein below:- "65. Cases in which secondary evidence relating to documents may be given: Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-
>
> (a) When the original is shown or appears to be in the possession or power— of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court or of any person legally bound to produce it, and when, after the notice mentioned in section 66, such person does not produce it;
>
> (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
>
> (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
>
> (d) when the original is of such a nature as not to be easily movable;

(e) when the original is public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force 40[India] to be given in evidence ;

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in court and the fact to be proved it the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible. In case (b), the written admission is admissible. In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, admissible. In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

15. The preconditions for leading secondary evidence are that such original documents could not be produced by the party relied upon such documents in spite of best efforts, unable to produce the same which is beyond their control. The party sought to produce secondary evidence must establish for the non-production of primary evidence. Unless, it is established that the original documents is lost or destroyed or is being deliberately withheld by the party in respect of that document sought to be used, secondary evidence in respect of that document cannot accepted.

16. The High Court in the impugned order noted the following :(Anita Beri vs. Rakesh Mohindra SCC Online HP 4258 para-9)

"9. There is no averment about Ext. DW-2/B in the Written Statement. The Written Statement was filed on 19.2.2007. DW-2/B infact is only a photocopy. The plaintiffs are claiming the property on the basis of a registered will deed executed in her favour in the year 1984. It was necessary for the defendant to prove that in what manner the document dated 24.8.1982 was executed. The defendant while appearing as AW-1 has admitted in his cross-examination that except in his affidavit Ext. AW-1/A, he has not mentioned in any document that the letter of disclaimer was executed by Justice late Sh. Tek Chand in his presence. The statement of DW-2 does not prove that Ext. DW-2/A, ever existed. DW-2 Sh. Gurcharan Singh, has categorically admitted in his cross-examination that he has not brought the original of Ext. DW- 2/B. He has also admitted that on Ext. DW-2/B, the signatures of P.C. Danda were not legible. Volunteered that, those were not visible. The learned trial Court has completely misread the oral as well as the documentary evidence, while allowing the application under Section 65 of the Indian Evidence Act, 1872, more particularly, the statements of DW- 2 Gurcharan Singh and DW-3 Deepak Narang. The applicant has miserably failed to comply with the provisions of Section 65 of the Indian Evidence Act, 1872. The learned trial Court has erred by coming to the conclusion that the applicant has taken sufficient steps to produce document Ext. DW- 2/B."

17. The High Court, following the ratio decided by this Court in the case of J. Yashoda vs. Smt. K. Shobha Rani, AIR 2007 SC 1721 and H. Siddiqui (dead) by lrs. vs. A. Ramalingam, AIR 2011 SC 1492, came to the conclusion that

the defendant failed to prove the existence and execution of the original documents and also failed to prove that he has ever handed over the original of the disclaimer letter dated 24.8.1982 to the authorities. Hence, the High Court is of the view that no case is made out for adducing the secondary evidence.

18. The witness DW-2, who is working as UDC in the office of DEO, Ambala produced the original GLR register. He has produced four sheets of paper including a photo copy of letter of disclaimer. He has stated that the original documents remained in the custody of DEO. In cross-examination, his deposition is reproduced hereinbelow:-

> "xxxxxxxx by Sh. M.S. Chandel, Advocate for the plaintiff No.2. I have not brought the complete file along with the record. I have only brought those documents which were summoned after taking up the documents from the file. As on today, as per the GLR, Ex.DW- 2/A, the name of Rakesh Mohindra is not there. His name was deleted vide order dated 29.8.2011. I have not brought the original of Ex.DW-2/B. It is correct that Ex.DW-2/D does not bear the signatures of Sh. P.C. Dhanda. Volunteered.: These are not legible. Ex.DW-2/C is signed but the signatures are not leible. On the said document the signatures of the attesting officer are not legible because the document became wet. I cannot say whose signatures are there on these documents. On Ex.DW-2/E the signatures at the place deponent also appears to have become illegible because of water. Ex.DW-2/F also bears the faded signatures and only Tek Chand is legible on the last page. It is incorrect to suggest that the last page does not have the signatures of the attesting authority. Volunteered: These are faded, but not legible. The stamp on the last paper is also not legible. There is no stamp on the first and second page. In our account, there is no family settlement, but only acknowledgement of family settlement. I do not know how many brothers Rakesh Mohindra has. It is correct that the original of Ex.DW-2/H does not bear the signatures of Sh. Abhay Kumar. I do not know whether Sh. Abhay Kumar Sud and Rakesh Mohindra are real brothers. The above mentioned documents were neither executed nor prepared in my presence. It is incorrect to suggest that the above mentioned documents are forged. It is incorrect to suggest that because of this reason I have not brought the complete file."

19. In Ehtisham Ali v. Jamma Prasad 1921 SCC OnLine PC 65 a similar question came for consideration as to the admissibility of secondary evidence in case of loss of primary evidence. Lord Phillimore in the judgment observed:(SCC Online PC)

> " It is, no doubt, not very likely that such a deed would be lost, but in ordinary cases, if the witness in whose custody the deed should be, deposed to its loss, unless there is some motive suggested for his being untruthful, his evidence would be accepted as sufficient to let in secondary evidence of the deed."

20. It is well settled that if a party wishes to lead secondary evidence, the Court is obliged to examine the probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. At the same time, the party has to lay down the factual foundation to establish the right to give secondary evidence

where the original document cannot be produced. It is equally well settled that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law."

13. Reliance is also placed on judgment of the Hon'ble Apex Court in **Nawab Singh** v. **Inderjit Kaur**, (1994) 4 SCC 413, wherein it has been held as under:

> "3. Having heard the learned counsel for the parties, we are of the opinion that the trial court was not justified in rejecting the prayer seeking leave of the court for production of secondary evidence. The prayer has been rejected mainly on the ground that the copy of the rent note sought to be produced by the appellant was of doubtful veracity. The trial court was not justified in forming that opinion without affording the appellant an opportunity of adducing secondary evidence. The appellant has alleged the original rent to be in possession of the respondent. The case was covered by Clause (a) of Section 65 of the Indian Evidence Act, 1872.
>
> 5. The appeal is allowed. The impugned order of the trial court dated 3.2.98 and the order of the High Court dated 16.9.98 passed in revision are both set-aside. The appellant is granted leave of adducing secondary evidence of the existence, condition and contents of the rent note dated 23.9.1994. The trial court shall appoint a date on which the appellant shall have the liberty of adducing such secondary evidence as he may choose to do but if he fails to adduce such evidence on the appointed date, he shall not be entitled to an adjournment for the purpose. The appellant shall also be liable to pay costs quantified at Rs. 5000/- (Rupees five thousand only) to the respondent, having regard to all the circumstances."

14. It clearly emerges from the aforesaid judgment that the question with regard to genuineness/doubtful veracity of the document intended to be produced by way of secondary evidence is not to be seen at the time of seeking permission to lead secondary evidence, rather, that would be considered at the time of leading secondary evidence and trial.

15. In **Rakesh Mohindra**(supra), Hon'ble Apex Court has held that if a party wishes to lead secondary evidence, court is obliged to examine probative value of the document produced in the Court or their contents and decide the question of admissibility of a document in secondary evidence. In the case at hand, defendants by way of bringing certain document to the fore have been able to establish the factum with regard to existence of certain documents, suggestive of the fact that deceased Roop Singh had divorced Sumitra Devi. Documents further reveal that Roop Singh during his life time had nominated mother of the defendants as his nominee in the pension papers, as such, it can not be said that the documents intended to proved by secondary evidence have no probative value, rather, same may be of great relevance for the proper adjudication of the case, if proved in accordance with law. In the aforesaid judgment, Hon'ble Apex Court has held that neither mere admission of a document in evidence amounts to its proof nor mere making of an exhibit of a document dispense with its proof, which is otherwise required to be done in accordance with law, as such, this court finds that no prejudice would be caused to the opposite party in case defendants are permitted to lead secondary evidence, because document intended to be placed on record by way of secondary evidence, would, in any circumstance, be required to be proved in accordance with law and opportunity of rebuttal shall also be provided to the opposite party.

16. No doubt, there can be no quarrel with the law settled by the Hon'ble Apex Court in **Benga Behera** v. **Braja Kishore Nanda**, (2007) 9 SCC 728, to the extent that positive evidence is required to be brought on record by the party intending to lead secondary evidence that the document intended to be produced by secondary evidence has been lost or destroyed, but, in the case at hand, as has been discussed above in detail, defendants by examining DW-4, Naik Karamvir Singh, have successfully established on record that documents intended to be proved by leading secondary evidence, are in existence but they have been lost/destroyed, rather, factum with regard to existence of such documents only came to the knowledge of the defendants, when certain documents were made available to them by the Army authorities, immediately whereafter, defendants got the army official summoned in the court, who subsequently, while deposing as DW-4, placed on record certain documents.

17. Accordingly, in view of the detailed discussion made hereinabove and law laid down by the Hon'ble Apex Court, present petition is allowed. order dated 31.5.2017 passed by the learned Civil Judge (Senior Division), Nahan, District Sirmaur, Himachal Pradesh in the application under S.65 of the Act filed by the defendants, in Civil Suit No. 88/1 of 07/16, is quashed and set aside. However, observations made herein above, shall have no bearing on the merits of the suit in question, which shall be decided on its own merits, and observations made herein above shall remain confined to the disposal of the instant petition.

18. Since the suit is hanging fire since long, this court hopes and trusts that the learned trial Court shall conclude the trial as expeditiously as possible, preferably within six months from today. Parties undertake to appear before the learned trial Court on **2.1.2019**. Registry of this court to convey this order to the learned Court below enabling it to proceed further with the matter.

Pending applications, if any, are disposed of. Interim direction, if any, is vacated. Record, if received, be sent back forthwith.

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

Dr. S. Ranganathan ... Petitioner

Versus

State of Himachal Pradesh ... Respondent

CrMP(M) No. 1752 of 2018
Decided on December 21, 2018

Code of Criminal Procedure, 1973 - Section 438 - Anticipatory bail - Grant of - Petitioner seeking anticipatory bail in case registered against him under Sections 201, 217, 406, 409, 411, 420, 467, 468, 471, and 120-B IPC, Section 13(1)(c) and 13(1)(d)(ii) of the Prevention of Corruption Act and Sections 5 and 7 of Himachal Pradesh Prevention of Specific Corrupt Practices Act - On facts, custodial interrogation of petitioner not required- Petitioner found co-operating during investigation and undertaking to appear before investigating officer as and when so directed by him - Held, freedom of individual is of utmost importance and same cannot be curtailed for indefinite period especially when his guilt is yet to be proved - Anticipatory bail allowed subject to conditions.(Paras 4 & 5)

Cases referred:
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another (2010) 14 SCC 496
Sanjay Chandra vs. Central Bureau of Investigation (2012)1 SCC 49

For the petitioner	:	Mr. V. Elanchezhiyan, Mr. Vivek Yadav, Mr. Balwinder Singh and Mr. Ajay Kumar Thakur, Advocates.
For the respondent	:	Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General with Mr. Amit Kumar, Deputy Advocate General. Shri Sandeep Dhawal, Superintendent of Police (CID) with Shri Ramesh Sharma, Dy.SP (CID) and HC Balbir Singh, Police Station CID, Bharari, Shimla.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of present bail petition filed under S.438 CrPC, bail petitioner has approached this court for grant of anticipatory bail in FIR No. 09/2016 dated 03.04.2016 under Ss. 420, 406, 409, 411, 467, 468, 471, 201, 217 and 120B IPC, Ss. 13(1)c and 13(1)d(ii) of the Prevention of Corruption Act and Ss. 5 and 7 of the Himachal Pradesh Prevention of Specific Corruption Practices Act, registered at Police Station CID Bharari, Shimla, Himachal Pradesh.

2. Sequel to order dated 12.12.2018, Shri Sandeep Dhawal, Superintendent of Police (CID), Shri Ramesh Sharma, Dy.SP (CID) and HC Balbir Singh, Police Station CID, Bharari, Shimla have come present with the record. Mr. Dinesh Thakur, learned Additional Advocate General has also placed on record status report, prepared on the basis of investigation carried out by the investigating agency. Record perused and returned.

3. Mr. Dinesh Thakur, learned Additional Advocate General, on the instructions of the Investigating Officer, who is present in the court, states that pursuant to order dated 12.12.2018, bail petitioner has joined the investigation and is fully cooperating. He further stated that as of today, though the custodial interrogation of the bail petitioner is not required, but he must undertake before this court that as and when his presence is required, he whould make himself available for interrogation by the investigating agency. In view of the fair stand adopted by the learned Additional Advocate General, this court sees no impediment in accepting the prayer having been made in the present application.

4. Though, involvement of the bail petitioner in the offence alleged against him is to be ascertained by the learned trial Court on the basis of evidence adduced on record by the investigating agency, but this court having carefully perused the material available on record, sees no reason to allow the bail petitioner to incarcerate in jail, for indefinite period, especially when guilt, if any, of the bail petitioner is yet to be proved in accordance with law. Hon'ble Apex Court and this court have repeatedly held that freedom of an individual is of utmost importance and same can not be curtailed for indefinite period. A person is deemed to be innocent until proven guilty.

5. Recently, the Hon'ble Apex Court in Criminal Appeal No. 227/2018, **Dataram Singh** vs. **State of Uttar Pradesh & Anr** decided on 6.2.2018 has held that freedom of an individual can not be curtailed for indefinite period, especially when his/her

guilt is yet to be proved. It has further held by the Hon'ble Apex Court in the aforesaid judgment that a person is believed to be innocent until found guilty. The Hon'ble Apex Court has held as under:

> "2. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.
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> 3. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case.
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> 4. While so introspecting, among the factors that need to be considered is whether the accused was arrested during investigations when that person perhaps has the best opportunity to tamper with the evidence or influence witnesses. If the investigating officer does not find it necessary to arrest an accused person during investigations, a strong case should be made out for placing that person in judicial custody after a charge sheet is filed. Similarly, it is important to ascertain whether the accused was participating in the investigations to the satisfaction of the investigating officer and was not absconding or not appearing when required by the investigating officer. Surely, if an accused is not hiding from the investigating officer or is hiding due to some genuine and expressed fear of being victimised, it would be a factor that a judge would need to consider in an appropriate case. It is also necessary for the judge to consider whether the accused is a first-time offender or has been accused of other offences and if so, the nature of such offences and his or her general conduct. The poverty or the deemed indigent status of an accused is also an extremely important factor and even Parliament has taken notice of it by incorporating an Explanation to Section 436 of the Code of Criminal Procedure, 1973. An equally soft approach to incarceration has been taken by Parliament by inserting Section 436A in the Code of Criminal Procedure, 1973.
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> 5. To put it shortly, a humane attitude is required to be adopted by a judge, while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. There are several reasons for this including maintaining the dignity of an accused person, howsoever poor that person might be, the requirements of Article 21 of the Constitution and the fact that there is enormous overcrowding in prisons, leading to social and other problems as noticed by this Court in In Re-Inhuman Conditions in 1382 Prisons."

6. By now it is well settled that gravity alone cannot be a decisive ground to deny bail, rather competing factors are required to be balanced by the court while exercising its discretion. It has been repeatedly held by the Hon'ble Apex Court that object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. The Hon'ble Apex Court in **Sanjay Chandra** versus **Central Bureau of Investigation** (2012)1 Supreme Court Cases 49; has been held as under:-

> "The object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The Courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. Detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In India , it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the propose of giving him a taste of imprisonment as a lesson."

7. Needless to say object of the bail is to secure the attendance of the accused in the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial. Otherwise also, normal rule is of bail and not jail. Apart from above, Court has to keep in mind nature of accusations, nature of evidence in support thereof, severity of the punishment, which conviction will entail, character of the accused, circumstances which are peculiar to the accused involved in that crime.

8. The Apex Court in **Prasanta Kumar Sarkar** versus **Ashis Chatterjee and another** (2010) 14 SCC 496**,** has laid down the following principles to be kept in mind, while deciding petition for bail:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

(v) character, behaviour, means, position and standing of the accused;

(vi) likelihood of the offence being repeated;

(vii) reasonable apprehension of the witnesses being influenced; and

(viii) danger, of course, of justice being thwarted by grant of bail.

9. In view of above, bail petitioner has carved out a case for grant of bail and as such, present petition is allowed and order dated 12.12.2018 is made absolute subject to petitioner furnishing fresh bail bonds in the sum of Rs.1,00,000/- (Rs. One Lakh) with two local sureties in the like amount, to the satisfaction of the Investigating Officer, besides the following conditions:

(a). He shall make himself available for the purpose of interrogation, if so required and regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

(b). He shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

(c). He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer; and

(d). He shall not leave the territory of India without the prior permission of the Court.

(e). He shall surrender passport, if any, held by her.

10. It is clarified that if the petitioner misuses the liberty or violates any of the conditions imposed upon him or fails to join the investigation, the investigating agency shall be free to move this Court for cancellation of the bail. It is also clarified that the instant order has been passed in the facts and circumstances, which are peculiar to the bail petitioner only and as such, same may not be treated as a precedent for other accused.

11. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition alone.

The petition stands accordingly disposed of.

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

Smt. Anita ...Petitioner

Versus

Sh. Balbir Singh ...Respondent

CMMO No. 258 of 2017
Decided on: December 24, 2018

Constitution of India, 1950 - Article 227 - **Code of Civil Procedure, 1908 -** Section 24 - Transfer of complaint - Petitioner seeking transfer of complaint filed by her under Protection of Women from Domestic Violence Act, 2005 from Court of Additional Chief Judicial Magistrate, Shimla to Court of JMIC, Nadaun, District Hamirpur - On facts, petitioner having two minor children - Found residing in her parental house in District Hamirpur - Difficult for her to attend hearing at Shimla leaving her minor children at Hamirpur - Held,

convenience of wife to be considered over and above inconvenience of husband - Petition allowed - Complaint ordered to be transferred from Court at Shimla to Court at Nadaun, Hamirpur. (Paras 5, 6 & 7)

Family Courts Act, 1984 - Section 10 - Proceedings through video conferencing - Held, in transfer application High Court cannot direct Family Court to conduct proceedings via video conferencing – It lies within discretion of Family Court whether or not to conduct proceedings through video conferencing. (Paras 11 & 12)

Cases referred:

Arti Rani alias Pinki Devi and another vs. Dharmendra Kumar Gupta, (2008) 9 SCC 353

Krishna Veni Nagam vs. Harish Nagam, (2017) 4 SCC 150

Kulwinder Kaur alias Kulwinder Gurcharan Singh vs. Kandi Friends Education Trust and others, (2008) 3 SCC 659

Rajani Kishor Pardeshi vs. Kishor Babulal Pardeshi, (2005) 12 SCC 237

Urvashi Rana vs. Himanshu Nayyar, Latest HLJ 2016(HP) 925

For the petitioner: Mr. Ashok K. Tyagi, Proxy Counsel.

For the respondent: Mr. Naresh K. Sharma, Proxy Counsel.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition filed under S.24 of the Code of Civil Procedure read with Art. 227 of the Constitution of India, prayer has been made to transfer complaint No. 39-3 of 2014 titled **Smt. Anita** vs. **Sh. Balbir Singh**, filed under the provisions of the Protection of Women from Domestic Violence Act, 2005, from the court of learned Additional Chief Judicial Magistrate, Court No.1, Shimla to any competent court of law at Nadaun, Hamirpur, Himachal Pradesh.

2. Facts, unfolding from the petition, are that marriage of petitioner and respondent was solemnized in the year 2001 as per Hindu rites and customs at Hamirpur and out of marriage, two children namely Kumari Simran and Master Sumit are stated to have been born to the parties. It is alleged that 3-4 months after the marriage, respondent started maltreating the petitioner. Petitioner is stated to be residing at Hamirpur in her paternal house after December, 2014, when she was forced to move out of the matrimonial house at Shimla. Further, vide order dated 6.4.2016, an interim maintenance of `2,000/- to the petitioner and `1500/- each to the minor children has been granted by the court of learned Additional Chief Judicial Magistrate, court No.1.

3. Subject matter of the present controversy is a complaint having been filed by the petitioner under the provisions of the Protection of Women from Domestic Violence Act, 2005 in the court of learned Additional Chief Judicial Magistrate, Court No.1, Shimla, i.e. Complaint No. 39-3 of 2014, against the respondent and which was lastly listed on 19.6.2017.

4. Learned proxy counsel representing the petitioner, in support of his aforesaid contentions also placed reliance upon the judgment rendered by this Court in **Urvashi Rana** versus **Himanshu Nayyar,** (CMPMO No. 177 of 2016) decided on 15.7.2016, reported in **Latest HLJ 2016(HP) 925**, to demonstrate that convenience of wife is required to be considered over and above the inconvenience of the husband.

5. Aforesaid judgment passed by this Court is based upon law laid down by the Hon'ble Apex Court in various cases, wherein it has observed that wife's convenience is required to be considered over and above the inconvenience of the husband.

6. In **Rajani Kishor Pardeshi** versus **Kishor Babulal Pardeshi**, (2005) 12 SCC 237, Hon'ble Apex Court has held that convenience of wife is of prime consideration.

7. Similarly, Hon'ble Apex Court in **Kulwinder Kaur alias Kulwinder Gurcharan Singh** versus **Kandi Friends Education Trust and others,** (2008) 3 SCC 659, has laid down parameters for transferring the cases i.e. balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceedings, etc. While laying aforesaid broad parameters, Hon'ble Apex Court has further held that these are illustrative in nature and by no means can be taken to be exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a 'fair trial', in the Court from which he/she seeks to transfer a case, it is not only the power, but the duty of the Court to make such order. The Hon'ble Apex Court has held as under:

> "23. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts. They are balance of convenience or inconvenience to the plaintiff or the defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; "interest of justice" demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a "fair trial" in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order."

8. Similarly, Hon'ble Apex Court in **Arti Rani alias Pinki Devi and another** versus **Dharmendra Kumar Gupta**, (2008) 9 SCC 353, while dealing with a petition preferred by wife for transfer of proceedings on the ground that she was having minor child and it was difficult for her to attend the Court at Palamu, Daltonganj, which was in the State of Jharkhand and at a quite distance from Patna, where she was now residing, with her child, ordered transfer of proceedings taking into consideration convenience of wife.

9. In the case at hand, facts, as have been discussed above, which have not been refuted, clearly reveal that at present, petitioner resides at Hamirpur, in her paternal house. Similarly, there appears to be no dispute with regard to petitioner having two minor children and it can be presumed that it is difficult for the petitioner to attend each and every hearing at Shimla, leaving her minor children at Hamirpur.

10. During proceedings of the case, attention of this Court was invited to the judgment passed by Hon'ble Apex Court in **Krishna Veni Nagam** versus **Harish Nagam**, (2017) 4 SCC 150, wherein Hon'ble Apex Court has held as under:

> "We are of the view that if orders are to be passed in every individual petition, this causes great hardship to the litigants who have to come to this Court. Moreover in this process, the matrimonial matters which are required to be dealt with expeditiously are delayed. In these circumstances, we are prima facie of the view that we need to consider whether we could pass a general order to the effect that in case where husband files matrimonial proceedings at place where wife does not reside, the court concerned should entertain such petition only on the condition that the husband makes appropriate deposit to bear the expenses of the wife as may be determined by the Court. The Court may also pass orders from time to time for further deposit to ensure that the wife is not handicapped to defend the proceedings. In other cases, the husband may take proceedings before the Court in whose jurisdiction the wife resides which may lessen inconvenience to the parties and avoid delay. Any other option to remedy the situation can also be considered.
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> 17. We are thus of the view that it is necessary to issue certain directions which may provide alternative to seeking transfer of proceedings on account of inability of a party to contest proceedings at a place away from their ordinary residence on the ground that if proceedings are not transferred it will result in denial of justice.
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> 18. We, therefore, direct that in matrimonial or custody matters or in proceedings between parties to a marriage or arising out of disputes between parties to a marriage, wherever the defendants/respondents are located outside the jurisdiction of the court, the court where proceedings are instituted, may examine whether it is in the interest of justice to incorporate any safeguards for ensuring that summoning of defendant/respondent does not result in denial of justice. Order incorporating such safeguards may be sent along with the summons. The safeguards can be:-
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> i) Availability of video conferencing facility.
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> ii) Availability of legal aid service.
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> iii) Deposit of cost for travel, lodging and boarding in terms of Order XXV CPC.
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> iv) E-mail address/phone number, if any, at which litigant from out station may communicate."

11. Recently, the Hon'ble Apex Court in Transfer Petition (Civil) No. 1278 of 2016, titled **Santhini** versus **Vijaya Venketesh**, has overruled the judgment passed in **Krishna Veni Nagam** versus **Harish Nagam**, (2017) 4 SCC 150 (Supra). Relevant paras of aforesaid latest judgment are reproduced below:

> "51. In this context, we may refer to the fundamental principle of necessity of doing justice and trial in camera. The nine-Judge Bench in Naresh Shridhar Mirajkar and Ors v. State of Maharashtra and Anr.46, after enunciating the universally accepted proposition in favour of open trials, expressed:-

> "While emphasising the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it. If a Judge trying a cause is satisfied that the very purpose of finding truth in the case would be retarded, or even defeated if witnesses are required to give evidence subject to public gaze, is it or is it not open to him in exercise of his inherent power to hold the trial in camera either partly or fully? If the primary function of the court is to do justice in causes brought before it, then on principle, it is difficult to accede to the proposition that there can be no exception to the rule that all causes must be tried in open court. If the principle that all trials before courts must be held in public was treated as inflexible and universal and it is held that it admits of no exceptions whatever, cases may arise where by following the principle, justice itself may be defeated. That is why we feel no hesitation in holding that the High Court has inherent jurisdiction to hold a trial in camera if the ends of justice clearly and necessarily require the adoption of such a course. It is hardly necessary to emphasise that this inherent power must be exercised with great caution and it is only if the court is satisfied beyond a doubt that the ends of justice themselves would be defeated if a case is tried in open court that it can pass an order to hold the trial in camera; but to deny the existence of such inherent power to the court would be to ignore the primary object of adjudication itself. The principle underlying the insistence on hearing causes in open court is to protect and assist fair, impartial and objective administration of justice; but if the requirement of justice itself sometimes dictates the necessity of trying the case in camera, it cannot be said that the said requirement should be sacrificed because of the principle that every trial must be held in open court."

52. The principle of exception that the larger Bench enunciated is founded on the centripodal necessity of doing justice to the cause and not to defeat it. In matrimonial disputes that are covered under Section 7 of the 1984 Act where the Family Court exercises its jurisdiction, there is a statutory protection to both the parties and conferment of power on the court with a duty to persuade the parties to reconcile. If the proceedings are directed to be conducted through videoconferencing, the command of the Section as well as the spirit of the 1984 Act will be in peril and further the cause of justice would be defeated.

53. A cogent reflection is also needed as regards the perception when both the parties concur to have the proceedings to be held through videoconferencing. In this context, the thought and the perception are to be viewed through the lens of the textual context, legislative intent and schematic canvas. The principle may had to be tested on the bedrock that courts must have progressive outlook and broader interpretation with the existing employed language in the statute so as to expand the horizon and the connotative expanse and not adopt a pedantic approach.

54. We have already discussed at length with regard to the complexity and the sensitive nature of the controversies. The statement of law made in Krishna Veni Nagam (supra) that if either of the parties gives consent, the case can be transferred, is absolutely unacceptable. However, an exception can be carved out to the same. We may repeat at the cost of repetition that though the principle does not flow from statutory silence, yet as we find from the scheme of the Act,

the Family Court has been given ample power to modulate its procedure. The Evidence Act is not strictly applicable. Affidavits of formal witnesses are acceptable. It will be permissible for the other party to cross-examine the deponent. We are absolutely conscious that the enactment gives emphasis on speedy settlement. As has been held in Bhuwan Mohan Singh (supra), the concept of speedy settlement does not allow room for lingering the proceedings. A genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to bring in a settlement or to arrive at a solution of the lis, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. Therefore, we are disposed to think that once a settlement fails and if both the parties give consent that a witness can be examined in video conferencing, that can be allowed. That apart, when they give consent that it is necessary in a specific factual matrix having regard to the convenience of the parties, the Family Court may allow the prayer for videoconferencing. That much of discretion, we are inclined to think can be conferred on the Family Court. Such a limited discretion will not run counter to the legislative intention that permeates the 1984 Act. However, we would like to add a safeguard. A joint application should be filed before the Family Court Judge, who shall take a decision. However, we make it clear that in a transfer petition, no direction can be issued for video conferencing. We reiterate that the discretion has to rest with the Family Court to be exercised after the court arrives at a definite conclusion that the settlement is not possible and both parties file a joint application or each party filing his/her consent memorandum seeking hearing by videoconferencing.

55. Be it noted, sometimes, transfer petitions are filed seeking transfer of cases instituted under the Protection of Women from Domestic Violence Act, 2005 and cases registered under the IPC. As the cases under the said Act and the IPC have not been adverted to in Krishna Veni Nagam (supra) or in the order of reference in these cases, we do intend to advert to the same.

56. In view of the aforesaid analysis, we sum up our conclusion as follows :-

(i) In view of the scheme of the 1984 Act and in particular Section 11, the hearing of matrimonial disputes may have to be conducted in camera.

(ii) After the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.

(iii) After the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.

(iv) In a transfer petition, video conferencing cannot be directed.

(v) Our directions shall apply prospectively.

(vi) The decision in Krishna Veni Nagam (supra) is overruled to the aforesaid extent"

12. Accordingly, perusal of aforesaid judgment clearly suggests that in a transfer petition, video conferencing cannot be directed and hearing of matrimonial disputes is

required to be conducted in camera. In the aforesaid judgment, Hon'ble Apex Court has further held that after the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer, but in transfer petition, video conferencing can not be directed.

13. This Court, after having taking note of the aforesaid grounds raised in the instant petition coupled with the law on the point, as has been laid down by the Hon'ble Apex Court as well as this Court, sees no impediment in transferring the complaint filed under the provisions of the Protection of Women from Domestic Violence Act, 2005 from Shimla to Hamirpur. Accordingly, this court deems it fit to transfer complaint No. 39-3 of 2014 titled **Smt. Anita** vs. **Sh. Balbir Singh**, filed under the provisions of the Protection of Women from Domestic Violence Act, 2005, from the court of learned Additional Chief Judicial Magistrate, Court No.1, Shimla to Judicial Magistrate 1st Class, Nadaun, Hamirpur, Himachal Pradesh. Ordered accordingly. However, observations made herein above shall have no bearing on the merits of the complaint in question, which shall be decided on its own merit, in accordance with law.

14. Learned counsel for parties undertake to cause presence of their clients before the learned Judicial Magistrate 1st Class, Nadaun, Hamirpur on **11.1.2019** Learned Additional Chief Judicial Magistrate, Court No.1, Shimla shall transfer the record of the aforesaid complaint to the Court of learned Judicial Magistrate 1st Class, Nadaun, Hamirpur, Himachal Pradesh, forthwith, to enable it to proceed further with the matter.

15. Registry to send copy of instant judgment to the learned Additional Chief Judicial Magistrate, Court No.1, Shimla as well as learned Judicial Magistrate 1st Class, Nadaun, Hamirpur, Himachal Pradesh, forthwith, to enable them to do the needful well within stipulated time.

16. In view of above, the present petition is disposed of, alongwith pending applications, if any.

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

Col. Surender Singh Multani (Retd.) .....Appellant/defendant.

Versus

Mrs. Vaneeta Jain and others .....Respondents/Plaintiffs.

FAO No. 194 of 2018.
Reserved on : 26th December, 2018.
Decided on : 31st December, 2018.

Code of Civil Procedure, 1908 - Order XLI Rules 23, 23-A, 25 & 26 – Remand - Additional issues- Framing of at appellate stage - Procedure thereafter - Held, when first Appellate Court frames additional issues omitted to be framed by trial court, it is required to remit matter to trial court for findings only on additional issues after recording evidence and hearing parties - Trial court is to return such evidence to Appellate Court along with its findings - Party aggrieved by findings of trial court on additional issues is entitled to file objections thereto. (Para 9)

For the Appellant: Mr. Neeraj Gupta, Advocate.
For Respondents No.1 to 3: Mr. N.K. Bhalla and Mr. Dalip K. Sharma, Advocate.
Respondents No. 4 and 5 already ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, is, directed against the verdict rendered by the learned District Judge (Forest), Shimla, upon, Civil Appeal RBT No. 23-S/13 of 2017/14 on 21.03.2018, wherethrough, he proceeded to after striking, the hereinafter ad verbatim extracted issues No. 1(a) and 7-A, hence make an order of remand, upon, the learned trial Court, (a) upon, his invoking, the, mandate of Order 41, Rule 23-A of the CPC, (b) AND with a peremptory direction, upon, it to render a decision afresh, upon, civil suit No. 14-1 of 2014/1985, (c) given his concluding qua infraction, vis-a-vis, mandate of Order 20, Rule 5 of the CPC, rather standing apparently sparked:-

> " Issue No. 1(a):
>
> Whether the value of the property in question was Rs.20 lacs at the time parties enter into an agreement for its sale. If so, what is its effect on the enforcement of the said agreement?.....OPD
>
> Issue No.7-A
>
> Whether the suit is bad for misjoinder of parties, i.e. plaintiff NO.2, who has been joined with malafide intention?OPD."

2. In the plaintiffs' suit for rendition of a decree for specific performance of contract/ agreement hence executed on 26.03.1982, and, on the pleadings of the parties, this Court, upon, institution of the apt civil suit initially, before, this Court, had, on 10.03.1986, framed, the hereinafter extracted issues:-

1. Whether the parties entered into an agreement of sale with respect to the suit property according to the terms and conditions given in para 3 of the amended plaint? OPP
2. Whether fraud and pressure was exercised on the defendant and there is no valid agreement between the parties?OPD.
3. Whether the plaintiff has been and is willing to perform his part of the contract?OPP
4. Whether the time was the essence of the contract? OPD.
5. Whether the defendant is bound to obtain the permission of the competent authority under the provisions of Himachal Pradesh Tenancy and Land Reforms Act for transfer of the suit property as also no objection certificate from the Income tax authorities?OPP.
6. Whether the plaintiff is estopped from filing the present suit due to his acts, conduct and acquiescence?OPD.
7. Whether the plaintiff is entitled to a decree for specific performance? If so, in which form? OPP
8. Relief.

The learned trial Court, after, making a conclusion qua there existing interconnectivity, and, interlinkage inter se all the afore formulated issues, thereafter clubbed all the afore issues, and, rendered common findings, upon, each of them, (a) and, for requisite reasons hence rendered disaffirmative findings, upon issue No.1, 3, 5 and 7, (b)and, rendered affirmative findings, upon, issues No.2 and 4. Being aggrieved therefrom, the plaintiffs instituted, an appeal before the learned First Appellate Court, and, the latter Court hence proceeded to render the impugned verdict.

4. The learned counsel appearing, for, the aggrieved therefrom defendant, and, the learned counsel appearing for the plaintiff, (i) respectively make vehement espousals before this Court, for, hence, invalidating or validating the impugned verdict, (ii) and, concomitantly also respectively hence espoused qua the appropriate course, for, adoption, by the learned First Appellate Court being one comprised in Order 41, Rule 25 of the CPC, and, one embodied, in, the mandate borne in Order 41, Rule 23-A, CPC hence being meritworthy.

5. Before proceeding to dwell into, and, mete an adjudication, upon, the afore espousals made before this Court, by the learned counsel for the contesting litigants, (a) it is deemed incumbent to render a verdict, vis-a-vis, the necessity at all, of, framing of the afore issue No.7-A. The afore framed issue, appears, to stand formulated, hence under the impugned verdict, by the learned First Appellate Court, upon, its being grossly unmindful, vis-a-vis, an order pronounced by this Court, on 6.5.1992, (b) wherein, a graphic disclosure, is, borne qua in the amended plaint, only, the name of plaintiff Shri Jawahar Lal Jain hence occurring, and, yet in the written statement, as well, as, in the replication thereto, as, filed by the plaintiff, a, reference also being made to original plaintiff No.2 M/s Punjab Concast Steel Ltd, (c) and, upon the counsels respectively appearing for the contesting litigants, hence, making a conjoint address before this Court qua th afore occurrence, in, the plaint, vis-a-vis, the name of M/s Punjab Concast Steel Ltd., original plaintiff No.2, rather arising from, a mere sheer inadvertence, and, it being ignored, (d) thereupon, this Court accepting the afore espousal, hence, the learned First Appellate Court, was enjoined to revere the afore mandate pronounced, by this Court, on 6.5.1992, than, to proceed to strike issue No.7-A supra. Consequently, the formulation, by the learned First Appellate Court, of, afore issue No.7-A, and, any direction made by it, upon, the learned trial Court, for, rendering findings thereon, is wanting in legality, and, hence, the afore issue is rendered redundant, and, also concomitantly, no findings are required to be rendered thereon, hence, by the learned trial Court.

6. Nowat, the core controversy engaging the contesting litigants, devolves upon, the trite factum qua the learned first Appellate Court, validly recoursing Order 41, Rule 23-A of the CPC, or whether the apt recoursing(s) rather being the one ordained, in, Order 41, Rule 25 of the CPC. Before proceeding to rest the afore legal conundrum, it is significant to bear in mind (a) that, the striving(s) of the learned counsel, hence, appearing for the respondents herein, for, his rather validating the impugned verdict, is, squarely rested, upon, the learned First Appellate Court, rather making a valid conclusion qua the learned trial Court, hence, committing an illegality in its clubbing or consolidating, all the afore issues, and, also its concomitantly rendering common findings thereon, (b) AND hence, thereupon, its making deep pervasive infraction(s), vis-a-vis, the mandate borne in Order 20, Rule 5, of, the CPC, provisions whereof stand extracted hereinafter:-

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

A plain reading of the hereinabove extracted provisions borne, in, Order 20, Rule 5 of the CPC, (c) though, does visibly bring forth, a noticeable, and, evident factum, of, a statutory injunction being cast, upon, the civil court concerned, to, render findings upon each of the issue(s), struck, upon, the contentious pleadings, of, the contesting litigants, (d) yet the afore peremptory injunction cast, upon, the civil courts concerned, is, with a rider qua, (e) unless recording, of, findings upon one or more issues, rather being sufficient for the decision, of, the suit. However, the afore provisions, as stand alluded, in the impugned verdict, by the learned First Appellate Court, in its hence recoursing the mandate embodied in Order 41, Rule 23-A, of the CPC, appear(s) to stand sparked, by, a gross mistaken dependence being made thereon, (f) given the afore exception, to, the dire legal necessity cast, upon, the civil court concerned, to render findings upon each of the issue(s), and, imperatively rather with the afore exception becoming activated rested, upon, any returning, of, a finding, upon, any issue rather being construed by the court concerned, to be sufficient, for, hence making, of, a valid pronouncement, vis-a-vis, the fate of the case, (g) obviously, being required to read in tandem, with, the mandate of Order 14, Rules 1 and 2 of the CPC, provisions whereof stand extracted hereinafter, (f) necessarily for begetting an apt inter se harmony, and, also for obviating both being not rendered redundant.

> "1. Framing of issues
>
> (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.
>
> (2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.
>
> (3) Each material proposition affirmed by one-party and denied by the other shall form the subject of distinct issue.
>
> (4) Issues are of two kinds:
>
> (a) issues of fact,
>
> (b) issues of law.
>
> (5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and [71][after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.
>
> (6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.
>
> [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.]"

A close and incisive reading, of, the hereinabove extracted mandate, as, encapsulated in Order 14, Rule 2 of the CPC, (i) makes vivid upsurgings qua the civil court concerned, being enjoined to pronounce judgment, on all issues, yet, upon, the civil court concerned, rather making an objective discerning qua the lis, being aptly terminable, upon, findings being rendered, upon, an issue appertaining to law, specifically appertaining qua (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force, (ii) thereupon, it being a valid befitting endeavour, for, hence the learned trial Court, to, hence after framing the afore issue(s) of law, rather render findings thereon, for hence ensuring termination, of, lis , and, also obviously hence, being empowered, to, postpone the settlement of, or, formulation of issues of fact. However, even the afore mandate, as, encapsulated in the provisions supra, borne in the CPC are unamenable, for, recoursing by the learned counsel, for the respondents, for his hence striving, to, validate the impugned pronouncement, (iii) given this Court, at the apt stage, of its, rather holding the apposite pecuniary jurisdiction, hence to try the suit, it formulating all issues of fact, and, of law, and, obviously when within, the, domain of sub-rule (2) to Rule 2, of, Order 14 of the CPC, (iv) no apt issues of law were either struck nor formulated, nor hence obviously when there was any postponement of formulation of issues appertaining to the contested facts, arising, from the pleadings, as, respectively reared by the contesting litigants, (v) thereupon, it was imperative for the learned trial Court, to not segregate the issues of fact, from the issues of law, nor hence, it was legally befitting, for, the learned trial Court to pronounce verdicts only, upon, issues appertaining, to law, and, to omit to render findings, upon, the factually contested issues, rather in the learned trial Court rendering findings upon issues of fact, and, upon, purported issues of law, has obviously not committed hence any gross illegality or impropriety.

7. However, the afore making, of, a combined reading, of, the afore exception, vis-a-vis, the mandate borne, in Order 20, Rule 5 of the CPC, wherein, in, the opening part thereof, a strict injunction is cast, upon, the civil courts concerned, to, decide each issue separately, and, also to render separate findings, upon, each issue, AND, with the mandate of Order 2, Rule 14 of the CPC. (i) It is evident qua hence for ensuring harmony inter se the afore provisions, that, the exception borne in Order 20, Rule 5 of the CPC, RATHER being recourseable, only upon emergences, of, the gravest exceptional circumstance, (ii) AND comprised, in, existence, of, forthright evidence qua the suit hence being barred by limitation or by law pronounced, by the Hon'ble Apex Court, and, only upon the afore exceptional contingencies rather evidently arising, (iii) thereupon, any non rendition of findings, by the learned trial Court, upon, the, issues appertaining to the contested facts, being, hence being legally worthy, given theirs being rendered redundant.

8. Be that as it may, a circumspect, and, deep reading of the afore provisions, does not apparently, bar the learned trial Court, to, upon its making an objective discernment, qua there being, a, visible interconnectivity inter se, the, formulated or struck issues, to hence, proceed to render common findings, upon, each of them (a) nor a surgical reading of the afore provisions, forbids, the, civil court concerned to club or consolidate, all, interlinkable or inconnected issues. However, the afore interconnectivity or inter-reliability, has, rather to be evident, and, also all the evidently interconnected or interlinked issues, are also required, to be hence thereon rather returned findings, (i) AND a stark illegality would arise, only, upon, evidently interconnected or interlinkable issues rather remaining unanswered or no findings standing recorded thereon. Bearing in mind the afore principle of law, as innately encapsulated, in the provisions supra, and, when all the issues, whereon

hence common findings are rendered, are evidently, and, apparently mutually interconnected, (ii) and, also when, they are also validly consolidated, thereupon, the learned trial Court, upon, its considering all the evidence apposite to each of the consolidated issue(s), and, thereafter it proceeding to render findings, upon, each of them, (iii) rather thereupon, foster(s) an inference qua it being unshakeably clear, that, the injunction supra cast, upon, the learned trial court, to, render findings, upon, each issue(s) standing neither breached nor infracted, whereupon, the strivings, of, the learned counsel, for, the respondent, is hence invalidated.

9. The effect of the afore discussion, necessarily brings to, the fore, the validity of recoursing, by the learned first appellate court, vis-a-vis, the mandate of Order 41, Rule 23-A of the CPC, or whether it was rather befitting for the learned first Appellate Court, to, recourse the provisions of Order 41, Rule 25 of the CPC. For determining the afore trite conundrum, it is imperative, to extract hereinafter, the, provisions of Order 41, Rule 23-A of the CPC, and, the provisions of Order 41, Rule 25 of the CPC:-

> "**23-A Remand in other cases.**-Where the Curt from whose decree an appeal is preferred has disposed of the case otherwise than one a preliminary pint, and, the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23.
>
> **25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from**.- Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and, refer the issue for trial to the court from whose decree and appeal is preferred and in such case shall direct such court to take the additional evidence required;
>
> and such court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time]."

A surgical reading, vis-a-vis, the mandate of Order 41, Rule 23-A hence brings forth rather upsurgings (i) qua upon the learned First Appellate Court, upon, noticing qua the learned trial Court hence omitting to frame or strike any issue(s) appertaining to the fact(s) or to law, (ii) whereas, both whereof hence appear to the learned first Appellate Court, rather essential, for, arriving at a valid decision, upon, the merits of the suit, (iii) thereupon, the learned First Appellate Court being empowered to frame apt therewith issues, and, to refer them to the learned trial Court, for, their trial, and, thereafter, it being also empowered to make an order of remand, to, the learned trial Court concerned, to, within a time bound period, hence, make a decision upon the relevant issues. However, it is also apparent, on, a reading of Order 41, Rule 25 of the CPC, (iv) qua upon the learned First Appellate Court, hence, within its ambit rather making an order of remand, vis-a-vis, the learned trial Court, to render findings, upon, the, issues formulated by the former Court, it, also being legally empowered, to, make a direction upon it, to, after receiving the apt evidence thereon, to also render apt findings thereon,(v) AND, for facilitating the afore statutory purpose(s), its also transmitting its verdict, wherethrough, hence, the apt remanded issues stand remitted, vis-a-vis, the learned first Appellate Court, (vi) imperatively, hence, the, innate subtle nuance thereof, is qua, the learned First Appellate Court, rather maintaining the appeal on its docket, and, after, the, order of remand, hence, being complied with by the learned trial Court concerned, thereupon, the, Appellate Court, within the ambit of Order 41, Rule 26 of the CPC,

provisions whereof stand extracted hereinafter, (vii) hence permitting the apposite aggrieved, to, within the time fixed by it, hence, prefer objections therebefore, against, the findings rendered, upon, the relevant issues, by the learned trial Court, (viii) conspicuously upon, the latter receiving them on remand, from, the first Appellate Court, provisions of Order 41, Rule 26 read as under:-

> "**26. Findings and evidence to be put on record-**objections to finding.- (1) Such evidence and findings shall form part of the record in the suit; and, either party may, within a a time to be fixed by the Appellate Court, present a memorandum of objection to any findings.
>
> (2) Determination of appeal- After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal."

10. The learned counsel appearing for the appellant has contended, that, the afore recoursing, was both valid and appropriate, than the recorusings, by the learned First Appellate, vis-a-vis, the mandate of Order 41, Rule 23, of, the CPC, provisions whereof stand extracted hereinafter:-

> "**23. Remand of case by Appellate Court.**
>
> Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may if it thinks fit, by order remand the case, and may further direct what issue or issues shall e tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, by evidence during the trial after remand."

(i) given any adherence to the mandate, of, the hereinabove extracted provisions of CPC, being sparked, only upon, a gross legal misdemeanor being visibly committed by the learned trial court, (ii) comprised in its proceeding to terminate the lis, upon, its recording findings, upon, a preliminary point, despite all issues, of, fact, and, of law being conjointly tried, (iii) AND hence it invalidly segregating issues, of fact, and, of law, and, also upon hence its making hence proceedings outside the domain of the afore grave exceptional contingency(ies), (iv) and, upon, the afore manner of termination of lis, by the learned trial Court, being frowned, upon, by the learned First Appellate Court, (v) thereupon, the latter Court, being also empowered to make an order of remand, upon, the learned trial Court to record findings, upon, a, specific issue, or issues, (vi) and, thereafter the learned First Appellate Court being further empowered, to, mete a direction, upon, the remandee court, to, readmit the suit, in, the relevant register, and, to proceed to determine the suit afresh, and, obviously hence a denovo trial, of, the suit, being an apt dire legal necessity. (vii) Since, the afore parameters, are, unsatiated by the verdict rendered by the learned trial Court, (viii) thereupon, the afore espousal made before this Court, by the learned counsel appearing for the appellant, is, both apt as well as legally sound, (ix) reiteratedly given the verdict appealed before the learned First Appellate Court, rather making an evident display qua the learned trial Court not terminating the lis, upon, any preliminary point, (x) thereupon, it was misbefitting, for the learned First Appellate Court, to, obviously hence make an order, of, wholesale remand also to hence order for an impermissible denovo trial of the civil suit. Contrarily, the recoursing by the learned first Appellate Court, vis-a-vis, the mandate of Order 41, Rule 25 of the CPC, was rather, both befitting and appropriate,

whereas, failure of recoursing thereto, is both inapt and illegal, thereupon, the impugned verdict suffers, from, an inherent legal fallacy.

11. For the foregoing reasons, the instant appeal is allowed and the impugned verdict is modified, in, the afore terms. The learned trial Court is directed, to, within a period of three months from 27th February, 2019, render findings only upon issue No.1(a) supra, and, the learned First Appellate Court is directed to within the ambit of Rule 25, Order 41 of the CPC, maintain, the record of the civil appeal in its docket, and, after the learned trial Court within the afore period, renders hence findings, upon, the afore issue, the learned First Appellate Court, is, directed to, within the ambit of Order 41, Rule 26 of the CPC, permit the aggrieved therefrom, to, within a specified period hence rear objections, in, civil appeal No. 23-S/13 of 2017/14 (Old No.22-S/13 of 2014), to maintained on its docket, by the learned First Appellate Court. The parties are directed to appear before the learned trial Court on 27th February, 2019. All pending applications also stand disposed of. No order as to costs. Apposite records be sent back forthwith, to the ld. trial Court, and, to the learned First Appellate Court.

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

Kanwar Amardeep Singh ....Petitioner.
Versus
State of Himachal Pradesh ....Respondent.

Cr.M.P(M) No. 1578 of 2018
Decided on : 17.12.2018

Code of Criminal Procedure, 1973 – Section 438 **–** Pre-arrest bail – Grant of – Accused seeking pre arrest bail in case registered against him of offence of rape – Victim a married lady – Continuously resided with accused for three months during which she had physical relations with him – Her continuous liaison with accused cannot be under his allurement to marry her – Accused fully cooperated with investigating officer and got recovered Laptop – Custody not required by police for further investigation - Bail granted subject to conditions. (Paras 3 to 5)

For the Petitioner: Mr. Tanuj Thakur, Advocate.
For the Respondent-State: Mr. Hemant Vaid, Additional Advocate General with Mr. Vikrant Chandel and Mr. Yudhveer Singh Thakur, Deputy Advocate Generals.
SI Devi Singh, I/O P.P City Bilaspur in person.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition, stands instituted by the bail petitioner, under, Section 438 Cr.P.C, wherethrough, he seeks grant of anticipatory bail qua him, given his apprehending his arrest, for his allegedly committing offence punishable, under Section 376

of Indian Penal Code, in case FIR No. 25/18 of 30.10.2018 registered with WPS Una District Una, Himachal Pradesh.

2. The Investigating Officer SI Suman Sharma, Police Station Woman, Una, is present in Court, and, has made a disclosure before this Court, that, the petitioner has enabled effectuation of recovery of laptop. She further submits that the accused had rendered to her, his fullest cooperation.

3. Be that as it may, the prosecutrix is a married lady aged about 37 years and is mothering a daughter aged about 6 ½ years, begotten from her marriage with one Mannu Sharma. A perusal of status report, discloses that she had for a continuous period of three months resided, at the home of the accused/bail applicant, and, throughout the afore period she was subjected to repeated sexual intercourse, by the bail applicant, under, pretext(s) of marriage proffered to her, by the bail applicant. The succumbing(s) of the prosecutrix to the sexual overtures, of the bail applicant, under, pretext(s) of marriage proffered, to her by the latter, would hold sway, only upon, the bail applicant after subjecting her to a singular or may be a couple of sexual intercourse, his, thereafter resiling therefrom, (a) and, obviously the effect of rather repeated succumbing(s) of the prosecutrix, under, purported repeated allurement(s), of, marriage meted by the accused to the prosecutrix, (b) begets, a, conclusion that, all the repeated sexual intercourse perpetrated, upon her person, by the bail applicant, being, not under any pretext of or allurement of marriage, proffered to her, by the bail applicant.

4. Consequently, and, further given the bail applicant, hence, rendering the fullest cooperation to the Investigating Officer, and, also with investigations into the alleged offences, being complete, besides when at this stage, no material stands placed by the prosecution, demonstrating, that in the event of bail being granted to the bail applicant, there being every likelihood of his fleeing from justice or tampering with prosecution evidence, thereupon this Court is, hence, constrained to afford, the facility of bail, in favour of the bail applicant.

5. Accordingly, the indulgence of bail is granted to the bail applicant, and, the order rendered on 20.11.2018 is confirmed, on, the following conditions:-

1. That he shall join the investigation, as and when required by the Investigating agency;
2. That he shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the Police;
3. That he shall not leave India without the previous permission of the Court;
4. That he shall deposit his passport, if any, with the Police Station, concerned;
5. That in case of violation of any of the conditions, the bail granted to the petitioner shall be forfeited and he shall be liable to be taken into custody;
6. That he shall apply for bail afresh when the challan is filed before the trial Court.

6. In view of above, petition stands disposed of. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

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

State of H.P. .....Appellant.
Versus
Bisham Singh & another .....Respondents.

Cr. Appeal No. 299 of 2007
Decided on : 17.12.2018

Indian Penal Code, 1860 – Sections 323, 325 and 506 – Grievous injuries and criminal intimidation – Proof – Accused prosecuted before court on allegations that they made assault on complainant 'VN' with dandas, caused grievous injuries and also intimidated him - Trial court convicting accused but Sessions Judge setting aside conviction and acquitting them in appeal – Appeal against – On facts, dispute between parties pertained to land - Possession of land with accused – In order to take possession forcibly, complainant made an assault upon accused – Held, complainant initiator of aggression - Injuries, if any, caused to complainant in exercise of private defence of person as well as property by accused – No reason to interfere with acquittal – Appeal dismissed- Acquittal upheld. (Paras 9, 11 & 12)

For the Appellant: Mr. Hemant Vaid, Additional Advocate General.
For the Respondents: Mr. Peeyush Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed by the State of Himachal Pradesh, against, the impugned judgment, of, 18.5.2007, rendered by the learned Special Judge, Shimla upon Criminal Appeal No. 51-s/10 of 2006, and, upon Criminal Appeal No. 52-s/10 of 2006, wherethrough the learned Special Judge, Shimla, while setting aside the judgment of conviction, rather acquitted the respondents herein of the charges framed against them.

2. Brief facts of the case are that complainant Vijay Nand, lodged a rapat Ex. PW-6/A on 12.5.2005, at Police Post Chirgaon, Tehsil Rohru, to the effect that he is an agriculturist and resident of village Dungyali. He has his agricultural land at Kalidhar. His daughter-in-law Negapati had gone on the previous day to said land for work. When she returned to home in the evening, she informed the complainant that wheat crop which had been sown in the afore land had been uprooted by accused Bhisham Singh and his family members. The complainant in the morning of May 12,2005, went to the spot at about 7.30 a.m. alongwith Main Ram, member Gram Panchayat and two other respectable persons. Accused Bhisham Singh, his wife Sushma Devi, his son Hans Raj and his sister came there. The complainant started talking to them about the mischief. In the meantime accused

Bhisham Singh gave a danda blow on the right arm and other persons gave beatings with fists and leg blows. Accused Sushma Devi also assaulted the complainant with a danda. He was saved by Main Ram and Fina Dass etc. The complainant sustained injuries on all over his body. Upon such report formal FIR Ex. PW-7/E was registered. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared against Bhisham Singh, Sushma Devi, respondents herein and Prabha Devi and Hans Raj and the same was filed in the Court.

3. The accused were charged by the learned trial Court for theirs committing offence punishable, under, Sections 323, 325 and 506 readwith Section 34 of Indian Penal Code, to which they pleaded not guilty, and, claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded, wherein, they pleaded innocence. In defence, they examined DW-1 Vijay Singh.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the respondents Bhisham Singh, and, his wife Sushma, respondents herein, vis-a-vis the offences charged. However, the learned trial Court returned findings of acquittal, in favour of Hans Raj, and, Prabha Devi. The respondents herein being aggrieved by the afore judgment of conviction rendered by the learned trial Court hence preferred appeal(s) before the learned Special Judge, Shimla. The learned Special Judge, Shimla, while setting aside the judgment of conviction recorded by the learned trial Court, returned findings of acquittal, in their favour.

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

7. The learned counsel appearing for the respondents, has with, considerable force and vigor contended qua the findings of acquittal recorded by the Court below, standing based, on a mature and balanced appreciation of evidence on record, and, theirs not necessitating any interference, rather theirs meriting vindication.

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

9. The charge appears to be proven by the respective depositions, as, rendered qua the occurrence, by PW-1 Vijay Nand, PW-2 Surender Singh, PW-3 Gulab Singh, and, PW-4 Main Ram. The depositions of the afore PWs, are, bereft of any taint of any intra-se contradictions, inter-se, their respective examinations-in-chief, vis-a-vis, their respective cross examinations', (i) and, also are bereft of any gross inter-se contradictions, nor, their depositions are ingrained with any vice of gross embellishments, vis-a-vis, their respectively recorded previous statements in writing. Consequently, even if, the afore rendered statements by the afore PWs, are not hence tainted with any of the afore stains, and, (ii) hence even when their purported interestedness, may also not rather subside the potency of their testifications hence rendered with inter-se corroboration, (iii) and also when each of the PWs, denied, the defences' propagation qua the complainant hence holding possession of the contentious parcel, of, land, (iv) and for hence usurping possession thereof rather the accused launching an assault upon him, (v) nonetheless with PW-7, the, Investigating

Officer, during, the course of his being subjected to cross-examination, by the learned defence counsel, hence acquiescing to a suggestion, put thereat to him, qua his during the course of his holding investigations' rather making unearthings qua the complainant, for, usurping possession of the contentious parcel of land, as held, by the accused, his rather proceeding to launch an assault upon the accused, (vi) suggestion whereof begot an affirmative answer, (vii) does fillip an inference qua the accused hence proving their espousal qua the injuries, if any, which stood inflicted, on the person of the complainant hence being inflicted, during, the course of their allegedly exercising the right of private defence of body, and, of property. Thereupon, a further inference arises qua the complainant being the initiator of the aggression, and, wherefrom a further sequel also arises qua the accused being entitled to exercise, both, right of private defence of property, and, of person.

10. Be that as it may even if certain injuries were purportedly sustained by the complainant, and, as stand embodied in PW-8/A, proven by PW-8, and, also when under PW-1/A, both Ex. P-1 and Ex.P-2 were handed over, by the complainant, to the Investigating Officer concerned, (i) however for the reasons to be assigned hereinafter, even the afore evidence does not support, the contention of the learned Additional Advocate general qua, thereupon, the prosecution proving the charge against the accused, given, (a) the MLC comprised in Ex.PW-8/A standing prepared on 12.5.2005, and, Ex. PW-1/A being prepared two days subsequent thereto, (b) thereupon hence when at the time of the Doctor concerned, holding the medical examination of the complainant, was obviously not shown, the weapon of offence, nor, with the afore dandas standing shown to him, during, the course of his being examined in Court, (c) rather when during the course of his cross-examination, he has ventilated qua the injuries occurring in the MLC being causable by fall, on a hard surface, and, all the injuries being not possible by a single fall, on a hard surface, thereupon it is possible to infer, that, the afore weapon(s) of offence, rather remaining unconnected with the injuries, disclosed in PW-8/A.

11. In view of the above, this Court does not deem it fit and appropriate, that, the findings of acquittal recorded by the learned Special Judge, Shimla hence meriting any interference.

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

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

H.P.S.E.B and another ..Petitioners.
Versus
Lal Singh ..Respondent.

CWP No. 432 of 2016 a/w
CWP No. 1104,433, 434 and
437 of 2016.
Reserved on : 21.12.2018.
Decided on : 31.12.2018.

Constitution of India, 1950 - Article 226 – Writ jurisdiction – Exercise of - Judgment of Hon'ble Single Bench – Challenge thereto – Whether can be challenged by way of Writ ? – Held- No - Hon'ble Single Bench setting aside award of Labour Court and directing employer to reinstate workmen within two months of judgment - No LPAs instituted by employer against judgment of Hon'ble Single Bench – Employer filing Writ petitions for challenging verdict – Further, held, Writ petitions challenging judgment of Hon'ble Single Bench not maintainable - Petitions dismissed. (Paras 5 & 6)

For the Petitioners: Mr. Vikrant Thakur, Advocate.
For the Respondents: Mr. Mohar Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The hereinafter extracted reference(s), stood, transmitted to the Labour Court-cum-industrial Tribunal, Dharamshala (for short "the Labour Court") hence for an apt answer being meted thereon:-

in CWP No. 432 of 2016

"Whether termination of the services of Sh. Lal Singh S/o Sh Narain Singh R/o Village Sihri, P.O Gohar, Tehsil Chachot, Distt. Mandi, H.P. by the Sr. Executive Engineer, HPSEB (Elect.) Division Gohar, Distt. Mandi (H.P.) w.e.f 16.3.2000 without issuing charge sheet without conducting enquiry and without complying with the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, what amount of back wages, seniority, past service benefits, the above workers are entitled to from the above employer?"

in CWP No. 1104 of 2016

"Whether verbal termination of the services of Shri Bhim Singh S/o Shri Natoram Singh, w.e.f 25.5.1999 by the Executive Engineer, HPSEB, Electrical Division, Mandi, H.P without serving notice, without conducting enquiry and without following the provisions of the Industrial Disputes Act, 1947, as alleged by workman, is legal and justified? If not, to what back wages, service benefits and relief the above named workman is entitled to from the employer?"

in CWP No. 433 of 2016

"Whether termination of the services of Sh. Shyam Singh S/o Sh Swaru Ram R/o Village Dadoun, P.O Cheuni, Tehsil Thunag, Dist. Mandi, H.P.,by the Sr. Executive Engineer, HPSEB (Elect.) Division Gohar, Distt. Mandi (H.P.) w.e.f 16.3.2000 without issuing charge sheet without conducting enquiry and without complying with the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, what amount of back wages, seniority, past service benefits, the above workers are entitled to from the above employer?"

in CWP No. 434 of 2016

"Whether verbal termination of the services of Shri Bahadur Singh S/o Shri Narain Singh, daily wage workman by the Executive Engineer, HPSEB, Division Gohar, Distt. Mandi, H.P. w.e.f 16.3.2000 without serving

notice and without complying with the provisions of the Industrial Disputes Act, 1947 is legal and justified? If not, to what back wages, service benefits and relief the above named workman is entitled to?"

CWP No. 437 of 2016

"Whether termination of the services of Sh. Chhaje Ram S/o Shri Dagnu Ram by the Executive Engineer, H.P.S.E.B Division, Gohar, Distt. Mandi, H.P w.e.f 22.2.1996, without complying the provisions of Industrial Disputes Act, 1947 is legal and justified? If not, what amount of back wages, seniority, past service benefit and compensation the above worked is entitled from the employer?"

2. The Labour Court in decision(s) recorded on 17.1.2013, on 11.12.2012, and, on 19.11.2012, upon, the respective reference(s), rather thereon meted an answer in the affirmative, and, proceeded to order for re-reinstatement in service of the respondent(s) herein. The respondents herein were also held entitled to the benefit of seniority and continuity in service, from, the date of their illegal termination. However, relief of back wages was declined to the workman concerned.

3. The H.P.S.E.B, being aggrieved therefrom, preferred CWP No. 3087 of 2013, alongwith other connected CWPs before this Court. The afore writ petitions stood decided under a common verdict recorded, thereon, on, 19.10.2013 whereunder, the apt reference petitions were remanded, to the Labour Court, for, making a decision upon the issue appertaining, to, delay and laches, given, the Principal Bench of this Court, while meting a decision upon the afore writ petitions, concluding qua the afore issue, being decided, in a perfunctory manner, and, upon the Labour Court, hence, misconstruing and misreading, the, decision recorded by the Hon'ble Apex Court in case Ajaib Singh Versus Sirhind Cooperative Marketing-cum-Processing Service Society Limited and another, reported in (1999) 6 SCC 82.

4. The Labour Court, on, receiving the apt reference(s), on remand, vis-a-vis it, and, after consideration of the material on record, and, after making an apt ad nauseam allusion, to, a verdict made upon Reference No. 41/2001 (RBT No. 403/04) titled as Sh. Hari Singh vs. The Secretary, Irrigation & Public Health, Government of H.P., Shimla, and, vis-a-vis a decision recorded in case titled as H.P State Forest Corporation versus Presiding Judge, Labour Court, Shimla and another, 2012 (133) FLR 684, besides, upon a decision rendered in Assistant Engineer, Rajasthan State Agriculture Marketing Board, Sub-Division, Kota versus Mohan Lal, Civil Appeal No. 6795 of 2013, decided on 16th August, 2013, and, with the afore decision(s) hence expostulating a clear proposition of law, that, (a) the controversy vis-a-vis any claim petition being gripped with a vice of delay and laches, rather being amenable for consideration, at the time of granting of relief, to the aggrieved workman, (b) that the Labour Court, even, after it hence proceeding to render an apt answer, upon, the afore controversy, it, after bearing in mind the apt parameters borne therein, and, upon its hence, proceeding to set aside the termination of the workmen, it, also hence being empowered to grant a befitting molded relief vis-a-vis the aggrieved workmen, (c) thereupon in consonance therewith, the learned Labour Court hence, upon, a consideration of evidence, appertaining to the employers' espousal, qua, the claim being time barred, had, rendered an answer, vis-a-vis, the employer, and, also proceeded, to, respectively, vis-a-vis, the apt workman hence accord the relevant compensation, borne in the sum(s) of Rs. 10,000/- and Rs. 20,000/- upon the respective reference(s).

5. Be that as it may this Court, upon, being seized with writ petition(s) No. 399, 613, 400, 398 and 614 of 2014, as stood instituted herebefore, by the aggrieved workmen,

hence quashed and set aside the award of 18.12.2013, to the extent it decided afresh issue N.3. However, a further direction was also made, upon, the respondents/employer, (i) for reinstating the employee(s), within, a period of two months, from the date of the pronouncement of judgment, (ii) yet with a rider couched in the phraseology " *If in operation, the respondents shall implement the awards by inter-alia, reinstating the employee within a period of two months from today"*, the afore rider estopped the employer, to, deny relief of reinstatement in service granted, vis-a-vis, the workmen in the afore CWP(s), (iii) however the effect of the afore rider obviously rather stood waned, and, subsumed upon elapse of two months therefrom, (iv) and conspicuously upon the employer, within the afore period, rather through an LPA constituted before the Principal Division Bench of this Court, hence striving to seek an order for staying the operation of the afore verdict, made, by this Court, upon, the afore writ petitions. However, the afore recourses' by the employer rather remained un-availed, thereupon the operation and clout, of, the afore mandate, continued to be binding upon the employer. Even if the principal Division Bench of this Court made an order, on 3.3.2016, hence for staying the operation, of, the impugned awards, respectively borne in (Annexure P-5 and in Annexure P-7), and, with liberty to the workman, to, seek alteration/modification thereof, yet with the workmen, though, not seeking modification, variation thereof, whereupon, it may be prima-facie concludable qua the rider borne in paragraph 9, of, the judgment pronounced by this Court on 24.7.2015, prima-facie outliving its vigor, (v) however, the afore non-recourse(s), by the workmen, does not strip the vigor of the mandate pronounced, by this Court, as embodied, in, the verdict recorded on 24.7.2015, (vi) given this Court fixing a period of two months, for, the employer, to, hence reinstate the employee(s) in service, (vii) and, when the employer neither constituted any LPA therefrom, before the Division Bench of this Court, (viii) rather, the employer much belatedly, from, a period of two months, prescribed in the judgment aforesaid, hence filing the afore CWP, (ix) and, without, any averment being borne therein, for, assailing the findings rendered thereupon, nor, the employer making any prayer for quashing the aforesaid verdict, (x) rather estops the appellants herein to seek quashing of Annexure(s) P-5 and of P-7. Consequently, the order rendered by this Court, upon, the afore CWPs, does, for all the afore reasons, hold binding and conclusive effect, and, the respondents are directed to put the same into operation.

6. In view of above, the present writ petitions are dismissed, alongwith all pending applications.

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

State of Himachal Pradesh & anr. .....Appellant.

Versus

Dr. Amar Nath & ors. .....Respondents.

LPA No. 69 of 2012.
Decided on: 28.12.2018.

Constitution of India, 1950- Articles 14 & 16 - Service law- Promotion- Review DPC- Convening of – Permissibility - Government creating posts of Sub-Divisional Ayurvedic Chakishta Adhikaris (SDACA) and promoting Ayurvedic Chakishta Adhikaris to such posts

on ad-hoc basis purely on seniority with rider that it would not confer any right to seek regular promotion - No R&P Rules in existence to fill posts of SDACA - Petitioner retiring in between on 31-10-2000 and filing writ in High Court on allegations that his promotion was intentionally delayed - Hon'ble Single Judge allowing writ and ordering Review DPC with all consequential benefits – LPA - Held, posts were newly created and no Rules for filling up such posts in existence – R & P Rules amended thereafter and notified on 05-12-2000 - Posts could have been filled only on finalization of R&P Rules - Rule making takes time and it is essential – No intentional delay in promotion of petitioner - Judgment of Hon'ble Single Judge directing review DPC not justified - LPA allowed - Judgment of Hon'ble Single Judge set aside.(Paras 6 to 8)

For the appellant(s): Mr. J.S.Guleria Dy. AG and Kunal Thakur, Dy. AG.
For the respondents: Mr. Rajiv Jiwan, Advocate, for respondent No. 1.
Mr. Lokinder Paul Thakur, Sr. Panel Counsel for respondent No. 2.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Respondents No. 1 & 2-State in CWP(T) No. 8257 of 2008, aggrieved by the judgment dated 15.10.2011 passed by learned Single Judge are in appeal.

2. The complaint is that learned Single Judge has failed to appreciate the response to the Writ Petition filed on their behalf in its right perspective. While admitting that the respondent-writ petitioner was working as Ayurvedic Chikitsa Adhikari, it is denied that his promotion as Sub Divisional Ayurvedic Chikitsa Adhikari was delayed intentionally, deliberately and in violation of Article 14 and 16 of the Constitution of India as according to the appellants-respondents, 36 posts of **Sub Divisional Ayurvedic Chikitsa Adhikari** were created vide notification dated 10.12.1998. Simultaneously, equal number of posts of Sub Divisional Ayurvedic Chikitsa Adhikari were also filled up by abolishing equal number of posts of Ayurvedic Chikitsa Adhikaris. Since in the Recruitment & Promotion Rules, no provision was there qua filling up the newly created posts of Sub Divisional Ayurvedic Chikitsa Adhikaris, therefore, a decision was taken to promote the Ayurvedic Chikitsa Adhikaris purely on adhoc basis/as a stop gap arrangement with the stipulation that such promotion will not confer any right upon them to seek regular promotion and seniority. In this regard, Notification dated 24.4.1999 can be pressed into service. In this way, 36 Ayurvedic Chikitsa Adhikaris were promoted as Sub Divisional Ayurvedic Chikitsa Adhikaris purely on adhoc basis and as a stop gap arrangement purely on the basis of their seniority. The Departmental Promotion Committee (DPC) meeting could only be convened to fill up these posts on regular basis after the provisions in the Rules made on 7.11.2000 i.e. after the retirement of the petitioner on 31.10.2000 on attaining the age of superannuation.

3. Learned Single Judge has not appreciated the case so pleaded by the appellants-respondents in reply filed to the writ petition on their behalf. Learned Single Judge allegedly erred in law while directing the appellants to consider the case of the petitioner for promotion to the post of Sub Divisional Ayurvedic Chikitsa Adhikari by holding review DPC with all consequential benefits as any such direction could have not been issued because in case the review DPC is held, it is likely to result in multiplicity of litigation and laying a precedent that the government servant even after retirement may also claim their promotion that too when they have no legal right for the same as in the case in hand. It is

also submitted that the promotion cannot be claimed as a matter of right but is subject to the administrative discretion based upon availability of posts and fulfillment of other mandatory requirements like sanction of competent authority to fill up the same, availability of service records and Recruitment & Promotion Rules etc. In the case in hand, meeting of DPC was convened on 13.9.2001 to fill up the posts in question on regular basis and on that day, the respondent had already retired from service. The impugned judgment, as such, has been sought to be quashed and set aside.

4. This matter was heard previously on 20.11.2018 for some time. The order passed on that day reads as follows:

> "Heard for some time. In order to verify the factual position as to whether the Ayurvedic Medical Officer(s), 36 in number, promoted on adhoc basis in the year 1999 were senior or junior to the appellant, record be produced on the next date. List on 27.11.2018."

5. The record, however, could be produced for perusal of this Court on 13.12.2018 when after hearing this matter further, it was observed as under:

> "Heard further. The record produced pursuant to the order passed on 20.11.2018, suggests that no Ayurvedic Chikitsa Adhikaries junior to the writ petitioner-respondent herein was promoted in the year 1999. Ayurvedic Chikitsa Adhikaries were promoted as Sub Divisional Ayurvedic Chikitsa Adhikari purely on adhoc basis/stop gap arrangement with the stipulation that promotion does not confer any right upon them in order to seek regular promotion and seniority. Therefore, the grievance of the writ petitioner that juniors were promoted in the year 1999, is not correct.
>
> Learned counsel representing respondent No.1 seeks adjournment so as to enable him to have instructions. Allowed. List for further hearing on 28th December, 2018. Record be also produced on the date fixed."

6. Today, when the matter is taken up for further consideration, learned counsel representing the respondent-writ petitioner has failed to point out from the record that persons junior to the petitioner were promoted on adhoc basis as Sub Divisional Ayurvedic Chikitsa Adhikaris in the year 1999 after the creation of 36 posts in this cadre. We have perused the record and also the orders of promotion made in the year 1999 and find that no person junior to the writ petitioner was promoted as Sub Divisional Divisional Ayurvedic Chikitsa Adhikari. The posts were newly created, therefore, the response of respondents-appellants that no rules governing the procedure to be followed for filling up such posts were in existence is absolutely justified. It is not that after creation of these posts, the respondent-State remained slept over the matter indefinitely because the existing rules were amended and the amendment notified on 5.12.2000. It is only thereafter these posts could have been filled up in accordance with R & P Rules on regular basis and the writ petitioner if eligible and in the zone of consideration as per rules considered. However, by that time, the petitioner had already retired on 31.10.2000, after attaining the age of superannuation. The rules were amended in a period about one year. In our opinion, keeping in view lengthy process and various sanctions are required before the rules are finalized and notified, this much time was essentially required for the purpose. The present, as such, is not a case where the department has delayed the finalization of the rules and held the meeting of Departmental Promotion Committee (DPC) late intentionally and deliberately to the detriment of the petitioner. The findings so recorded by learned Single Judge, as such are neither legally nor factually sustainable.

7. True it is that a government servant has legitimate expectation of being considered for promotion, however, in the case in hand, no occasion arose to the writ petitioner during his tenure as Ayurvedic Chikitsa Adhikari for promotion to the post of Sub Divisional Ayurvedic Chikitsa Adhikari, now nomenclature as Sub Divisional Ayurvedic Medical Officer because he stood retired on attaining the age of superannuation well before the Rules came into existence. The judgment of the Hon'ble Apex Court relied upon by learned Single Judge in the given facts and circumstances of this case is also not applicable. Learned Single Judge rather has assumed and presumed so many things even if not borne out from the records.

8. The respondents-appellants are absolutely justified in claiming that a direction to convene the meeting of review DPC after the retirement of a government servant would result in multiplicity of litigation and also laying a bad precedent as in that event a person who stood retired from the service may come forward and claim promotion retrospectively on coming into force the rules or happening of any other eventuality. Learned Single Judge has failed to take into consideration this aspect of the matter and swayed with the submissions made on behalf of the petitioner that the process to convene DPC was delayed intentionally and deliberately which, to our mind are not correct because in the case in hand, R & P Rules could only be framed after superannuation of the petitioner from service. There is no delay qua making provisions under the R & P Rules for promotion to the posts in question and even there is no delay also to convene the meeting of DPC also. However, unfortunately, the petitioner had not been left with sufficient tenure for being considered against the newly created posts of Sub Divisional Ayurvedic Chikitsa Adhikari later on re-designated as Sub Divisional Ayurvedic Medical Officer in the year 1999 as he stood retired from service within one year i.e. on 31.10.2000 thereafter.

In view of the foregoing reasons, this appeal succeeds and the same is accordingly allowed. Consequently, the impugned judgment is quashed and set aside and the writ petition dismissed.

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

The New India Assurance Company .... Appellant-Respondent
Versus
Smt.Kala Devi & Others .... Respondents-Claimants

FAO No.344 of 2017
Date of decision: 17.04.2018

Motor Vehicles Act, 1988- Section 166 - Motor accident - Claim application - Compensation under conventional heads - Claims Tribunal allowing application of legal representatives of deceased and awarding compensation to tune of Rupees one lac each under heads 'Loss of love and affection', 'loss of consortium' and 'loss of estate' - Appeal against - Held, head relating to 'loss of care and guidance' for minor children does not exist - No compensation can be awarded towards loss of love and affection - Compensation awarded under other conventional heads also brought in tune with **National Insurance Company Limited vs. Pranay Sethi and Others, AIR 2017 SC 5157.** (Paras 10 & 11)

Motor Vehicles Act, 1988 - Motor accident - Claim application – Compensation - Future prospects - Self employed person - Held, in case of self-employed person or person on fixed

salary aged below 40 years, increase of 40% towards future prospects can only be given - Appeal partly allowed - Award modified. (Paras 12 & 16)

Cases referred:

Laxmidhar Nayak and Others vs. Jugal Kishore Behera and Others in Civil Appeal No.19856 of 2017 (arising out of SLP(C) No.31405 of 2016)

National Insurance Company Limited vs. Pranay Sethi and Others, AIR 2017 SC 5157

Rajesh and Others vs. Rajbir Singh and Others, (2013)9 SCC 54

For the Appellant:	Mr.B.M.Chauhan, Advocate.
For Respondent No.1:	Mr.Romesh Verma, Advocate.
For Respondents No.2&3:	Ms.Bhavita Kumari, Advocate vice Mr.Subhash Mohan Sanhi, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant appeal emanates from award dated 30.5.2017 passed by Motor Accident Claims Tribunal-II, Kinnaur at Rampur Bushahr, H.P. in MAC Petition No.56-R/2 of 2015, whereby petition under Section 166 of the Motor Vehicles Act having been filed by respondents No.1 to 3 *(hereinafter referred to as the 'claimants'),* seeking therein compensation on account of death of Ved Prakash came to be allowed.

2. On 19th July, 2014 persons; namely; Mast Ram and Ved Prakash had hired vehicle bearing No.HP-06A-4287 from Rampur to Gaura Mashnoo, to carry welding machine and other welding material. Unfortunately, when vehicle reached near Rattanpur at about 6.00 P.M., it met with an accident, as a result of which both the occupants of the vehicle; namely Mast Ram and Ved Prakash, died on the spot. Driver of the offending vehicle also died on the spot. In the aforesaid background, claimants, claiming themselves to be the dependants of deceased Ved Prakash, filed claim petition, seeking therein compensation to the tune of Rs.50 lacs on account of death of deceased Ved Prakash.

3. Appellant-Insurance Company refuted the claim of the claimants and claimed before Tribunal below that offending vehicle was being driven in violation of terms and conditions of the insurance policy. Appellant-Insurance Company also claimed that driver of the vehicle was not having valid and effective driving licence and as such it is not liable to indemnify the insured.

4. Though respondent No.4 i.e. owner of the vehicle, claimed that the vehicle in question was comprehensively insured with respondent No.1, but categorically stated that monthly income of deceased Ved Prakash as reflected in claim petition has been exaggerated to claim higher compensation.

5. Learned Tribunal below, on the basis of evidence led on record by respective parties, allowed the claim petition vide award dated 30.5.2017 and held respondents-claimants entitled to the compensation to the tune of Rs.17,65,000/- alongwith interest @ 9% per annum from the date of filing of petition till final realization of amount.

6. In the aforesaid background, appellant-Insurance Company, being aggrieved and dissatisfied with the impugned award, has approached this Court with a prayer to set aside the same.

7. Mr.B.M. Chauhan, learned counsel representing the appellant-Insurance Company, vehemently argued that impugned award is against law and facts and, as such, is liable to be set aside. While referring to the impugned award, Mr.Chauhan made an attempt to persuade this Court to agree with his contention that Tribunal below, while accepting the claim petition having been filed by the claimants, has failed to appreciate the evidence in its right perspective, as a consequence of which erroneous findings to the detriment of appellant-Insurance Company have come on record. Mr.Chauhan contended that learned Tribunal below, while deciding issue No.1, has erroneously held that accident occurred because of rash and negligent driving by the driver of the offending vehicle. While placing reliance upon judgment rendered by Hon'ble Apex Court in ***National Insurance Company Limited vs. Pranay Sethi and Others, AIR 2017 SC 5157***, Mr.Chauhan contended that learned Tribunal below has erred in law in awarding 50% increase over and above the income assessed by it to assess future prospects. He further contended that in terms of aforesaid judgment passed by Hon'ble Apex Court, no amount, if any, could be awarded under the head of *"love and affection"* and, as such, award made in this regard deserves to be quashed and set aside. Mr.Chauhan also stated that in terms of judgment rendered by Hon'ble Apex Court in ***Pranay Sethi's*** case *supra* only an amount of Rs.40,000/- could be awarded on account of "loss of consortium" to the wife of the deceased, whereas, in the instant case, an amount of Rs.1,00,000/- has been awarded under this head. Mr.Chauhan further contended that learned Tribunal has erred in awarding Rs.25,000/- on account of funeral expenses and a sum of Rs.1,00,000/- on account of loss of estate to the respondents-claimants, whereas, in the instant case, in terms of ***Pranay Sethi's*** case *supra*, only a sum of Rs.15,000/- could be awarded, on account of funeral expenses and Rs.15,000/- on account of loss of estate.

8. Ms.Bhavita Kumari, learned counsel representing the respondents supported the impugned award and contended that there is no illegality and infirmity in the impugned award and as such same deserves to be up held. Learned counsel, while inviting the attention of this Court to evidence led on record by respective parties, strenuously argued that the appellant-Insurance Company has miserably failed to prove its case and as such award being strictly in consonance with evidence as well as law needs to be upheld. While referring to the quantum of compensation, learned counsel contended that it stands duly proved on record that deceased was earning Rs.8,000/- per month and, as such, there is no force in the arguments of learned counsel appearing for the appellant-Insurance Company that learned Tribunal below wrongly made addition @ 50% while computing future prospectus. However, learned counsel representing the respondents-claimants fairly conceded that claimants are entitled to Rs.15,000/- on account of funeral expenses and Rs.40,000/- on account of loss of consortium. However, learned counsel representing respondents-claimants No.1 to 3 categorically disputed the contention put forth by learned counsel representing the appellant-Insurance Company that no amount could be allowed to the respondents-claimants on the head of "loss of love and affection".

9. Having heard learned counsel representing the parties and perused the record, this Court is not inclined to agree with the submissions having been made by learned counsel representing the appellant-Insurance Company that learned Tribunal below erred in concluding that deceased Ved Prakash died in accident due to rash and negligent driving of driver of the offending vehicle. Similarly, this Court finds from the evidence led on record by the respective parties that onus to prove that the deceased driver of the offending vehicle was not possessing valid and effective driving license at the time of accident was upon appellant-Insurance Company, who has not been able to discharge the aforesaid onus, rather it stands duly proved on record that Amar Singh i.e. driver of the offending vehicle was having valid and effective driving licence.

10. Having carefully perused the judgment rendered by Hon'ble Apex Court in ***Pranay Sethi's*** case *supra,* this Court is persuaded to agree with the contention of Mr.B.M. Chauhan, learned counsel representing the appellant-Insurance Company that no money could be awarded under the head *"loss of love and affection"* by the Tribunal below while assessing the compensation on account of death of deceased Ved Prakash. Hon'ble Apex Court in the judgment *supra* has categorically held that head relating to *"loss of care and guidance for the minor children"* does not exist. As per judgment passed by Hon'ble Apex Court, there are only three conventional heads i.e. *"loss of estate, loss of consortium and funeral expenses".* Amounts payable under aforesaid heads have further been quantified in the judgment. At this stage, it would be profitable to take note of the following paras of ***Pranay Sethi's*** case supra:

> ***"47. In our considered opinion, if the same is followed, it shall subserve the cause of justice and the unnecessary contest before the tribunals and the courts would be avoided.***
>
> ***48. Another aspect which has created confusion pertains to grant of loss of estate, loss of consortium and funeral expenses. In Santosh Devi (supra), the two-Judge Bench followed the traditional method and granted Rs. 5,000/- for transportation of the body, Rs. 10,000/- as funeral expenses and Rs. 10,000/- as regards the loss of consortium. In Sarla Verma, the Court granted Rs. 5,000/- under the head of loss of estate, Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of Consortium. In Rajesh, the Court granted Rs. 1,00,000/- towards loss of consortium and Rs. 25,000/- towards funeral expenses. It also granted Rs. 1,00,000/- towards loss of care and guidance for minor children. The Court enhanced the same on the principle that a formula framed to achieve uniformity and consistency on a socio-economic issue has to be contrasted from a legal principle and ought to be periodically revisited as has been held in Santosh Devi (supra). On the principle of revisit, it fixed different amount on conventional heads. What weighed with the Court is factum of inflation and the price index. It has also been moved by the concept of loss of consortium. We are inclined to think so, for what it states in that regard. We quote:-***
>
> > ***"17. ... In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non- pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be***

proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium."

49. Be it noted, Munna Lal Jain (supra) did not deal with the same as the notice was confined to the issue of application of correct multiplier and deduction of the amount.

50. This aspect needs to be clarified and appositely stated. The conventional sum has been provided in the Second Schedule of the Act. The said Schedule has been found to be defective as stated by the Court in Trilok Chandra (supra). Recently in Puttamma and others v. K.L. Narayana Reddy and another38 it has been reiterated by stating:-

"... we hold that the Second Schedule as was enacted in 1994 has now become redundant, irrational and unworkable due to changed scenario including the present cost of living and current rate of inflation and increased life expectancy."

51. As far as multiplier or multiplicand is concerned, the same has been put to rest by the judgments of this Court. Para 3 of the Second Schedule also provides for General Damages in case of death. It is as follows:-

"3. General Damages (in case of death): The following General Damages shall be payable in addition to compensation outlined above:-

(i) Funeral expenses - Rs. 2,000/-

(ii) Loss of Consortium, if beneficiary is the spouse – - Rs. 5,000/-

(iii) Loss of Estate - Rs. 2,500/-

(iv) Medical Expenses – actual expenses incurred before death supported by bills/vouchers but not exceeding – Rs. 15,000/-"

52. On a perusal of various decisions of this Court, it is manifest that the Second Schedule has not been followed starting from the decision in Trilok Chandra (supra) and there has been no amendment to the same. The conventional damage amount needs to be appositely determined. As we notice, in different cases different amounts have been granted. A sum of Rs. 1,00,000/- was granted towards consortium in Rajesh. The justification for grant of consortium, as we find from Rajesh, is founded on the observation as we have reproduced hereinbefore.

53. On the aforesaid basis, the Court has revisited the practice of awarding compensation under conventional heads.

54. As far as the conventional heads are concerned, we find it difficult to agree with the view expressed in Rajesh. It has granted Rs. 25,000/- towards funeral expenses, Rs. 1,00,000/- loss of consortium and Rs. 1,00,000/- towards loss of care and guidance for minor children. The head relating to loss of care and minor children does not exist. Though Rajesh refers to Santosh Devi, it does not seem to follow the same. The conventional and traditional heads, needless to say, cannot be determined on percentage basis because that would not be an acceptable criterion. Unlike determination of income, the said heads have to be quantified. Any quantification must have a reasonable foundation. There can be no dispute over the fact that price index, fall

in bank interest, escalation of rates in many a field have to be noticed. The court cannot remain oblivious to the same. There has been a thumb rule in this aspect. Otherwise, there will be extreme difficulty in determination of the same and unless the thumb rule is applied, there will be immense variation lacking any kind of consistency as a consequence of which, the orders passed by the tribunals and courts are likely to be unguided. Therefore, we think it seemly to fix reasonable sums. It seems to us that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The principle of revisiting the said heads is an acceptable principle. But the revisit should not be fact-centric or quantum-centric. We think that it would be condign that the amount that we have quantified should be enhanced on percentage basis in every three years and the enhancement should be at the rate of 10% in a span of three years. We are disposed to hold so because that will bring in consistency in respect of those heads.

55. ***Presently, we come to the issue of addition of future prospects to determine the multiplicand.***

56. ***In Santosh Devi the Court has not accepted as a principle that a self-employed person remains on a fixed salary throughout his life. It has taken note of the rise in the cost of living which affects everyone without making any distinction between the rich and the poor. Emphasis has been laid on the extra efforts made by this category of persons to generate additional income. That apart, judicial notice has been taken of the fact that the salaries of those who are employed in private sectors also with the passage of time increase manifold. In Rajesh's case, the Court had added 15% in the case where the victim is between the age group of 15 to 60 years so as to make the compensation just, equitable, fair and reasonable. This addition has been made in respect of self-employed or engaged on fixed wages.***

57. ***Section 168 of the Act deals with the concept of "just compensation" and the same has to be determined on the foundation of fairness, reasonableness and equitability on acceptable legal standard because such determination can never be in arithmetical exactitude. It can never be perfect. The aim is to achieve an acceptable degree of proximity to arithmetical precision on the basis of materials brought on record in an individual case. The conception of "just compensation" has to be viewed through the prism of fairness, reasonableness and non- violation of the principle of equitability. In a case of death, the legal heirs of the claimants cannot expect a windfall. Simultaneously, the compensation granted cannot be an apology for compensation. It cannot be a pittance. Though the discretion vested in the tribunal is quite wide, yet it is obligatory on the part of the tribunal to be guided by the expression, that is, "just compensation". The determination has to be on the foundation of evidence brought on record as regards the age and income of the deceased and thereafter the apposite multiplier to be applied. The formula relating to multiplier has been clearly stated in Sarla Verma (supra) and it has been approved in Reshma Kumari (supra). The age and income, as stated earlier, have to be***

established by adducing evidence. The tribunal and the Courts have to bear in mind that the basic principle lies in pragmatic computation which is in proximity to reality. It is a well accepted norm that money cannot substitute a life lost but an effort has to be made for grant of just compensation having uniformity of approach. There has to be a balance between the two extremes, that is, a windfall and the pittance, a bonanza and the modicum. In such an adjudication, the duty of the tribunal and the Courts is difficult and hence, an endeavour has been made by this Court for standardization which in its ambit includes addition of future prospects on the proven income at present. As far as future prospects are concerned, there has been standardization keeping in view the principle of certainty, stability and consistency. We approve the principle of "standardization" so that a specific and certain multiplicand is determined for applying the multiplier on the basis of age.

58. ***The seminal issue is the fixation of future prospects in cases of deceased who is self-employed or on a fixed salary. Sarla Verma (supra) has carved out an exception permitting the claimants to bring materials on record to get the benefit of addition of future prospects. It has not, per se, allowed any future prospects in respect of the said category.***

59. ***Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which always***

intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

60. The controversy does not end here. The question still remains whether there should be no addition where the age of the deceased is more than 50 years. Sarla Verma thinks it appropriate not to add any amount and the same has been approved in Reshma Kumari. Judicial notice can be taken of the fact that salary does not remain the same. When a person is in a permanent job, there is always an enhancement due to one reason or the other. To lay down as a thumb rule that there will be no addition after 50 years will be an unacceptable concept. We are disposed to think, there should be an addition of 15% if the deceased is between the age of 50 to 60 years and there should be no addition thereafter. Similarly, in case of self- employed or person on fixed salary, the addition should be 10% between the age of 50 to 60 years. The aforesaid yardstick has been fixed so that there can be consistency in the approach by the tribunals and the courts.

61. In view of the aforesaid analysis, we proceed to record our conclusions:-

- ***(i) The two-Judge Bench in Santosh Devi should have been well advised to refer the matter to a larger Bench as it was taking a different view than what has been stated in Sarla Verma, a judgment by a coordinate Bench. It is because a coordinate Bench of the same strength cannot take a contrary view than what has been held by another coordinate Bench.***
- ***(ii) As Rajesh has not taken note of the decision in Reshma Kumari, which was delivered at earlier point of time, the decision in Rajesh is not a binding precedent.***
- ***(iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age of 40 years, should be made. The addition should be 30%, if the***

age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax.

(iv) In case the deceased was self-employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. An addition of 25% where the deceased was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years should be regarded as the necessary method of computation. The established income means the income minus the tax component.

(v) For determination of the multiplicand, the deduction for personal and living expenses, the tribunals and the courts shall be guided by paragraphs 30 to 32 of Sarla Verma which we have reproduced hereinbefore.

(vi) The selection of multiplier shall be as indicated in the Table in Sarla Verma read with paragraph 42 of that judgment.

(vii) The age of the deceased should be the basis for applying the multiplier.

(viii) Reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. The aforesaid amounts should be enhanced at the rate of 10% in every three years."

11. While applying ratio of aforesaid law laid down by the Hon'ble Apex Court in ***Pranay Sethi's*** case *supra*, amounts awarded under the various heads i.e. funeral expenses, loss of love and affection, loss of estate and loss of consortium, need to be re-assessed. Accordingly, the amount awarded qua the funeral expenses, loss of estate and loss of consortium is modified to Rs.15,000/-, Rs.15,000/- and Rs.40,000/- instead of Rs.25,000/-, Rs.1,00,000/- and Rs.1,00,000/-, as awarded by the learned MACT below. As has been observed above, no amount, if any, could be awarded under the head "loss of love and affection" and as such, amount award qua the same is quashed and set aside.

12. Similarly, this Court finds that learned Motor Accident Claims Tribunal below, while applying the law laid down by Hon'ble Apex Court in ***Rajesh and Others vs. Rajbir Singh and Others, (2013)9 SCC 54,*** has enhanced the proved income of deceased by 50%, whereas in terms of latest judgment passed by Hon'ble Apex Court in ***Pranay Sethi's*** case *supra,* 40% additional income was required to be made in the case where deceased was self employed or on a fixed salary and was between the age of 40 to 50 years. Admittedly, in the instant case, deceased was 36 years of age and his proved income is Rs.8,000/- per month. Since he was self-employed and was below the age of 40 years, an addition of 40% of established income should have been made by Tribunal below while computing the future prospects. By enhancing income of deceased by 40% of his established income, his income comes out to Rs.11,200/- per month (Rs.8,000 + Rs.3,200 = Rs.11,200). Since deceased was having three dependants, his 1/3rd income was liable to be deducted from his income for his personal expenses, his contribution towards the family comes to Rs.7,466/- (Rs.11,200 – Rs.3,734 = Rs.7,466). After applying multiplier of 15, loss of dependency comes out to Rs.7,466 x 12 x 15 = Rs.13,43,880). In view of aforesaid

modification, claimants shall be entitled to a sum of Rs.13,43,880/- on account of loss of dependency.

13. In view of aforesaid modification made under various heads by this Court, while applying ratio of law laid down by the Hon'ble Apex Court in ***Pranay Sethi's*** case *supra*, respondents-claimants shall be entitled to the following amount:

Compensation for dependency	=	Rs.13,43,880
Funeral expenses	=	Rs. 15,000
Loss of consortium	=	Rs.40,000
Loss of estate	=	Rs.15,000
Total	**=**	**Rs.14,13,880**

14. Though, reliance placed on the judgment rendered by the Hon'ble Apex Court in ***Laxmidhar Nayak and Others vs. Jugal Kishore Behera and Others in Civil Appeal No.19856 of 2017 (arising out of SLP(C) No.31405 of 2016),*** by learned counsel representing the appellant-Insurance Company in support of his contention that learned Tribunal below has fallen in grave error while awarding 9% rate of interest to the claimants on the awarded amount, is wholly misplaced because there is no thumb rule/law that interest on the compensation/awarded amount cannot be awarded at the rate of 9%, however, in the given facts and circumstances of the case, interest awarded at the rate of 9% is modified to 7.5% and as such, claimants shall be entitled to interest at the rate of 7.5% on the awarded amount.

15. The award amount shall be apportioned among the claimants-respondents No.1 to 3 as under:-

1. Smt.Kala Devi, widow of deceased (including consortium)	:	Rs. 7,26,940
2. Smt.Himi Devi, mother of deceased	:	Rs. 4,67,120
3. Sh.Sain Ram, father of deceased	:	Rs. 2,19,820
	Total:	**Rs.14,13,880**

16. Consequently, in view of the detailed discussion made hereinabove and law laid down by the Hon'ble Apex Court, present appeal is partly allowed and the impugned award passed by the learned Motor Accident Claims Tribunal below is modified to the aforesaid extent only. Present appeal is disposed of, so also pending applications, if any.

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

Kumari Monika ....Appellant-Defendant

Versus

Baldev Raj & Others ....Respondents-Plaintiffs

Regular Second Appeal No.662 of 2008
Judgment Reserved on: 17.04.2018
Date of decision: 23.04.2018

Code of Civil Procedure, 1908 - Sections 2(2) and 96 – Decree - Held, if rights are finally adjudicated upon by court, it would assume status of 'decree' - Drawal of formal decree not necessary - Party aggrieved by such adjudication needs to challenge it by way of separate appeal - Composite appeal of defendants against decree partly decreeing suit and part dismissal of their counter-claim by trial court, not maintainable before District Judge. Defendants ought to have file separate appeals before District Judge against decree of trial court. (Paras 11-12, 40 & 43)

Cases referred:

B.S. Sheshagiri Setty and others versus State of Karnataka and others (2016)2 SCC 123
Gangadhar and another vs. Shri Raj Kumar, AIR 1983 SC 1202
Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11
Laxmidevamma and Others vs. Ranganath and Others, (2015) 4 SCC 264
Narhari and others vs. Shanker and others, AIR 1953 S.C.419
Rajni Rani and vs. Khairati Lal and Others, (2015) 2 SCC 682
Tamilnad Mercantile Bank Shareholders welfare Association(2) vs S.C.Sekar and others (2009)2 SCC 784

For the Appellant: Mr.Ajay Chandel, Advocate.
For Respondents No.1 & 2: Mr.G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the defendant-appellant against the judgment and decree dated 25.08.2008, passed by the learned Additional District Judge, Fast Track Court, Kullu, H.P., affirming the judgment and decree dated 06.11.2007, passed by the learned Civil Judge(Senior Division), Kullu, whereby the suit filed by the plaintiffs-respondents for permanent prohibitory injunction was decreed by restraining the defendants from causing any interference in any manner, whatsoever in the joint ownership and possession of the plaintiffs over the double storeyed house situated over the suit land till partition of the joint suit property. At the same time learned trial Court also decreed the counter claim filed by the defendants in the aforesaid suit for permanent prohibitory injunction by restraining the plaintiffs from carrying out any repair for construction work in the aforesaid house in dispute in any manner or change its nature in any manner till the house in dispute is partitioned in accordance with law, however dismissed the counter claim filed by the defendants for mandatory injunction.

2. The brief facts of the case are that the plaintiffs-respondents *(herein after referred to as the `plaintiffs'),* are owners in possession of the suit land as described in the plaint. It is averred in the plaint that the plaintiffs purchased two storeyed house situated on this land from Smt.Shanti Devi, as she was in exclusive possession of this property by way of family partition, and in this connection sale deed No.1947 dated 25.10,2005 was executed inter se the parties. It is further averred that the house, having been purchased by the plaintiffs, has been shown by letters "ABCD" as depicted in site plan attached with the plaint. It is further averred that the defendants are also joint owners in possession of the suit land and they have constructed two storeyed house, as has been shown by letters "DCEF" depicted in the site plan attached with the plaint, on their share after partition,

adjoining to the property in question. It is further averred that on 18.04.2006, plaintiffs started carrying out repair work of the house in question, but, defendants, who are quarrelsome persons, have started causing illegal interference in the peaceful possession of the plaintiffs qua the house in question. The plaintiffs averred that they have requested the defendants not to cause illegal interference in their ownership and possession qua the property in question, but in vain. In the aforesaid background, the plaintiffs have sought relief of permanent prohibitory injunction against the defendants to the effect that defendants be restrained from causing illegal interference in the ownership and possession of the plaintiff's qua the property in question.

3. Defendants, by way of filing written statement, refuted the claim of the plaintiffs on the ground of maintainability, *locus standi,* estoppel, and claimed that the present suit is bad for non-joinder of necessary party. They also filed counter claim against the plaintiffs. On merits, the defendants have admitted that plaintiffs are owners in possession of the suit land and two storeyed house exists on the suit land, but the defendants denied that said house was in the exclusive possession of Smt.Shanti Devi. It is averred in the written statement that predecessor-in-interest of defendants and proforma defendant, namely; Bir Singh and husband of Smt.Shanti Devi, namely; Amar Dev had been working together in Lahaul & Spiti in the same Department and they were having cordial and family relations with each other. It is averred that the said Amar Dev was sentenced to imprisonment in rape case in the year 1986-87 and he remained in jail till 1993. It is the claim of the defendants that Bir Singh purchased suit land on 24.9.1987 to the extent of half share in his name and in the name of his family members and remaining half share was purchased by him in the name of Smt.Shanti Devi and in this connection, a sum of Rs.49,500/- was paid. In the year 1989, said Bir Singh constructed two storeyed house on this land by spending huge amount. As, at the relevant time, Amar Dev husband of Smt.Shanti Devi was in jail, Bir Singh permitted Smt.Shanti Devi to live in his house as a family member without payment of rent. After the death of Bir Singh, Smt.Shanti Devi alongwith her family members continued to reside in the aforesaid house. However, in the month of August, 2005, Smt.Shanti Devi left the house and in the month of April, 2006, the defendants came to know that Smt.Shanti Devi had sold her share qua the suit land in favour of plaintiffs and the Plaintiffs started causing illegal interference in the property in question. They threatened to dispossess the defendants from the suit property. It is the claim of the defendants that the house in question is in the exclusive possession of the defendants and in this regard the plaintiffs were requested from time to time not to cause illegal interference in the peaceful possession of the defendants qua the property in question, but in vain. It is further claim of the defendants that the present suit has been filed by the plaintiffs in order to grab valuable portion of the house in question. In the aforesaid background the defendants prayed for dismissal of the suit.

4. Defendants also filed counter-claim praying therein that in case court comes to the conclusion that house in question is not in the exclusive possession of defendants and that said property is joint and un-partitioned, plaintiffs be restrained from occupying valuable portion of the house in question or damaging the walls of the house or changing the nature of the property in question or causing illegal interference in the peaceful possession of the defendants qua the house in question till this property is partitioned in accordance with law. Defendants also prayed for mandatory injunction by demolition of structure, if any, raised by the plaintiffs during the pendency of the suit over the land in question.

5. Plaintiffs filed a separate written statement qua the counter claim set up by the defendants in which the averments of the counter claim have been disputed and contents of the plaint are re-asserted.

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

"1. Whether the plaintiffs are entitled to carry out repairs in the two storeyed house situated over the suit land as prayed for? OPP.

2. Whether the plaintiffs are entitled to the relief of permanent prohibitory injunction as prayed for? OPP.

3. Whether the defendants are the absolute owners of the house situated over the suit land. If so, its effect? OPD.

4. Whether the suit is not maintainable in the present form? OPP.

5. Whether the plaintiffs have no locus standi to maintain the present suit? OPD.

6. Whether the plaintiffs are estopped by their act and conduct 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 is bad for want of necessary parties? OPD.

9. Whether the defendants are entitled to the relief of permanent prohibitory injunction against the plaintiffs by way of counter claim as prayed for? OPD.

10. In the alternative, whether the defendants are also entitled to remove and demolish the construction, if any, found to have been raised by the plaintiffs during the pendency of the present suit by way of mandatory injunction? OPD.

11. Relief."

7. Learned trial Court vide common judgment and decree dated 06.11.2007 decreed the suit of the plaintiffs for permanent prohibitory injunction to the effect that the defendants are restrained from causing any interference in any manner whatsoever in the joint ownership and possession of the plaintiffs over the double storeyed house situated over the suit land till partition of the joint suit property and at the same time also decreed the counter claim filed by the defendants in the aforesaid suit for permanent prohibitory injunction to the effect that the plaintiffs are restrained from carrying out any repair or construction work in the aforesaid house in dispute or change its nature in any manner till the house in dispute is partitioned in accordance with law, however dismissed the counter claim of the defendants for mandatory injunction.

8. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiffs was decreed and counter claim filed by the defendants-respondents was partly decreed, appellant-defendant filed an appeal under Section 96 of the Code of Civil Procedure *(for short `CPC')* read with Section 21 of the H.P. Courts Act, 1976 assailing therein judgment and decree dated 06.11.2007 passed by learned Civil Judge(Senior Division), Kullu in the Court of learned Additional District Judge, Fast Track Court, Kullu.

9. Learned Additional District Judge, Fast Track Court, Kullu vide judgment and decree dated 25.08.2008 dismissed the appeal preferred by the appellant-defendant by affirming the judgment and decree passed by the learned trial Court. Learned first appellate Court also affirmed the decreed passed by the learned trial Court in the counter claim.

10. In the aforesaid background, the present appellant-defendant filed this Regular Second Appeal before this Court, details whereof have already been given above.

11. This second appeal was admitted by this Court on 11.12.2008 on the following substantial question of law:

> *"(1) Whether the Ld.Courts below has mis-read the testimony of DW-1 Monika Kumari and thereby concluded that it appears that Shanti Devi was one of the owners of the house?"*

12. At this stage, it may be noticed that on 6th March, 2018, the matter was listed before this Court, and attention of Mr. Ajay Chandel, Advocate, representing the appellant-defendant was invited towards the judgments passed by this Court in ***RSA No.293 of 2006***, *titled as* ***Piar Chand & Others vs. Ranjeet Singh & Others*** and ***RSA No.41 of 2006,*** *titled as* **Mohan Singh vs. Inder Singh & Others,** wherein following the judgments of Hon'ble Apex Court in ***Rajni Rani and vs. Khairati Lal and Others, (2015)2 SCC 682*** and ***Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11***, this Court held that while dismissing the counter claim, Court may or may not draw a formal decree, but, if rights are finally adjudicated, it would assume the status of a decree and same needs to be laid challenge, if any, by way of filing separate appeal affixing required court fee.

13. In view of aforesaid law having been brought to the notice of Mr.Ajay Chandel, learned counsel, representing the appellant-defendant, sought time to go through the same. Thereafter, today i.e. on 17.04.2018, when the matter was listed before this Court, this Court, in view of aforesaid law having been laid down by the Hon'ble Apex Court, deemed it fit to frame additional substantial question of law for proper adjudication of the case at hand. The additional substantial question of law is as under:-

> **1. "Whether the learned First Appellate Court has erred in entertaining the composite appeal having been preferred by the appellant-plaintiff against the judgment and decree passed by learned trial Court dismissing the suit of the plaintiff and decreeing the counter claim preferred by the defendants-respondents that too without affixing separate/ requisite court fee as far as counter claim is concerned.**

14. Mr.Chandel, learned counsel representing the appellant-defendant, vehemently argued that the judgments passed by both the Courts below are not sustainable as the same are not based upon the correct appreciation of the evidence adduced on record by the respective parties and as such, same deserve to be quashed and set-aside. Mr.Chandel, further contended that bare perusal of the judgments passed by both the Courts below suggests that evidence led on record by the appellant-defendant has not been read in its right perspective and as such, great prejudice has been caused to the appellant-defendant against whom decree for permanent prohibitory injunction has been passed.

15. Mr.Chandel, while making his submission qua the additional issue having been framed by this Court, contended that genuine and legitimate claim of the appellant-defendant cannot be allowed to be defeated on mere technicalities and this Court has wide power to ignore such technicalities and can proceed ahead to decide the matter on the basis

of the evidence adduced on record by the respective parties to do substantive justice in the matter. Mr.Chandel, further claimed that the learned trial Court decreed the counter claim of the appellant-defendant and appellant-defendant rightly preferred composite appeal against the same before the learned District Judge, laying challenge therein to the composite decree passed in the suit as well as in the counter claim. He further contended that no appeal, if any, could be filed without there being any decree and as such, appellant-defendant had no option but to file composite appeal, whereby suit of the plaintiffs was decreed and counter claim of the appellant-defendant was not decreed in toto.

16. In the aforesaid background, Mr.Chandel, strenuously argued that the counter claim filed by the appellant-defendant deserves to be decreed after setting aside the judgment and decree passed by the Courts below. In support of his contention Mr. Chandel, also placed reliance on the judgments of Hon'ble Apex Court in ***Narhari and others vs. Shanker and others, AIR 1953 S.C.419, Gangadhar and another vs. Shri Raj Kumar, AIR(1983) Supreme Court 1202, Tamilnad Mercantile Bank Shareholders welfare Association(2) versus S.C.Sekar and others (2009)2 Supreme Court Cases 784 and B.S. Sheshagiri Setty and others versus State of Karnataka and others (2016)2 Supreme Court Cases 123.***

17. Mr.Chandel, learned counsel appearing for the appellant-defendant, vehemently argued that the impugned judgment and decree passed by learned first appellate is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence as well as law on point. Mr.Chandel contended that bare perusal of impugned judgment passed by learned first appellate Court suggests that the same is based on conjectures and surmises and learned first appellate Court has fallen in grave error while affirming the judgment and decree passed by the learned trial Court.

18. Mr.Chandel, forcefully contended that the courts below have mis-read and mis-appreciated the testimony of DW-1 Monika and based its findings merely on surmises, conjectures and presumptions. He further contended that the learned trial Court has wrongly and illegally returned the findings that the respondents-plaintiffs were in possession of the house in dispute. Learned counsel vehemently argued that there is ample evidence on record that Smt.Shanti Devi, who is residing alongwith the appellant-defendant as family member, had left the house in August, 2005, as such, the findings, which are against the evidence on record are liable to be set aside.

19. Mr.G.R. Palsra, learned counsel appearing for the respondents-plaintiffs, supported the judgment passed by the learned first appellate Court. Mr. Palsra, vehemently argued that bare perusal of the judgment passed by the learned first appellate Court suggests that the same is based upon the correct appreciation of the evidence adduced on record by the respective parties and as such, there is no scope of interference, whatsoever, by this Court, especially in view of the concurrent findings of fact recorded by the Court below. He further contended that the present appeal is not maintainable in view of the law laid down by the Hon'ble Apex Court in ***Rajni Rani and another vs. Khairati Lal and Others, (2015) 2 SCC 682,*** which was further followed by this Court while passing ***judgment dated 16.9.2016 in RSA No.293 of 2006.*** Mr. Palsra also placed reliance on the judgment of Hon'ble Apex Court in ***Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilala Kabrawala and others, AIR 1964 SC 11.***

20. Mr.Palsra, apart from above, also supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have meticulously dealt with each and every aspect of the matter. He also

urged that scope of interference by this Court is very limited especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

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

22. Keeping in view the specific objection with regard to maintainability having been raised by the appellant-defendant in the light of the judgment passed by the Hon'ble Apex Court, this Court deems it fit to take additional substantial question of law framed by this Court at first instance for adjudication.

23. Perusal of the counter claim filed on behalf of the appellant-defendants suggests that while filing written statement they asserted counter claim but fact remains that no requisite fee was paid on the aforesaid counter claim. The respondent-plaintiff denied the aforesaid counter claim of the appellant-defendant terming the same to be false and claimed that there was no negligence on the part of the appellant-defendant as claimed in the counter claim.

24. Careful perusal of the trial court record further suggests that respondents-plaintiffs refuted the aforesaid counter claim of the appellant-defendant by way of filing separate written statement. However, the fact remains that learned trial Court after framing issues, as have been reproduced above, decreed the suit of the plaintiffs for permanent prohibitory injunction and also partly decreed the cross-objection having been filed by the appellant-defendant. Operative part of the judgment and decree passed by the learned trial Court read as under:-

> ***"For the reasons recorded while discussing issues No.1 to 10 above, the suit of the plaintiffs for permanent prohibitory injunction is hereby decreed to the effect that the defendants are hereby restrained from causing any interference in any manner whatsoever in the joint ownership and possession of the plaintiffs over the double storeyed house situated over the suit land measuring 0-0-6 bigha comprised in Khasra No.2141/2020/1734 of Khata and Khatouni No.873/1151 and land measuring 0-5-0 bigha being 4/16 share out of the total land measuring 1-0-0 bighas comprised under Khasra No.2139/2022/1735 of Khata and Khatouni No.874/1152 incorporated in Jamabandi for the years 2003-04 situated at Phati Balh, Kothi Maharaja Tehsil and District Kullu, H.P. till partition of the joint suit property and at the same time the counter claim filed by the defendants in this suit for permanent prohibitory injunction is also decreed to the effect that the plaintiffs are hereby restrained from carrying out any repair or construction work in the aforesaid house in dispute in any manner or change its nature in any manner till the house in dispute is partitioned in accordance with law. However, the counter claim filed by the defendants for mandatory injunction is hereby dismissed. The parties shall bear their own costs. Decree sheet be prepared, accordingly."***

25. Careful perusal of aforesaid decree prepared by the learned trial Court while decreeing the suit and accepting the counter claim of the defendants, clearly suggests that

proper decree was drawn as far as acceptance of the counter claim filed by the defendants is concerned.

26. Appellant-defendant, being aggrieved with the aforesaid judgment and decree, approached the learned Additional District Judge, Fast Track Court, Kullu, by way of an appeal under Section 96 CPC, laying therein challenge to aforesaid judgment and decree passed by the learned trial Court. At this stage, it would be appropriate to reproduce cause title/ head note of appeal preferred by the appellant-defendant before the learned District Judge, Kullu, H.P. which reads thus:-

> ***"Civil First appeal under section 96 C.P.C. read with section 21 of the H.P. Courts Act, 1976 against the judgment and decree dated 6.11.2007, passed by the learned Civil Judge (Sr. Divn.), Kullu HP in civil suit No.59/2006, titled as Sh.Baldev Raj & Ors. Vs Smt.Sonam Angmo & Ors. with a prayer to set-aside the judgment and decree under appeal and the suit of the respondents No.1 and 2 may be dismissed with cost and the counter claim of the appellant and proforma respondent No.3 may be decreed without any condition in favour of the appellant and proforma respondents No.3 to 5 and against the respondents No.1 and 2."***

27. Careful perusal of aforesaid cause title as well as relief claimed in the appeal clearly suggests that appellant-defendant by way of appeal before the learned first appellate Court prayed that her appeal may be accepted with costs and the judgment and decree dated 06.11.2007 passed by learned trial Court be set aside. Appellant-defendant by way of appeal referred hereinabove also prayed that her counter claim may also be decreed without any condition.

28. Before adverting to the submissions having been made on behalf of the learned counsel representing both the parties, it would be appropriate to refer to relevant provisions of law applicable in the present case i.e. Order 8 Rule 6A:

> ***"6A. Counter claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not:***
>
> ***Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court.***
>
> ***(2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.***
>
> ***(3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the court.***
>
> ***(4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaints."***

29. Aforesaid provisions of law entitles defendant in a suit to set up counter claim against the claim of the plaintiff in respect of cause of action accruing to him against the plaintiff either before or after filing the suit, but definitely before defendant files his defence or before the time stipulated for delivering the defence is expired. Needless to say that aforesaid right of filing counter claim is in addition to his right of pleading as set up in Rule 6. Further perusal of aforesaid provisions of law suggests that counter claim, if any, filed on behalf of the defendant would be treated as a plaint and same would be governed by Rules applicable to the plaint. Similarly, counter claims filed on behalf of the defendant would have same effect as a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and the counter claim.

30. Similarly, Rule 6A(3) enables the plaintiff to file a written statement, if any, to the counter claim filed by the defendant. Rule 6D specifically provides that in case suit of the plaintiff is stayed, discontinued or dismissed, the counter claim filed on behalf of the defendant would nevertheless be proceeded with.

31. Similarly, Rule 6E provides that if plaintiff fails to file reply to the counter claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him/her, or make such order in relation to the counter-claim as it deems fit. It would be relevant here to refer to Order VIII Rule 6F:

> ***"6F. Relief to defendant where counter-claim succeeds.- Where in any suit a set-off or counter-claim is established as a defence against the plaintiffs claim and any balance is found due to the plaintiff or the defendant, as the case may be , the Court may give judgment to the party entitled to such balance."***

32. Perusal of aforesaid Order VIII Rule 6F clearly suggests that where in any suit a set-off or counter claim is established as a defence against the plaintiffs' claim and any balance is found due to the plaintiff or the defendant, Court may give judgment to the party entitled to such balance. Further perusal of Order VIII Rule 6G suggests that no pleadings, if any, subsequent to the written statement filed by a defendant other than by way of defence to set up a claim can be presented except with the leave of Court.

33. Under Order VIII Rule 10 when any party fails to file written statement as required under rule 1 or rule 9 within the stipulated time, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

34. Careful perusal of aforesaid provisions of law clearly suggests that counter claim, if any, preferred by the defendant in the suit is in nature of cross suit and even if suit is dismissed counter claim would remain alive for adjudication. Since counter claim is in nature of cross suit, defendant is required to pay the requisite court fee on the valuation of counter claim. It has been specifically provided in the aforesaid provisions that the plaintiff is obliged to file a written statement qua counter claim and in case of default court can pronounce the judgment against the plaintiff in relation to the counter claim put forth by the defendant as it has an independent status. As per Rule 6A(2), the Court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter-claim.

35. In the present case, as clearly emerged from the judgment passed by the learned trial Court, learned trial Court effectively determined the rights of the parties on the basis of counter claim as well as written statement thereto filed by the respective parties and

as such it attained the status of decree. It would be profitable here to reproduce definition of the term *'decree'* as contained in Section 2(2) of CPC:-

> *"2.(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [1][* * *] Section 144, but shall not include –*
>
> *(a) any adjudication from which an appeal lies as an appeal from an order, or*
>
> *(b) any order of dismissal for default.*
>
> *Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"*

36. Close scrutiny of aforesaid definition of "decree" clearly suggests that there should be formal expression of adjudication by the Court while determining the rights of the parties with regard to controversy in the suit, which would also include the rejection of plaint. Similarly, determination should be conclusive determination resulting in a formal expression of the adjudication. It is settled principle that once the matter in controversy has received judicial determination, the suit results in a decree, either in favour of the plaintiff or in favour of the defendant.

37. In this regard, it would be appropriate to place reliance on the judgment of the Hon'ble Apex Court in ***Rajni Rani and Another vs. Khairati Lal and Others,* (2015)2 SCC 682**, wherein the Court has held as under:-

> ***"16. We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter-claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India. Ergo, the order passed by the High Court is indefensible."***

38. After perusing aforesaid judgment passed by Hon'ble Apex Court, this Court need not to elaborate further on the issue at hand because Hon'ble Apex Court has categorically held that if by virtue of order of the Court rights have finally been adjudicated, it would assume the status of decree. Hon'ble Apex Court has also stated that Court may or may not draw a formal decree but if rights are finally adjudicated, it would assume the status of a decree. Learned Apex Court has further held that in such like situation order passed by trial Judge has the status of decree and challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee.

39. Consequently, in view of detailed discussion made hereinabove as well as law laid down by Hon'ble Apex Court in ***Rajni Rani's*** case *supra*, this Court is of the view that learned first appellate Court erred in entertaining the composite appeal having been preferred by the appellant-defendant laying therein challenge to the judgment and decree passed by learned trial Court decreeing the suit of the plaintiffs-respondents as well as partly decreeing the counter claim preferred on behalf of the appellant-defendant. Appellant-defendant being aggrieved with the rejection of his counter claim ought to have filed separate appeal by affixing separate court fee and, as such, composite appeal, laying therein challenge to both, decreeing the suit of plaintiff and rejection of counter claim of the appellant-defendant, is not maintainable.

40. Though in view of findings returned by this Court qua additional substantial question of law framed hereinabove, other substantial question of law famed at the time of admission of the appeal has become redundant. However, this Court having perused evidence led on record by respective parties, especially deposition made by DW-1 Monika Kumari, sees no illegality and infirmity in the specific finding returned by the Court below that "it cannot be concluded on the strength of ocular version put forth by DW-1 Monika Kumari that Shanti Devi was not having any title in the property in dispute". Substantial question is answered accordingly.

41. Leaving everything aside, having perused concurrent findings of fact and law recorded by the Courts below, which are based upon proper appreciation of evidence, this Court is persuaded to agree with the contention of learned counsel representing the respondents-plaintiffs that there is no scope left for this Court to interfere with the concurrent findings of facts. This Court finds no perversity as far as findings of fact and law recorded by the Courts below are concerned. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma's*** case *supra***,** wherein the Hon'ble Apex Court has held as under:-

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

42. Aforesaid exposition of law clearly suggests that High Court, while excising power under Section 100 CPC, cannot upset concurrent findings of fact unless the same are shown to be perverse. But, in the case at hand, this Court, while examining the correctness and genuineness of submissions having been made by the parties, has carefully perused evidence led on record by the respective parties, perusal whereof certainly suggests that the Courts below have appreciated the evidence in its right perspective and there is no perversity, as such, in the impugned judgments and decrees passed by both the Courts below. Moreover, learned counsel representing the appellant-defendant was unable to point

out perversity, if any, in the impugned judgments and decrees passed by both the Courts below and, as such, same do not call for any interference.

43. Consequently, in view of the detailed discussion made hereinabove, as well as law laid down by the Hon'ble Apex Court, the present appeal fails and is dismissed accordingly. There shall be no order as to costs.

44. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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

Rajender Singh ....Petitioner
Versus
Gajinder Singh & Others ....Respondents

CMPMO No.25 of 2018
Date of decision: 05.05.2018

Code of Civil Procedure, 1908 - Section 151 - Additional evidence - Adduction of – Permissibility - Leave of court - Plaintiff filing application for leading secondary evidence to prove Will by alleging that its scribe, marginal witnesses and identifier are dead - Trial court dismissing application by holding that since execution of said Will stood admitted by defendant in pleadings, there was no necessity for him to examine witnesses in proving it - Subsequently report of CFSL, Delhi revealing that thumb impression of executrix on said Will and subsequent Will were different - Plaintiff filing application for examining witnesses to prove Will as well as report of CFSL, Delhi - Trial court dismissing application by holding that witnesses cannot be allowed to be examined at belated stage to prove Will - And report of CFSL, Delhi is *per se* admissible - Petition against - Held, plaintiff was under bona fide belief of his not required to lead secondary evidence to prove Will because of earlier order of Court – Plaintiff cannot be denied opportunity to prove Will - Petition allowed - Plaintiff permitted to lead additional evidence. (Paras 6-9)

For the Petitioner: Mr.I.D. Bali, Senior Advocate with Mr.Virender Bali, Advocate.
For the Respondents: Mr.Nimish Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Being aggrieved and dis-satisfied with the order dated 12.12.2017, passed by learned Senior Civil Judge, Chamba, District Chamba, whereby the Court below dismissed the application under Section 151 of the Code of Civil Procedure *(for short 'CPC')* filed on behalf of applicant-plaintiff for leading additional evidence, petitioner *(hereinafter referred to as the 'plaintiff')* has approached this Court in the instant proceedings.

2. Necessary facts, as emerged from the material available on record, are that the plaintiff filed a suit against the respondents-defendants *(hereinafter referred to as the*

'defendants') for declaration to the effect that Uttmo Devi (deceased) mother of the plaintiff and defendant No.1, namely; Gazinder Singh, who was owner in possession of the land detailed in the plaint, bequeathed her entire property in favour of the plaintiff vide registered Will dated 23.08.1993 and mutation No.992 dated 15.06.2005, whereby defendant got suit land to the extent of half share mutated in his favour in connivance with the revenue officials, is wrong, illegal, void and inoperative. Plaintiff also prayed that mutation No.992, dated 15.06.2005 and subsequent entries in favour of the defendants may be declared as null and void. Apart from above, plaintiff also sought decree for permanent prohibitory injunction restraining the defendants from interfering in possession of the plaintiffs in any manner and from taking forcible possession of the suit land.

3. Defendant No.1, while contesting the claim of the plaintiff, as set up in the plaint, though admitted the factum with regard to execution of Will dated 23.08.1993 by late Uttmo Devi in favour of the plaintiff, but, claimed that the Will set up by the plaintiff was subsequently cancelled by late Uttmo Devi by executing another Will dated 05.10.2003, whereby she bequeathed her entire property in favour of both; plaintiff and defendant No.1; in equal shares.

4. During the pendency of trial, plaintiff filed an application under Sections 45 and 73 of the Indian Evidence Act, 1872, praying therein to send thumb impression of late Utrtmo Devi on Will dated 23.08.1993, to an expert for comparing the same with thumb impression put on Will dated 05.10.2003. Aforesaid application was rejected by the Court below, however, this Court vide order dated 21.3.2016 passed in *CMPMO No.366 of 2015*, set aside the order dated 15.09.2014, passed by the learned Court below and ordered that the registered Will dated 23.08.1993 be requisitioned from the office of Sub Registrar, Chamba and thereafter the same be sent to the Government Examiner of Questioned Documents to compare thumb impression of Uttmo Devi on Wills dated 23.08.1993 and 05.10.2003.

5. Pursuant to the aforesaid direction passed by this Court, both the Wills, as referred hereinabove, were sent to CFSL, Delhi, who vide communication dated 30.1.2017, submitted its report to the learned Court below. CFSL, Delhi, in the aforesaid opinion/report has reported that thumb impression contained on Will dated 23.08.1993, does not match with the subsequent Will dated 05.10.2003.

6. Pursuant to receipt of aforesaid report submitted by CFSL, Delhi, plaintiff moved an application under Section 151 CPC before the Court below seeking therein permission to lead additional evidence. Plaintiff averred in the application that the plaintiff earlier could not examine the witnesses to the Will in dispute and he also wants to examine the expert, who compared both the Wills to prove the report in accordance with law.

7. Learned Court below, while dismissing the aforesaid application filed by the plaintiff, held that in order to prove the due execution of Will alleged to have been executed by deceased Uttmo Devi in favour of the plaintiff, plaintiff was required to lead evidence in affirmative and as such, application at this stage, cannot be allowed as it would amount to *de novo* trial, which is not permissible under law. Learned Court below also observed that since report of CFSL, Delhi is *per se* admissible, plaintiff is not required to prove the same by examining the expert, who has given the report. In the aforesaid background, petitioner-plaintiff, being aggrieved with order dated 12.12.2017, has approached this Court in the instant proceedings.

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

9. It is quiet apparent from the record that defendant No.1, while contesting the suit of the plaintiff, has admitted the Will dated 23.08.1993 executed by late Uttmo Devi,

bequeathing thereby entire property in favour of the plaintiff, however, while doing so, defendant No.1 has set up a case that the aforesaid Will was subsequently cancelled and another Will dated 05.10.2003 was executed by late Uttmo Devi, whereby she bequeathed her entire property in favour of both sons i.e. plaintiff and defendant No.1. Since, in the case at hand, scribe, marginal witnesses and identifier had expired, an application came to be filed on behalf of the plaintiff for leading secondary evidence. Learned trial Court vide order dated 14.07.2011, passed the following order:-

> ***"defendant No.1 has raised contention that Will dated 23.08.1993 was later on cancelled by execution of subsequent Will dated 05.10.2003, therefore, bone of contention between the plaintiff and defendant No.1 is whether any Will subsequent to Will dated 23.08.1993 was executed by late Uttmo Devi in favour of her both sons including defendant No.1, hence I am of the opinion that no formal proof of Will dated 23.08.1993 is acquired even though the original has been lost."***

10. Learned Court below vide aforesaid order held that since defendant No.1 has raised contention that Will dated 23.08.1993 was lateron cancelled by execution of subsequent Will dated 05.10.2003, therefore, no formal proof of Will dated 23.08.1993 is required even though the original has been lost. As noticed hereinabove, thumb impression contained on Wills dated 23.08.1993 and 05.10.2003 came to be examined/compared by Question Document Expert, who in his report has categorically held that thumb impression contained on Will dated 23.08.1993 does not match with thumb impression contained on Will dated 05.10.2003. After receipt of aforesaid report by CFSL, plaintiff moved an application seeking therein permission to lead additional evidence to prove the due execution of Will executed by deceased Uttmo in his favour, which prayer was not accepted by the Court below.

11. Having carefully perused observation made in order dated 14.07.2011, this Court finds considerable force in the arguments of learned Senior Counsel representing the plaintiff, that in view of findings recorded in the order dated 14.07.2011, wherein learned Court below recorded that no formal proof of Will dated 23.08.1993 is required even though the original has been lost and that in view of admission having been made by defendants in their written statement with regard to execution of Will dated 23.08.1993, plaintiff remained under impression that he is not required to lead specific evidence to prove the valid execution of the Will dated 23.08.1993. There is no quarrel as far as finding returned by the Court below that the report submitted by CFSL, Delhi is *perse* admissible and as such it is not required to be proved by examining the expert, who has rendered this report, but, this Court is not in agreement with the findings recorded by the Court below that in case plaintiff is permitted to lead additional evidence, as prayed in the application, it would amount to *de novo* trial.

12. In the case at hand, as clearly emerged from averments contained in the application that scribe, marginal witnesses and identifier of the Will dated 23.08.1993, which is otherwise registered document, have passed away and in these circumstances, plaintiff could either prove valid execution of Will dated 23.08.1993 by leading secondary evidence i.e. seeking direction to Sub Registrar to produce original Will or examine person, who can verify signatures of scribe, marginal witnesses and identifier on the Will dated 23.08.1993. As has been noticed above, learned Court below, while considering prayer made on behalf of the plaintiff for leading secondary evidence, specifically observed, rather returned a finding that *"he is of the opinion that in view of stand taken by the defendant, wherein he has virtually admitted the execution of Will dated 23.8.1993, no formal proof of Will dated 23.8.1993 is required"* and, as such, explanation rendered on account of plaintiff

for not examining witnesses in support of valid execution of Will appears to be plausible and Court below ought to have considered the same in its right perspective. Will set up by the plaintiff is a registered Will, execution whereof has been admitted by defendant No.1 and, as such, Court below ought to have permitted plaintiff to lead additional evidence to prove valid execution of Will in the interest of justice. Moreover, no prejudice would have been caused to the defendants because they would have got an opportunity to cross-examine the witnesses, if any, examined by the plaintiff. Apart from above, defendants would have also got an opportunity to lead evidence in rebuttal, if any. No doubt, evidence of both the parties have been closed and the matter is already fixed for arguments, but judgment is yet to be pronounced and as such in the peculiar facts and circumstances, as have been taken note hereinabove, plaintiff ought have been afforded an opportunity to lead additional evidence, at this stage, because it would also help the Court below to adjudicate the controversy *interse* parties in most fair manner.

13. Consequently, in view of the above, the present petition is allowed. The impugned order dated 12.12.2017, passed by learned Senior Civil Judge, Chamba, District Chamba is quashed and set aside and plaintiff is permitted to lead additional evidence, as prayed for in the application.

14. Mr.I.D. Bali, learned Senior Counsel, undertakes to cause appearance of witnesses named in the list of witnesses attached to the application on *11th June, 2018*, on which date the learned Court below shall record the statements of witnesses, named in the list of witnesses, in support of valid execution of Will.

15. Needless to say that opportunity to lead evidence in rebuttal, if required, would be afforded to the defendants. However, it is made clear that in case the plaintiff fails to lead evidence on the aforesaid date, no more opportunity shall be afforded to him and case shall be decided on the basis of material already available on record. It is further clarified that the plaintiff would only lead evidence in support of execution of Will dated 23.08.1993 and not qua the report of CFSL, Delhi, which is otherwise *perse* admissible.

16. Consequently, in view of the detailed discussion made hereinabove, this petition is disposed of in the aforesaid terms. Interim order, if any, is vacated. All miscellaneous applications are disposed of.

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

Geeta Bhavan, Mandi ....Appellant-Plaintiff

Versus

Balbir Singh & Others ....Respondents-Defendants

Regular Second Appeal No.141 of 2005.
Judgment Reserved on: 11.05.2018
Date of decision: 18.05.2018

Specific Relief Act, 1963 - Section 5 - Suit for possession on basis of title – Proof - Plaintiff filing suit for possession by averring that suit property owned by it and one 'D' was only its manager - And 'D' had no authority to alienate it – Trial court dismissing plaintiffs suit -

Appeal also dismissed by District Judge – RSA – In documentary evidence suit property recorded as 'Dev Asharam' – No connecting evidence that 'Dev Asharam' ever remained part of plaintiffs property – Held, mere fact of 'D' proclaiming in some documents himself as its manager (Sanchalak) does not prove title of plaintiff over suit land - Title of plaintiff over suit land not proved - Suit rightly dismissed - RSA dismissed. Judgments of lower courts upheld. (Paras 10-13,18 & 35)

Code of Civil Procedure, 1908 - Section 96 - First appeal - Mode of disposal - Held, when appellate court agrees with view of trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court - Expression of general agreement with reasons given by trial court would ordinarily suffice. (Para 24)

Indian Evidence Act, 1872 - Section 90 – Thirty (30) years old document – Presumption - Held, presumption of truth is attached to documents which are thirty (30) years old and court may presume that signature and every other part of such document was duly executed and attested by person by whom it purports to be executed and attested. (Para 20)

Cases referred:

Agnigundala Venkata Ranga Rao vs. Indukuru Ramchandra Reddy (Dead) by Legal Representatives and Others, (2017)7 SCC 694
Bijender and Another vs. Ramesh Chand and Others, (2016)12 SCC 483
Chandna Impex Private Limited vs. Commissioner of Customs, New Delhi, (2011)7 SCC 289
Chuhniya Devi vs. Jindu Ram, 1991(1) Sim.L.C. 223
D.R. Rathna Murthy vs. Ramappa, (2011)1 SCC 158
Damodar Lal vs. Sohan Devi and Others, (2016)3 SCC 78
Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Malkiyat Singh vs. Ram Dial and Others, 1992(2) Sim.L.C. 323
Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs., (2001)3 SCC 179
Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161
State of Rajasthan vs. Harphool Singh (Dead) through his LRs, (2000)5 SCC 652

For the Appellant: Mr.G.R. Palsra, Advocate.
For Respondent No.1: Mr.Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Appellant-plaintiff, *(hereinafter referred to as the 'plaintiff')*, claiming itself to be Hindu Religious Institution, filed a suit for possession on the basis of title, averring therein that it is a registered society established with the sole purpose of imparting education in Hindu religion. Plaintiff further averred that property comprising Khata Khatauni No.125/158, Khasra Nos.368, 369, 370, 371, 801/372, 802/372 and 373, measuring 535.05 square meters, situate in Mohal Paddal, Mandi Town is a part and parcel of plaintiff institution and was never separately acquired property of Shri Devi Nand, who had expired on 9.1.1999. Plaintiff further averred that property shown in the name of Sri Dev Ashram under the management of Shri Devi Nand Brahamchari is a part and parcel of the plaintiff's institution and at no point of time it was separately acquired property of Shri Devi Nand. Plaintiff further alleged that Devi Nand, who died on 9.1.1999, had executed a

Will of suit property in favour of defendant No.1 on 7.7.1989, on the basis of which mutation was attested in favour of defendant No.1. Plaintiff also laid challenge to aforesaid Will alleging that Devi Nand had no right to execute the Will of the suit property as he was not owner in possession of the suit property; rather he was simply a manager of plaintiff's institution. Plaintiff, while claiming that defendants No.2 to 4 are in wrongful possession of the suit property, claimed for possession by way of suit, referred hereinabove.

2. Defendant No.1 refuted the aforesaid claim, as set up in the plaint, on the ground of limitation and jurisdiction. Defendant No.1 categorically stated that Devi Nand was exclusive owner in possession of the property in question as it was constructed by him of his own money and not as a Manager of the property. Defendant No.1 further averred that the suit property was owned and possessed by Devi Nand and he had every right to execute the Will qua the same. Defendant No.1 further stated in written statement that defendants No.2 to 4 are the tenants in the suit property. Defendants No.3 and 4 in their written statement also not admitted the title of the plaintiff and claimed that earlier they were tenants under Devi Nand and now under defendant No.1. In the aforesaid background, the defendants prayed for dismissal of the suit.

3. By way of replication, the plaintiff, while denying the allegations made in the written statement(s) reaffirmed the averments made in the plaint and controverted the contrary averments made in the written statement(s).

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

> "1. Whether the plaintiff is owner of th property in dispute as alleged? OPP.
>
> 2. Whether the Will dated 7.7.1989 is void document, as alleged? OPP.
>
> 3. Whethr the plaintiff has got no right, title and interest in the suit property, as alleged? OPD.
>
> 4. Whethr the plaintiff has no locus-standi to file the present suit, as alleged? OPD.
>
> 5. Whether the suit of the plaintiff is not within limitation, as alleged? OPD.
>
> 6. Whether the suit of the plaintiff has not been properly valued for the purposes of jurisdiction and court fees. If so what is correct valuation? OPD.
>
> 7. Relief."

5. Learned trial Court, on the basis of evidence adduced on record by respective parties, dismissed the suit of the plaintiff. Being aggrieved and dis-satisfied with judgment dated 15.12.1999 passed by learned trial Court in Civil Suit No.89/91, plaintiff preferred an appeal under Section 96 of the Code of Civil Procedure *(for short 'CPC')* in the Court of learned District Judge, Mandi, which came to be registered as Civil Appeal No.25 of 2000/44 of 2003. However, fact remains that the same was also dismissed, as a consequence of which, judgment of trial Court dated 15.12.1999 came to be upheld. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, praying therein to decree its suit after setting aside the judgments and decrees passed by both the Courts below.

6. This Court vide order dated 19.04.2006, admitted the appeal on the following substantial questions of law:-

> *"1. Whether the Courts below have misread the evidence to come to the conclusion that deceased Devi Nand was the owner of the suit property?*

2. *Whether the Courts below have erred in holding that the plaintiff does not have the locus standi to file the suit?."*

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

8. Keeping in view the contents and text of substantial questions of law, reproduced hereinabove, this Court intends to take both the substantial questions of law together as they are interconnected.

9. Having carefully perused/examined the evidence, be it ocular or documentary, led on record by the respective parties, this Court is not persuaded to agree with the contention raised by Mr.G.R. Palsra, learned counsel representing the appellant, that Courts below have misread the evidence while arriving at the conclusion that deceased Devi Nand was the owner of the suit property. Similarly, this Court, having carefully perused the material led on record by the plaintiff, finds no error in the findings recorded by the Court below that the plaintiff does not have the *locus standi* to file the suit. Close scrutiny of evidence available on record clearly suggests that both the Courts below have dealt with each and every aspect of the matter meticulously and, as such, there appears to be no force on the plea of Mr.G.R. Palsra, learned counsel for the plaintiff that evidence led on record by the plaintiff has not been appreciated in its right perspective.

10. In nutshell, case of the plaintiff is that the suit property is owned and possessed by the plaintiff-institution and late Shri Devi Nand, who was acting as its manager, had no authority, whatsoever, to bequeath the same in favour of defendant No.1. On the other hand, the case of defendant No.1 is that Devi Nand was exclusive owner in possession of the suit property as he had raised construction on the land by spending his own money. Mr.Palsra, while making this Court to travel through documentary evidence led on record i.e. Exts.PK, PL, PM and PO, strenuously argued that the suit property is part of *Geeta Bhawan,* which also owns *Gopal Dev Ashram* (subsequently, which was wrongly recorded as *Dev Ashram*) and Devi Nand was only its Manager. Bare perusal of aforesaid documents nowhere suggests that *Dev Ashram* of Brahmchari Devi Nand was part and parcel of *Geeta Bhawan* and *Dev Ashram* and *Gopal Dev Ashram* relate to the same property. Certainly, perusal of Exts.PM, PN and PO suggests that late Brahmchari Devi Nand, while making communication qua the property in question, repeatedly claimed himself to be Manager/Sanchalak of the property, but, that is not sufficient to conclude that *Dev Ashram* is owned by *Geeta Bhawan.* Ex.PM, i.e. letter alleged to have been written by Devi Nand Brahmachari to the Executive Committee of *Geeta Bhawan*, nowhere suggests that he had been looking after the suit property of *Geeta Bhawan.* Similarly, perusal of Ex.PO, i.e. a letter written by Jamna Mal etc. to the Governor of Himachal Pradesh, nowhere suggests that Brahmachari Devi Nand was managing the *Gopal Dev Ashram* on behalf of *Geeta Bhawan*. Perusal of aforesaid Ex.PO, further suggests that *Gopal Dev Ashram* was started in the year 1945, whereas, Brahmchari Devi Nand had started *Hindi Pathshala* in the year 1940. Close scrutiny of documentary evidence adduced on record by the plaintiff nowhere indicates that the plaintiff is the owner of suit property.

11. Having perused Ex.PJ, there appears to be considerable force in the arguments of Mr.Sanjeev Kuthiala, learned counsel representing the respondents, that land comprised in Khasra Nos.369 and 373 was in illegal possession of *Dev Ashram* under the control of Brahmachari Devi Nand and subsequently proprietary rights of these Khasra numbers were given to *Dev Ashram*.

12. Mr.Palsra, while making reference to Exts.PW-3/1, PW-3/2, PW-3/3 and PW-3/4, strenuously argued that Brahmchari Devi Nand, who by way of Will bequeathed his entire property in favour of defendant No.1, repeatedly claimed himself to be Sanchalak of the property in a suit filed against Gulab Chand and, as such, by no stretch of imagination, he can be termed to be absolute owner of the suit property.

13. Aforesaid arguments raised by learned counsel representing the plaintiff cannot be accepted because admittedly the property named as *Dev Asharam* being an unanimated body incapable of functioning of its own was required to be represented by some individuals and, as such, Devi Nand Brahmchari, while presenting the suit, claimed himself to be Sanchalak/Manager/Coordinator. His status, as referred in the copies of plaint, application and affidavit of the suit i.e. Exts.PW-3/1, PW-3/2, PW-3/3 and PW-3/4, cannot lead to an inference that property belongs to plaintiff or to any other person and it was not the property established by Devi Nand Brahmchari.

14. Plaintiff, apart from aforesaid documentary evidence, also examined few witnesses. PW-1 Kewal Ram, *Pradhan Geeta Bhawan*, deposed that Devi Nand was appointed as Caretaker/Sanchalak in or around the year 1950, but he was unable to point out any material placed on record in support of his aforesaid contention. In cross-examination, he categorically admitted that there was a building having slate roof and in this building three rooms having slab were constructed by Devi Nand. When further cross-examined, he admitted that against one Gulab Chand, Devi Nand Brahmchari had filed a suit claiming himself to be Manager/Sanchalak of the property. Interestingly, this witness stated before the trial Court below that property in question was given to plaintiff by Raja of Mandi, but, in this regard, no document i.e. agreement, registered deed or mutation of the same, is led on record. He further stated that part of the suit land was previously owned by one Purshotam, but categorically denied that this land was given to Devi Nand by Purshotam, however, there is no documentary evidence led on record to substantiate ownership, if any, of Purshotam. This witness categorically admitted that since the year 1950, rooms of *Dev Ashram* have been rented out and Devi Nand used to receive the rent and he appropriated the same for himself. He also stated that new rooms were added by Devi Nand in the year 1984 and at that time neither any objection was raised nor any money was spent by the plaintiff. This witness feigned ignorance with respect to the possession of Devi Nand Brahmchari over Khasra No.373, which was found in his illegal possession. It has also come in the statement of this witness that Gulab Chand, against whom Devi Nand had filed civil litigation, had encroached upon a part of the suit property.

15. Similarly, PW-2 Baldev and PW-3 Tulsi supported the version put forth by PW-1 Kewal Ram that the suit property belongs to the plaintiff but they were unable to state whether Devi Nand constructed house in the year 1950 or whether Devi Nand had taken this property from Purshotam. PW-3 Tulsi Ram gave altogether different version by stating that Devi Nand had taken loan from Jamna. This witness was also unable to tell whether Devi Nand got any land from the Government or he had inducted tenants. Similarly, PW-4 Kameshwar has stated that Devi Nand was Sanchalak of *Gopal Ashram*, which was constructed from the funds of the plaintiff, but in cross-examination he admitted that the money earned from *Gopal Ashram* used to be received by Devi Nand, who was made Sanchalak by Indera Ram.

16. Having carefully perused the evidence led on record by the plaintiff, this Court finds no illegality and infirmity in the findings returned by Court below that the plaintiff has been unable to show its title qua the suit property and, as such, is not entitled to relief of possession as claimed in the suit. Copies of Exts.DW-1/B and DW-1/CA suggest that proprietary rights qua Khasra Nos.369 and 373 were conferred upon Devi Nand. It has

specifically come in the statement of defendant Balbir Singh that Devi Nand was having illegal possession over 244.92 square meters of land in Paddal Mohal and, as such, proceedings were initiated against him, in which persons namely; Gulab Chand and Kameshwar Sharma had raised objections, but despite these objections, land was subsequently allotted to Devi Nand vide order dated 18.8.81, Ex.DW-1/B. Devi Nand had deposited a sum of Rs.625.90 paise vide challan Ex.DW-1/CA.

17. Close scrutiny of evidence, be it ocular or documentary, clearly suggests that suit property was never owned and possessed by the plaintiff, rather it remained under the control of Devi Nand Brahmchari, who not only raised construction on the land beneath suit property rather rented out the same to different tenants, as has been clearly admitted by defendants No.3 and 4 in their written statements. Leaving everything aside, this Court was unable to lay its hand to any documentary evidence led on record by the plaintiff suggestive of the fact that the property was ever owned and possessed by the plaintiff.

18. There is another aspect of the matter that the plaintiff by way of suit in question claimed possession on the basis of title, but, as has been concluded hereinabove, there is no evidence worth the name suggestive of the fact that the plaintiff has title, if any, qua the suit land. Moreover, in the suit, plaintiff has categorically admitted factum with regard to execution of Will, whereby Brahmachari Devi Nand bequeathed his entire property in favour of defendant No.1. There is no specific challenge to aforesaid Will executed by Brahmachari rather plaintiff has only raised the plea that Brahmachari was a Manager/Sanchalak of the property, as such, he had no authority to execute the Will. But, as has been noticed above, it stands duly established on record that *Geeta Bhawan* and *Dev Ashram* are both different entities run by the plaintiff and defendant No.1.

19. Mr.Palsra, while specifically referring to Ex.PG, argued that bare perusal of constitution of *Geeta Bhawan*, Mandi, clearly suggests that there is no difference between Gopal Dev Ashran and Geeta Bhawan. True, it is that perusal of Clause-21 of the constitution Ex.PG suggests that Committee of *Geeta Bhawan* had agreed to merge *Gopal Dev Ashram* with *Geeta Bhawan*, but that may not be sufficient to conclude that by making such entry in constitution, *Geeta Bhawan* acquired title qua the suit property i.e. *Gopal Dev Ashram,* which was being maintained and controlled by Brahmachari Devi Nand.

20. Mr.Palsra, while placing reliance upon the judgments titled as: ***Chuhniya Devi vs. Jindu Ram, 1991(1) Sim.L.C. 223, Malkiyat Singh vs. Ram Dial and Others, 1992(2) Sim.L.C. 323*** and ***Agnigundala Venkata Ranga Rao vs. Indukuru Ramchandra Reddy (Dead) by Legal Representatives and Others, (2017)7 SCC 694,*** strenuously argued that presumption of truth is attached to documents, which are 30 years old, as has been provided under Section 90 of the Indian Evidence Act, 1872 and, as such, Courts below ought not to have ignored Ex.PG i.e. Constitution of *Geeta Bhawan,* while ascertaining/ determining the title of plaintiff. There cannot be any quarrel with regard to aforesaid proposition of law that presumption of truth is attached to documents, which are 30 years old and Court may presume that that the signature and every other part of such document, is duly executed and attested by a person by whom it purports to be executed and attested. But, in the case at hand, Ex.PG i.e. Constitution of *Geeta Bhawan* nowhere depicts/proves title of the plaintiff qua the suit property, rather it only defines the Object of the Society and Rules and Regulations governing the affairs of the Society. Though perusal of Clause-21 of aforesaid Constitution suggests that name of *Gopal Dev Ashram* was resolved to be changed to *Geeta Bhawan*, but that may not be sufficient to conclude the title qua *Gopal Dev Ashram* in favour of the plaintiff.

21. Perusal of Ex.D4 further suggests that vide order dated 24.01.1990, Assistant Collector 2nd Grade, Tehsil Sadar, District Mandi had attested mutation No.235, on the basis of Will No.137 Ex.D-3 dated 7.7.1989, in favour of defendant. Being aggrieved with the aforesaid mutation attested in favour of defendant, plaintiff *Geeta Bhawan* filed an appeal in the Court of Collector, SDM, Sadar, Sub Division, Mandi, which came to be decided on 30.11.1995. Collector, Sadar Sub Division Mandi, having perused material made available to him found that mutation No.235 was attested in the presence of Manohar Lal and Ram Lok identified by Hem Raj Sharma, Advocate before the Assistant Collector 2nd Grade and, as such, arrived at the conclusion that Assistant Collector 2nd Grade committed no irregularities while attesting the mutation. In the aforesaid order passed by the Collector, Sadar, Sub Division Mandi, it has been categorically stated that the claim of the plaintiff does not seems to be genuine and it has no *locus standi* to agitate against the impugned order dated 24.1.1990 passed by the Assistant Collector 2nd Grade, Sadar, Mandi. Interestingly, this order passed by Collector, Sadar, Sub Division, Mandi never came to be assailed in the superior Court of law and as such it has already attained finality.

22. This Court, after having carefully examined and analyzed the evidence adduced on record by the plaintiff-appellant, sees no force in the aforesaid contentions having been raised/made by learned counsel representing the appellant-plaintiff, rather this Court is of the view that both the Courts below have carefully appreciated/perused the evidence in its right perspective and there is no misreading or misconstruction of evidence, as alleged by the appellant-plaintiff, in the instant proceedings. Since this Court, in process of finding answer to substantial questions of law, had an occasion to peruse pleadings as well as impugned judgments, it really finds it difficult to accept the contention of learned counsel representing the appellant-plaintiff that learned lower appellate Court has failed to discuss the entire evidence of the parties, while upholding the judgment passed by learned trial Court. Perusal of impugned judgment passed by first appellate Court clearly suggests that learned first appellate Court has dealt with each and every aspect of the matter meticulously and has carefully analyzed the evidence led on record by appellant-plaintiff.

23. True, it is, that Court of first appeal must cover all important questions involved in the case and they should not be general and vague. Similarly, it is well settled that when first appellate Court reverses findings of trial Court, it is expected to record findings in clear terms specifically stating therein, in what manner reasoning of trial Court is erroneous.

24. The Hon'ble Apex Court in ***Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415,*** has held that when appellate Court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial Court; expression of general agreement with reasons given by trial court would ordinarily suffice. Hon'ble Apex Court has further held that when the first appellate Court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasoning of the trial court are erroneous. The Hon'ble Apex Court has held as under:

> ***"14. The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. When appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily***

suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasonings of the trial court are erroneous."

25. In the case at hand, learned first appellate Court, who concurred with the findings returned by learned trial Court was not expected to reiterate reasons given by trial Court, rather mere expression of general agreement with the reason given by the trial Court was sufficient. Moreover, in the instant case, as clearly emerge from the reading of impugned judgment passed by the first appellate Court that it has dealt with each and every issue involved in the case and as such there is no force in the arguments of Mr.G.R. Palsra, learned counsel for the appellant-plaintiff, that first appellate Court has failed to discuss the entire evidence of parties as required in terms of law laid down by Hon'ble Apex Court in ***State of Rajasthan vs. Harphool Singh (Dead) through his LRs, (2000)5 SCC 652***.

26. Since specific objection with regard to maintainability of present appeal, in view of concurrent findings of fact recorded by Courts below, has been taken by Mr.Sanjeev Kuthiala, learned counsel representing respondent-defendant No.1, this Court deems it necessary to deal with the same. In this regard, this Court deems it proper to take into consideration the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264,**, wherein it has been held as under:-

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

27. Perusal of the aforesaid judgment suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. This Court, after having taken note of observations made by Hon'ble Apex Court in judgment *supra,* sees no reason to differ with the argument having been made by Mr.Sanjeev Kuthiala, learned counsel representing respondent-defendant No.1, that in normal circumstance concurrent findings of fact recorded by Courts below should not be interfered with by the High Courts, rather, High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record. But, aforesaid judgment passed by Hon'ble Apex Court nowhere suggests that there is complete bar for High Courts to upset the concurrent findings of the Courts below, especially when finding recorded by Courts below appears to be perverse.

28. In addition to ***Laxmidevamma's*** case *supra*, reliance is also placed upon ***Damodar Lal vs. Sohan Devi and Others, (2016)3 SCC 78*** and ***Bijender and Another vs. Ramesh Chand and Others, (2016)12 SCC 483.***

29. It is well settled by now that a finding of fact itself may give rise to a substantial question of law, *inter alia*, in the event the findings are based on no evidence and/or while arriving at the said findings, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. In this regard, reliance is placed upon the judgment of Hon'ble Supreme Court in ***Chandna Impex Private Limited vs. Commissioner of Customs, New Delhi, (2011)7 SCC 289,*** wherein the Hon'ble Apex Court has held as under:-

> ***"14. In Hero Vinoth Vs. Seshammal, (2006)5 SCC 545, referring to the Constitution Bench decision of this Court in Sir Chunilal V. Mehta & Sons Ltd. Vs. Century Spg. & Mfg. Co.Ltd., AIR 1962 SC 1314, as also a number of other decisions on the point, this Court culled out three principles for determining whether a question of law raised in a case is substantial. One of the principles so summarised, is : (Hero Vinoth case, SCC p.556, para 24)***
>
> > ***"24.(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding". (p.294)***

30. Hon'ble Apex Court in ***D.R. Rathna Murthy vs. Ramappa, (2011)1 SCC 158***, has specifically held that High Court can interfere with the findings of fact even in the second appeal, provided the findings recorded by Courts below are found to be perverse. It has further been held in the case *supra* that there is no absolute bar on the re-appreciation of evidence in those proceedings; however, such a course is permissible in exceptional circumstances. The Hon'ble Apex Court has held as under:-

> ***"9. Undoubtedly, the High Court can interfere with the findings of fact even in the Second Appeal, provided the findings recorded by the courts below are found to be perverse i.e. not being based on the evidence or contrary to the evidence on record or reasoning is based on surmises and misreading of the evidence on record or where the core issue is not decided. There is no absolute bar on the re-appreciation of evidence in those proceedings, however, such a course is permissible in exceptional circumstances. (Vide Rajappa Hanamantha Ranoji v. Mahadev Channabasappa, (2000)6 SCC 120; Hafazat Hussain v. Abdul Majeed, (2001) 7 SCC 189 and Bharatha Matha & Anr. v. R. Vijaya Renganathan, (2010)11 SCC 483.)"(p.162)***

31. Hon'ble Apex Court in ***Santosh Hazari vs. Purushottam Tiwari (Deceased) By LRs., (2001)3 SCC 179,*** has held that appellate Court ought not to interfere with the findings of trial Judge on a question of fact unless the latter has overlooked some peculiar feature connected with evidence of a witness or such evidence on balance is sufficiently improbable so as to invite displacement by appellate Court.

32. Careful reading of aforesaid law laid down by Hon'ble Apex Court clearly suggests that there is no blanket bar for High Courts to upset the concurrent findings of Courts below, especially when it emerge from the record that (i) the Courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. Hon'ble Apex Court in ***Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161,*** has held as under:

> ***"35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)***
>
> > **"24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:**
> >
> > **(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.**
> >
> > **(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.**
> >
> > **(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."**
>
> ***We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC,***

and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same."(pp.174-175)

33. It is quite evident from the aforesaid exposition of law that even concurrent findings of fact recorded by Courts below can be interfered with/upset by the High Courts, while exercising power under Section 100 CPC, if it is convinced that findings recorded by Courts below are not based upon any evidence and same are perverse. However, in the case at hand, this Court having perused entire record, finds no perversity in the impugned judgments and decrees passed by both the Courts below and as such, there is no scope left for this Court to interfere with the concurrent findings of fact and law recorded by the Courts below.

34. Having perused the material available on record, this Court is in complete agreement with the findings returned by both the Courts below that the plaintiff has not been able to prove his title qua the suit property and definitely suit having been filed by the plaintiff could not be allowed by the Courts below merely on the averments made by the plaintiff that Brahmachari Devi Nand was Manager/ Sanchalak of the property, rather plaintiff ought to have led some cogent and convincing evidence to prove his title qua the suit property. Both the aforesaid substantial questions of law are answered, accordingly.

35. Consequently, in view of detailed discussion made hereinabove, impugned judgments and decrees passed by both the Courts below are upheld. Hence, the present appeal fails and is dismissed. There shall be no order as to costs.

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

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

RSR Private Limited ....Petitioner
Versus
State of H.P. & Others ....Respondents

CWP No.192 of 2018
Judgment Reserved on: 08.05.2018
Date of decision: 11.05.2018

Constitution of India, 1950 - Article 226 – Tender - Acceptance – Extension of rate contract - Court interference - Corporation not accepting tender of petitioner for year 2017-18 for supply of Plant Protection Equipments despite it being lowest – In earlier petition, High Court directing Corporation to consider tender and grant it to petitioner, if lowest - Corporation accepting tender vide communication dated 31-12-2017 and awarding rate contract to petitioner till 31.03.2018, i.e., for three months - Petitioner again approaching High Court and praying for extension of rate contract for complete one year - Held, tender was only for financial year 2017-18 - Directing extension of rate contract would amount to re-writing contract which is not permissible under law – Petition disposed of in view of concession made by Corporation in favour of petitioner. (Paras 17-19)

For the Petitioner:	Mr.Sanjeev Bhushan, Senior Advocate with Ms.Abhilasha Kaundal, Advocate.
For Respondent No.1:	Mr.Ranjan Sharma, Additional Advocate General.
For Respondent Nos.2 & 3:	Mr.Shrawan Dogra, Senior Advocate with Ms.Nishi Goel, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant Civil Writ Petition filed under Article 226 of the Constitution of India, petitioner has prayed for the following main relief amongst others:

> ***"1. That an appropriate writ order or direction may very kindly be issued against the respondents and in favour of the petitioner directing the respondents to grant rate contract for the supply of Plant Protection Equipments (Sprayers) to the petitioner for a complete period of an year i.e. up till 31st December, 2018 by further directing the respondents to amend/modified the rate contract issued to the petitioner vide communication dated 13.12.2017 (Annexure P-3) in the interest of law and justice."***

2. Necessary facts, as emerged from the record, are that the petitioner-firm, who despite being lowest and successful bidder, was not awarded rate contract for the purchase of Plant Protection Equipments (A) (Foot, Hand Compression & Knapsack, Sprayer etc.) for the year 2017-2018, approached this Court by way of ***CWP No.910 of 2017***, seeking therein direction to respondents to award rate contract with respect to aforesaid items for the year 2017-18 and to hold a fair and impartial inquiry with regard to unnecessary delay caused and attempts made by officials of respondent No.2 to oust/debar the petitioner-firm from the tender process with malafide intention and for the extraneous reasons.

3. During the pendency of aforesaid petition, a communication dated 29th April, 2017 came to be issued by respondent cancelling therein tender in question, as a consequence of which, petitioner, while amending its petition, also prayed for quashing of communication dated 29th April, 2017. This Court, having perused pleadings adduced on record by the respective parties, allowed the aforesaid writ petition filed by the petitioner vide judgment dated 8.11.2017. It would be appropriate to take note of operative portion of judgment referred hereinabove:-

> ***"45. Consequently, in view of detailed discussion made hereinabove as well as law laid down by Hon'ble Apex Court, the decision/communication dated 22nd/29th April, 2017, taken/issued by the Managing Director, H.P. Agro Industries, cancelling therein tender in question is quashed and set aside with a further direction to the respondent-Corporation to consider the tender submitted by the petitioner with respect to purchase of Plant Protection Equipment for the year 2017-18, ignoring the alleged short comings as pointed by "TOC" and "TSSC" and thereafter award rate contract in its favour, if it is a lowest bidder. Needless to say authorities concerned while examining/analyzing tender in the light of direction issued by this Court shall act***

judiciously strictly in accordance with law without there being any malice towards the petitioner. Necessary action in terms of direction passed by this Court shall be taken by the authorities concerned within fifteen days from the receipt of copy of instant judgment.

46. Before parting, we are constrained to place on record our displeasure and anguish over the practice adopted by the respondents-Authorities while dealing with the tender in question and as such respondents-authorities are warned to be more careful and cautious in future while discharging their duties. Registry is directed to supply a copy of this judgment to the Chief Secretary to the Government of Himachal Pradesh, so that necessary safeguards/steps are taken by the Government, to sensitize/educate its officers with regard to procedure/approach required to be followed and adopted in the tender matters.

47. Since petitioner was unnecessarily pushed to the wall and it was compelled to initiate legal proceedings in the Court of law, respondents-authorities are liable to compensate it suitably, accordingly costs of Rs.one lac is imposed upon the respondents-authorities, which shall be paid within a period of six weeks from today. Accordingly, the writ petition is disposed of in the aforesaid terms."

4. Pursuant to passing of aforesaid judgment, respondent-H.P. Agro Industries Corporation Limited, issued communication dated 13.12.2017 to the petitioner intimating therein that Departmental High Level Purchase Committee (Agriculture) *(for short 'DHLPC')* in its meeting held on 12.12.2017, has approved tendered/negotiated rates in respect of items detailed in enclosed schedule 'A' on the terms and conditions specified therein as well as terms and conditions of tender document and schedule 'B' & 'C'. Respondent, while conveying aforesaid decision taken by *'DHLPC',* categorically conveyed to the petitioner-firm that validity of this rate contract will remain in force up to 31.03.2018.

5. Being aggrieved and dis-satisfied with time period/validity of rate contract, the petitioner has approached this Court in the instant proceedings seeking therein direction to the respondents to grant rate contract to it for the supply of Plant Protection Equipments (Sprayers) for a complete period of one year i.e. up to 31.12.2018. Petitioner has further prayed that necessary directions may be issued to the respondents to amend/modify the rate contract issued vide communication dated 13.12.2017.

6. Mr.Sanjeev Bhushan, learned Senior Counsel representing the petitioner-firm, vehemently argued that respondent by issuing communication dated 13.12.2017 (Annexure P-3), whereby tendered/negotiated rates submitted by the petitioner have been approved by *'DHLPC'* for a period of three months i.e. up to 31.03.2018, has made an attempt to overreach the mandate given in the judgment dated 8.11.2017 passed in *CWP No.910 of 2017*. Mr.Bhushan further contended that aforesaid judgment passed by this Court, whereby this Court quashed and set aside the decision taken by the respondents to cancel the tender and issued directions to the respondents-Corporation to consider the tender submitted by the petitioner in respect of purchase of Plant Protection Equipments for the year 2017-18, was purposely not complied with for more than 2½ months, whereafter impugned communication dated 13.12.2017 came to be issued awarding therein rate contract to the petitioner just for a period of three months.

7. Mr.Bhushan further contended that respondents, who were warned to be more careful and cautious in future while discharging their duty, have again acted malafidely with a view to teach a lesson to the petitioner, who successfully, by way of earlier writ petition, highlighted the issue with regard to colourable exercise of power by the Authorities while awarding rate contract. Mr.Bhushan argued that petitioner-firm ought to have been awarded rate contract for complete one year after passing of judgment dated 8.11.2017 because writ petition having been filed by him remained pending for almost six months, whereafter, this Court, having carefully perused record of the respondents, arrived at a conclusion that the process adopted or decision taken by the respondents-Authorities is malafide or intended to favour someone.

8. Lastly, Mr.Bhushan contended that since even prior to 31.03.2017, rate contract for supply of equipments was with the petitioner-firm, respondents, malafidely and with a bias, purposely did not take decision for finalizing the tender before 31.03.2017 and that despite having a similar clause in the earlier tender document, respondents failed to extend the rate contract for a further period of six months. While inviting the attention of this Court to condition No.26, as contained in Annexure P-1, Mr.Bhushan contended that keeping in view the peculiar facts and circumstances of the case, respondent-Corporation can extend annual rate contract up to six months.

9. Mr.Ranjan Sharma, learned Additional Advocate General, representing respondent-State, while placing on record communication dated 03.05.2018 sent by Dy. General Manager, H.P. Agro Industries Corporation Limited, stated that if this Court permits us, the case of the petitioner for extension of rate contract can be put up before the *'DHLPC'* for granting similar treatment as stands granted to other suppliers. He further stated that in terms of instructions imparted to him, action in terms of Clause 26 of agreement of tender form can only be taken in case the Directors Agriculture and/or Horticulture *(for short 'Indenting Departments')* so demands and the same is approved by the *'DHLPC'* .

10. While refuting the aforesaid submissions having been made by Mr.Sanjeev Bhushan, learned Senior Counsel representing the petitioner-firm, Mr.Shrawan Dogra, learned Senior Counsel representing respondents No.2 and 3, contended that earlier judgment dated 8.11.2017 stands duly complied with and as such, it cannot be said that attempt has been made by respondent-Corporation to overreach the mandate contained in the aforesaid judgment. While referring to Annexure P-3, communication dated 13.12.2017, Mr.Dogra argued that since tender submitted by the petitioner was with respect to purchase of Plant Protection Equipments (A) (Foot, Hand Compression & Knapsack, Sprayer etc.) for the year 2017-2018, respondent-Corporation immediately after passing of aforesaid judgment awarded rate contract in favour of petitioner till 31.03.2018 and after that fresh tender is required to be issued by the respondent-Corporation, which is a nodal agency to settle/finalize rate contract on behalf of Departments of Agriculture and Horticulture for one financial year.

11. Mr.Dogra further argued that grant of extension in the period of tender virtually would amount to re-writing the contract, which is not permissible under law. While inviting the attention of this Court to the tender document (Annexure P-1), Mr.Dogra contended that validity of tender was for a period of one year and not beyond that and as such relief prayed for in the present petition cannot be granted being beyond realm of contract and it is well settled by now that there cannot be re-writing of contract by this Court.

12. Lastly, Mr.Dogra contended that financial year 2017-2018 ended on 31.03.2018 and, as such, in a given situation *'Intending Departments'* could have made a

request for extension of rate contract in favour of particular party in peculiar exigency in case the new rate contract is not finalized for the next financial year. But, in the instant case, respondent-Corporation did not receive any such request for extension of rate contract on behalf of *'Intending Departments'* as far as the present petition is concerned.

13. We have heard learned counsel for the parties and gone through the record of the case.

14. Factum with regard to passing of earlier judgment dated 8.11.2017 is not in dispute, whereby this Court, while holding action of respondents to be arbitrary and irrational, quashed and set aside the order cancelling the tender in question. While concluding that process adopted or decision taken by the respondent-Authorities while cancelling the tender of petitioner is intended to favour someone, this Court specifically directed respondent-Corporation to consider the tender submitted by the petitioner with respect to purchase of Plant Protection Equipments (A) (Foot, Hand Compression & Knapsack, Sprayer etc.) for the year 2017-2018.

15. Having carefully perused Annexure P-1 i.e. tender document, which was subject matter of earlier writ petition, it is quiet apparent that respondent-Corporation had invited tenders for purchase of Plant Protection Equipments (A) (Foot, Hand Compression & Knapsack, Sprayer etc.) on behalf of *'Intending Departments'* for the financial year 2017-2018. Though, there is no specific date prescribed for commencement of period of rate contract, but in normal course the rate contract is presumed to be for the period starting from Ist April to 31st March of the financial year.

16. True, it is, that this Court, after having found action of respondent-Corporation arbitrary or irrational, set aside the decision dated 22nd/29th April, 2017 taken by the Managing Director, H.P. Agro Industries, cancelling therein tender in question and issued direction to the respondent-Corporation to consider the tender submitted by the petitioner with respect to purchase of Plant Protection Equipments for the year 2017-2018, but, having carefully perused tender document, wherein it has been specifically stated that tender is for the year 2017-18, this Court finds it difficult to accept the prayer having been made by the petitioner in the instant petition for extension of rate contract for a period of one year. When specific time period is provided under tender document, this Court cannot extend the period beyond contractual time period unless there is agreement between the parties to lis. Otherwise also, this Court, while allowing the earlier writ petition, had issued direction to the respondents to consider the tender submitted by the petitioner with respect to purchase of Plant Protection Equipments (A) (Foot, Hand Compression & Knapsack, Sprayer etc.) for the year 2017-2018, whereafter new rate contract is to be finalized by the respondent-Corporation being nodal agency on behalf of *'Indenting Departments'* by issuing fresh tender.

17. No doubt, petitioner, despite being lowest tender, was not awarded rate contract and it was compelled to approach this Court by way of writ petition for having rate contract awarded in its favour and in this process sufficient/considerable time was lost as far as petitioner is concerned, but that cannot be a ground/basis for extending the validity of rate contract, especially when tender in question for purchase of equipments, as referred hereinabove, was only for the financial year, 2017-18, as it would amount to rewriting of contract, which is not permissible under law.

18. Though, this Court, having carefully perused pleadings adduced on record as well as judgment dated 8.11.2017 passed in *CWP No.910 of 2017*, has no hesitation to conclude that the respondent-Corporation has not acted in fair manner while dealing with

the petitioner-firm, even after passing of judgment dated 8.11.2017, wherein this Court had specifically observed that the respondents, while taking action in terms of judgment passed by this Court, would consider the case of the petitioner without there being any malice, but since validity of tender is only up to 31.03.2018, this Court cannot pass any direction to issue rate contract beyond that particular date. However, taking note of condition No.26, contained in Annexure P-1, this Court is of the view that in the peculiar fact and circumstances of the case, wherein admittedly question with regard to validity of tender submitted by the petitioner remained pending before this Court, case of the petitioner for extension of time in terms of clause 26 of the agreement of tender can be considered favourably by the authorities concerned, but, definitely decision in this regard is required to be taken by the *'Indenting Departments'* on whose behalf respondent-Corporation invited tenders. As has been noticed hereinabove that Dy.General Manager of respondent-Corporation vide letter dated 03.05.2018 has informed the learned Additional Advocate General that in case this Court permits, case of the petitioner, for extension of rate contract, can be put up before the *'DHLPC'* for granting similar treatment as stands granted to other suppliers and for extension of validity of contract in terms of Clause 26 of the agreement.

19. Though at no point of time, this Court restrained the respondents from putting up the case of petitioner for extension of time before the *'DHLPC',* but, taking cue from communication dated 03.05.2018, as has been taken note hereinabove, this Court deems it appropriate, in peculiar facts and circumstances of the case, to dispose of present petition with the direction to respondent-Corporation to submit the case of the petitioner for extension of rate contract in terms of Clause 26 of the agreement of tender form before the *'DHLPC',* who, after having heard the petitioner as well as representatives of the *'Indenting Departments',* may consider extending validity of rate contract awarded in favour of the petitioner for a period of six months.

20. Needless to say necessary action in terms of observations made hereinabove shall be taken within a period of one week from the date of passing of this judgment.

21. Consequently, in view of detailed discussion made hereinabove, this petition is disposed of in the aforesaid terms. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Jagdish Chand & Others ....Appellants-Defendants

Versus

Hari Singh ....Respondent-Plaintiff

Regular Second Appeal No.161 of 2011.
Judgment Reserved on: 18.05.2018
Date of decision: 29.05.2018

Specific Relief Act, 1963 - Section 5 - Suit of possession on strength of title – Maintainability - Plaintiff filing suit for permanent prohibitory injunction and in alternative for possession of suit land, if dispossessed, from it during pendency of suit - Trial court dismissing suit *in toto* - District Judge allowing appeal and decreeing suit for possession holding defendants to be in its unauthorized possession – RSA- Facts revealing that in

earlier suit filed by defendants, plaintiff had set up counter-claim for possession of suit land - His counter-claim stood dismissed on plaintiff's claiming his own possession over suit land - Plaintiff not filing any appeal against dismissal of his counter-claim in earlier suit - Also not pleading anything in present suit about his dispossession from suit land subsequent to judgment of earlier suit - Held, findings qua plaintiff's entitlement for possession of suit land had attained finality in earlier suit / counter-claim - Fresh suit for possession was not maintainable - Appeal allowed – Judgment and decree of first appellate court set aside - Suit dismissed.(Paras 14,15 and 25)

Code of Civil Procedure, 1908 - Section 96 - First appeal - Mode of disposal - Held, when appellate court agrees with view of trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court - Expression of general agreement with reasons given by trial court would ordinarily suffice. However, when first appellate court reverses findings of trial court, it must record findings in clear terms explaining how reasonings of trial court are erroneous. (Para 23)

Cases referred:

Aloys Wobben and Another vs. Yogesh Mehra and Others, (2014)15 SCC 360
Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415
Rajni Rani and Another vs. Khairatilal and Others, (2015)2 SCC 682

For the Appellants Mr.Romesh Verma, Advocate.
For Respondent Mr.V.S. Rathore, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of present Regular Second Appeal, challenge has been laid to judgment and decree dated 7.10.2010, passed by learned District Judge, Kangra at Dharamshala, in Civil Appeal(RBT) No.150-B/XIII-2010/2006, reversing the judgment and decree dated 14.06.2006 passed by learned Civil Judge(Senior Division), Baijnath, District Kangra in Civil Suit No.59/2003, whereby suit having been filed by the respondent-plaintiff *(hereinafter referred to as the 'plaintiff')* for permanent prohibitory injunction and in the alternative decree for possession was decreed.

2. Succinctly facts, as emerged from the pleadings adduced on record by the respective parties, are that the plaintiff filed a suit against the appellants-defendants *(hereinafter referred to as the 'defendants'),* seeking therein decree for permanent prohibitory injunction and in the alternative decree for possession qua the suit land as described in the plaint as well as in the impugned judgment. It has been averred in the plaint that the plaintiff is recorded as owner in possession of the suit land and the defendants have no right, title or interest in the suit land and, as such, they being stranger have no concern with the suit land. It has further been averred that the defendants, who are clever and shrewd persons, are trying to take forcible possession of the suit land with a view to change the nature of the suit land. It has further been averred by the plaintiff that defendant No.1 had earlier filed a suit for specific performance against him to take the suit land on the basis of an invalid agreement, but same was dismissed and now defendants, with a view to take forcible possession, are interfering in the possession of the plaintiff. Plaintiff further alleged that the defendants are threatening to cut bamboo and other trees from the suit land and continuously interfering in the absence of the plaintiff and proclaiming to take forcible possession of the suit land. In the aforesaid background, plaintiff claimed that he is entitled

to decree for permanent prohibitory injunction, restraining the defendants from interfering in any manner, or taking forcible possession, or constructing any structure, cutting the trees or changing the nature of the suit land. It is further prayed that in case, defendants succeed in taking forcible possession during the pendency of this suit, then decree for possession of the suit land may also be awarded in his favour.

3. Defendants, by way of written statement, refuted the aforesaid claim of the plaintiff by taking preliminary objections qua the maintainability, cause of action, locus standi, estoppel and claimed that the plaintiff is not at all in possession of the suit land and that the suit, having been filed by him, is barred by Section 11 of the Code of Civil Procedure *(hereinafter referred to as ''CPC').* Defendants further averred that the plaintiff entered into an agreement to sell the suit land to defendant No.1 on 2.6.1989 and on the same day the plaintiff put defendant No.1 into possession of the suit land and since then he is in possession of the suit land on the spot and plaintiff is having knowledge of the same. Defendants further claimed that defendant No.1 is in possession of the suit land from the date of agreement and said possession is open, hostile, uninterrupted and within the knowledge of the plaintiff and he has become owner in possession of the suit land by way of adverse possession and, as such, plaintiff has no right, title or interest over the suit land. Defendants further averred that defendant No.1 had filed a suit for specific performance and the same was dismissed but he is in possession of the suit land on the basis of agreement dated 2.6.1989 and till date plaintiff has not taken possession back from him, therefore, he is liable to be declared owner in possession of the suit land by way of adverse possession. It is further averred that the plaintiff had filed an application under Order 21 Rule 11 CPC for getting the possession of the suit land from defendant No.1, which was dismissed on 11.6.2003 during the pendency of the suit which itself suggests that the defendant is in possession of the suit land, but the plaintiff has purposely concealed this fact from the Court to get the relief as prayed for in the plaint. Lastly, defendants averred that the plaintiff is estopped by his own act and conduct from filing this suit without any *locus standi* and the present suit has been filed merely to harass the defendants.

4. Despite opportunity, plaintiff failed to file replication and, as such, right to file the same came to be closed vide order dated 4.11.2004.

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

> "1. *Whether the plaintiff is entitled for the relief of injunction, as prayed for? OPP.*
>
> *1-A. Whether the plaintiff in the alternative is also entitled for the relief of possession in case defendants succeed in taking forcible possession during the pendency of the suit or found in unauthorized possession of the suit land, as alleged ? OPP.*
>
> *2. Whether the suit is not maintainable in the present form? OPD.*
>
> *3. Whether the plaintiff has got no cause of action? OPD.*
>
> *4. Whether the plaintiff has no locus standi to sue? OPD.*
>
> *5. Whether the plaintiff is estopped from filing the present suit by his act and conduct? OPD.*
>
> *6. Whether the defendant is in possession of the suit land on the basis of agreement dated 2.6.1989 and now his possession is ripened into ownership by way of adverse possession, as alleged? OPD.*
>
> *7. Relief."*

6. Learned trial Court, on the basis of evidence led on record by respective parties, dismissed the suit of the plaintiff. Being aggrieved and dis-satisfied with the judgment and decree dated 14.6.2006 passed by learned Civil Judge(Senior Division), Baijnath, District Kangra, plaintiff preferred an appeal in the Court of learned District Judge, Kangra at Dharamshala, who, partly allowed the appeal having been preferred by the plaintiff and decreed her suit for possession of the land comprised in Khata No.114 min, Khatauni No.319 min, Khasra No.772/175 and 185, measuring 0-28-42 Hectares as per Jamabandi for the year 1998-99 situate in Mohal Panjayala Buhla Mouza Sansaal Tehsil Baijnath District Kangra. However, learned District Judge did not disturb the findings returned by the learned trial Court below with regard to prayer having been made by the plaintiff for permanent injunction. In the aforesaid background, appellants-defendants have approached this Court in the instant proceedings, praying therein to set aside the impugned judgment and decree dated 7.10.2010 passed by learned District Judge, Kangra at Dharamshala.

7. This Court vide order dated 18.7.2011 admitted the present appeal on the following substantial question of law:-

> *"(1) After the dismissal of counter claim of the respondent by the learned trial Court in Civil Suit No.239/99, dated 21.6.2000, whether respondent-plaintiff is entitled to decree of possession in the present suit?*

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

9. Mr.Romesh Verma, learned counsel representing the appellants-defendants, vehemently argued that impugned judgment passed by learned District Judge is not sustainable in the eye of law as the same is not based upon proper appreciation of evidence as well as law and, as such, same deserves to be quashed and set aside. Mr.Verma further contended that bare perusal of judgment dated 14.6.2006 passed by learned trial Court clearly suggests that the same is based upon proper appreciation of evidence and law and, as such, there is/was no scope left for learned District Judge to reverse the findings returned by the Court below. While inviting the attention of this Court to Ex.P-2 i.e. copy of judgment dated 25.9.2000 passed by learned Sub Judge Ist Class, Baijnath, District Kangra, H.P in Civil Suit No.239/99/97, titled: Jagdish Chand vs. Hari Singh, Mr.Verma strenuously argued that on the basis of pleadings adduced on record in that suit a specific issue i.e. issue No.9, *"Whether defendant is entitled for the decree of possession? OPD"*, was framed and learned trial Court, having perused material on record, returned the findings that since defendant *(Plaintiff in present suit)* has admitted that he is in possession of the suit land, therefore, he cannot claim decree of possession against the plaintiff in the counter claim.

10. Mr.Verma further contended that the plaintiff had filed counter claim specifically praying therein decree of permanent prohibitory injunction as well as for possession, but plaintiff was not held entitled to possession in that suit, but at no point of time challenge was ever laid to finding returned by the trial Court in the counter claim having been filed by the plaintiff and, as such, the same has attained finality. While placing reliance upon judgments rendered by Hon'ble Apex Court in ***Rajni Rani and Another vs. Khairatilal and Others, (2015)2 SCC 682*** and ***Aloys Wobben and Another vs. Yogesh Mehra and Others, (2014)15 SCC 360,*** Mr.Romesh Verma contended that subsequent suit i.e. present suit, having been filed by the plaintiff on the same and similar cause of action, has been rightly dismissed by the Court below. He further argued that counter claim in a

suit is in the nature of cross suit and if counter claim is dismissed on being adjudicated on merits, it forecloses the right of the defendants. He further stated that in case the counter claim was dismissed by expressing an opinion that the plaintiff is not entitled to relief of possession and formal order made in this regard amounts to decree which is/was required to be assailed by the plaintiff by way of independent appeal, affixing separate court fee. Mr.Verma, while referring to the plaint having been filed by the plaintiff, vehemently argued that no decree for possession could be granted by learned first appellate Court in view of averments contained in the plaint, wherein plaintiff has specifically claimed himself to be owner in possession.

11. Mr.Virender Rathore, learned counsel representing the respondent-plaintiff, supported the impugned judgment and decree passed by the learned District Judge and admitted that there is no illegality and infirmity in the impugned judgment and decree and as such the same deserves to be upheld. Mr.Rathore, while fairly acknowledging the fact that no appeal was filed against the rejection of counter claim having been filed by the plaintiff in earlier suit i.e. Ex.P-2, contended that on the strength of findings returned in the earlier counter claim having been filed by the plaintiff, plaintiff cannot be precluded from filing fresh suit for possession; especially when defendants forcibly took the possession of the suit land during the pendency of the suit. While inviting the attention of this Court to the written statement having been filed by the defendants, Mr.Rathore strenuously argued that factum with regard to forcible possession taken by defendants stands duly admitted in the written statement and, as such, there is no force in the arguments of the learned counsel representing the defendants that no decree for possession could be granted in favour of plaintiff on the strength of pleadings made in the plaint.

12. Having gone through the pleadings and evidence adduced on record, this Court finds that plaintiff while praying for decree of possession has specifically averred in the plaint that he is owner in possession of the suit land. Plaintiff has further averred that the defendants being stranger has no right, title or interest in the suit property and, as such, he be restrained from taking forcible possession of the suit land. There is no averment much less specific with regard to possession, if any, of defendants over the suit land and, as such, this Court is persuaded to agree with the contention of Mr.Romesh Verma, learned counsel representing the defendants, that in the absence of specific pleadings with regard to possession, if any, of defendants over the suit land, first appellate Court below ought not to have granted decree of possession in favour of plaintiff.

13. No doubt, defendant No.1, while refuting the averments contained in the plaint, has claimed himself to be in possession of the suit land, but needless to say plaintiff is/was required to stand on his own legs to make him entitled for decree of possession, which can/could only be granted in case plaintiff is/was able to show that he has been dispossessed. At the cost of repetition, it may be observed that it nowhere emerge from the averments contained in the plaint that the plaintiff is not in possession of the suit land and he was forcibly dispossessed from the suit land during the pendency of the suit. Defendant No.1 has averred that he was put into possession of the suit land in terms of the agreement dated 2.6.1989 Ex.DW-2/A, which came to be set aside in earlier suit Ex.P-2 i.e. Civil Suit No.239/99/97, having been filed by the appellant-defendant Jagdish Chand, who, on the strength of aforesaid agreement Ex.DW-2/A, prayed for decree of specific performance of contract and permanent prohibitory injunction. Though aforesaid suit having been filed by the appellant-defendant Jagdish Chand was partly decreed for recovery of Rs.15,000/- from the defendant with simple interest @ 6% per annum w.e.f. 2.6.1989 till the final payment of the amount, but he was not held entitled for decree of permanent prohibitory injunction.

14. Careful perusal of Ex.P-2 clearly suggests that in the previous suit having been filed by the plaintiff (appellant-defendant herein) for specific performance of contract and for permanent prohibitory injunction, defendant (respondent-plaintiff herein) also filed counter claim, wherein defendant claimed decree of possession on the basis of title against the plaintiff. In the suit, referred hereinabove, a specific issue i.e. issue No.9 *"Whether defendant is entitled for the decree of possession? OPD,* came to be framed. However, fact remains that learned Civil Court, while passing judgment dated 25.9.2000 (Ex.P-2), held the defendant *(respondent-plaintiff herein)* not entitled for decree of possession. While returning findings qua issue No.9, learned trial Court specifically held that defendant *(respondent-plaintiff herein)* has admitted this fact that he was in possession of the suit land and, as such, he cannot claim decree of possession against the plaintiff in counter claim. It would be profitable to take note of para-13 of judgment Ex.P-2, wherein specific finding, with regard to counter claim having been filed by the plaintiff, seeking therein decree of possession, has been returned. Para-13 of the judgment reads thus:-

> ***"13. It is the case of the plaintiff that the possession of the suit land was delivered to him by the defendant on 2.6.1989 at the time of execution of agreement, but as per the defendant, the plaintiff has forcibly taken the possession of the suit land after 17.1.97. Witnesses have been produced by both the parties in the witness box to prove the possession. But the plaintiff has produced the copy of plaint Ex.PX of the Civil Suit No.70/2000 which is pending before this court qua the suit property in which it has been admitted by the present defendant that he is in possession of the suit land i.e. Khasra No.772/275 and 185. It shows that the defendant is admitting this fact that he is in possession of the suit land. Therefore, he cannot claim the decree of possession against the plaintiff in counter claim. The plaintiff is not entitled to decree of permanent prohibitory injunction as the agreement itself is void and the plaintiff cannot claim the right over the suit land on the basis of agreement Ex.PW-3/A. The suit is maintainable to the extent of alternative prayer of recovery of the amount of Rs.15,000/-. The plaintiff has locus standi to file the present suit."***

15. It is quite apparent from the aforesaid findings returned by the learned Civil Court that in earlier suit having been filed by the appellant-defendant that respondent-plaintiff with a view to prove his possession over the suit land had produced the copy of plaint Ex.PX filed in Civil Suit No.70/2000, wherein appellant-defendant had admitted him (plaintiff) to be in possession of the suit land i.e. Khasra No.772/275 and 185 and, as such, Court below, taking note of aforesaid admission having been made by the appellant-defendant in that suit, arrived at the conclusion that since defendant had admitted possession of plaintiff in the suit, therefore, he cannot claim decree of possession against the plaintiff in the counter claim. It is not in dispute that the present appellant-defendant, being aggrieved and dissatisfied with the aforesaid judgment and decree Ex.P2, preferred an appeal in the Court of learned District Judge, Kangra i.e. mark 'A', but, the same was dismissed. However, fact remains that plaintiff never laid any challenge to the judgment, whereby his counter claim for decree of possession was rejected and, as such, it attained finality. Plaintiff being aggrieved and dissatisfied with rejection of his counter claim, whereby he had prayed for decree of possession against the plaintiff, ought to have filed an appeal in the competent Court of law against the rejection of his counter claim, but, he chose to remain silent, as is evident from the record.

16. By now it is well settled that a counter claim preferred by the defendant in a suit is in the nature of cross suit. As per Order 8 Rule 6-A(2) CPC, the Court is required to pronounce a final judgment in the same suit both on the original claim as also in the counter claim. When a counter claim filed by the defendant is dismissed being adjudicated on merits it forecloses the rights of the defendant.

17. It is also well settled that when there is a conclusive determination of rights of parties upon the adjudication, the said decision in certain circumstances can have the status of a decree. A Court may or may not draw a formal decree, but if by virtue of the order of the Court, rights are finally adjudicated, irrefutably it would assume the status of a decree and the same is required to be laid challenge by way of filing a separate appeal after affixing prescribed Court fee. In this regard reliance is placed upon ***Rajni Rani and Another vs. Khairati Lal and Others, (2015)2 SCC 682,*** wherein the Hon'ble Apex Court has held as under:-

> ***9. To appreciate the controversy in proper perspective it is imperative to appreciate the scheme relating to the counter-claim that has been introduced by Civil Procedure Code (Amendment) Act 104 of 1976 with effect from 1.2.1977.***
>
> ***9.1 Order 8, Rule 6A deals with counter-claim by the defendant. Rule 6A(2) stipulates thus:-***
>
> ***"6-A.(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counterclaim."***
>
> ***9.2 Rule 6-A(3) enables the plaintiff to file a written statement. The said provision reads as follows:-***
>
> ***"6-A.(3) The plaintiff shall be at liberty to file a written statement in answer to the counterclaim of the defendant within such period as may be fixed by the Court."***
>
> ***9.3. Rule 6-A(4) of the said Rule postulates that:***
>
> ***"6-A(4) The counter-claim shall be treated as a plaint and governed by rules applicable to a plaint.***
>
> ***9.4 Rule 6-B provides how the counter-claim is to be stated and Rule 6C deals with exclusion of counter-claim.***
>
> ***9.5 Rules 6-D deals with the situation when the suit is discontinued. It is as follows:-***
>
> ***"6-D. Effect of discontinuance of suit. – If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with."***
>
> ***9.6. On a plain reading of the aforesaid provisions it is quite limpid that a counter-claim preferred by the defendant in a suit is in the nature of a cross-suit and by a statutory command even if the suit is dismissed, counter-claim shall remain alive for adjudication. For making a counter- claim entertainable by the court, the defendant is required to pay the requisite court fee on the valuation of the counter-claim. The plaintiff is obliged to file a written statement and in case there is default the court can pronounce the Judgment against the plaintiff in relation to the counter-claim put forth by the defendant as it has an***

independent status. The purpose of the scheme relating to counter-claim is to avoid multiplicity of the proceedings. When a counter-claim is dismissed on being adjudicated on merits it forecloses the rights of the defendant. As per Rule 6A(2) the court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter-claim. The seminal purpose is to avoid piece-meal adjudication. The plaintiff can file an application for exclusion of a counter-claim and can do so at any time before issues are settled in relation to the counter-claim. We are not concerned with such a situation.

10. In the instant case, the counter-claim has been dismissed finally by expressing an opinion that it is barred by principles of Order 2, Rule 2 of the CPC. The question is what status is to be given to such an expression of opinion. In this context we may refer with profit the definition of the term decree as contained in section 2(2) of CPC:-

"2.(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [1][* * *] Section 144, but shall not include –

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

11. In R. Rathinavel Chettiar v. V. Sivaraman, (1999)4 SCC 89, dealing with the basic components of a decree, it has been held thus: (SCC pp.93-94, paras 10-11)

"10. Thus a "decree" has to have the following essential elements, namely:

(i) There must have been an adjudication in a suit.

(ii) The adjudication must have determined the rights of the parties in respect of, or any of the matters in controversy.

(iii) Such determination must be a conclusive determination resulting in a formal expression of the adjudication.

11. Once the matter in controversy has received judicial determination, the suit results in a decree either in favour of the plaintiff or in favour of the defendant."

12. From the aforesaid enunciation of law, it is manifest that when there is a conclusive determination of rights of parties upon adjudication, the said decision in certain circumstances can have the status of a decree. In the instant case, as has been narrated earlier, the counter-claim has been adjudicated and decided on merits holding that it is barred by principle of Order 2, Rule 2 of C.P.C. The claim of the

defendants has been negatived. In Jag Mohan Chawla v. Dera Radha Swami Satsang, (1996)4 SCC 699 dealing with the concept of counterclaim, the Court has opined thus: (SCC p.703, para 5)

> *"5.... is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection (sic protraction), the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit."*

13. *Keeping in mind the conceptual meaning given to the counter-claim and the definitive character assigned to it, there can be no shadow of doubt that when the counter-claim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put forth by the defendants is concerned. Nothing in that regard survives as far as the said defendants are concerned. If the definition of a decree is appropriately understood it conveys that there has to be a formal expression of an adjudication as far as that Court is concerned. The determination should conclusively put to rest the rights of the parties in that sphere. When an opinion is expressed holding that the counter-claim is barred by principles of Order 2, Rule 2 C.P.C., it indubitably adjudicates the controversy as regards the substantive right of the defendants who had lodged the counter-claim. It cannot be regarded as an ancillary or incidental finding recorded in the suit.*

14. *In this context, we may fruitfully refer to a three-Judge Bench decision in Ram Chand Spg. & Wvg. Mills v. Bijli Cotton Mills (P) Ltd., AIR 1967 SC 1344 wherein their Lordships was dealing with what constituted a final order to be a decree. The thrust of the controversy therein was that whether an order passed by the executing court setting aside an auction sale as a nullity is an appealable order or not.*

15. *The Court referred to the decisions in Jethanand and Sons v. State of U.P., AIR 1961 SC 794 and Abdul Rahman v. D.K. Cassim and Sons, AIR 1933 PC 58 and proceeded to state as follows: (Ram Chand Spg. & Wvg. Case, AIR 0.1347, para 13)*

> *"13. In deciding the question whether the order is a final order determining the rights of parties and, therefore, falling within the definition of a decree in Section 2(2), it would often become necessary to view it from the point of view of both the parties in the present case — the judgment-debtor and the auction-purchaser. So far as the judgment-debtor is concerned the order obviously does not finally decide his rights since a fresh sale is ordered. The position however, of the auction-purchaser is different. When an auction-purchaser is declared to be the*

highest bidder and the auction is declared to have been concluded certain rights accrue to him and he becomes entitled to conveyance of the property through the court on his paying the balance unless the sale is not confirmed by the court. Where an application is made to set aside the auction sale as a nullity, if the court sets it aside either by an order on such an application or suo motu the only question arising in such a case as between him and the judgment- debtor is whether the auction was a nullity by reason of any violation of Order 21, Rule 84 or other similar mandatory provisions. If the court sets aside the auction sale there is an end of the matter and no further question remains to be decided so far as he and the judgment-debtor are concerned. Even though a resale in such a case is ordered such an order cannot be said to be an interlocutory order as the entire matter is finally disposed of. It is thus manifest that the order setting aside the auction sale amounts to a final decision relating to the rights of the parties in dispute in that particular civil proceeding, such a proceeding being one in which the rights and liabilities of the parties arising from the auction sale are in dispute and wherein they are finally determined by the court passing the order setting it aside. The parties in such a case are only the judgment-debtor and the auction-purchaser, the only issue between them for determination being whether the auction sale is liable to be set aside. There is an end of that matter when the court passes the order and that order is final as it finally, determines the rights and liabilities of the parties, viz., the judgment-debtor and the auction-purchaser in regard to that sale, as after that order nothing remains to be determined as between them."

After so stating, the Court ruled that the order in question was a final order determining the rights of the parties and, therefore, fell within the definition of a decree under Section 2(2) read with Section 47 and was an appealable order.

16. We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter-claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India. Ergo, the order passed by the High Court is indefensible."

18. Reliance is also placed on ***Alloys Wobben and Another vs. Yogesh Mehra and Others, 2014(15) SCC 360***.

19. Now, question which needs to be decided by this Court is, "*Whether after dismissal of counter claim of the respondent by the learned trial Court in Civil Suit 239/99/97 dated 21.6.2000, respondent-plaintiff is entitled to decree of possession in the present suit?*

20. It is quiet evident from the aforesaid exposition of law rendered by Hon'ble Apex Court in ***Rajni Rani's*** case *supra* that when there is conclusive determination of rights of the parties upon the adjudication, such decision can have the status of a decree. If there is formal expression of an adjudication and determination qua the rights of the parties order gets the status of a decree. It has been held in the aforesaid judgment that the Court may or may not draw a formal decree, but, if by virtue of this order rights are finally decided, it would assume the status of decree and same is required to be laid challenge by way of appeal by paying the requisite court fee.

21. Having carefully perused Ex.P2, judgment dated 25.9.2000, passed in earlier suit, this Court is persuaded to agree with the contention of Mr.Romesh Verma, learned counsel representing the appellant-defendant, that since in earlier suit claim of the plaintiff for possession of suit land was finally adjudicated, no fresh suit for possession qua the suit land, which was subject matter of earlier suit, could be filed by the respondent-plaintiff; especially when findings returned in the counter claim filed by him in the earlier suit has attained finality. Apart from above, as has been noticed hereinabove, plaintiff-respondent in his plaint has specifically claimed himself to be in possession of the suit property and, as such, no decree for possession could be granted in his favour by learned Additional District Judge in the appeal having been preferred by him. No doubt, there is averment in the written statement having been filed by the defendants that they are in possession of the suit land, but plaintiff, who had filed suit for possession, was required to lead positive evidence to the effect that he has been dispossessed forcibly. But, in the instant case plaintiff in his plaint has claimed himself to be in possession and prayer has been made to restrain the defendants from interfering in his peaceful possession and, as such, no benefit can be allowed to be drawn by him from the averment with regard to possession made by the defendant in the written statement. Leaving everything aside, plaintiff is estopped from filing suit for possession qua the suit land in terms of Section 11 of CPC i.e. principle of *res judicata*, in view of judgment Ex.P2.

22. True, it is, that Court of first appeal must cover all important questions involved in the case and they should not be general and vague. Similarly, it is well settled that when first appellate Court reverses findings of trial Court, it is expected to record findings in clear terms specifically stating therein, in what manner reasoning of trial Court is erroneous.

23. The Hon'ble Apex Court in ***Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415,*** has held that when appellate Court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial Court; expression of general agreement with reasons given by trial court would ordinarily suffice. Hon'ble Apex Court has further held that when the first appellate Court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasoning of the trial court are erroneous. The Hon'ble Apex Court has held as under:

> ***"14. The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. When appellate court agrees***

with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasonings of the trial court are erroneous."

24. This Court sees substantial force in the arguments of Mr.Romesh Verma, learned counsel representing the appellant-defendant that learned first appellate Court, while disagreeing with the judgment passed by the Court below, has not dealt with each and every issue involved in the case and has not assigned any reason to differ with the findings returned by the trial Court.

25. In view of aforesaid discussion, this Court has no hesitation to conclude that respondent-plaintiff is not entitled to decree of possession in the present suit after dismissal of the counter claim having been filed by him for possession in Civil Suit No.239/99/97, decided vide judgment dated 25.9.2000, which has attained finality. Substantial question of law is answered accordingly.

26. Consequently, in view of detailed discussion made hereinabove, this Court sees valid reason to interfere in the judgment passed by first appellate Court, which is apparently not based upon proper appreciation of evidence as well as law. Accordingly judgment passed by learned first appellate Court is set aside and that of the learned trial Court is restored. This appeal is allowed. There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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

Court on its own motion ....Petitioner
Versus
State of H.P. & Others ....Respondents

CWPIL No.81 of 2018
Date of decision: 30.05.2018

Constitution of India, 1950- Article 226 - Poor quality of tarring of road - Epistolary writ jurisdiction - High Court taking cognizance on letter of letter petitioner highlighting poor quality of tarring of road – Letter petitioner mentioning sprouting of grass on road within 15 days of its tarring by contractor - Department justifying work executed by contractor and assigning water logging as cause of sprouting of grass on certain patches of road - Reason assigned by Department not found satisfactory – Interregnum, contractor relaid tarring - Petition disposed of with directions to Engineering-in-Chief, PWD to ensure that work entrusted to contractors is executed as per specifications - Officials of department, if failed, to get work done as per specifications shall be personally liable and cost incurred in repair should also be recovered from their salaries. (Paras 6-9)

For the Petitioner: Mr.Lovneesh Kanwar, Advocate as Amicus Curiae.

For Respondents-State: Mr.Ashok Sharma, Advocate General with Mr.Ranjan Sharma, Ms.Rita Goswami and Mr.Adarsh Sharma, Additional Advocate Generals.

For Respondent No.6: Mr.T.S. Chauhan, Advocate.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.

By way of letter petition, addressed to the Chief Justice of this Court, petitioner, who is a student and is a resident of village Dol, Tehsil Joginder Nagar, District Mandi, highlighted the issue with regard to poor quality of work executed by the contractor while carrying out tarring/mettaling of Gadyara-Dol-Chho road at Joginder Nagar, Mandi, H.P. Alongwith petition, letter petitioner also annexed news item published on 14th April, 2018 in a daily Hindi newspaper, *"Punjab Kesari",* under caption, *"Tarring Ke 20 Din Baad Sadak Per Ugi Ghas"*. Letter petitioner alleged that Public Works Department *(for short 'PWD')* had awarded work to Government Contractor; namely; Prem Pal in March, 2018 for tarring/mettaling of road, referred hereinabove, but, interestingly, within a period of 15 days from the completion of aforesaid work done by respondent No.6, grass started sprouting on tarred surface in some portion. Letter petitioner alleged that respondent No.6, while tarring/metalling the road in question, failed to lay proper layer of stone and grit before putting charcoal. She also alleged that workers engaged by respondent No.6 laid charcoal on the surface without removing dist/soil from the road, as a consequence of which, grass started sprouting within a period of 15 days of completion of work in question.

2. After having carefully perused averments contained in the letter petition as well as news item published in newspaper, this Court, while registering the letter petition as Public Interest Litigation, directed learned Additional Advocate General to ascertain the factual position and furnish the particulars of the contractor, who executed such work. Subsequently, this Court vide order dated 2.5.2018, impleaded the contractor; namely Prem Lal as party respondent No.6.

3. Superintending Engineer, Joginder Nagar Circle, HPPWD Joginder Nagar in his affidavit acknowledged the factum with regard to sprouting of grass on the road in question on some stretches of road. Officer, referred hereinabove, further stated before this Court by way of affidavit that tarring work was executed by respondent No.6 as per HPPWD specifications and work was completed successfully on 23.3.2018 under the supervision of Junior Engineer, Neri Section Sub Division Lad Bharol. He further stated that one week after completion of work, site was inspected by Junior Engineer, who had observed that grass started sprouting on tarred surface in some portion and accordingly directed contractor respondent No.6 to rectify the deffects. It has also been stated in the affidavit that department also inspected the site to find out the reasons of sprouting of grass on some stretches on the road and came to the conclusion that the main reason of sprouting grass on the road was due to water logged area and having clayey formation. As per Superintending Engineer, quality of work executed by respondent No.6 has been found to be good and well within prescribed limits. It has further been stated in the affidavit that tarring process though was completed on 26.3.2018, but rainfall occurred on 28.3.2018, 6.4.2018, 7.4.2018 and 8.4.2018 and the rain water pounded in the existing water logged area, as a consequence of which, grass sprouted on tarred surface. As per affidavit, department started the construction of Katcha side drain, but the local villagers of Dol, Gadyara and Chho did not allow the construction of side drain, due to which the rain water remained pounded on the tarred surface and grass sprouted on tarred surface in the aforementioned

stretches, not on the entire length of this road. It has further been stated in the affidavit that whole tarred surface, including area where grass sprouted is intact, without any pot holes, ruts and the traffic is plying smoothly without any inconvenience to the commuters.

4. Taking note of the fact that very poor quality of work was executed by respondent No.6 and no supervision was conducted by the authority concerned, this Court, while directing private respondent No.6 to file affidavit, also called upon Executive Engineer, HPPWD Division Joginder Nagar to remain present in the Court.

5. Today, during the proceedings of the case, Executive Engineer, HPPWD Division Joginder Nagar apprised this Court that defects noticed on the aforesaid stretches have been rectified, as per direction issued by the Engineer-in-charge, and fresh tarring/mettaling has been done on the road as per HPPWD specifications. Executive Engineer also invited our attention to the photographs to demonstrate that after having noticed defects, as have been noticed hereinabove, respondent No.6-contractor was called upon to rectify the same, who has redone tarring/metalling work after laying proper layer of stone and grit. Though this Court having perused affidavit filed by Superintending Engineer and private contractor respondent No.6, finds that damage caused to the road in question has been cured by respondent No.6 by doing fresh tarring/mettaling work, but it is not understood that how within a period of 15 days grass sprouted on mettalled/tarred road. Interestingly, department concerned, instead of taking action against erring officers/officials, has made an attempt to justify their action by stating that work has been done by respondent No.6 as per specifications and there was no defect in the same at the time of completion. Had the authorities concerned bothered to ensure proper laying of stone/grit before tarring/mettaling, grass would not have sprouted on the road. Explanation rendered on record by the department for sprouting of grass is neither plausible nor can be accepted because it is the duty of official/officer, who was supervising the work, to ensure that work of road is done strictly as per specifications and not on the whims and fences of the contractor.

6. Having taken note of the fact that defects have been cured by respondent No.6 on his own expenses, this Court sees no reason to keep the present petition alive, but before parting, we wish to observe that the authorities responsible for getting the work executed need to be more vigilant, cautious and responsible, so far as execution of work by private contractors is concerned, because public money cannot be allowed to be wasted. Secretary (PWD) to the Government of Himachal Pradesh as well as Engineer-in-Chief, HPPWD, Shimla are directed to issue necessary directions/guidelines to the officers/officials concerned, responsible for getting the work executed, to ensure quality of work to be executed by the private contractors and in case they fail to get the work done, as per specifications, they should be held personally liable and costs incurred on repair/damages should also be recovered from their salaries.

7. Necessary affidavit of compliance shall be filed by the aforesaid authorities i.e. Secretary(PWD) to the Government of Himachal Pradesh and Engineer-in-Chief within a period of two weeks from the receipt of copy of the judgment in the Registry of this Court.

8. We fully appreciate initiative taken by letter petitioner, who, being a vigilant resident of the area, not only highlighted the poor quality of work done by the contractor on the road in question, but also set up an example to other persons, who, while taking note of such irregularities and illegalities committed by the government officers/officials, may approach the authorities so that appropriate action is taken against the erring officials/officers.

9. We also wish to place on record appreciation qua the efforts put in by Mr.Lovneesh Kanwar, Advocate, Amicus Curiae, who, on the instructions of this Court, contacted letter petitioner and obtained necessary feed back.

10. Registry is directed to send a copy of this judgment to the Secretary (PWD) to the Government of Himachal Pradesh and Engineer-in-Chief, HPPWD, Shimla for necessary action at their end.

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

Gian Dass Negi ....Petitioner
Versus
State of H.P. & Others ....Respondents

CWP No.183 of 2018
Date of decision: 30.05.2018

Constitution of India, 1950 - Article 21- **Himachal Pradesh Minor Canals Act, 1976** – Distribution of Kuhl water for irrigation – Grievances - Writ jurisdiction - Petitioner alleging arbitrary supply of water for irrigation to village 'K' vis-à-vis village 'B' - High Court directing Deputy Commissioner to look into grievances - Deputy Commissioner constituting Committee and directing Sub-Divisional Magistrate(SDM) to ensure compliance of Committee's Report – Petitioner again filing petition and challenging order of Deputy Commissioner - Held, Kuhl water is natural resource to which residents of area are equally entitled for irrigation - Committee Report suggesting supply of water on *pro-rata* basis vis-à-vis areas of villages concerned – Petitioner failing in proving less supply of water vis-à-vis village 'K' – Petition dismissed.(Para 4)

For the Petitioner: Mr. Naveen K.Dass, Advocate.
For Respondents : Mr.Ashok Sharma, Advocate General with Mr.Ajay Vaidya, Sr.Additional Advocate General, Mr.Ranjan Sharma, Ms.Ritta Goswami and Mr.Adarsh Sharma, Additional Advocate Generals.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.

Prior to filing of instant writ petition, petitioner had approached this Court by way of CWP No.300 of 2017, portraying therein his grievance with regard to unequal distribution of water by the authorities for irrigation. Petitioner alleged that residents of village Brelingi are getting less water than the residents of Kalpa. Learned Single Judge of this Court, taking note of averments contained in that petition, disposed of the same vide order dated 23.2.2017 and directed Deputy Commissioner, Kinnaur to look into the grievances of the petitioner and to take decision within two weeks. Pursuant to aforesaid directions contained in order dated 23.2.2017, Deputy Commissioner, District Kinnaur at Reckong Peo passed order dated 23.9.2017, whereby he, with a view to do complete justice,

ordered that the area should be calculated and water per hour be distributed on the basis of area. Deputy Commissioner constituted a Committee, headed by Tehsildar, Kalpa, and directed it to submit proposal to re-distribute the water and time schedule Mohal-wise with the intimation to each land owner. Deputy Commissioner also directed SDM Kalpa-cum-Chairman, Boktu Kuhl to issue orders on the basis of recommendation of the Committee for re-distribution of water of Boktu Kuhl.

2. Being aggrieved and dissatisfied with the aforesaid order passed by Deputy Commissioner, petitioner has approached this Court in the instant proceedings praying therein the following main reliefs:-

> ***"1. That a writ in the nature of certiorari may kindly be issued and Annexure P-4 may kindly be quashed and set aside.***
>
> ***2. That a writ of mandamus may kindly be issued and the respondent No.3 may kindly be directed again to monitor the regulation and proper allocation of the waters of the Boktu Kuhl in accordance with the Abhiana register and revenue records of the concerned beneficiary in a time bound manner that is before the commencing spring harvest season of 2018"***

3. Having carefully perused order dated 23.9.2017 (Annexure P-4), we do not find any illegality and infirmity in the same because Deputy Commissioner vide aforesaid order had only constituted a Committee, who had to submit proposal to redistribute water and time schedule Mohal-wise with the intimation to each land owner. It is not understood as to in what manner petitioner can be aggrieved with the aforesaid order, rather Deputy Commissioner, taking note of grievance raised by present petitioner, ordered for fresh exercise to be carried out by Committee so that water is distributed equally amongst all stakeholders.

4. In nutshell case of the petitioner is that the villagers of village Kalpa had more water per hour than villagers of village Brelingi, Tehsil Kalpa from the Boktu Kuhl. The Boktu Kuhl is a scheduled Kuhl and regulated by Himachal Pradesh Minor Canals Act, 1976, wherein the Collector has been defined as a District Collector. Farming/cultivation in the said village depends on irrigation Kuhl (water canal) and Boktu Kuhl water is a natural source to which the petitioner as well as other residents of the area are entitled as they are having small farming land in their respective villages.

5. As per petitioner, irrigated land in Kalpa is 59-71-69 hectares and that of village Brelingi is 27-55-20 hectares, the area is almost double, but, water supplied to Kalpa is almost five times more than village Brelingi. Abhiana charged from 2009-2016 for village Kalpa is 7545.56, whereas from village Brelingi it is 3465.57, which clearly suggests that it is nearly a half of village Kalpa. As per petitioner, irrigation water for Kalpa is already for 10 days, which has further been increased by 2 days and 2 nights, whereas, irrigational area of village Brelingi is 27-55-20 hectare, but, residents of village Brelingi are getting water for 2 days and 12 hours.

6. Respondents by way of reply have categorically refuted the aforesaid submissions made on behalf of the petitioner and have contended that as per Abhiana record maintained by the department, the irrigated area of Mohal Kalpa and Brelingi is 59-71-69 hectares and 27-55-20 hectares respectively and the Abhiana charged for Mohal Kalpa and Brelingi is Rs.3418.23 and Rs.1597.07 respectively. It has further been submitted in the affidavit that period of 10 days, which was further increased by 2 days and 2 nights, was not solely for village Kalpa, but, for Gram Vikas Committee Kalpa, which further

distributes the water to five more Mohals; namely; Shudarang Raang, Kalpa,Sariyo and Awal Chini with respective area of 61-24-87 hectare, 51-95-48 hectares, 59-71-69 hectares, 63-98-82 hectare and 70-22-88 hectares because no separate village Committees exist for the rest of four Mohals. Respondents have further stated before this Court that meeting was held under the Chairmanship of the Sub Divisional Magistrate, Kalpa at Reckong Peo, wherein it was decided that both the Mohals i.e. Kalpa and Brelingi shall be distributed equal share of water (72 hours/3 days) in compliance to the order of the High Court dated 17.1.2018, despite the fact that irrigated area of Mohal Kalpa is almost double than Mohal Brelingi.

7. Latest affidavit filed on behalf of respondents No.3 and 4 by Sub Divisional Officer (Civil) Kalpa at Reckong Peo, clearly suggests that pursuant to directions contained in order dated 23.2.2017, passed by learned Single Judge of this Court in CWP No.300 of 2017, a Committee was constituted by Deputy Commissioner for ensuring equal distribution of water. Perusal of order dated 8.3.2018, passed by Sub Divisional Magistrate, Kalpa at Reckong Peo, clearly suggests that water of Boktu Kuhl has been ordered to be re-distributed as per details of the irrigated area of Mohals irrigated by Boktu Kuhl, as verified by the Assistant Engineer IPH Sub Division, Reckong Peo, District Kinnaur. Careful perusal of aforesaid order passed by Sub Divisional Magistrate, Kalpa at Reckong Peo, clearly suggests that villages Kalpa and Brelingi have been ordered to be given water equally for 72 hours (3 days) each and, as such, grievance of petitioner stands duly redressed. It clearly emerge from the record that since Gram Vikas Committee Kalpa further distributes the water to five more Mohals, as have been taken noticed hereinabove, Sub Divisional Magistrate, Kalpa at Reckong Peo, on the recommendation of Committee has specified time schedule for supply of water to other Mohals i.e. Shudarang, Raang, Kalpa, Sariyo and Awal Chini to which petitioner cannot have any objection.

8. Having carefully perused material placed on record by respondents, this Court is convinced and satisfied that water from Boktu Kuhl is being distributed equally amongst all the stakeholders and, as such, nothing survives in the present petition.

9. Consequently, in view of detailed discussion made hereinabove, this petition is disposed of with the direction to Sub Divisional Magistrate, Kalpa at Reckong Peo to continue with the distribution of water for irrigation purposes from Boktu Kuhl, as per office order dated 8.3.2018, so that no discrimination is done to any of the stakeholder including the petitioner.

10. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Sikander Madan ....Petitioner

Versus

Union of India & Others ....Respondents

CWP Nos.389, 845, 846, 847, 854, 923 & 927 and 1006 of 2018

Date of decision: 31.05.2018

Constitution of India, 1950 - Article 226 - **Companies Act, 2013 (Act)** - Sections 164(2) & 248(2) - Directors of Companies – Disqualification - Challenge thereto - Writ jurisdiction - Petitioners being Directors of different private companies since not filing requisite returns declared disqualified by Registrar of Companies (ROC) - Petitioners approaching High Court and praying restraint against ROC from blocking their Directors Identification Numbers (DINs) - Petitioners contending that they stood appointed as Directors of other companies and blocking their DINs without notice would adversely affect their interest - Petitions disposed of with directions to petitioners to approach ROC and apply for liquidation of erstwhile companies and avail benefits of CODS-2018 – ROC also directed to expedite the proceedings. (Paras 3-9)

CWP No.389 of 2018

For the Petitioners: Mr. B.C. Negi, Senior Advocate with Mr.Raj Negi, Advocate.

CWP Nos.846 & 847 of 2018

Mr. R.L. Sood, Senior Advocate with Mr.Sunil Mohan Goel.

CWP Nos.845, 923 & 927 of 2018

Mr.Sunil Mohan Goel, Advocate.

CWP Nos.854 of 2018

Mr.Ajay Vaidya, Advocate.

CWP Nos.1006 of 2018

Mr.Dinesh Mohan Sinha and Mr.Rahul Mahajan, Advocates.

For Respondent-UOI: Mr.Rajesh Sharma, Assistant Solicitor General of India.

The following judgment of the Court was delivered:

Per Sandeep Sharma, J.

With the consent of learned counsel representing the petitioners in the aforesaid writ petitions, all the cases are being taken together for final adjudication since issues involved in abovementioned petitions are identical. Moreover, in all the petitions similar relief has been claimed by the petitioners.

2. Above named petitioners, who claimed themselves to be the Directors of different Companies, being aggrieved with the inclusion of their names in the list of disqualified Directors published by the respondents, have approached this Court in the instant proceedings, praying therein for issuance of writ in the nature of mandamus directing thereby respondents not to block Director Identification Numbers *(hereinafter referred to as 'DIN')* issued in their names.

3. Petitioners claim that they are the Directors of private companies, but such companies have not carried out any business for considerable time and their accounts are also not in operation for the last so many years. Since the petitioners did not file requisite returns as required under the Companies Act, 2013 *(hereinafter referred to as the 'Act'),* they incurred disqualification under Section 164(2) of the Act.

4. On 27.04.2018, when all these petitions came up for admission, learned counsel representing the parties unequivocally stated before this Court that the petitioners do not wish to revive the petitioner-Company and would like to instead apply for its voluntary liquidation. Learned counsel representing the petitioners also stated before this Court that the petitioners apart from being on the Board of Directors of alleged defaulter

company are also appointed as Director on the Board of Directors of other companies and as such inclusion of their names in the list of disqualified Directors, without notice, affects their interest.

5. Having heard learned counsel for the parties and perused the record made available to this Court, this Court passed interim order dated 2704.2018 and observed that disqualification of holding Directorship, if any, by the petitioners should not extend to other companies, which are not in default, and that too, without notice to the petitioners. Since company(s) had not carried out any business, they were liable to be struck off from the Registrar of Companies. However, they could seek voluntary dissolution of the Companies under Section 248(2) of the Act only if they were provided opportunity to do so. At the time of hearing on 27.04.2018, this Court, having taken note of material adduced on record, especially factum that Company(s) are not carrying out any business and their bank accounts have not been operated for quiet considerable time, arrived at a conclusion that the petitioners ought to have provided benefit of CODS-2018 and accordingly, passed the following directions:

> ***"(a) The petitioners may file all the requisite returns in relation to the Company to avail the CODS-2018***
>
> ***(b) The petitioners may also file the necessary resolutions for voluntarily striking off the name of the Company as required under Section 248(2) of the Act.***
>
> ***(c) The petitioners would also make a necessary application under CODS-2018 alongwith the requisite charges.***
>
> ***(d) The aforesaid documents and applications will not be submitted online but in hardcopies to the Registrar of Companies.***

6. Apart from above, this Court also directed that the Registrar shall scrutinize the documents submitted by the petitioners and in case same are found to be in accordance with Section 248(2) of the Act, the petitioners would be granted the benefit of the CODS-2018. This Court further held that removal of the Company from the Registrar under Section 248(1) of the Act would be deemed as striking off the Company under Section 248(2) of the Act, whereafter the petitioner's applications under CODS-2018 would be considered sympathetically by the Registrar.

7. The aforesaid order dated 27.04.2018 was passed in the presence of learned Assistant Solicitor General of India and today during the proceedings of the case, we have been informed that the petitioners have already approached the Registrar of Companies and have filed documents in terms of directions contained in order dated 27.4.2018.

8. Learned Senior Counsel representing the petitioners, fairly state that since the matter is under active consideration of Registrar of Companies in terms of interim order dated 27.04.2018 above captioned petitions can be disposed of with the direction to the authority concerned to decide the issue at hand expeditiously in terms of interim order dated 27.4.2018 after affording opportunity of being heard to the petitioners.

9. Consequently, in view of above, present petitions are disposed of with the direction to the respondents to consider and decide the application filed by the petitioners, under the CODS-2018, within a time bound manner, preferably within a period of two months from today, after having afforded opportunity of being heard to the petitioners, who, being aggrieved, if any, by order to be passed by the competent authority in terms of order dated 27.4.2018, are at liberty to file appropriate proceedings in appropriate Court of law. It

is further clarified that till the time final decision is taken on the petitions by the respondents, interim order dated 27.04.2018 shall remain in force.

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

Deep Chand Anand ....Plaintiff-Appellant

Versus

The Principal Secretary(Revenue) to the Government of H.P. & Another ....Defendants-Respondents

Regular Second Appeal No.154 of 2007.
Judgment Reserved on: 15.06.2018
Date of decision: 26.06.2018

Specific Relief Act, 1963 - Section 34 - Suit for declaration of title and injunction – Proof - Plaintiff seeking declaration of his ownership over suit land by claiming title through 'DN' to whom it was allegedly given as Patta by Raja of Koti - In alternative plaintiff claiming ownership by adverse possession - Trial court dismissing suit by holding plaintiff not proving his title or possession - District Judge dismissing his appeal – RSA - On facts, grant of Patta in favour of 'DN' qua suit land not proved - No cogent evidence indicating plaintiff's possession over suit land - Plaintiff himself not stepping in witness box to prove his possession - Plaintiff's own witnesses deposing qua possession of State Government over disputed land - Held, no material on record to conclude plaintiff having become owner of suit land either by purchase or by way of adverse possession - RSA dismissed - Judgments of lower courts upheld. (Paras 11-19 and 30)

Cases referred:

Bangalore Development Authority vs. N.Jayamma, AIR 2016 SC 1294
Gurdwara Sahib vs. Gram Panchayat Village Sirthala and Another, (2014)1 SCC 669
Harswarup vs. Ram Lok Sharma, 2000(3) Shim.L.C.160
Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan & Ors., AIR 2009 SC 103
Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415,
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
Nasgabhushanammal (D) By LRs. Vs. C.Chandikeswaralingam, AIR 2016 SC 1134
Prem Nath Khanna and others vs. Narinder Nath Kapoor (Dead) Through L.Rs. and others, AIR 2016 SC 1433

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

For the Respondents: Mr.S.C. Sharma & Mr.Dinesh Thakur, Additional Advocate Generals with Mr.Amit Dhumal, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant Regular Second Appeal is directed against the judgment and decree passed by the learned District Judge (Forest), Shimla, H.P. in Civil Appeal No.12-S/13 of 2005/04, dated 16.01.2007, affirming the judgment and decree passed by learned Civil Judge(Junior Division), Court No.1, Shimla, H.P. in Civil Suit No.17/1 of 2003, dated 24.09.2004, praying therein to decree the suit having been filed by the plaintiff-appellant after setting aside the judgments and decrees passed by both the Courts below.

2. Necessary facts, as emerged from the record, are that the plaintiff-appellant *(hereinafter referred to as the 'plaintiff')* filed a suit for declaration to the effect that he is owner in possession of the land comprised in Khata No.20 min, Khatauni No.32, Khasra No.57/11 (New), area measuring 1391-19 hectares, situate in Mauza Jangal Mashobra, Pargana Shohawali, Tehsil and District Shimla *(hereinafter referred to as the 'suit land')*. Plaintiff averred in the plaint that the suit land was given on Patta to one Shri Dina Nath Mehra, the predecessor in interest of Shri Jag Mohan Mehra, and thereafter it remained in possession of Shri Jag Mohan Mehra and his successors in interest from whom plaintiff has purchased this land. It is further averred that in the year 1962 Shri Jag Mohan Mehra had moved an application for correction of revenue record with respect to 15-9 bighas of land, out of the entire land of 24-18 bighas, because only 9-9 bighas of land, out of the suit land, was shown in ownership and possession of Shri Jag Mohan Mehra. It is alleged that in the aforesaid application, moved by Shri Jag Mohan Mehra, Tehsildar, Kasumpti conducted an inquiry and found that the entire suit land had given to the predecessor-in-interest of Shri Jag Mohan Mehra by *Patta*, but, in the revenue record only 9-9 bighas of area was entered in his name. It is further alleged that Shri Jag Mohan Mehra contested the case before different revenue authorities and after his death, his successors-in-interest namely; Smt.Ved Kumari Mehra and Shri Bharat Mohan Mehra, remained in possession of the entire land and thereafter they sold it to the plaintiff and delivered the possession of entire land to him. It is pleaded that respondents-defendants *(hereinafter referred to as the 'defendants')* are interfering with the possession of the plaintiff in the suit land on the basis of wrong entries and, as such, he is entitled to the relief of declaration as well as permanent prohibitory injunction. In this background, the plaintiff sought a decree for possession and injunction against the defendants.

3. Defendants, by way of filing their written statement, refuted the claim of the plaintiff on the ground of cause of action, proper valuation, res judicata etc. On merits, defendants refuted the claim put forth by the plaintiff and claimed that Jagmohan Mehra was owner of 9-9 bighas of land at Mauja Mashobra by way of *Patta* and, out of this land, he sold 7 biswas of land in the year 1981 to Smt.Mohinder Pal Sidhu, as a result of which only 9-2 bighas land remained in his share. It is averred that other land is owned and possessed by State of Himachal Pradesh and Jagmohan Mehra and his successors-in-interest had no right or interest over that land. Defendants also averred that predecessors-in-interest of the plaintiff were not in possession of that land, the applications filed by them for the correction of revenue entries were rightly dismissed by the revenue Courts. Defendants further averred that even the plaintiff has purchased land to the extent of 9-2 bighas and is not in possession of other land, as such, question of his becoming the owner by way of adverse possession does not arise. In the aforesaid background, the defendants prayed for dismissal of the suit.

4. By way of replication, the plaintiff, while denying the allegations made in the written statement, reaffirmed the averments made in the plaint and controverted the contrary averments made in the written statement.

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

"1. Whether the suit property specifically in para No.1 of the plaint was given to Sh.Jagmohan Mehra by the princely state of Koti vide dated 29.7.1878 as alleged? OPP.

2. Whether Sh.Jagmohan Mehra came to process the suit property, as alleged? OPP.

3. Whether the suit property was inherited by the widow Ved Kumari Mehra as alleged, if so to what effect? OPP.

4. Whether the plaintiff is the owner in possession of the suit property on account of its purchase vide sale deed dated 28.1.88, if so to what effect? OPP.

5. Whether the revenue entries pertaining to suit land are wrong, null and void? OPP.

6. Whether in the alternative the plaintiff has become the owner of the suit property by way of adverse possession? OPP.

7. Whether the plaintiff is entitled to the relief of Permanent Prohibitory Injunction as prayed for? OPD.

8. Whether the plaintiff has no cause of action to file the suit? OPD.

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

10. Whether the jurisdiction of the court is barred under the provisions of H.P. Land Rent Act? OPP.

11. Whether the plaint is liable to be rejected under order 7 rule 11 C.P.C. for want of cause of action? OPD.

12. Whether the suit is bad for non joinder of necessary parties? OPD.

13. Whether the suit is barred by principle of resjudicata as alleged? OPD.

14. Whether the suit is bad for want of legal and valid notice under section 80 C.P.C. ? OPD.

15. Relief."

6. Learned trial Court, on the basis of evidence adduced on record by respective parties, dismissed the suit of the plaintiff. Being aggrieved and dis-satisfied with judgment dated 24.09.2004 passed by learned trial Court in Civil Suit No.17/1 of 2003, plaintiff preferred an appeal under Section 96 of the Code of Civil Procedure *(for short 'CPC')* in the Court of learned District Judge (Forest), Shimla, which came to be registered as Civil Appeal No.12-S/13 of 2005/04. However, fact remains that the same was also dismissed, as a consequence of which, judgment of trial Court dated 24.09.2004 came to be upheld. In the aforesaid background, plaintiff has approached this Court in the instant proceedings, praying therein to decree his suit after setting aside the judgments and decrees passed by both the Courts below.

7. This Court vide order dated 17.08.2007, admitted the appeal on the following substantial questions of law:-

"1. Whether the application filed under Section 65 of Evidence Act for secondary evidence was wrongly dismissed by the learned trial Court as well as the learned appellate Court and the same deserves to be allowed?

2. Whether there has been misreading of evidence by the Courts below in regard to the claim of the plaintiff regarding adverse possession?.

3. Whether the learned trial Court has wrongly drawn an adverse inference in regard to non-appearance of the witness in the witness box?"

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

9. Taking note of the nature and the text of substantial questions of law referred hereinabove, this Court intends to take all the substantial questions of law together for adjudication.

10. Having carefully perused pleadings as well as evidence adduced on record, be it ocular or documentary, this Court does not find much force in the contention raised by Mr.Bhupender Gupta, learned Senior Counsel representing the appellant-plaintiff that the Courts below have failed to appreciate the evidence in its right perspective and there is complete misreading, mis-appreciation and mis-construction of evidence, rather this Court, having carefully examined material available on record vis-à-vis impugned judgments passed by both the Courts below, has no hesitation to conclude that the plaintiff has miserably failed to prove on record that he is in adverse possession of the suit land as claimed in the Civil Suit having been filed by him. Though Mr.Bhupender Gupta, while inviting the attention of this Court to the pleadings as well as evidence led on record by the plaintiff, made a serious attempt to persuade this Court to agree with his contention that the plaintiff is in adverse possession of the suit property, but such claim is not corroborated by evidence, be it ocular or documentary. To the contrary, evidence available on record clearly suggests that *Patta* dated 29.7.1878 was given/made in favour of Mr.Thomas Bliss, proprietor of M/s.A.Plomar & Company *(hereinafter referred to as 'M/s.A. Plomar')* by Raja of Koti and not in favour of Shri Dina Nath Mehra i.e. predecessor-in-interest of the plaintiff. Evidence available on record clearly suggests that Dina Nath Mehra had only purchased land to the extent of 9-9 bighas from M/s.A.Plomar.

11. In nutshell, case as set up by the plaintiff in the plaint is that *Patta* of land measuring 24-18 bighas was granted in favour of Dina Nath Mehra on 29.7.1878 by Raja of Koti. As per plaintiff, only part of land measuring 9-9 bighas (Khasra Nos.78, 79 and 80) has been mutated in his name, whereas rest of land has not been recorded in his ownership and entries in this regard made in revenue record are wrong. Plaintiff has further averred that land measuring 9-9 bighas corresponding to Khasra Nos.78, 79 & 80 as well as land corresponding to Khasra No.57/11 was allotted to Dina Nath Mehra by the same Patta dated 29.7.1878 by Raja of Koti and subsequently same land descended to him vide sale deed dated 28.1.1988, but, aforesaid case set up by the plaintiff is not corroborated by the evidence led on record by plaintiff himself, rather, evidence led on record by the plaintiff itself suggests that *Patta* dated 29.7.1878 was allotted to M/s.A.Plomar and not to Dina Nath Mehra. Careful perusal of Ex.PW-2/B and Ex.D-10 i.e. Misalhaquiat Bandobast for the year 1949-50 in respect of Khasra Nos.78, 79 and 80 clearly suggests that *Patta* in question was not granted in favour of Dina Nath Mehra, rather the same was allotted to M/s.A.Plomar from whom Dina Nath Mehra purchased 9-9 bighas of land in the year 1961 vide sale deed dated 17.8.1961. Careful perusal of entries made in Jamabandies for the years, 1952-53 Ex.PW-2/B and D-11, 1956-57 Ex.PW-2/C and Ex.D-12 and 1960-61 Ex.PW-2/D and Ex.D-13, further suggest that mutation with regard to 9-9 bighas of land purchased by Dina Nath Mehra from M/s.A. Plomar was attested in favour of Dina Nath Mehra on 17.8.1961. Interestingly, plaintiff has failed to place on record sale deed executed

by M/s.A.Plomar in favour of Dina Nath Mehra. Similarly, there is no evidence led on record by the plaintiff to demonstrate that their predecessor-in-interest Dina Nath Mehra had purchased entire land, detailed in *Patta* dated 29.7.1878. Careful perusal of copies of Jamabandies for the years 1949-50 Ex.PW-2/B and 1956-57 Ex.PW-2/C, clearly suggest that M/s.A.Plomar was in possession of land to the extent of 9-9 bighas as *Pattadar*. In the Jamabandi for the year 1960-61 Ex.PW-2/D, it stands mentioned that land measuring 9-9 bighas, out of suit land, was transferred in the name of Dina Nath Mehra vide mutation No.77, whereafter some entry showing Jag Mohan Mehra in possession of this land stands mentioned in Ex.PW-2/E i.e. copy of Jamabandi for the year 1964-65. Close scrutiny of documentary evidence, as has been discussed hereinabove, as well as Ex./PW-2/F and Ex.PW-2/G i.e. copies of Jamabandies for the years 1979-80 and 1974-75 clearly suggests that original *Patta* was in favour of M/s.A.Plomar and not Dina Nath Mehra. Vide Ex.PW-5/D, predecessor-in-interest of the plaintiff had applied for copy of *Patta,* but the same was not entertained and returned to the applicant on the ground that required details have not been furnished and copy of *Patta* is not on the record. Ex.PW-5/E i.e. communication sent by Shri Jag Mohan Mehra to the Under Secretary, H.P. Territorial Council, Shimla further reveals that infact no *Patta* was ever issued in favour of Dina Nath Mehra, but there is only a deed to sell in favour of Dina Nath Mehra by M/s.A.Polmar

12. Leaving everything aside, it is not in dispute that the plaintiff had purchased only 9-9 bighas of land from the successors-in –interest of Shri Dina Nath Mehra and, as such, there is no dispute qua the same between the parties. Though the plaintiff by way of filing the suit claimed possession over the remaining land i.e. 15-9 bighas, but no cogent and convincing evidence has been led on record in this regard save and except deposition of PW-5 Sansar Chand i.e. attorney of plaintiff. If the statement of this witness is read in its entirely, it nowhere discloses that how predecessor-in-interest of the plaintiff came into possession of the remaining land measuring 15-9 bighas and who had the control over the land in question. No doubt, as has been concluded hereinabove, there is no dispute with regard to ownership and possession of plaintiff qua 9-2 bighas of land purchased by their predecessor-in-interest from M/s.A.Polmar, but certainly there is no evidence worth the name led on record by the plaintiff suggestive of the fact that they are in possession of remaining 15-9 bighas of land. Though plaintiff has taken the plea of adverse possession, but, it is well settled that the plea of adverse possession is not a pure question of law but a blended one of fact and law. A person, claiming adverse possession, is required to prove; (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed.

13. The Hon'ble Apex Court in ***Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan & Ors., AIR 2009 SC 103,*** has categorically held that since a person claiming adverse possession intends to defeat the rights of the true owner, onus is heavily upon him to clearly plead and establish all facts necessary to establish his adverse possession. Rather, in the case referred above, Hon'ble Apex Court termed the law of adverse possession as irrational, illogical and wholly disproportionate and recommended Union of India to seriously consider and make suitable changes in the law of adverse possession. The Hon'ble Apex Court has held:-

> ***"18. In Karnataka Board of Wakf v. Govt. of India (2004) 10 SCC 779 at para 11, this court observed as under:-***
>
> > ***"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position***

> ***will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period."***

The court further observed that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

19. In Saroop Singh v. Banto (2005) 8 SCC 330 this Court observed:

> ***"29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendant's possession becomes adverse. (See Vasantiben Prahladji Nayak v. Somnath Muljibhai Nayak (2004) 3 SCC 376)***
>
> ***30. 'Animus possidendi' is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence. As in the instant case, the appellant categorically states that his possession is not adverse as that of true owner, the logical corollary is that he did not have the requisite animus. (See Md. Mohammad Ali (Dead) by LRs. v. Jagdish Kalita and Others (2004) 1 SCC 271)"***

20. This principle has been reiterated later in the case of M. Durai v. Muthu and Others (2007) 3 SCC 114 para 7. This Court observed as under:

> ***"...In terms of Articles 142 and 144 of the old Limitation Act, the plaintiff was bound to prove his title as also possession within twelve years preceding the date of institution of the suit under the Limitation Act, 1963, once the plaintiff proves his title, the burden shifts to the defendant to establish that he has perfected his title by adverse possession."***

21. This court had an occasion to examine the concept of adverse possession in T. Anjanappa & Others v. Somalingappa & Another [(2006) 7 SCC 570]. The court observed that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The court further observed that the classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the

property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

22. In a relatively recent case in P. T. Munichikkanna Reddy & Others v. Revamma & Others (2007) 6 SCC 59] this court again had an occasion to deal with the concept of adverse possession in detail. The court also examined the legal position in various countries particularly in English and American system. We deem it appropriate to reproduce relevant passages in extenso. The court dealing with adverse possession in paras 5 and 6 observed as under:-

> ***"5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See Downing v. Bird 100 So. 2d 57 (Fla. 1958), Arkansas Commemorative Commission v. City of Little Rock 227 Ark. 1085 : 303 S.W.2d 569 (1957); Monnot v. Murphy 207 N.Y. 240, 100 N.E. 742 (1913); City of Rock Springs v. Sturm 39 Wyo. 494, 273 P. 908, 97 A.L.R. 1 (1929).]***
>
> ***6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or color of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess can not be given a complete go by. Simple application of Limitation shall not be enough by itself for the success of an adverse possession claim."***

34. Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

36. In our considered view, there is an urgent need of fresh look regarding the law on adverse possession. We recommend the Union of India to seriously consider and make suitable changes in the law of adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps in accordance with law."

14. Reliance is also placed upon the judgments of Hon'ble Apex Court in ***Nasgabhushanammal (D) By LRs. Vs. C.Chandikeswaralingam, AIR 2016 SC 1134, Bangalore Development Authority vs. N.Jayamma, AIR 2016 SC 1294*** and ***Prem Nath Khanna and others vs. Narinder Nath Kapoor (Dead) Through L.Rs. and others, AIR 2016 SC 1433.***

15. While setting up a case for adverse possession qua the suit property, plaintiff has averred that since suit land, comprising of Khasra No.57/11, was a part of *Patta* dated 29.7.1878, as such, he has become its owner by way of adverse possession and the right, title and interest of the defendants stand extinguished. But, it is well settled that adverse possession involves assertion of hostile animus and factum with regard to the fact whether such hostile animus was exerted, can be proved by the claimant-plaintiff by leading definite evidence to this effect, but interestingly, in the case at hand, plaintiff himself did not step into the witness box, rather he just examined his Special Power of Attorney PW-5 Shri Sansar Chand, who miserably failed to prove the plea of adverse possession set up in the suit.

16. It is not in dispute before this Court that the plaintiff had purchased suit land from Ved Kumari Mehra and Bharat Mohan Mehra, but interestingly plaintiff also failed to examine them, which he ought to have to prove the factum with regard to possession over the suit land. Ved Kumari Mehra and Bharat Mohan Mehra, from whom plaintiff purchased land, were the most appropriate and suitable persons to depose with regard to timing and place of handing over the possession of the suit land to the plaintiff pursuant to sale made by them in his favour. As per plaintiff, he had purchased suit land from the persons named hereinabove in the year 1988 vide sale deed dated 28.1.1988 and since then he is in hostile possession, but even then possession, if any, of the plaintiff has not matured into adverse possession against the State of Himachal Pradesh.

17. PW-2 and PW-3 S/Shri Karam Chand and Deepak Sood have failed to corroborate the case set up by the plaintiff, rather they categorically deposed before the Court that the plaintiff is in possession of land measuring 9-9 bighas and the surrounding land is being possessed by the State Government.

18. It is well settled that a party claiming adverse possession must prove that his possession is *"nec vi, nec clam, nec precario",* that is, peaceful, open and continuous., rather it must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. On the top of everything, it must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.

19. Both the Courts below having taken note of evidence adduced on record by the plaintiff have rightly come to the conclusion that there is no material to conclude that the plaintiff has become owner of the suit any by way of adverse possession and the revenue entries are wrong.

20. In the case at hand, plaintiff, by way of an application filed under Section 65 of the Evidence Act, sought permission of the trial Court to lead secondary evidence with a

view to prove *Patta* dated 29.7.1878 on the ground that original was destroyed in fire. Judgment passed by trial Court suggests that same was considered and decided at the time of final hearing. As has been noticed hereinabove, plaintiff failed to place on record sale deed dated 28.1.1988 executed in his favour in respect of land detailed in *Patta* dated 29.7.1878 and, as such, Court below rightly came to the conclusion that the production of original *Patta* and in its absence secondary evidence thereof shall not enhance and advance the cause of the plaintiff because since it stands duly proved that he had purchased land to the extent of 9-2 bighas vide sale deed 28.1.1988, he cannot claim any right over the remaining land measuring 15-9 bighas. Though, neither *Patta* dated 29.7.1878 nor sale/mutation dated 17.8.1961, whereby land measuring 9-9 bighas was mutated in the name of Dina Nath Mehra, have been placed on record by the plaintiff, but, even then it can safely be concluded on the basis of stand taken by the defendants in their written statement that Jag Mohan Mehra, successor-in-interest of Dina Nath Mehra was owner of 9-9 bighas of land at Mauza Mashobra by way of *Patta* and out of this land he had sold 7 biswas of land to Smt.Mahender Pal Sidhu in the year 1981. Since remaining land measuring 15-9 bighas was shown to be in ownership and possession of the defendant-State, Jag Mohan Mehra and his successors-in-interest had filed application for the correction of revenue entries (Ex.PW-5/B), which came to be dismissed by the revenue Courts. It emerge from the record that the settlement operation was conducted in the year 1950-51 and during settlement operation Jag Mohan Mehra, successor-in-interest of Dina Nath Mehra was recorded as owner qua the land measuring 9-9 bighas. Being aggrieved with the entry made qua the land measuring 9-9 bighas only and recording of ownership and possession of respondent-State over the remaining land measuring 15-9 bighas, Jag Mohan Mehra consistently filed applications for correction of revenue entries.

21. Learned Assistant Collector 2nd Grade(R), Shimla, while concluding that Smt.Ved Kumari and Shri Bharat Mohan Mehra sold the property comprised in Khasra Nos.78, 79, 399/80, Kita 3, measuring 9-2 bighas for a consideration of Rs.5 lacs vide mutation No.309, dated 11.11.1988 to Deep Chand son of Dharam Chand *(plaintiff herein)* and that the rest of the land, recorded in possession of the Forest Department, was owned by the State Government, rejected the application vide order dated 3.10.1991, Ex.PW-5/H. It is not in dispute that the said order was assailed till Financial Commissioner (Appeals) to the Government of Himachal Pradesh, who dismissed the same on 17.4.2002. There is no iota of evidence adduced on record by the plaintiff that Jag Mohan Mehra or Smt.Ved Kumari Mehra and Bharat Mohan Mehra, from whom he subsequently purchased land detailed hereinabove were owners in possession of land measuring 24-18 bighas and, as such, there was no occasion for them to effect sale qua 24 bighas and 18 biswas land in favour of plaintiff as claimed by the plaintiff. Even if for the sake of arguments having been advanced by Mr.Bhupender Gupta, learned Senior Counsel representing the appellant-plaintiff, it is assumed that original *Patta* dated 29.7.1878 was in respect of 24-18 bighas of land, but even then case set up by the plaintiff cannot be accepted because *Patta* was in favour of M/s.A.Plomar. Definitely Dina Nath Mehra could enter into the shoes of M/s.A.Plomar, had he purchased the entire land measuring 24-18 bighas of land from M/s.A.Plomar, but in this regard no evidence has been led on record by the plaintiff. Even if *Patta* dated 28.07.1878 is presumed to be granted in favour of M/s.A. Plomar qua the land measuring 24-18 bighas, still documents available on record suggest that he had parted land to the extent of 9-9 bighas in favour of Dina Nath Mehra and, as such, legal heirs, if any, of Mr.Thoman Bliss proprietor of M/s.A.Plomar could claim their right, if any, over the land measuring 15-9 bighas, but definitely not Dina Nath Mehra or his successors-in-interest.

22. No evidence is available on record that appeal, if any, was filed by the predecessor-in-interest of the plaintiff, laying therein challenge to orders passed by the revenue Courts upholding the revenue entries showing State of Himachal Pradesh as owner in possession qua the land measuring 15-9 bighas of land. It is quiet apparent from the material available on record that *Patta* dated 29.7.1878 was in favour of M/s.A.Plomar and not in favour of Shri Dina Nath Mehra i.e. predecessor-in-interest of Jag Monah Mehra. Documentary evidence, as has been discussed above, also suggests that even M/s.A.Plomar was shown to be owner in possession of 9-9 bighas of land as *Pattadar*. Only in the Jamabandi for the year 1960-61 Ex.PW-2/D land measuring 9-9 bighas has been shown to be sold/transferred in the name of Dina Nath Mehra vide mutation No.78 out of suit land, whereafter consistently Jag Mohan Mehra, successor-in-in-interest of Dina Nath Mehra, has been shown to be in possession of land measuring 9-9 bighas. Careful perusal of judgment rendered by trial Court clearly suggests that application under Section 65 of the Indian Evidence Act was considered and rightly dismissed by the Courts below. Since plaintiff miserably failed to prove on record his entitlement to the land over and above 9-9 bighas, which has otherwise been admitted by the defendants in their written statement, no fruitful purpose would have served in case plaintiff was allowed to lead secondary evidence to prove *Patta* dated 29.7.1878.

23. It is not in dispute that in the case at hand neither plaintiff himself nor Ved Kumari Mehra or Bharat Mohan Mehra, who allegedly sold suit land to the plaintiff vide sale deed dated 28.1.1988, stepped into the witness box, rather plaintiff's attorney PW-5 Sansar Chand appeared as his Special Power of Attorney. But, as has been observed above, he miserably failed to prove the case of plaintiff as set up in plaint. Since sale deed was executed in favour of plaintiff by Ved Kumari Mehra, plaintiff was expected to step into witness box and state that he is in possession of the suit land pursuant to sale made by aforesaid persons or he should have examined Ved Kumari and Bharat Mohan to prove factum with regard to delivery of possession of the entire suit land measuring 24-18 bighas. By now it is well settled that where a party to a suit fails to enter into a witness box and state his/her own case on oath and does not offer himself/herself to be cross-examined by the other side, a presumption would arise that the case set up by him/her is not correct.

24. In this regard reliance is placed on the judgment of this Court in ***Harswarup vs. Ram Lok Sharma, 2000(3) Shim.L.C.160,*** wherein this Court has held as under:-

> ***"18. Be it stated that the tenant has not dared to step into the witness box to state about either the condition of the tenanted premises or the bona fide requirement of the landlord for rebuilding and/or reconstruction. Only his general attorney Kuldip Singh has appeared as RW5.***
>
> ***19. It has been held by the Apex Court in Ishwar Bhai C.Patel v. Harihar Behera and another, (1999(2) Current Civil Cases 171 (SC), that if a defendant does not enter the witness box to make a statement on oath in support of the pleadings set out in the written statement, an adverse inference would arise that what he had stated in the written statement was not correct.***
>
> ***20. This court in Gurdev Singh v. Gulaboo, R.S.A.No.302 of 1992, decided on 24.4.2000, has held that the appearance of a general attorney cannot be regarded as appearance of the party. The appearance of a general attorney is only as a witness in his personal capacity.***

21. Therefore, in the present case, on the failure of the tenant to step into the witness box to make a statement on oath in support of his pleadings and to subject himself to cross-examination, an adverse inference will have to be drawn against him and it will have to be presumed that the tenanted premises are dilapidated and have become unfit and unsafe for human habitation. The findings recorded by the learned Appellate Authority, therefore, call for no interference."

25. At this stage, Mr.Bhupender Gupta, learned Senior Counsel, representing the appellant-plaintiff also argued that learned District Judge has failed to assign specific reasoning while upholding the findings returned by the trial Court below on the application filed under Section 65 of the Indian Evidence Act, but this Court is not in agreement with the aforesaid argument of him because it clearly emerge from the judgment rendered by the first appellate Court that it has specifically dealt with that aspect of the matter and has concurred with the findings returned by the trial Court. Hon'ble Apex Court in ***Laliteshwar Prasad Singh vs. S.P. Srivastava, (2017)2 SCC 415***, has specifically held that where appellate Court agrees with the views of trial court on evidence, it need not restate effect of the evidence or reiterate reasons given by trial court and expression of general agreement with reasons given by trial court would ordinarily suffice in such a case. The Hon'ble Apex Court has held as under:-

"14. The points which arise for determination by a court of first appeal must cover all important questions involved in the case and they should not be general and vague. Even though the appellate court would be justified in taking a different view on question of fact that should be done after adverting to the reasons given by the trial judge in arriving at the finding in question. When appellate court agrees with the views of the trial court on evidence, it need not restate effect of evidence or reiterate reasons given by trial court; expression of general agreement with reasons given by trial court would ordinarily suffice. However, when the first appellate court reverses the findings of the trial court, it must record the findings in clear terms explaining how the reasonings of the trial court is erroneous.

26. In the case at hand, since the first appellate Court has concurred with the views of trial Court on the point in question, it was not required to restate effect of evidence or reiterate reasons given by the trial Court rather expression of general agreement with reasons given by trial Court is sufficient. All the substantial questions of law are answered, accordingly.

27. Mr.S.C. Sharma, learned Additional Advocate General, appearing for the respondent-State, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have very meticulously dealt with each and every aspect of the matter. He also urged that scope of interference by this Court is very limited, especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate the aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264,** wherein the Hon'ble Apex Court has held as under**:-**

"16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have

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

28. Having carefully perused material available on record, this Court finds no error in judgment and decree passed by both the Courts below. Mr.Bhupender Gupta, learned Senior Counsel representing the appellant, has not been able to point out perversity, if any, in the impugned judgments passed by both the Courts below and as such scope of interference is very limited, as has been held in ***Laxmidevamma's*** case *supra.*

29. Leaving everything aside it is/was not open for the plaintiff to claim adverse possession in a suit for declaration having been filed by him, claiming therein that his adverse possession qua the suit has been matured into ownership. Hon'ble Apex Court in ***Gurdwara Sahib vs. Gram Panchayat Village Sirthala and Another, (2014)1 SCC 669*** has categorically held that the plea of adverse possession can be taken/used as a shield to defend such possession by a defendant, but definitely plaintiff cannot seek declaration to the effect that his/her adverse possession has matured into ownership. The Hon'ble Apex has held as under:-

"7. In the second appeal, the relief of ownership by adverse possession is again denied holding that such a suit is not maintainable.

8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."

30. In the facts and circumstances discussed hereinabove, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy, appear to be based upon correct appreciation of oral as well as documentary evidence. Hence, the present appeal fails and is dismissed, accordingly. There shall be no order as to costs.

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

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

Court on its own motion ....Petitioner
Versus
State of H.P. & Others ....Respondents

CWPIL No.119 of 2018
Date of decision: 12.07.2018

Constitution of India, 1950 – Articles 21 & 226 – Deficiencies in dental college - Writ jurisdiction - High Court taking *suo moto* cognizance on basis of news item indicating that costly machinery installed in Himachal Pradesh Government Dental College and Hospital, Shimla is either out of order or not being put to use - State filing reply and refuting allegations labeled in news item, however, reply not found satisfactory - Some machinery found outdated requiring replacement whereas some was not being put to use for lack of manpower - High Court directed Secretary (Health) to visit college concerned, convene meeting with stake holders and take appropriate steps within stipulated time. (Paras 6 to 8)

For the Petitioners: Mr.Aman Parth Sharma, Advocate as Amicus Curiae.
For Respondents-State: Mr.Ashok Sharma, Advocate General
with Mr.Ranjan Sharma, Ms.Rita Goswami, Mr.Adarsh K.Sharma and Mr.Nand Lal Thakur, Additional Advocate Generals
Dr.R.P. Luthra, Principal, Government Dental College and Hospital, Shimla is present in person.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.

The news items captioned as ***"30 lakh ki Machine faank rahin dhool' & "Dhool chat rahin lakhon ki machinery",*** published in two daily Hindi News Papers, wherein it is/was reported that costly machines, provided in the State's premium Government Dental College and Hospital at Shimla, are being not put to use for quiet considerable time, as a consequence of which, Post Graduate Students of the College are not only facing hardship rather are not acquiring required experience, prompted this Court to take suo motu cognizance of the matter and accordingly present Public Interest Litigation came to be registered.

2. It is reported in the aforesaid news items that since Digital OPG and Cephalometric Radiography Machine are out of order for the last one year, a lot of inconvenience is caused to the students studying in the college and the patients who are otherwise compelled to go to the private clinic to have the X-ray done. As per news items, Digital Intraoral Radiography Machine (IPOA), Ceramic Lab (fully equipped) and Chrome Cobalt lab (fully equipped) are out of order for the last three years. Apart from above, other machines; namely; Implant Equipment, Lab Equipment for histopathological and cytological investigations are also out of order and no steps, whatsoever, are being taken by the authorities concerned to get these machines repaired and then put them to operation. As per news items, Ceramic Lab was set up in the Himachal Pradesh Government Dental College in the Prosthodontic Department at the cost of Rs.30 lacs, but that has virtually not

performed since its installation. Similarly, Ceramic Lab Equipments have been written off for unknown reasons, thereby leading to Porcelain Crown and Bridge work being given to private labs for the last 15 years.

3. Pursuant to notices issued in the case at hand, Shri R.P. Luthra, Principal, Government Dental College and Hospital, Shimla came present in the Court and explained that most of contents of news items are not factually correct and news items appear to be planted. This Court did not accept aforesaid explanation rendered by the Principal, Government Dental College and Hospital, Shimla, and directed him to file his personal affidavit responding therein to the contents of the news items.

4. Today, during the proceedings of the case, learned Advocate General has filed detailed reply on the affidavit of Dr.R.P. Luthra, Principal, Government Dental College and Hospital, Shimla, perusal whereof suggests that Digital OPG and Cephalometric Radiography Machine is out of order for the last one year and efforts are being made to get it repaired, however, being old model, coupled with the fact that it has outlived its life, it could not be repaired and the matter with regard to procurement of new machine has already been taken up with the State Government. The State Government vide communication dated 26.08.2018 (Annexure R-5/A) has already conveyed the approval to procure the Intra Oral X-ray Unit, Radio Visio Graphy and Digital OPG Ceph Unit with Printers. After receipt of aforesaid approval, steps are being taken to purchase the aforesaid equipments. As far as Ceramic Lab, being fully equipped is concerned, it has been submitted in the affidavit that at present the lab is having Porcelin Furnace with vacuum pump (manual) and Porcelin Furnace (Gemini-2), which are functional. Both these machines are functional and in working conditions. So far as Chrome Cobalt Lab is concerned, at present out of twelve equipments required for functioning the lab, nine are in working condition and are being used for teaching and training of the students. Only three i.e. (i) Globucast Induction Casting Machine, (ii) Dentatherm Pre Heating Furnace and (iii) Electropolishing Unit have been condemned on account of wear and tear and they have lived their life. It has further been submitted that Department of Prosthodontic is having other equipments, which are functional and further being used for making complete dentures, partial dentures and other procedures. It also emerge from the affidavit that the process has been initiated for procurement of implant equipment and the same shall be made available in other four to five months. Earlier the tenders were flouted twice to procure the Lab equipment for Histopathological and Cytological investigations, but the same could not be finalized due to lack of competition and as such fresh steps are being taken to procure such equipments. Deponent has specifically denied that the Ceramic-cum-Casting Lab is not functional and the allegations to the contrary are ill founded. Students of BDS and MDS are being taught and trained in such lab, whereas for the patient work, department is not having the trained ceramist and two trained Chrome Cobalt Technicians are required for smooth functioning of the lab. Deponent has specifically denied the allegations that the Porcelin Crown and Bridge Work is being given to the private labs for some extraneous considerations.

5. Having carefully perused the averments contained in the aforesaid reply filed by the Principal, Government Dental College and Hospital, Shimla, we find that there are certain deficiencies, but it cannot be said that machineries provided to the hospital concerned have not been put to use. True, it is, that certain machines have outlived their lives and new equipments are required to be purchased so that students as well as patients do not suffer. Affidavit further reveals that Heads of the Departments and Consultants of the Institution had already mooted a proposal to purchase the CBCT and RVG to the Government in the year 2015, but for one reason or the other those have not been purchased till date.

6. Government Dental College and Hospital, Shimla, being a premium Institution of State, is expected to be fully equipped with labs, machines and the latest technology, but it appears that no facilities, as required in the State Level Hospital, are being provided, as a consequence of which, students studying in the College and the patients are suffering. Despite there being such a prime Dental Hospital, patients are being made to spend huge money for their dental treatment because due to lack of infrastructure in the State Dental Hospital, they are compelled to go to private hospitals/clinics.

7. Having perused affidavit of Principal, Government Dental College and Hospital, Shimla, though we are convinced that steps are being taken to replace old and out dated machines, but, not impressed/satisfied with the progress made in last few years towards the upliftment of State's Premium Dental College and Hospital at Shimla. We appreciate that Principal, being the Head of the Institution, can only moot a proposal for procuring new machines or other equipments but ultimately decision in this regard is to be taken at the level of State Government, we cannot lost sight of the fact that the students, who would be becoming doctors tomorrow are being trained and imparted education in this Institution and as such College/Hospital should be fully equipped with the labs, machines and latest technology. Needless to say speedy progress has been made in medicines/dental sciences and as such State's Premium Dental College and Hospital, Shimla is expected to have all necessary infrastructure required for imparting latest education and training to doctors besides serving general people.

8. Consequently, in view of affidavit filed by the Principal, Government Dental College and Hospital, Shimla, we do not see any reason to keep the present petition alive, however, before parting, we wish to direct Secretary(Health) to the Government of Himachal Pradesh to visit Government Dental College and Hospital, Shimla forthwith and ensure that all necessary facilities are made available to the Hospital at the earliest. Secretary concerned, during his visit to Hospital, shall convene meeting with Principal and all the Heads of Departments to have feedback with regard to deficiency in the hospital and thereafter shall take up the matter with the highest level so that necessary funds are provided without any delay. All necessary actions, as referred hereinabove, shall be taken by the Secretary(Health) to the Government of Himachal Pradesh within a period of ten days from the date of receipt of this order and thereafter necessary affidavit of compliance shall be filed in this Court within one week.

9. We also wish to place on record appreciation qua the efforts put in by Mr.Aman Parth Sharma, Advocate, Amicus Curiae, who, on the instructions of this Court, regularly provided the feed back.

10. Copy of instant order shall be made available to the Secretary(Health) to the Government of Himachal Pradesh, and Amicus Curiae.

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

Smt.Vimlesh ....Petitioner

Versus

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

CWP No.1575 of 2017

Date of decision: 12.07.2018

Constitution of India, 1950 - Article 226 – Notification dated 01.10.2010 - *Ex-gratia*- Entitlement - Writ jurisdiction - Deputy Commissioner denying *ex-gratia* payment to petitioner on ground of her not being *bona fide* resident of Himachal Pradesh - Challenge thereto - Petitioner found residing at Shamshi in Kullu for last 20 years and having certificate of *bona fide* Himachali issued by Competent Authority - Petitioner also availing other benefits, like, ration on concessional rates through department of Civil Supplies - Held, petitioner is *bona fide* resident of Himachal Pradesh and entitled for *ex-gratia* payment for death of her husband in natural calamity - Petition allowed. (Paras 8-13)

For the Petitioner:	Mr.B.N.Misra, Advocate.
For the Respondents-State:	Mr.Ashok Sharma, Advocate General with Mr.Ranjan Sharma, Ms.Rita Goswami, Mr.Adarsh K.Sharma and Mr.Nand Lal Thakur, Additional Advocate Generals.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.

Petitioner Smt.Vimlesh, on account of death of her husband Shri Chattar Pal, filed a representation before SDO(C), Kullu, District Kullu, H.P. praying therein for grant of ex-gratia payment (Annexure P-1).

2. Though aforesaid application was filed on 13.1.2014, but since no appropriate action was taken by the authority concerned, petitioner approached this Court by way of Civil Writ Petition bearing CWP No.3542 of 2015. This Court vide order dated 26.08.2015 directed the competent authority to consider and decide the petitioner's representation in accordance with law by affording due opportunity of hearing/representation to the petitioner within a period of four weeks from the date of production of certified copy of the said order.

3. Pursuant to aforesaid direction issued by this Court, SDO(C), Kullu, District Kullu disposed of representation, dated 22.9.2015 having been filed by the petitioner and held the petitioner not entitled for payment of ex-gratia amount on account of death of her husband. SDO(C), Kullu, while arriving at aforesaid conclusion, held that since applicant Smt.Vimlesh belongs to Panchayat Orangabad Kaser, Tehsil Dibri, District Bulandshehar, (UP), no relief can be extended to her being non Himachali, as has been prescribed in Government instruction/notification. Competent authority also took into consideration Notification No.Rev.D(D)1-7/2004, dated 1.10.2010, whereby all the Deputy Commissioners and Sub Divisional Officers of Himachal Pradesh have been directed to grant ex-gratia payment to the families of deceased persons, belonging to State of Himachal Pradesh, who expire due to natural calamities/accidents in the State of Himachal Pradesh.

4. Being aggrieved and dissatisfied with order dated 8.10.2015 passed by SDO(C), Kullu, District Kullu, petitioner has approached this Court in the instant petition, praying therein for quashing the aforesaid order and to issue directions to the competent authority to grant ex-gratia payment to the petitioner on account of death of her husband.

5. Respondent-State, by way of reply, has supported the impugned order passed by SDO(C), Kullu and has reiterated that in terms of Notification issued by

Government of Himachal Pradesh, as has been taken note hereinabove, no ex-gratia payment can be granted to the families of deceased persons, who are not the residents of State of Himachal Pradesh.

6. By way of rejoinder, petitioner has claimed that she as well as her husband have been residing in village Shamshi, Tehsil Bhuntar, District Kullu from the last 20 years and they have their permanent home in the residence of Shri T.P. Singh, Village and Post Office, Shamshi, Tehsil Bhuntar, District Kullu, H.P., who has also tendered an affidavit in support of aforesaid claim of the petitioner. Petitioner has also placed on record Bonafide Himachali Certificate issued by the office of Tehsildar, Bhuntar, District Kullu, certifying therein that the petitioner has been residing in Himachal Pradesh from the last more than 20 years and, as such, has acquired the status of bonafide Himachali. Petitioner has also placed on record Ration Card issued in her name by the Department of Food and Civil Supplies, which further corroborates her version with regard to her permanent house in the State of Himachal Pradesh.

7. Having perused aforesaid documents placed on record, this Court is in full agreement with Shri B.N. Misra, learned counsel for the petitioner that the petitioner, for all intents and purposes, is resident of Himachal Pradesh and, as such, is entitled for ex-gratia payment in terms of Notification issued *supra*. It would be profitable to take note of the following relevant portion of the aforesaid Notification, whereby all the Deputy Commissioners and Sub Divisional Officers of Himachal Pradesh have been directed to grant ex-gratia payment to the families of deceased persons, belonging to State of Himachal Pradesh, who expire due to natural calamities/accidents in the State of Himachal Pradesh:-

> ***"Henceforth the payment of ex-gratia to the families of deceased persons who expires due to natural calamities/accidents be made only in respect of person belonging to State of Himachal Pradesh while in respect of persons belonging to other States, immediate medical help and assistance be provided (Annexure A).)"***

8. Careful perusal of the contents of the Notification, as have been reproduced hereinabove, clearly suggest that the persons belonging to the State of Himachal Pradesh shall be entitled for the ex-gratia payment on account of death of family members. In the case at hand it is quiet apparent that the petitioner as well as her husband were residing in the State of Himachal Pradesh for the last more than 20 years and with the issuance of bonafide Himachali Certificate issued by the office of Tehsildar, Bhuntar, District Kullu, H.P. they have acquired the status of bonafide Himachali and, as such, prayer having been made by her for grant of ex-gratia payment on account of death of her husband ought to have been accepted by the competent authority.

9. Leaving everything aside, during proceedings of the case, our attention was invited to communication dated 19.5.2015, issued by Deputy Secretary(Rev-DMC) to the Government of Himachal Pradesh, addressed to all the Divisional Commissioners and Deputy Commissioners in the State of Himachal Pradesh, perusal whereof clearly suggests that Government of India, Ministry of Home Affairs, revised the items and norms for assistance from SDRF/NDRF for the period 2015-2020 and the Council of Minister's, State of Himachal Pradesh also approved revised norms, as proposed by Government of India, in its meeting held on 6.5.2015. It would be profitable to take note of aforesaid communication alongwith Annexure-F, contents of which are as follows:-

> ***"... ... ...I am directed to enclose a photocopy of letter No. 32-7/2014-NDM-1 dated 8th April, 2015 received from the Deputy Secretary***

to the Govt.of India, Ministry of Home Affairs on the subject cited above and to say that the Government of India has revised the items and norms for assistance from SDRF/NDRF on the same analogy revised norsm have been approved by the Council of Minister's in its meeting held on 6.5.2015.

You are, therefore, requested to take further necessary action as per guidelines issued by the Govt.of India, Ministry of Home Affairs."

Annexure-F

REVISED LIST OF ITEMS AND NORMS OF ASSISTANCE FROM STATE DISASTER RESPONSE FUND (SDRF) AND NATIONAL DISASTER RESPONSE FUND (NDRF)

Sr.No.	*ITEM*	*NORMS OF ASSISTANCE*
(1)	*(2)*	*(3)*
1.	*a) Ex-Gratia payment to families of deceased persons.*	*Rs.4.00 lakh (Four Lakh) per deceased person including those involved in relief operations or associated in preparedness activities, subject to certification regarding cause of death from appropriate authority.* *Note:-* *i. This Relief will be provided to all irrespective of their place of residence or nationality.* *ii. This relief would also be admissible to residents of Himachal Pradesh if they meet with an accident out side the state and where no relief is provided to them. In such case, an application has to be made to the local Sub Divisional Officer (Civil) in whole jurisdiction the dependents reside alongwith relevant documents.The application would be duly supported by an affidavit stating that no relief has been received from the family from the authority where the accident/calamity took place.*
	b) Ex-Gratia payment for loss of a limb or eye(s).	*Rs.59,100/- per person, when the disability is between 40% and 60%.* *Rs.2.00 Lakh/- (Two Lakh) per person, when the disability is more than 60%.*

10. Careful perusal of aforesaid Annexure-F clearly suggests that as per revised norms, relief shall be provided to all irrespective of their place of residence or nationality.

11. Ms.Rita Goswami, learned Additional Advocate General, while fairly acknowledging factum with regard to issuance of revised norms, contended that it cannot be made applicable in the case of the petitioner as its operation is prospective and not retrospective.

12. We, having carefully perused contents of letter dated 19.5.2015 and enclosed Annexure-F, are not persuaded to agree with the aforesaid contention of Ms.Rita Goswami because there is no specific mention that revised norms shall be applied prospectively. Similarly, aforesaid communication nowhere suggests that Council of Ministers' in the State of Himachal Pradesh, while revising the norms for assistance of SDRF/NDRF on the analogy of Government of India stipulated that its operation/application shall be prospective. Otherwise also this Court cannot lose sight of the fact that very purpose and intent of Government to allow such norms for assistance is to provide immediate financial help to the families of persons, who die in accident or there has been disability in the motor vehicle accident, SDRF as well as NDRF have been created to provide immediate relief to the families of victim of motor vehicles accidents. Though, as has been noticed hereinabove, we are convinced and satisfied that the petitioner, being bonafide Himachali, is entitled to ex-gratia payment, even then also objection as is being taken by the State of Himachal Pradesh for denying compensation to the petitioner is not tenable in view of aforesaid revised norms issued by the respondents.

13. In view of the discussion made hereinabove, present petition is allowed and order dated 8.10.2015, passed by the SDO(C), Kullu is set aside. SDO(C), Kullu is directed to award ex-gratia payment immediately in favour of the petitioner alongwith interest @ 7.5% from the date she became eligible under the Government Notification.

14. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Bhakra Beas Management Board & Ors. ....Appellants

Versus

Ajay Kumar & Others ....Respondents

LPA No.18 of 2018
Date of decision: 01.08.2018

Bhakra Beas Management Board Class-III & IV Employees (Recruitment and Conditions of Service), Regulations, 1994- Foreman all Trades – Promotion - Welder Grade-I and Crane Operator Grade-I after specified qualifying service forming feeder cadre for promotion to post of Foreman all Trades - Petitioner though having completed qualifying service not considered for promotion vis-à-vis private respondents - Hon'ble Single Bench directing Board to promote petitioner from date private respondents were promoted and to place him in seniority above them – LPA - Held, Regulations do not provide any quota for different feeder categories for promotional post of 'Foreman All Trade' - Persons falling in

feeder cadre after qualifying service eligible for promotion - Petitioner since having completed qualifying service, and was senior to private respondents eligible for promotion ahead of them - Non-consideration of petitioner for promotion was illegal - Post being non-selection, petitioner entitled for promotion when nothing adverse against him - LPA dismissed. (Paras 9 & 13)

For the Appellant: Mr.N.K. Sood, Senior Advocate with Mr.Aman Sood, Advocate.

For Respondent No.1: Mr.Dilip Sharma, Senior Advocate with Mr.Deven Khanna.

The following judgment of the Court was delivered:

Per Sandeep Sharma, J.:

Instant Letters Patent Appeal is directed against the judgment dated 18.4.2018, passed by learned Single Judge of this Court, whereby learned Single Judge, while allowing the writ petition having been filed by the respondent, *(hereinafter referred to as the 'petitioner'),* directed the appellant-respondent-Board *(hereinafter referred to as the 'respondent-Board')* to consider and confer promotion to the petitioner against the post of "Foreman all Trades" from the date when the private respondents were promoted to the same posts and, in the seniority list, place the petitioner above the private respondents. However, learned Single Judge, while granting aforesaid relief, held that the petitioner shall be entitled to deemed promotion with benefits, which shall also be deemed and actual benefits including promotional and monetary shall accrue upon the petitioner as from the date of passing of the judgment.

2. For having bird's eye view, certain undisputed facts, as emerged from the record, are that the petitioner joined the services of the respondent-Board as Welder Grade-II on 13.08.1993 and subsequently he came to be promoted as Welder Grade-I w.e.f. 12.10.1998. It is also not in dispute that respondent Nos.4 to 7 joined the respondent-Board as Crane Operators Grade-I on 14.10.1994. Respondent-Board has framed Bhakra Beas Management Board 'Class III & IV Employees' (Recruitment & Conditions of Service) Regulations, 1994 (Annexure P-1 annexed with the Writ Petition*) (hereinafter referred to as the 'Regulations, 1994')*, which clearly provide that the post of "Foreman all Trades", shall be filled up 33% by way of direct recruitment from amongst three year diploma holders in specified technical trade and 67% by way of promotions from respective trades, which otherwise stand duly mentioned in the said Regulations.

3. Careful perusal of aforesaid Regulations, suggests that the posts of Welder Grade-1 as well as Crane Operator Grade-1 are the feeder category posts for promotion to the post of "Foreman all Trades" and, as such, there is no dispute that petitioner as well as respondents No.4 to 7 were entitled to be considered for promotion to the post of "Foreman all Trades" after completion of specific years of service being in the feeder category. Similarly Regulations, as referred above, further suggest that Welder Grade-I is eligible to be promoted to the post of "Foreman all Trades" after completion of eight years service, whereas Crane Operator Grade-1 becomes eligible for the same post after putting in twelve years service. It is not in dispute that the petitioner came to be promoted as Welder Grade-1 w.e.f. 12.10.1998 and, as such, after having completed eight years of service, he became eligible for promotion to the post of "Foreman all Trades" w.e.f. 12.10.2006, whereas, private respondents, who were appointed as Crane Operators Grade-1 on 14.10.1994, acquired eligibility for promotion to the post of 'Foreman all Trades' after putting in twelve years service as Crane Operator Grade-1 w.e.f. 14.10.2006.

4. In the case at hand, petitioner's grouse is that he despite having acquired eligibility for the promotion to the post of "Foreman All Trades" much prior to the private respondents, was ignored for promotion to the post of Foreman Grade-1, whereas, respondent-Board illegally in violation of Regulations promoted private respondents vide Office Order dated 28.12.2011 (Annexure P-2 annexed with the petition). Petitioner's further grievance is that private respondents were promoted to the post in question ignoring his seniority, which act of the respondents, is/was not only in violation of the aforesaid Regulations, but also arbitrary and illegal, and as such the same deserves to be quashed and set aside.

5. Careful perusal of reply having been filed on behalf of the respondent-Board suggests that facts, as narrated hereinabove, are not denied, rather an attempt has been made by respondent-Board to justify their act on the ground that as per Regulations, the promotional post was "Foreman all Trades" and feeder category, from which promotion was to be made, comprised of various Trades and, as such, promotions were made by the respondent-Board not only on the basis of seniority of eligible candidates, but also by taking into consideration that all Trades were equally represented for the purpose of promotion.

6. Learned Single Judge, having perused pleadings adduced on record as well as Regulations of the respondent-Board, arrived at a conclusion that action of respondent-Board in promoting private respondents ahead of petitioner is not justified in terms of Regulations, which clearly provide that post of "Foreman all Trades" is required to be filled up 33% by way of direct recruitment from amongst three year diploma holders in specified technical trade and 67% by way of promotions from respective trades, which so stand mentioned in the said Regulations. Learned Single Judge, while rejecting the arguments advanced on behalf of respondent-Board that promotion had to be made from specific Trade from the feeder categories mentioned therein, came to the conclusion that the Regulations, which govern promotion to the post of "Foreman all Trades" do not provide any quota for different categories. Otherwise also, it is well settled law that when there are more than one sources of recruitment which also includes promotion to a post in issue, then after persons are appointed to that particular post from various sources, they lose their birth mark. Learned Single Judge, while returning the findings, also took into consideration Annexure P-2 i.e. Office Order vide which private respondents were promoted to the post in question and arrived at the conclusion that the private respondents, who otherwise belong to the feeder category i.e. Crane Operator Grade-I, were promoted to the posts of "Foreman Special Instrument Repair, Foreman Special Rigging, Foreman Penstock and Foreman Tractor Repair, respectively" meaning thereby that respondents No.4 to 7 were not appointed against particular Trade, rather they being in the feeder categories were considered for promotion to the post of "Foreman all Trades".

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

8. Having carefully perused pleadings, material available on record as well as judgment rendered by learned Single Judge, this Court is not persuaded to agree with the contention of Mr.N.K. Sood, learned Senior Counsel representing the respondent-Board, that judgment passed by the learned Single Judge is not based upon correct appreciation of Rules and Regulations governing promotions to the post of "Foreman all Trades" rather, this Court, having carefully gone through the Regulations (Annexure P-1), find no reason to differ with the findings returned by learned Single Judge that Regulations, which govern to the post of "Foreman all Trades" do not provide quota for different categories which find mentioned therein, rather all the persons prescribed as feeder categories in the Rules itself

are eligible to be promoted to the post of "Foreman all Trades" after completion of particular years of service as stands prescribed in the Regulations itself.

9. In the case at hand, it is not in dispute that petitioner was promoted as Welder Grade-I w.e.f. 12.10.1998 and as such he, after having completed eight years of service, had become eligible for the promotion to the post of "Foreman all Trades" w.e.f. 12.10.2006, whereas, on the other hand, private respondents, who were appointed as Crane Operator on 14.10.1994, acquired eligibility for the promotion to the post of "Foreman all Trades" after completion of 12 years service as Crane Operator Grade-I w.e.f. 14.10.2006. Admittedly, petitioner, being senior in the feeder category, was required to be considered ahead of private respondents for the promotion to the post of "Foreman all Trades". Another argument advanced by Mr.N.K. Sood, learned Senior Counsel, that as per Regulations, promotions had to be made from respective Trades from the feeder categories mentioned therein, is wholly misconceived and deserves outright rejection. He argued that since no post of Foreman from the Trade of the petitioner was available, he could not be considered for the post in question. As per Mr.Sood, had the post of "Foreman all Trades" being vacated by a person, who was promoted as such from Welder Grade-1, then the petitioner was eligible for promotion to the said post.

10. Having carefully perused Regulations (Annexure P-1), we are not inclined to accept the aforesaid arguments advanced by Mr.N.K. Sood, learned Senior Counsel, being wholly un-tenable. Careful perusal of Regulations reveals that the same nowhere provide any quota for different categories mentioned therein, rather same suggests that anybody from the feeder category, which otherwise stands duly defined in the Regulations itself, is eligible for the post of "Foreman all Trades" subject to completion of specified years of service as mentioned in the Regulations.

11. Interestingly, in the case at hand, respondent-Board tried to justify their act on the ground that the petitioner was denied promotion because there was no vacancy of "Foreman all Trades" vacated by a person, who was promoted to the said post from the category of Welder Grade-1, but, as has been taken note hereinabove, careful perusal of Office Order (Annexure P-2 annexed with the Writ Petition), whereby private respondents came to be promoted to the post(s) in question, clearly suggests that private respondents, who otherwise belong to the feeder category of Crane Operators Grade-1 came to be promoted against the vacant post of Foreman Special Instrument Repair, Foreman Special Rigging, Foreman Penstock and Foreman Tractor Repair, respectively and, as such, learned Single Judge rightly came to the conclusion that promotion order of the private respondents is self speaking that it is not as if promotions from various feeder categories to the post of "Foreman all Trades" were made only against "respective Trades", rather private respondents being in feeder category came to be considered for the promotion to the post of "Foreman all Trades" though wrongly.

12. By now it is well settled law that though an employee has no right to claim promotion, however, he has a fundamental right of being considered for promotion. But, in the case at hand, respondent-Board, solely with a view to extend undue benefit to private respondents, not only denied right of promotion to the petitioner, rather failed to consider his case for promotion. It is also not in dispute that post in question is non-selection post and the same is to be filled on the basis of seniority-cum-merit. There is nothing on record from where it can be inferred that the petitioner was not eligible to be promoted against the post of "Foreman all Trades" ahead of respondents because he after having acquired status of Welder Grade-I w.e.f. 12.10.1998 had also completed eight years of service and, as such, had become eligible for the post of "Foreman all Trades" w.e.f. 12.10.2006, whereas private respondents acquired eligibility to the post of "Foreman all Trades" after putting 12 years

service of Crane Operator Grade-I w.e.f. 14.10.2006. It is well settled that when promotion is to be made to a non-selection post, the principle which governs the field is that promotion is to be made on the basis of seniority, subject to rejection of an unfit candidate. But, in the present case, private respondents came to be promoted to the post of "Foreman all Trades" ahead of petitioner wrongly ignoring his seniority and, as such, learned Single Judge rightly allowed the petition filed by the petitioner.

13. Consequently, in view of detailed discussion made hereinabove, we see no reason to interfere in the well reasoned judgment rendered by the learned Single Judge, which otherwise appears to be based upon proper appreciation of Regulations/Rules governing the field and, as such, the same is upheld. This appeal fails and is dismissed, accordingly.

14. All interim orders are vacated and all the pending miscellaneous applications are disposed of.

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

Yadwinder Singh & Others ....Petitioners
Versus
State of H.P. & Others ....Respondents

Cr.M.M.O. No.12 of 2015
Judgment Reserved on: 06.07.2018
Date of decision: 10.08.2018

Code of Criminal Procedure, 1973 – Sections 177, 178 and 482 – Inherent powers – Exercise of – Quashing of FIR – Petitioner seeking quashing of FIR registered by his wife against him and his parents for dowry demands, criminal intimidation etc on ground of Nalagarh Police having no territorial jurisdiction to investigate alleged offences – State resisting petition on plea that complainant (wife) in her supplementary statement had alleged accused of having intimidating her at Nalagarh on day when they came to their house for conciliation - Facts showing that after marriage wife residing in matrimonial house at Jalandhar - In FIR there is no allegation of criminal intimidation by accused on day they visited her house at Nalalgarh for conciliation - No such statement given to IO by parents of complainant – Supplementary statement of complainant appears to have being given just to bring matter within territorial jurisdiction of Nalagarh police – Offences of cruelty and intimidation, if any, committed at Jalandhar – Offences not continuing one – Held, Nalagarh police had no jurisdiction to investigate matter – Petition allowed – FIR quashed – Liberty given to complainant to approach police/women cell at Jalandhar, if so, desired. (Paras 43 to 46)

Cases referred:

Amarendu Jyoti and Others vs. State of Chhattisgarh, (2014)12 SCC 362
Bhaskar Lal Sharma and Another vs. Monica and Others, (2014)3 SCC 383
Ghanshyam Sharma vs. Surendra Kumar Sharma and Others, (2014)13 SCC 401
K.V. Prakash Babu vs. State of Karnataka, (2017)11 SCC 176
Kartar Singh vs. State of Punjab, AIR 1977 SC 349

State of Bihar and another etc. etc. vs. Shri P.P. Sharma and another etc. etc., AIR 1991 SC 1260
State of Madhya Pradesh vs. Suresh Kaushal and another, 2002 Crl.L.J. 217
Sunita Kumari Kashyap vs. State of Bihar and Another, (2011)11 SCC 301
Suresh Chandra Swain vs. State of Orissa, 1988 Crl.L.J. 1175
Varala Bharath Kumar vs. State of Telangana and Another, (2017)9 SCC 413
Y.Abraham Ajith and Others vs. Inspector of Police, Chennai and Another, (2004)8 SCC 100

For the Petitioner:	Mr.R.K. Sharma, Senior Advocate with Mr.Rakesh Kanoujia and Ms.Vidushi Sharma, Advocates.
For Respondents 1&2:	Mr.S.C. Sharma and Mr.Dinesh Thakur, Additional Advocate Generals with Mr.Amit Kumar Dhumal, Deputy Advocate General.
For Respondent No.3:	Mr.Ramakant Sharma, Senior Advocate with Mr.Dinesh Bhatia, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

By way of instant petition filed under Section 482 of the Code of Criminal Procedure *(for short Cr.P.C.),* a prayer has been made on behalf of the petitioners to quash FIR No.224, dated 7.10.2014, under Sections 498-A, 406, 506 read with Section 34 of the Indian Penal Code and consequent proceedings thereto.

2. Before adverting to the factual matrix of the present case, it may be noticed that Mr.R.K. Sharma, learned Senior Counsel representing the petitioners, confined his challenge to the jurisdiction of the Police at Nalagarh or Baddi in the State of Himachal Pradesh to investigate into the allegations leveled in the above referred FIR. Mr.Sharma, while making his submissions, fairly submitted that in case this Court, after having perused material adduced on record, comes to the conclusion that Police of Nalagarh/Baddi, Himachal Pradesh has jurisdiction to investigate into allegations levelled into FIR, in that eventuality, other prayer made in the petition for quashing of FIR may also be considered. In view of aforesaid specific prayer/submission made by learned Senior Counsel representing the petitioners, this Court shall consider issue with regard to jurisdiction of Nalagarh/Baddi Police to investigate into the allegations levelled in the FIR at first instance and in case, it comes to the conclusion that Police Station, named as above, has jurisdiction, the second prayer made in the petition, as referred hereinabove, shall be examined accordingly.

3. In nutshell, facts of the case, for having bird's eye view, are that on 31.01.2013, an arranged marriage was solemnized between petitioner No.4 namely; Akashdeep and respondent No.3 namely; Nikita at Ropar, Punjab as per Sikh rites *(hereinafter referred to as 'petitioner-husband & respondent-wife').* It appears that immediately after marriage certain differences cropped up between the petitioner- husband and respondent-wife as well as their families and after shorter duration couple also lived separately from their parents in a separate house at Tara Singh Nagar, Jallandhar, Punjab *(for short 'Pb'),* however, they could not get along for long. On the basis of allegations of beatings, allegedly given by petitioner-husband and his parents to respondent-wife, complaint was lodged with the Police Authorities as well as Deputy Commissioner of Jallandhar (Pb), who subsequently referred the matter to Women Cell, Jallandhar (Pb).

Allegedly on 4.8.2014, respondent-wife came to Nalagarh, whereafter her father got her medically examined at Chawla Hospital, Mohali on 5.8.2014. On 6.8.2014, respondent-wife again went back to her house at Jallandhar (Pb), however, by that time allegedly petitioner-husband had removed all the articles/things from her house. On 17.8.2014 and thereafter on 24.8.2014 Women Cell at Jallandhar (Pb) called both the petitioner-husband and respondent-wife for re-conciliation, but no progress could be made. Subsequently, on 27.8.2014, respondent-wife lodged a complaint with SHO, Police Station, Nalagarh, District Solan, Himachal Pradesh, which was forwarded to Women Cell, Baddi. Women Cell, Baddi, after having respondent-wife medically checked, summoned all the petitioners. Since on 7.10.2014, petitioner-husband refused to arrive at amicable settlement, if any, with respondent-wife, respondent-wife lodged complaint, dated 7.10.2014 and got her statement recorded under Section 154 Cr.P.C., alleging therein ill treatment given by the petitioner-husband after marriage. She alleged in FIR that after solemnization of her marriage with petitioner-husband, she was repeatedly subjected to ill-treatment and harassment by the petitioners, while she was living with them in her matrimonial home at Jallandhar. Respondent-wife also alleged that petitioners, on various occasions, demanded money, jewellery etc. and despite having their demands fulfilled by her father, she was not only abused with filthy language, but was also given beatings. She further alleged that during pregnancy she had stomachache and her mother made her consume some medicines, as a consequence of which child in her womb died. She also alleged that repeatedly she was teased by saying that she has not brought appropriate dowry, whereas her younger sister-in-law has brought sufficient dowry with her. In the FIR, referred hereinabove, respondent-wife alleged that petitioners, named hereinabove, apart from causing physical and mental agony also gave her beatings and extended threats to do away with her life. On the basis of aforesaid statement recorded under Section 154 Cr.P.C., Police at Police Station, Nalagarh, registered FIR bearing No.224 against the petitioners under Sections 498-A, 406, 506 read with Section 34 IPC.

4. At this stage, it may be noticed that after lodging of aforesaid FIR (Annexure P-14), police allegedly recorded supplementary statement of respondent-wife under Section 161 Cr.P.C. dated 7.10.2014, which has been annexed as Annexure R-3 with reply of respondents No.1 & 2, wherein she alleged that she alongwith her mother Smt.Neelam and father Shailinder Singh remained present during investigation and on 26.8.2014 her husband Akashdeep Singh, father-in-law Yadwinder Singh, mother-in-law Ranjit Kaur and Devar (brother-in-law) Gaurav visited her parental house at Nalagarh and asked her that they will resolve the matter amicably by way of compromise, but, she told them that she has filed a complaint before the police and police shall settle the matter. Upon this, persons named in FIR got adamant and started hurling abuses on her and also extended threats to her to do away with her life. Subsequently, police got respondent-wife medically examined from Medical Officer, ESI Hospital, Jharmajri, Tehsil Baddi, District Solan, H.P., who, after conducting M.L.C. dated 22.8.2014, opined the alleged injury suffered by respondent-wife to be grievous and on the basis of aforesaid M.L.C., police added Section 325 IPC in the FIR. Police, after completion of investigation in the aforesaid FIR, presented challan in the Court of learned Additional Chief Judicial Magistrate, Nalagarh, which is pending adjudication.

5. Learned Senior counsel for the petitioners vehemently argued that there is/was no territorial jurisdiction with Police Station at Nalagarh to carry out the investigation into the allegations contained in FIR because bare reading of the contents of abovementioned FIR clearly reveals that none of the alleged incident of cruelty, criminal breach of trust and voluntary causing hurt, if any, had taken place at Nalagarh, as such, Police Station at Nalagarh had no jurisdiction to investigate into the FIR. In support of aforesaid arguments learned Senior Counsel invited the attention of this Court to Section

171 Cr.P.C. and also placed reliance upon judgment passed by the Hon'ble Apex Court in ***Amarendu Jyoti and Others vs. State of Chhattisgarh, (2014)12 SCC 362.*** Mr.Sharma, learned Senior Counsel further argued that otherwise also perusal of allegations contained in FIR nowhere suggests that case, if any, is made out against the petitioners under Sections 498-A, 406, 506 read with Section 34 IPC because there is no allegation that the petitioners ever raised demand for dowry. He further argued that though in the FIR, respondent-wife, has alleged that she was repeatedly teased on account of less dowry brought by her, but there is nothing on record that she was subjected to cruelty as defined by Section 498-A of IPC by the petitioners.

6. Lastly, Mr.Sharma, while making this Court to peruse contents of FIR, made a serious attempt to persuade this Court to agree with his contention that no incident of beatings or maltreatment took place at Nalagarh, rather all alleged incidents, if are presumed to be correct, happened at Jallandhar prior to lodging of FIR at Nalagarh. Mr.Sharma further submitted that there is no explanation available on record that why respondent-wife forgot to mention about alleged hurling of abuses and extension of threats by the petitioners on 26.8.2014 at Nalagarh, while getting her first statement recorded under Section 154 Cr.P.C. on the basis of which FIR No.224 came to be registered against the petitioners. Mr.Sharma, while referring to the supplementary statement recorded by Police after lodging of FIR, contended that Police at Nalagarh is hand-in-glove with respondent-wife, who is a local resident of the area and she solely with a view to falsely implicate the petitioners in a case purposely got the supplementary statement recorded so that jurisdiction at Nalalgarh is made out. Mr.Sharma further contended that there is no allegation, either in the impugned FIR or in other proceedings initiated by petitioner-husband in different Courts at Nalagarh, that petitioners kept on harassing her even after her leaving Jallandhar and, as such, there was no occasion for police at Nalagarh to take cognizance of the contents of allegations contained in the FIR. Mr.Sharma forcefully contended that dispute, if any, between petitioner-husband and respondent-wife is purely matrimonial and respondent-wife, solely with a view to teach lesson to the petitioner-husband as well as her family members i.e. petitioners No.1 to 3, has concocted false story and petitioners have been falsely implicated in the case. While referring to the MLC, adduced on record by the police to conclude that petitioner-husband was given beatings at Jallandhar, Mr.Sharma contended that alleged incident had occurred on 3.8.2014 whereafter admittedly respondent-wife appeared before Women Cell at Jallandhar and no such incident was ever reported, hence no much importance can be attached to such MLC, which was subsequently obtained after 23 days of the alleged incident. With the aforesaid submissions, Mr.Sharma prayed that FIR lodged by police of Nalagarh as well as consequent proceedings pending in the Court at Nalagarh may be quashed and set aside.

7. While refuting the aforesaid submissions having been made by Mr.R.K.Sharma, learned Senior Counsel representing the petitioners, Mr.Ramakant Sharma, learned Senior Counsel, representing respondent-wife (respondent No.3 herein), contended that in view of the contents of the FIR, Police of Police Station, Nalagarh, rightly investigated the matter and lodged FIR against the petitioners. Mr.Sharma further argued that a clear cut case under Sections 498-A, 406, 506, 325 read with Section 34 IPC is made out against the petitioners.

8. While referring to the allegations contained in FIR., Mr.Ramakant Sharma argued that though initial statement recorded under Section 154 Cr.P.C., on the basis of which formal FIR came to be lodged against the petitioners, itself reveals the commission of offence at Nalagarh, but even otherwise supplementary statement recorded on the same day clearly suggests that petitioners not only hurled abuses to the respondent-wife at Nalagarh,

rather, while leaving her house, they extended threats to do away with her life and, as such, FIR rightly came to be lodged at Police Station Nalaglarh.

9. While refuting the submissions of learned Senior Counsel that no case, if any, is made out against the petitioners under Section 498-A, Mr.Ramakant Sharma, strenuously argued that it is quiet apparent from the contents of FIR that respondent-wife specifically alleged against the petitioners that she was repeatedly teased and harassed by the petitioners on account of bringing less dowry and, as such, police rightly inserted Section 498-A in the FIR. While making this Court to peruse supplementary statement recorded under Section 161 Cr.P.C. of the respondent-wife, Mr.Sharma argued that the petitioners continued to commit offence punishable under aforesaid Sections even after respondent-wife had left her matrimonial house at Jallandhar and, as such, even on that account also Police at Nalagarh is/was well within its right to take cognizance of the above allegations contained in the FIR.

10. Lastly, Mr.Sharma contended that since pursuant to investigation conducted by the Police at Nalalgarh in FIR No.224, challan stands filed in the competent Court of law at Nalagarh, this Court may not accede to prayer of quashing made on behalf of petitioners while exercising its inherent jurisdiction under Section 482 Cr.P.C. Mr.Sharma further argued that though this Court enjoys vast powers under Section 482 Cr.P.C., but such powers are required to be exercised sparingly, carefully or with caution and only when such exercise is justified by the tests specifically laid down under Section 482 Cr.P.C. itself. He further submitted that exercise of inherent powers should not be exercised to stifle a legitimate prosecution.

11. Mr.Sharma argued that supplementary statement and evidence collected by police during investigation makes it amply clear that the offence under Section 498A IPC is made out against the petitioners and it is not necessary that there should be demand of dowry for the purpose of attracting provision of Section 498A IPC as has been held by the Hon'ble Apex Court in ***K.V. Prakash Babu vs. State of Karnataka, (2017)11 SCC 176*** and ***Bhaskar Lal Sharma and Another vs. Monica and Others, (2014)3 SCC 383.***

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

13. As has been noticed hereinabove, this Court at first instance shall consider issue with regard to jurisdiction of Nalagarh/Baddi Police to investigate into allegations contained in the FIR.

14. In nutshell case, as projected by the petitioners, is that the Police Station, Nalagarh has/had no territorial jurisdiction to investigate the allegations levelled in the impugned FIR and, as such, consequent action, if any, pursuant to same, deserves to be quashed and set aside.

15. Before ascertaining the correctness and merit of submissions made on behalf of the respective parties, it would be profitable to take note of the following provisions of law:-

> ***"11. Sections 177, 178 and 181 of Code of Criminal Procedure read as under:***
>
> ***"177. Ordinary place of inquiry and trial.-- Every offence shall ordinary be inquired into and tried by a court within whose local jurisdiction it was committed.***

178. Place of inquiry or trial.--(a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and party in another, or

(c) where an offence is a continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

181. Place of trial in case of certain offences.—

(1) Any offence of being a thug, or murder committed by a thug, of dacoity, of dacoity with murder, of belonging to a gang of dacoits, or of escaping from custody, may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the accused person is found.

(2) Any offence of kidnapping or abduction of a person may be inquired into or tried by a Court within whose local jurisdiction the person was kidnapped or abducted or was conveyed or concealed or detained.

(3) Any offence of theft, extortion or robbery may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property which is the subject of the offence was possessed by any person committing it or by any person who received or retained such property knowing or having reason to believe it to be stolen property.

(4) Any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained, or was required to be returned or accounted for, by the accused person.

(5) Any offence which includes the possession of stolen property may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the stolen property was possessed by any person who received or retained it knowing or having reason to believe it to be stolen property."

16. Close scrutiny of aforesaid provisions of law clearly suggests that Section 177 Cr.P.C. lays down a general rule with regard to place where a case can be inquired into and tried by a Court within whose local jurisdiction it was committed, whereas Sections 178 and 181 Cr.P.C. are exception to the aforesaid general rule contained in Section 177 Cr.P.C. Sub-section (c) of Section 178 Cr.P.C. provides that where an offence is a continuing one, and continues to be committed in more local areas than one, it may be inquired into or tried by a Court having jurisdiction over any of such local areas. Sub-section (4) of Section 181 Cr.P.C. lays down that any offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained, or was required to be returned or accounted for, by the accused person.

17. In the case at hand, bare perusal of FIR lodged by respondent-wife clearly suggests that all the alleged incidents with respect to cruelty, voluntary causing hurt and breach of trust, had allegedly occurred at Jallandhar (Pb) and not at Nalagarh (HP). Similarly, cruelty and humiliating treatment, alleged to have been given by the petitioner-husband to respondent-wife on account of bringing less dowry, is also alleged to have taken place at her matrimonial home at Jallandhar (Pb) and not at Nalagarh (HP). FIR in question nowhere reveals that demands of money, gifts and jewellery were ever made at Nalagarh, rather as per own case set up by respondent-wife she was allegedly given beatings by her husband and other family members at Jallandhar and subsequently the matter on the complaint of respondent-wife came to be referred to the Women Cell at Jallandhar. As per contents of FIR, on 17.8.2014 and thereafter on 24.8.2014, Women Cell at Jallandhar, called both the petitioner-husband and respondent-wife for reconciliation and subsequently on 27.8.2014, respondent-wife lodged complaint with SHO, Police Station, Nalagarh, which ultimately came to be forwarded to Women Cell, Baddi. Though respondent-wife has alleged in the FIR that on various occasions, petitioners demanded money and jewellery and abused her, but all such alleged incidents allegedly happened at Jallandhar (Pb) and not at Nalagarh (HP). Respondent-wife also alleged in the FIR that during pregnancy, she had stomach-ache and her mother made her consume some medicines, as a consequence of which child in her womb died, but, such incident, if any, also happened at Jallandhar. There is no narration of incident, if any, occurred at Nalagarh. Respondent-wife has alleged that on account of beatings given by her husband to her at Jallandhar, her father got her medically examined at Chawla Hospital, Mohali on 5.8.2014 and Women Cell, Baddi (HP), taking note of aforesaid alleged incident of beatings, which had happened at Jallandhar (Pb), got respondent-wife medically examined by Medical Officer in Himachal Pradesh and thereafter added Section 325 IPC in the FIR.

18. Having carefully perused the contents of FIR lodged with Police Station, Nalagarh, dated 7.8.2014, this Court is persuaded to agree with contention of Shri R.K. Sharma, learned Senior Counsel representing the petitioner-husband, that since none of the alleged incident of cruelty, criminal breach of trust and voluntary causing hurt had taken place at Nalagarh and, as such, Nalagarh Police had no jurisdiction to investigate into the FIR. True, it is, that respondent-wife subsequently on 7.10.2014, got her supplementary statement recorded under Section 161 Cr.P.C., (Annexure R-3, annexed with the reply of respondents No.1 and 2), alleging therein that on 26.8.2014 her husband Akashdeep Singh, father-in-law Yadwinder Singh, mother-in-law Ranjit Kaur and Devar (brother-in-law) Gaurav visited her parental house at Nalagarh and asked her to resolve the matter amicably by way of compromise, but, when she told them that she has filed complaint before the police, they got adamant and started hurling abuses on her and also extended threats to her to do away with her life. But, now question, which remains to be adjudicated, is whether allegations contained in supplementary statement of respondent-wife, recorded under Section 161 Cr.P.C., can be read in continuation to FIR dated 7.10.2014. Admittedly respondent-wife in her initial statement under Section 154 Cr.P.C. chose not to allege that on 26.8.2014, her husband Akashdeep Singh, father-in-law Yadwinder Singh, mother-in-law Ranjit Kaur and Devar (brother-in-law) Gaurav, hurled abuses and extended threats to her at Nalagarh. Needless to say, investigating agency can make addition or deletion in FIR, on the basis of investigation, and, as such, there appears to be no force in the arguments of Shri R.K. Sharma, learned Senior Counsel, that supplementary statement recorded under Section 161 Cr.P.C. cannot be read as a part of FIR, dated 7.10.2014, filed at the behest of respondent-wife at Nalagarh. Careful perusal of record, especially statement of parents of respondent-wife recorded at the time of lodging FIR on 7.10.2014, nowhere suggests that alleged incident of 26.8.2014 was ever reported to the police at first instance, even if, for the sake of arguments, it is presumed and accepted that respondent-wife forgot to mention

aforesaid alleged incident of 26.8.2014, while lodging FIR, dated 7.10.2014, but, it cannot be accepted that parents of respondent-wife, whose statements were also recorded at the time of lodging FIR on 7.8.2014, also inadvertently failed to state with regard to alleged incident of 26.8.2014. Documents adduced on record, especially reply/status report filed by investigating agency, while opposing bail of bail petitioners, nowhere suggests that alleged incident, if any, happened/occurred on 26.8.2014 was ever brought to the notice of Court, who was dealing with the application for grant of bail made on behalf of the petitioners. Apart from above, there is no mention, if any, of aforesaid incident of 26.8.2014 in the other proceedings initiated by respondent-wife against the petitioner-husband under Protection of Women from Domestic Violence Act 2005 and under Section 125 Cr.P.C. for maintenance. Even in the statement recorded under Section 161 Cr.P.C., respondent-wife simply alleged that on 26.8.2014, she was extended threats and hurled abuses by the petitioners, but there is no allegation that the petitioners demanded dowry and when their demand was not fulfilled, they insulted her, rather respondent-wife has stated that the petitioners asked her to get the dispute settled amicably.

19. Having carefully perused the contents of the FIR including supplementary statement recorded under Section 161 Cr.P.C. of respondent-wife, dated 7.10.2014, this Court has no hesitation to conclude that Police of Police Station, Nalagarh, has/had no jurisdiction to conduct investigation of allegations as recorded in FIR because all the alleged incidents, as narrated in the FIR, actually occurred/ happened at Jallandhar and not at Nalagarh and it is only Police Station at Jallandhar, who has/had the jurisdiction to conduct investigation, pursuant to complaint, if any, lodged by respondent-wife at Jallandhar (Pb). At this stage, it would be appropriate to place reliance upon judgment rendered by Hon'ble Apex Court in ***Amarendu Jyoti's*** case *supra***,** wherein it has held as under:-

> ***"5. Aggrieved by the rejection of the application Under Section 482 of the Code, the Appellants have approached this Court by way of special leave to appeal. The main contention on behalf of the Appellants was that the F.I.R. did not disclose a continuing offence. The offence, if any, was alleged to have been committed only at Delhi and there was no question of any offence having been committed after Respondent 2 went to stay at Ambikapur. The learned counsel for the appellants relied on the decision of this Court in Manish Ratan v. State of M.P., (2007)1 SCC 262.***
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> ***6. In Manish Ratan case, in the complaint, the incident was said to have taken place in Jabalpur. The wife had left her matrimonial house and started residing at Datia. The criminal revision filed by the accused, questioning the jurisdiction of the Court at Datia, was dismissed opining that the offence was a continuing one, and therefore, the Datia Court had jurisdiction to take cognizance. The High Court held that the Court at Datia also has jurisdiction to try the case since the harassment to the wife continued at the place where she was residing with her father "since she was forced to live at her father's place on account of the torture of the in-laws and as such it can safely be said that there was also a mental cruelty." This conclusion of the High Court was dubbed as curious by this Court since the High Court found earlier that "there is nothing in the complaint to show that any maltreatment was given to the Appellant at Datia. The allegations, which I may repeat here, are that the maltreatment was given within a specific period at Jabalpur." After looking at the decided cases on***

the point i.e. Sujata Mukherjee v. Prashant Kumar Mukherjee, (1997)5 SCC 30, State of Bihar v. Deokaran Nenshi, (1972)2 SCC 890, Y. Abraham Ajith v. Inspector of Police, (2004)8 SCC 100 and Ramesh v. State of T.N., (2005)3 SCC 507, this Court held that the order of the High Court was unsustainable, and therefore, set it aside. It is not only that in the interest of justice, while setting aside the order of the High Court, this Court also directed the transfer of the criminal case pending in the Court of the Chief Judicial Magistrate, Datia, where the wife was staying with her father to the Court of the Judicial, Jabalpur (vide para 18).

7. Relying on the judgment of this Court in Manish Ratan case , the learned counsel for the appellants contended that the offence in the present case cannot be considered to be a continuing offence, if any, and must be taken to have been complete at Delhi and no cause of action can be said to have arisen at Ambikapur. As must necessarily be, the application of law and the consequences must vary from case to case.

8. The core question thus is whether the allegations made in the FIR constitute a continuing offence.

9. We find from the FIR that all the incidents alleged by the complainant in respect of the alleged cruelty are said to have occurred at Delhi. The cruel and humiliating words spoken to the 2nd respondent, wife by her husband, elder brother-in-law and elder sister-in-law for bringing less dowry are said to have been uttered at Delhi. Allegedly, arbitrary demands of lakhs of rupees in dowry have been made in Delhi. The incident of beating and dragging Respondent 2 and abusing her in filthy language also are said to have taken place at Delhi. Suffice it to say that all overt acts, which are said to have constituted cruelty have allegedly taken place at Delhi.

10. The allegations as to what has happened at Ambikapur are as follows:

> ***"No purposeful information has been received from the in-laws of Kiran even on contacting on telephone till today. They have been threatened and abused and two years have been elapsed and the in-laws have not shown any interest to call her to her matrimonial home and since then Kiran is making her both ends meet in her parental home. To get rid of the ill-treatment and harassment of the in-laws of Kiran, the complainant is praying for registration of an FIR and request for immediate legal action so that Kiran may get appropriate justice."***

11. We find that the offence of cruelty cannot be said to be a continuing one as contemplated by Sections 178 and 179 of the Code. We do not agree with the High Court that in this case the mental cruelty inflicted upon Respondent 2 "continued unabated" on account of no effort having been made by the appellants to take her back to her matrimonial home, and the threats given by the appellants over the telephone. It might be noted incidentally that the High Court does not make reference to any particular piece of evidence regarding the threats said to have been given by the appellants over the telephone. Thus, going by the complaint, we are of the view that it cannot be held that the Court at Ambikapur has jurisdiction to try the offence since

the appropriate Court at Delhi would have jurisdiction to try the said offence. Accordingly, the appeal is allowed."

20. Applying the aforesaid exposition of law laid down by the Hon'ble Apex Court in ***Amarendu Jyoti's*** case *supra*, argument advanced by Mr.Ramakant Sharma, learned Senior Counsel representing the respondent-wife, that alleged offence of cruelty is continuing one, deserves outright rejection. Contention of Shri Ramakant Sharma, that bare perusal of supplementary statement of respondent-wife recorded under Section 161 Cr.P.C. suggests that petitioners continued to commit offence punishable under the aforesaid provisions, is not at all tenable because there is no mention, if any, with regard to demand of dowry, beatings and criminal breach of trust, if any, at Nalagarh, rather contents of FIR suggest beyond doubt that all the alleged incidents, as narrated in the FIR in question, allegedly happened at Jallandhar.

21. As has been noticed hereinabove, even if, it is presumed that the respondents-wife had suffered fracture on account of beatings given by her husband, alleged incident also happened at Jallandhar and not at Nalagarh. Mere medical examination of respondent-wife within the territorial jurisdiction of Nalagarh Police shall not confer any territorial jurisdiction upon the Police at Nalagarh to investigate the incident, which actually happened beyond its territorial jurisdiction.

22. Similarly, this Court sees no reason to agree with the contention of Mr.Ramakant Sharma, learned Senior Counsel, that mental cruelty inflicted upon respondent-wife continued on account of persistent demand made by the petitioners to bring the dowry, because there is no whisper, if any, in the FIR that after departure of respondent-wife from Jallandhar to her parental house, demand, if any, was ever raised for dowry by the petitioners, rather respondent-wife in her supplementary statement categorically stated to the police that petitioners on 26.8.2014 had come to her house and asked her to settle the matter amicably. Though in her supplementary statement, she mentioned that the petitioners, while leaving her parental house, extended threats and hurled abuses to her, but there is no plausible explanation rendered on record by respondent-wife that what prevented her from narrating this incident to police at first instance while getting her statement recorded under Section 154 Cr.P.C., on the basis of which formal FIR came to be lodged at Nalagarh on 7.10.2014.

23. This Court has no hesitation to agree with the contention of Shri Ramakant Sharma, learned Senior Counsel, that since respondent-wife was mentally disturbed at the time of lodging FIR, she forgot to mention incident on 26.8.2014, but, as has been noticed above, there is nothing in the statement of parents of respondent-wife, recorded pursuant to lodging of FIR on 7.10.2014, with regard to alleged incident of 26.8.2014, and, as such, there appears to be some force in the arguments of Mr.R.K Sharma, learned Senior Counsel for the petitioners that Police at Nalagarh, solely with a view to have jurisdiction to inquire into the contents of FIR, dated 7.10.2014, purposely got the supplementary statement of respondent-wife recorded after lodging of FIR on 7.10.2014. Even if it is presumed to be correct that on 26.8.2014 petitioners had hurled abuses or extended threats to the respondent-wife, case, if any, could be registered against the petitioners under Section 506 read with Section 34 IPC at Nalagarh and not under Section 498-A, 406 325 IPC.

24. Since no specific allegations are contained in the FIR with regard to demand of dowry by the petitioners at Nalagarh, no case could be registered against the petitioners under Section 498-A IPC at Police Station, Nalagarh. So far as offence under Section 406 IPC is concerned, it is evident from the perusal of FIR that there is no allegation that any article, given at the time of marriage, was entrusted/given to the petitioners at Nalagarh. It

is also not the case of respondent-wife that dowry articles etc. entrusted to the petitioners at Jallandhar were promised to be returned back at Nalagarh or were demanded to be returned back at Nalagarh. As far as commission of offence, if any, under Section 325 IPC is concerned, which subsequently came to be added in FIR, at the cost of repetition, it may be stated that incident of beatings, in which respondent-wife allegedly suffered grievous injury, had allegedly happened/occurred at Jallandhar, as per own statement of respondent-wife and as such police at Nalagarh has/had no jurisdiction to register a case against the petitioner-husband on this account also at police station, Nalagarh(HP).

25. Mr. Ramakant Sharma, learned Senior Counsel representing the respondent-wife, in support of his contention that in view of allegations contained in FIR as well as supplementary statement made by the respondent-wife on the same day, Police at Nalagarh had jurisdiction to investigate the matter, placed reliance upon the following judgments:-

(i) ***Kartar Singh vs. State of Punjab, AIR 1977 SC 349, (Para-6).***

(ii) ***Sunita Kumari Kashyap vs. State of Bihar and Another, (2011)11 SCC 301 (Para-17).***

(iii) ***Y.Abraham Ajith and Others vs. Inspector of Police, Chennai and Another, (2004)8 SCC 100 (para-8).***

(iv) ***State of Madhya Pradesh vs. Suresh Kaushal and another, 2002 Crl.L.J. 217 (paras 6 & 7).***

26. Mr.Sharma further contended that perusal of FIR as well as supplementary statement of respondent-wife made on 7.10.2014 and evidence collected by police during investigation makes it amply clear that offence under Section 498-A IPC is made out against the petitioners and as such police at Nalagarh had jurisdiction to look into the allegations leveled by the respondent-wife. He further argued that it is not necessary that there should be demand of dowry for the purpose of attracting provisions of Section 498-A IPC, as has been held by Hon'ble Apex Court in the judgments reported in ***K.V. Prakash Babu vs. State of Karnataka, (2017)11 SCC 176*** and ***Bhaskar Lal Sharma and Another vs. Monica and Others, (2014)3 SCC 383.***

27. Before adverting to the aforesaid law relied upon by learned Senior Counsel representing the respondent-wife, it may be observed that at this stage Court is not considering sustainability of charge, if any, and allegation against the petitioners with regard to commission of offence, if any, under Section 498-A, 406 and 506 IPC, rather endeavour of Court is to explore answer to the question whether police at Nalagarh has/had jurisdiction to investigate into the allegations contained in the FIR lodged at the behest of respondent-wife and whether Court at Nalagarh has/had jurisdiction to continue with the proceedings based upon the investigation carried out by the Police at Nalagarh, pursuant to FIR dated 7.10.2014 lodged by respondent-wife.

28. Having carefully perused facts of the case before Hon'ble Apex Court in case reported in ***Kartar Singh's*** case *supra*, this Court is of the view that the same are not applicable in the present facts and circumstances of the case. As has been already observed above, it is always open for investigating agency to take into consideration subsequent developments/facts, if any, collected during investigation, but question before this Court is that what prevented respondent-wife i.e. complainant from disclosing facts which were otherwise in her knowledge at the time of lodging FIR. True, it is, that one can forget mentioning certain facts at the time of lodging first report, but as has been observed in the earlier part of the judgment that it is not only respondent-wife who forgot to mention with regard to alleged incident of 26.8.2014, rather her parents, who also in their statements recorded at the time of lodging FIR on 7.10.2014 failed to mention factum with regard to

alleged incident of 26.8.2014, wherein petitioners had allegedly hurled abuses and extended threats to respondent-wife. Otherwise also Hon'ble Apex Court, in the case *supra,* has not returned specific finding that every supplementary statement recorded by the complainant after lodging of FIR is required to be taken into consideration, rather in the case before the Hon'ble Apex Court facts were altogether different, wherein complainant had forgot to mention the name of driver, who was also present at the site of occurrence at the time of alleged incident and as such his name was subsequently disclosed by the complainant in her supplementary statement.

29. Similarly, judgment rendered by Hon'ble Apex Court in ***Sunita Kumari Kashyap's*** case *supra,* is also not applicable in the present case because in that case complainant-wife had specifically alleged that while she was in her matrimonial house at Ranchi and was pregnant, she was forcibly left at her parental house at Gaya by her husband, who thereafter continued to harass her. Complainant also alleged that even after birth of child, respondent-husband continued to harass her at Gaya by raising new demand that unless her father gives his house at Gaya to him she will not be taken to Gaya. Hon'ble Apex Court having perused record, more particularly complaint filed on behalf of the wife, arrived at a conclusion that there was ill-treatment and cruelty at the hands of her husband and his family members at the matrimonial home at Ranchi and because of their actions and threat she was forcibly taken to her parental home at Gaya where she initiated the criminal proceedings against them for offences punishable under Sections 498A and 406/34 IPC and Sections 3 and 4 of the D.P. Act. Hon'ble Apex Court, in view of specific assertion by the appellant-wife about the ill-treatment and cruelty at the hands of the husband and his relatives at Ranchi and of the fact that because of their action, she was taken to her parental home at Gaya by her husband with a threat of dire consequences for not fulfilling their demand of dowry, arrived at a conclusion that in view of Sections 178 and 179 of the Code, the offence in this case was a continuing one having been committed in more local areas and one of the local areas being Gaya, the learned Magistrate at Gaya has jurisdiction to proceed with the criminal case instituted therein. Hon'ble Apex Court further held that the offence was a continuing one and the episode at Gaya was only a consequence of continuing offence of harassment or ill-treatment meted out to the complainant. Hon'ble Apex Court, having perused allegations of the complainant, held that it is a continuing offence of ill-treatment and humiliation meted out to the appellant at the hands of all the accused persons, therefore, undoubtedly clause (c) of Section 178 of the Code is clearly attracted.

30. However, facts of the case at hand are clearly distinguishable. In the case at hand allegations contained in FIR that respondent-wife was ill-treated and harassed by petitioners for bringing less dowry, but definitely there is nothing in the FIR that complainant/respondent-wife was ill-treated by her husband at her parental house and even after her departure from matrimonial house, all the petitioners kept on raising demand for dowry, rather supplementary statement made by the respondent-wife itself suggests that after registration of FIR at Nalagarh, petitioners made an attempt for amicable settlement but same was not acceptable to the respondent-wife. In the case *supra* before Hon'ble Apex Court complainant-wife was able to show that alleged offence of cruelty continued not at place called Gaya rather at a number of places, but as has been discussed herein above, respondent-wife in the case at hand has not been able to show commission of offence, if any, at Nalagarh.

31. In the other case relied upon on behalf of the respondents i.e. ***State of Madhya Pradesh vs. Suresh Kaushal and another, 2002 Crl.L.J. 217,*** allegation was that wife was subjected to physical torture when she was in the family way and she had to be taken back to her parental house at Jabalpur. The miscarriage took place while she was

at Jabalpur. Section 313 IPC came to be included in the charge as the cumulative effect of all the allegations ending with the consequence of the miscarriage which took place at Jabalpur. High Court at Jabalpur having perused record arrived at a conclusion that the Court at Jabalpur has no jurisdiction at all for trying the case. Learned Single Judge dealing with the case observed that alleged offence under Section 313 IPC was committed outside the city of Jabalpur and as such courts at Jabalpur therefore, have no jurisdiction to take cognizance of the aforesaid offences against the Petitioners. Learned Single Judge further observed that the competency of the Court to take jurisdiction is determined by the place in which the offence is alleged to have been committed and held that it is settled law that the Magistrate, within whose local jurisdiction the offence is alleged to have been committed is authorized to take cognizance, and either to try the case himself or to commit it to the Court of Sessions. Learned Single Judge further arrived at a conclusion that since the alleged offence has not been committed within the local jurisdiction of the Magistrate at Jabalpur, the learned Judge to whom the case has been committed by the learned Magistrate of Jabalpur has no power to try the petitioners for the alleged offences which were allegedly committed wholly outside the local limits of his jurisdiction. However, Hon'ble Apex Court, while interpreting provisions contained in Section 179 Cr.P.C., observed that the said section contemplates two courts having jurisdiction and the trial is permitted to take place in any one of those two Courts. One is the court within whose local jurisdiction the act has been done and the other is the court within whose local jurisdiction the consequence has ensued. Hon'ble Apex Court further held that when the allegation is that the miscarriage took place at Jabalpur it cannot be contended that the court at Jabalpur could not have acquired jurisdiction as the acts alleged against the accused took place at Indore. Hon'ble Apex Court further held that apart from above, when the High Court found that the courts at Jabalpur had no jurisdiction, the course adopted by the High Court by quashing the entire criminal proceedings is not permissible in law, rather the High Court should have transferred the case to the court which it found to be vested with jurisdiction and observed that we cannot appreciate the course adopted by the High Court in quashing the whole criminal proceedings against the accused.

32. Having carefully perused facts of the case which were before Hon'ble Apex Court as well as ratio laid down by Hon'ble Apex Court, in the case *supra* this Court is of the view that same is not applicable in the present facts and circumstances wherein admittedly there is no specific allegation, if any, with regard to incident of cruelty, criminal breach of trust and ill-treatment by the petitioners at Nalagarh, rather, respondent-wife of her own volition left her matrimonial home at Jallandhar and came back to her parental house at Nalagarh.

33. In the case at hand allegation contained in the FIR itself suggests that complainant herself left the house of the husband on 4.8.2014 on account of alleged dowry demand made by the husband and other family members. As noticed above, there is not a whisper about allegation of any dowry demand made at Nalagarh and, as such, logic of Section 178(c) Cr.P.C. cannot be applied. Hon'ble Apex Court in ***Y.Abraham Ajith's*** case *supra***,** reiterated the well established common law/Rules referred to in ***Halsbury's Laws of England (Vol. IX para 83)*** that the proper and ordinary venue for the trial of a crime is the area of jurisdiction in which, on the evidence, the facts occur and which is alleged to constitute the crime. The Hon'ble Apex Court in ***Y.Abraham Ajith's*** case *supra* has held as under:-

> ***"8. Sections 177 to 186 deal with venue and place of trial. Section 177 reiterates the well-established common law rule referred to in Halsbury's Laws of England (Vol. IX para 83) that the proper and***

ordinary venue for the trial of a crime is the area of jurisdiction in which, on the evidence, the facts occur and which are alleged to constitute the crime. There are several exceptions to this general rule and some of them are, so far as the present case is concerned, indicated in Section 178 of the Code which read as follows:

"Section 178 Place of inquiry or trial.--

(a) ***When it is uncertain in which of several local areas an offence was committed, or***

(b) ***where an offence is committed partly in one local area and partly in another, or***

(c) ***where an offence is continuing one, and continues to be committed in more local areas than one, or***

(d) ***where it consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas."***

9. ***"All crime is local, the jurisdiction over the crime belongs to the country where the crime is committed", as observed by Blackstone. A significant word used in Section 177 of the Code is "ordinarily". Use of the word indicates that the provision is a general one and must be read subject to the special provisions contained in the Code. As observed by the Court in Purushottamdas Dalmia v. State of West Bengal, (AIR 1961 SC 1589), L.N.Mukherjee V. State of Madras (AIR 1961 SC 1601), Banwarilal Jhunjhunwalla and Ors. v. Union of India and Anr. (AIR 1963 SC 1620) and Mohan Baitha and Ors. v. State of Bihar and Anr. (2001 (4) SCC 350), exception implied by the word "ordinarily" need not be limited to those specially provided for by the law and exceptions may be provided by law on consideration or may be implied from the provisions of law permitting joint trial of offences by the same Court. No such exception is applicable to the case at hand.***

10. ***As observed by this Court in State of Bihar v. Deokaran Nenshi and Anr. (AIR 1973 SC 908), continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all, that it is one of those offences which arises out of the failure to obey or comply with a rule or its requirement and which involves a penalty, liability continues till compliance, that on every occasion such disobedience or non-compliance occurs or recurs, there is the offence committed.***

11. ***A similar plea relating to continuance of the offence was examined by this Court in Sujata Mukherjee (Smt.) v. Prashant Kumar Mukherjee (1997 (5) SCC 30). There the allegations related to commission of alleged offences punishable under Section 498-A, 506 and 323 IPC. On the factual background, it was noted that though the dowry demands were made earlier the husband of the complainant went to the place where complainant was residing and had assaulted her. This Court held in that factual background that clause (c) of Section 178 was attracted. But in the present case the factual position is different and the complainant herself left the house of the husband on 15.4.1997 on account of alleged dowry demands by the husband and his relations. There is thereafter not even a whisper of allegations about any***

demand of dowry or commission of any act constituting an offence much less at Chennai. That being so, the logic of Section 178 (c) of the Code relating to continuance of the offences cannot be applied.

12. The crucial question is whether any part of the cause of action arose within the jurisdiction of the Court concerned. In terms of Section 177 of the Code it is the place where the offence was committed. In essence it is the cause of action for initiation of the proceedings against the accused.

13. While in civil cases, normally the expression "cause of action" is used, in criminal cases as stated in Section 177 of the Code, reference is to the local jurisdiction where the offence is committed. These variations in etymological expression do not really make the position different. The expression "cause of action" is therefore not a stranger to criminal cases.

14. It is settled law that cause of action consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise."

34. Hon'ble Apex Court in the judgment referred hereinabove has categorically held that it is settled law that cause of action consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a Court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise. Most importantly in the judgment referred above Hon'ble Apex Court has categorically held that in terms of Section 177, it is the place where the offence was committed and in essence it is the cause of action for initiation of the proceedings against the accused. In the case at hand, there is not even a whisper of allegation about the demand of dowry much less at Nalagarh, as such, this Court has no hesitation to conclude that the logic of Section 178(c) of the Code relating to continuance of the offences cannot be applied in the present facts and circumstances of the case.

35. Having closely examined/analyzed the facts of the case at hand, it is amply clear that exceptions to the general rule, as provided in Sections 178 and 182 Cr.P.C., are not applicable in the case in hand. Police Station at Nalagarh has/had no jurisdiction to conduct investigation of the allegations levelled in the impugned FIR. Jurisdiction, if any, to inquire into the contents as contained in FIR, is/was with police station at Jallandhar, as all the incidents happened/occurred at Jallandhar (Punjab) and not at Nalagarh (Himachal Pradesh). Since respondent-wife before lodging FIR at Nalagarh had lodged complaint at Women Cell, Jallandhar, she could pursue the same at Jallandhar and definitely, on the basis of allegations contained in FIR in question lodged at Nalagarh, no case could be registered against the petitioners at Nalagarh.

36. As far as another contention of Shri Ramakant Sharma, learned Senior Counsel that since the proceedings, consequent to lodging of FIR in question at Nalagarh, are pending adjudication before competent Court of law at Nalagarh, the instant petition, is not maintainable, also deserves to be rejected because once it stands established on record that Police Station, Nalagarh, has/had no territorial jurisdiction to inquire into the contents

of FIR lodged at the behest of respondent-wife, no consequential proceedings pursuant to the investigation carried out by Police at Nalagarh in the FIR can be allowed to sustain. Since, this Court has arrived at definite conclusion that Police has/had no territorial jurisdiction to investigate contents of impugned FIR, Court at Nalagarh is/was not competent to take cognizance of investigation/challan filed by the police and as such same also deserves to be quashed and set aside.

37. Reliance placed upon judgment of Hon'ble Apex Court in ***State of Bihar and another etc. etc. vs. Shri P.P. Sharma and another etc. etc., AIR 1991 SC 1260*** is wholly mis-placed and it does not fit into the present facts and circumstances of the case and as such same cannot be applied.

38. In the case *supra*, Hon'ble Apex Court observed that mere allegations of mala-fide against the informant based on the facts after the lodging of the FIR were of no consequence and could not be made basis for quashing the proceedings. Hon'ble Apex Court further held that simply because the Investigating Officer, while acting bonafidely ruled out certain documents as irrelevant, cannot be ground to assume that he acted malafidely. No doubt, in the present case Hon'ble Apex Court held that when the police report under Section 173 Cr.P.C. is forwarded to the Magistrate after completion of investigation and the material collected by the investigating officer is under the gaze of judicial scrutiny, the High Court would do well to discipline itself not to undertake quashing proceedings at that stage in exercise of its inherent jurisdiction, but the aforesaid observation made by the Hon'ble Apex Court is altogether in different context and in peculiar facts and circumstances of the case.

39. In the case before Hon'ble Apex Court there were allegations of malafide against the informant and investigating officer and Hon'ble Apex Court held that the same cannot be basis for quashing the proceedings because non-annexing of certain documents being irrelevant by the investigating officer cannot be a ground to assume that he acted malafidely. Hon'ble Apex Court, on the basis of material before it, arrived at a conclusion that the dominant purpose for registering the case against the respondents was to have an investigation done into the allegations contained in the FIR and in the event of there being sufficient material in support of the allegations to present the charge sheet before the court. Similarly, there is no material to show that the dominant object of registering the case was the character assassination of the respondents or to harass and humiliate them. Hon'ble Apex Court set aside the judgment passed by High Court of Patna, wherein it had quashed the proceedings. But, in the present case when it is quiet apparent that police at Nalagarh had no jurisdiction to look into the allegations contained in the FIR, consequential proceeding, if any, initiated pursuant to report presented under Section 173 Cr.P.C. by the police at Nalagarh cannot be allowed to sustain, hence aforesaid judgment relied upon by the learned Senior Counsel has no application. Had the Police at Nalagarh(HP) jurisdiction to look into the contents of FIR lodged at the behest of respondent-wife and on the basis of investigation carried out by the police challan was presented in the competent Court of law, definitely aforesaid judgment could be applied and it could be concluded that since challan stood filed, Court cannot interfere while exercising powers under Section 482 Cr.P.C. But in the present case facts are otherwise as has been discussed hereinabove and as such this case has no application.

40. The Hon'ble Apex Court in ***Shri P.P. Sharma's*** case *supra* held as under:-

> ***"33. The above order was brought to the notice of the Patna High Court but the High Court refused to be persuaded to adopt the same course. We are of the considered view that at a stage when the police report under***

<u>S.173</u> Cr. P.C. has been forwarded to the Magistrate after completion of the investigation and the material collected by the investigating officer is under the gaze of judicial scrutiny, the High Court would do well to discipline itself not to undertake quashing proceedings at that stage in exercise of its inherent jurisdiction. We could have set aside the High Court judgment on this ground alone but elaborate argument having been addressed by the learned counsel for the parties we thought it proper to deal with all the aspects of the case."

41. There cannot be any quarrel with the argument advanced by Mr.Ramakant Sharma, learned Senior Counsel that by now it is well settled that High Court while exercising power under Section 482 Cr.P.C. though has wide powers but those are to be exercised sparingly, carefully or with caution and only when such exercise is justified by the tests specifically laid down under Section 482 Cr.P.C. itself. Mr.Sharma in support of aforesaid submission also placed reliance upon the judgment rendered by Hon'ble Apex Court in ***Ghanshyam Sharma vs. Surendra Kumar Sharma and Others, (2014)13 SCC 401 (para-8), Suresh Chandra Swain vs. State of Orissa, 1988 Crl.L.J. 1175 (para-11(3))*** and ***Varala Bharath Kumar vs. State of Telangana and Another, (2017)9 SCC 413 (para-7).*** Since in all the judgments referred hereinabove similar principle of law has been laid down by the Hon'ble Apex Court, this Court would only be dealing with the latest judgment rendered by Hon'ble Apex Court in ***Varala Bharath Kumar's*** case *supra.*

42. In the aforesaid judgment Hon'ble Apex Court has held that extra ordinary power under Article 226 or inherent power under Section 482 of the Code of Criminal Procedure can be exercised by the High Court, either to prevent abuse of process of the court or otherwise to secure the ends of justice. Hon'ble Apex Court though in the aforesaid judgment has observed that while exercising power under Section 482 or under Article 226 in such matters, the court does not function as a Court of Appeal or Revision but held that inherent jurisdiction under Section 482 of the Code though wide has to be exercised sparingly, carefully or with caution and only when such exercise is justified by the tests specifically laid down under Section 482 itself. It is to be exercised ex debito justitiae to do real and substantial justice, for the administration of which alone courts exist. The Hon'ble Apex Court further held that the Court must be careful and should see that its decision in exercise of its power is based on sound principles. The inherent powers should not be exercised to stifle a legitimate prosecution. But, on the top of everything, Hon'ble Court has categorically held that no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extra ordinary jurisdiction of quashing the proceedings at any stage. It would be profitable to take note of following paras of the aforesaid judgment:-

"6. It is by now well settled that the extraordinary power under Article 226 or inherent power under Section 482 of the Code of Criminal Procedure can be exercised by the High Court, either to prevent abuse of process of the court or otherwise to secure the ends of justice. Where allegations made in the First Information Report/the complaint or the outcome of investigation as found in the Charge Sheet, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out the case against the accused; where the allegations do not disclose the ingredients of the offence alleged; where the uncontroverted allegations made in the First Information Report or complaint and the material collected in support of the same do not disclose the commission of offence alleged and make out a case against the accused; where a criminal

proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge, the power under Article 226 of the Constitution of India or under Section 482 of Code of Criminal Procedure may be exercised.

7. While exercising power under Section 482 or under Article 226 in such matters, the court does not function as a Court of Appeal or Revision. Inherent jurisdiction under Section 482 of the Code though wide has to be exercised sparingly, carefully or with caution and only when such exercise is justified by the tests specifically laid down under Section 482 itself. It is to be exercised ex debito justitiae to do real and substantial justice, for the administration of which alone courts exist. The court must be careful and see that its decision in exercise of its power is based on sound principles. The inherent powers should not be exercised to stifle a legitimate prosecution. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extra ordinary jurisdiction of quashing the proceedings at any stage."

43. Before considering application of aforesaid law laid down by Hon'ble Apex Court in the present facts and circumstances of the case, it may be observed that in the case at hand this Court has not examined the material available on record with a view to ascertain the correctness of allegation contained in the FIR, rather attempt, if any, by this Court is to arrive at conclusion that *"whether, in view of allegation contained in the FIR, Police at Nalagarh has jurisdiction or not?"* In the earlier part of the judgment, it is made clear that second prayer for quashing of FIR would depend upon answer to the first question.

44. In the peculiar facts and circumstances of the case, as has been discussed above, this Court has arrived at a conclusion that Police at Nalagarh has/had no jurisdiction to enquire into the contents of FIR and as such there is no occasion for this Court to go into the correctness of the allegation as well as sustainability of charge, if any, framed against the petitioners. As has been noticed hereinabove, inherent power under Section 482 Cr.P.C., is to be exercised sparingly, carefully or with caution and only when such exercise is justified by the tests specifically laid down under Section 482 Cr.P.C. itself. True, it is, that it should be exercised ex debito justitiae to do real and substantial justice. Judgment referred to hereinabove nowhere suggests that power under Section 482 Cr.P.C. cannot be exercised by the Court at all, rather exercise of it would depend upon the facts of the case before it. Hon'ble Apex Court in the aforesaid judgment has held that inherent power should not be exercised to stifle a legitimate prosecution. But, what is legitimate prosecution depends upon facts of the particular case. In the case at hand, as has been, elaborately discussed hereinabove clearly suggests that Police at Nalagarh has/had no authority/jurisdiction to investigate into allegations contained in FIR, which admittedly took place at Jallandhar and as such Courts at Nalagarh have/had no jurisdiction to continue with the proceedings, which are apparently based upon the investigation carried out by police at Nalagarh and as such same cannot be allowed to sustain. Since police at Nalagarh had no jurisdiction, as has/had been held hereinabove, proceedings if any pending before Courts at Nalagarh cannot be allowed to sustain.

45. Consequently, in view of above, present petition is allowed and the FIR dated 7.10.2014 as well as consequent proceedings are quashed and set aside, however,

respondent-wife is at liberty to initiate action, if any, against the petitioners, on account of allegations contained in impugned FIR but at Jallandhar(Pb), either by lodging fresh FIR or by pursuing complaint filed by her at Women Cell Jallandhar.

46. Needless to say that this Court has only examined/analyzed material adduced on record by the respective parties to ascertain whether Police at Nalagarh has/had jurisdiction to investigate into contents of FIR and as such this Court may not be understood to have returned findings, if any, qua the sustainability of offence/charge, if any, made out against the petitioners under Sections 498-A, 406 and 506 IPC which shall be considered and decided by the Court of competent jurisdiction, if required and desired.

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

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

Dharam Pal Gupta ....Appellant

Versus

State of H.P. & Another ....Respondents

LPA No.4003 of 2013
Judgment Reserved on:19.07.2018
Date of decision: 14.08.2018

Constitution of India, 1950 - Articles 14 & 16 - Promotion to post of Registrar, Department of Irrigation and Public Health – Eligibility - State Government creating two departments i.e. Department of Irrigation and Public Health (I&PH) and Department of Public Works Department (PWD) from erstwhile Public Works Department - Also giving liberty to officials/officers to opt - On failure of officials to exercise option(s), State Government bifurcating cadre on 'as is where is basis' - Petitioner allocated PWD (B&R) cadre - Petitioner filing writ challenging bifurcation as arbitrary being violative of natural justice and seeking promotion to post as Registrar, Department of Irrigation and Public Health on basis of combined seniority list - Hon'ble Single Judge dismissing writ – LPA - Held, on date of bifurcation of department as well as on date of bifurcation of cadre, petitioner was with PWD wing - Petitioner not challenging bifurcation of Department and he merely challenging bifurcation of cadre on 'as is where is basis' - Petitioner never exercised any option for allocation of Department of Irrigation and Public Health nor his posting in PWD(B&R) - Petitioner accepted promotion on basis of seniority of PWD(B&R) Department, suggesting his acceptance of allocation in that Department - Petitioner not entitled to lay claim for promotion to post of Registrar in Department of I&PH - LPA dismissed. (Paras 13, 14, 18, 19 & 23)

Case referred:

Jagdish Parsad Sinha and Others vs. Bhagwat Prasad and Others, (1989)3 SCC 610

For the Appellant: Mr.B.C. Negi, Senior Advocate with Mr.Pranay Pratap Singh, Advocate.

For the Respondents: Mr.Ajay Vaidya, Sr.Additional Advocate General with Mr.Ranjan Sharma, Ms.Ritta Goswami, Mr.Adarsh Sharma and Mr.Nand Lal Thakur, Additional Advocate Generals.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.:

Instant Letters Patent Appeal is directed against the judgment dated 29.04.2013, passed by learned Single Judge of this Court, whereby Writ Petition having been filed by the appellant-petitioner (*hereinafter referred to as the 'petitioner')* came to be dismissed.

2. At first instance, petitioner approached Himachal Pradesh State Administrative Tribunal by way of Original Application No.1713 of 1995, which subsequently registered as CWP(T) No.2662/2008, praying therein following main reliefs:-

> ***"(i) That the notification dated 27th April, 1994 (Annexure A-5) deserves to be quashed being arbitrary, illegal, unilateral and violative of Article 14 & 16 of the Constitution.***
>
> ***(ii) The respondents be directed to consider the case of the applicant for the promotion to the post of Registrar which is going to be vacated in the Deptt. of Irrigation and Public Health Deptt. on 31.8.95 immediately as the applicant is to retire on 28th Feb., 1996 just after about 6 months."***

3. Succinctly facts, which may be relevant for adjudication of present appeal, are that the petitioner was appointed as Clerk in the Public Works Department on 25.9.1956. The petitioner served the aforesaid department in various capacities i.e Steno-typist, Circle Stenographer, Junior Scale Stenographer, Head Clerk re-designated as Superintendent Grade-II, Legal Assistant and then Superintendent Grade-I in the scale of Rs.2200-4000 Class-II Gazetted. The petitioner worked as Head Clerk, re-designated as Superintendent Grade-II from 14.11.1969 to 13.1.1983. During the pendency of writ petition, petitioner came to be promoted as Vigilance Officer on 31.10.1995 on the basis of seniority in Public Works Department.

4. Prior to the year 1984, Public Works Department was also executing Irrigation Schemes, Water Supply Schemes, Sewerage Schemes, and Flood Protection Schemes, in addition to construction of building (residential as well as non-residential), roads and bridges etc. The respondent-State, with a view to provide speedy water supply and better irrigation facilities to the public at large, decided to separate the Irrigation and Public Health Wing of Public Works Department and to make it as an independent and separate Department headed by Chief Engineer.

5. Vide Notification dated 22.9.1984 (Annexure A-2 annexed with the O.A.), Government of Himachal Pradesh was pleased to order bifurcation of aforesaid Himachal Pradesh Public Works Department into two separate Departments, as has been noticed hereinabove. Vide aforesaid Notification, it was ordered that w.e.f. 1.10.1984 two Departments, as referred above, shall function independently under the respective Heads of Departments and officers/officials working with each wing of combined Departments will continue to work against the respective posts on "as is where is principle", pending finalization of the allocation as per the procedure approved.

6. Vide Notification dated 28.9.1984 (Annexure A-2B), Screening Committee of Officers came to be constituted to consider the options of the officers/officials of the existing Public Works Department and decide the allocation into two above named Departments.

7. Vide separate Notification dated 28.9.1984 (Annexure A-3), it was ordered that consequent upon the bifurcation of the H.P. Public Works Department into two separate Departments i.e. Public Works Department and Irrigation and Public Health Department, each and every officer/official of the Himachal Pradesh Public Works Department borne on its strength on 30.9.1984 (including those employees of the Department who are on deputation/or on foreign service elsewhere) shall exercise his/her option for his/her allocation to any one of the two aforementioned Departments, within a period of 3 months w.e.f. 1.10.1984. It further emerge from the record that process of calling the options came to be extended repeatedly from time to time, but same could not be materialized till 27.4.1994 (Annexure A-5), on which date bifurcation was effected unilaterally on the principle of "as is where is" and it was made clear that Recruitment and Promotion Rules applicable in Himachal Pradesh Public Works Department as on 1.10.1984 shall be applicable to the employees of Irrigation and Public Health Department.

8. Careful perusal of aforesaid Notification dated 27.4.1994 suggests that the Governor of Himachal Pradesh was pleased to issue specific order regarding bifurcation with respect to Public Works Department and Irrigation and Public Health Department, wherein it was provided that with effect from 27th April, 1994, those officers and employees who are working in Public Works Department and Irrigation and Public Health Department are bifurcated on the basis of their postings in their respective Departments on the principle of "as is where is" in the concerned Departments. Notification further provided that the Architect and Electrical wings will remain in the Public Works Department, whereas, the Design and the Mechanical wings will be divided in to two Departments on half-half basis and in case some difficulty arises in the division, the matter shall be placed in front of the Government. It appears that process of option in terms of Notification dated 28.9.1984 could not be finalized/ completed on account of various representations made by the Unions of the employees working in the Public Works Department, wherein they opposed action of the State inasmuch calling of options is concerned. It is also not in dispute that in combined seniority list of Superintendent Grade-IV, re-designated as Superintendent Grade-II as on 31.1.1989, the petitioner was shown at Sr.No.38. All the Superintendents senior to the petitioner in the seniority list had either retired or left the Department except Rajesh Kumar mentioned at Sr.No.5, who stood promoted as Registrar and posted in the office of the Chief Engineer (N), Dharamshala. Amar Singh Sen shown at Sr.No.29 posted in the office of the Superintending Engineer, Ist Circle, HPPWD, Mandi was not eligible for promotion to the post of Registrar for want of clearing the Departmental Examination meant for Gazetted Officers. Since the petitioner had already passed the Departmental Examination meant for Gazetted Officers, he claimed that he ought to have promoted to the post of Registrar. However, as per Notification dated 16/19.2.1976 and subsequent amendment issued on 20.11.1984 in the Recruitment and Promotion Rules of Registrar in Public Works Department, the post of Registrar was required to be filled up from the posts of Vigilance Officers with three years regular service or Superintendent Grade-I having five years regular service in the office of the Chief Engineers, failing which by promotion from amongst the Superintendents in the office of the Chief Engineers, PWD with five year regular or ad hoc service in the cadre/grade. As per petitioner, post of Registrar was to be vacated in the office of Engineer-in-Chief, IPH Department after 31.8.1995 on account of retirement of one R.D. Kaundal, whereas, one post of Vigilance Officer was going to be vacated on 31.8.1995 in the office of Engineer-in-Chief, Irrigation & Public Health Department on the retirement of S.D. Bansal, as such, petitioner, being senior most eligible person for

promotion to the post of Registrar, ought to have been considered for promotion, but, the Government, intended to promote the junior persons to him on the basis of notification issued on 27.7.1994, whereby two Departments i.e. Irrigation & Public Health and Public Works Department came to be in existence and in case respondent-department is permitted to do so, it would cause injustice to the petitioner, who was senior in the joint seniority list. He further alleged that even after the notification dated 27.4.1994, whereby the employees came to be allocated on the principle of 'as is where is', the officers/officials are being posted from one department to other department on promotion.

9. Respondents, while refuting the aforesaid averments, claimed that in the seniority list of Superintendent Grade-II circulated on 31.8.1994, the petitioner has been shown at Sr.No.27, whereas, in another seniority list of Superintendent Grade-II circulated on 17.8.1994 on the basis of bifurcation order dated 27.4.1994, the petitioner is not shown in the list of Superintendent Grade-II in Irrigation & Public Health Department and, as such, petitioner cannot claim himself senior in the seniority list of Superintendent Grade-II in the Irrigation & Public Health Department. Respondents further claimed that the petitioner has no right in the Irrigation & Public Health Department since he failed to exercise option in pursuance to the notification issued by the Government with regard to bifurcation of two Departments. Respondents further claimed that the Government has bifurcated the combined cadres of the Departments of Public Works and Irrigation & Public Health on the principle of 'as is where is' on the basis of notification dated 27.4.1994, which is legal, just and expedient in the public interest. However, petitioner by way of rejoinder claimed that he is entitled to be promoted to the post of Registrar in the Department of Irrigation & Public Health on the basis of combined seniority list of Superintendent Grade-II and not on the basis of two seniority lists of Superintendent Grade-II of Irrigation & Public Health Department and Public Works Department prepared after bifurcation and the principle of 'as is where is' is arbitrary and contrary to the principle of natural justice.

10. Record reveals that during the pendency of petition, Special Secretary(PWD) to the Government of Himachal Pradesh filed supplementary affidavit dated 4.7.1996 stating therein that the bifurcation of Public Works Department and Irrigation & Public Health Department was ordered on 27.4.1994, when the staff was bifurcated into Pubic Works Department and Irrigation & Public Health Department on 'as is where is' basis. Under Secretary(PWD) to the Government of Himachal Pradesh also filed affidavit dated 28.7.2009 stating therein that the petitioner upon the bifurcation of Public Works Department and Irrigation & Public Health Department on the basis of 'as is where is' principle was allocated to Public Works Department and accordingly he was assigned seniority in the seniority list of Superintendent Grade-II issued by the Engineer-in-Chief, HPPWD on 31.8.1994. Petitioner was promoted as Superintendent Grade-I on 20.7.1991 and on the date of bifurcation i.e. 27.4.1994, the petitioner was Superintendent Grade-I in Public Works Department and not in Irrigation & Public Health Department. Accordingly, in view of his seniority maintained in Public Works Department, he was promoted as Vigilance Officer in Public Works Department on 30.10.1995. Respondents refuted the claim of the petitioner for promotion to the post of Registrar in the Department of Irrigation & Public Health on the ground that in the seniority list circulated by Engineer-in-Chief, I&PH on 17.8.1994. Since the name of the petitioner did not figure in that seniority list of feeder category, he could not be considered for promotion to the post of Registrar in the Department of Irrigation & Public Health. It also emerge from perusal of the record that till the passing of order dated 9.10.1995, whereby learned Tribunal, while modifying its earlier order dated 4.9.1995, had directed the respondents to consider the petitioner alongwith others, if found eligible, for the post of Registrar in the office of the Engineer-in-Chief, I&PH Department, neither the

petitioner nor any other person was considered nor any person was promoted as Registrar in the Irrigation & Public Health Department.

11. We have heard learned counsel for the parties and gone through the record of the case.

12. We are not persuaded to agree with the contention of Mr.B.C. Negi, learned Senior Counsel representing the petitioner that since in the combined seniority list of Superintendent Grade-IV, re-designated as Superintendent Grade-II, as it stood on 31.8.1987, where petitioner was shown at Sr.No.38, the petitioner ought to have been considered for the promotion to the post of Registrar in the Department of Irrigation & Public Health being only eligible candidate. It is not in dispute that vide notification dated 22.9.1984 Public Works Department came to be bifurcated into two Departments as Public Works Department and Irrigation & Public Health Department on the principle of 'as is where is' w.e.f. 1.10.1984.

13. True, it is, that after bifurcation of the two Departments, the officers/officials in both the Departments continued to have common cadres, but, it is also the matter of record, that the common cadres of the two Departments were also bifurcated on 27.4.1994, whereby it was ordered that w.e.f. 27.4.1994, those officers and employees, who are working in Public Works Department and Irrigation & Public Health Departments, are bifurcated on the basis of their postings in the respective Departments on the principle of 'as is where is' in the concerned Department. Notification dated 27.4.1994 specifically ordered that Architect and Electrical wings will remain in the Public Works Department, whereas Design and the Mechanical wings will be divided in two Departments on half-half basis. It is also not in dispute that on the date of bifurcation i.e. 22.9.1984, petitioner was employee of Public Works Department and on 27.4.1994, he was Superintendent Grade-I in Public Works Department. Interestingly, in the case at hand, the petitioner has laid challenge to the decision of the Government to bifurcate the cadres of two Departments, but he has failed to lay challenge to the decision of Government to bifurcate Public Works Department into two Departments, namely; Public Works Department and Irrigation & Public Health Department on 'as is where is' principle w.e.f. 1.10.1984. There is no specific challenge, if any, to the decision taken by the respondents for creation of two Departments, rather it is quiet apparent from the record as well as conduct of the petitioner that he continued to work in Public Works Department after its bifurcation in the year 1984. As has been noticed hereinabove, Screening Committee was also constituted with a view to examine options exercised by the officers/officials of the Public Works Department with a view to decide their postings, but it appears that in view of resentment/opposition of employees unions matter with regard to exercise of option remained undecided and ultimately on 27.4.1994 Government of its own issued order with regard to bifurcation in respect of Public Works Department and Irrigation & Public Health Department. Vide aforesaid notification dated 27.4.1994, respondents provided the Recruitment and Promotion Rules, which, were applicable to the Public Works Department as on 1.10.1984, will also be applicable in the Department of Irrigation and Public Health and any amendment in future to these rules will be made by the concerned Department according to the need and circumstances.

14. In nutshell, case/grievance of the petitioner is that Government ought to have called for option before bifurcation of the Public Works Department into two Departments, but matter with regard to exercising option as well as bifurcation of cadres

remained pending for a decade and all of a sudden Government allocated the officers and officials in two Departments on the principle of 'as is where is' basis on 27.4.1994, which action is not in accordance with law. Though reply filed by the respondents itself suggests that it was not obligatory for Government to have obtained options from the employees including officers for their deployment in either of the two Departments, but, admittedly, as per original notification dated 22.9.1984 and 28.9.1984, options exercised, if any, by officers and officials of the Public Works Department were required to be considered and decided by Screening Committee. But, in the case at hand, it is none of the case of the petitioner that he, in terms of aforesaid notification dated 22.9.1984, exercised his option for allocation in the newly created Irrigation & Public Health Department nor it is the case of the petitioner that the Wing in which he was working in Public Works Department at the time of bifurcation lateron became part of the newly created Irrigation & Public Health Department. Rather, it appears that the petitioner also adopted wait and watch policy and never exercised option for allocation of any Department and suddenly in the year 1994 when Government of its own decided to bifurcate the cadre on the basis of principle 'as is where is' basis staked his claim for promotion to the post of Registrar in the newly created Department Irrigation & Public Health on the basis of combined seniority list of Superintendent Grade-IV, re-designated as Superintendent Grade-II, as it stood on 31.8.1989. As has been noticed hereinabove, petitioner never laid challenge to the notification of the Government to allocate the staff in two Departments, rather he, after having been filed petition at hand, accepted promotion to the post of Vigilance Officer on 31.10.1995 in the Public Works Department on the basis of its seniority in the Public Works Department, which itself suggests that the petitioner had accepted allocation in the Public Works Department, as such, learned Single Judge rightly returned finding that once petitioner accepted Public Works Department, he has no right to claim over the post of Registrar in another separate Department; namely; Irrigation and Public Health Department.

15. Though having carefully perused record, we find force in the argument of Mr.B.C. Negi, learned Senior Counsel representing the petitioner, that learned Single Judge has erred in recording findings that option given by the petitioner was not considered because admittedly there is no averment in the petition that at any point of time after issuance of notification dated 22.9.1984 petitioner ever gave option to remain in one particular Department, rather record suggests that in view of consistent protest by the employees union, matter with regard to exercise of option remained un- decided till issuance of notification dated 27.4.1994 i.e. allocation of officials and officers of both the Departments on the principle of 'as is where is', but that may be of no consequence because careful perusal of notification dated 27.4.1994 suggests that Government proceeded to bifurcate employees of Public Works Department and Irrigation & Public Health Department on the basis of their postings in the respective Departments on the principle of 'as is where is' in the concerned Departments.

16. Vide aforesaid notification, Department carved out special category and ordered that Architect and Electrical wings will remain in Public Works Department, whereas Design and Mechanical wings shall be divided in two Departments on half-half basis. Employees working in the Public Works Department other than aforesaid category i.e. Architect and Electrical wings and Design and the Mechanical wings were ordered to be bifurcated on the basis of their postings in the respective Departments on the principle of 'as is where is'.

17. In the petition at hand, though petitioner at one hand sought quashing of notification dated 27.4.1994, whereby officers and officials working in Public Works Departments came to be bifurcated on the basis of principle of 'as is where is' and on the

other hand, sought direction to the respondents to consider his case for the promotion to the post of Registrar, which at that time was going to be vacated in the newly carved out Department of Irrigation & Public Health from 31.8.1995. This Court is in agreement with the findings returned by learned Single Judge that since the Government is to run the Departments; it may not be possible for it to accept option of each and every employee. In the present case, matter with regard to exercise of option remained pending for ten years, whereafter respondent-State of its own vide notification dated 27.4.1994 bifurcated the Departments and decided to allocate officials and officers in the Departments on the basis of 'as is where is' principle. Mr.Negi, learned Senior Counsel, was not able to dispute that after bifurcation of two Departments, common cadres of two departments were also bifurcated on 27.4.1994.

18. There is considerable force in the arguments of Mr.Ashok Sharma, learned Advocate General, that the case of the petitioner for promotion to the post of Registrar in the newly carved out department i.e. Irrigation & Public Health Department could not be considered on the basis of seniority list of Superintendent Grade-IV, re-designated as Superintendent Grade-II, as it stood on 31.1.1989. It is also not in dispute that subsequent to issuance of combined seniority list of Superintendent Grade-IV, re-designated as Superintendent Grade-II, as it stood on 31.1.1989, other seniority list of Superintendent Grade-II came to be circulated on 17.8.1994, after bifurcation of two departments, wherein petitioner had been shown at Sr.No.27. Similarly, another seniority list of Superintendent Grade-II circulated on 17.8.1994, on the basis of bifurcation order dated 27.4.1994, came to be issued in the Department of newly carved out Irrigation & Public Health Department, wherein admittedly petitioner was not shown in the seniority list of Superintendent Grade-II and, as such, it is not understood as to how he could be considered for the promotion to the post of Registrar in the newly carved out Irrigation & Public Health Department. Most importantly, as we have noticed hereinabove, there is no challenge, if any, to the initial notification dated 22.9.1984, whereby Government took decision to bifurcate Public Works Department into two separate departments, i.e. Public Works Department and Irrigation & Public Health Department w.e.f. 1.10.1984, as such, learned Single Judge rightly arrived at a conclusion that the petitioner never objected to the decision of the Government to allocate the staff in two departments, rather it is undisputed that after filing of petition, petitioner accepted his promotion as Vigilance Officer on 31.10.1995 in the Public Works Department on the basis of his seniority in the Public Works Department, which fact itself suggests that at the time of his promotion in the Vigilance Officer, he accepted his allocation in the Public Works Department.

19. Apart from above, petitioner, while filing his petition on 31.8.1995, described himself as Superintendent Grade-I in the office of the Engineer-in-Chief, HP PWD, US Club, Shimla, meaning thereby, even at the time of filing of petition, which was filed two months prior to his promotion to the post of Vigilance Officer in the Public Works Department, petitioner had accepted himself to be Superintendent Grade-I in the office of Engineer-in-Chief Himachal Pradesh Public Works Department.

20. It is only in view of aforesaid facts the learned Single Judge arrived at conclusion that "it can be safely inferred from the conduct of the petitioner for not giving any option for allocation to any Department that he never wanted his allocation to the newly created Irrigation & Public Health Department. On the contrary, he wanted to move safely by sailing in two boats with an eye to lay claim in both departments at appropriate stage".

21. As per own case set up by the petitioner, post of Registrar in the newly carved out Department Irrigation & Public Health was to be vacated on 31.8.1995, on which date he stood promoted to the post of Vigilance Officer in the Public Works Department and

as such, even, for the sake of arguments, it is presumed that post of Registrar in the newly created Department of Irrigation & Public Health was to be filled up on the basis of combined seniority list as it stood on 31.1.1989, petitioner was not eligible to be promoted to the post of Registrar in the Department of Irrigation & Public Health on 31.8.1995 because admittedly as per Recruitment and Promotion Rules of Registrar in Public Works Department, which were also applicable to the newly carved out department, the post of Registrar could be filled up from the post of Vigilance Officers with three years regular service or Superintendent Grade-I having five years regular service in the office of the Chief Engineers. In the case at hand, admittedly, the petitioner was promoted as Superintendent Grade-I in the scale of Rs.2200-4000 Class-II Gazetted on 20.7.1991 and as such he would have become eligible for the post of Registrar in the newly created department on the basis of Recruitment and Promotion Rules after completion of his five years of service as Superintendent Grade-I i.e. 20.7.1996, whereas, by way of petition at hand, he prayed that respondents be directed to promote him to the post of Registrar in the newly created department w.e.f. 31.8.1995 which could not be done.

22. During arguments Mr.B.C. Negi, learned Senior Counsel, placed reliance upon judgment rendered by Hon'ble Apex Court in ***Jagdish Parsad Sinha and Others vs. Bhagwat Prasad and Others, (1989)3 SCC 610*** to state that bifurcation was the outcome of an attempt to provide quick promotional avenues to those who were lower down in the joint cadre and would not have come within the range of consideration for promotional benefits but by bifurcation became entitled to such benefits. The High Court, in our opinion, rightly found fault with such action. This Court having carefully perused aforesaid judgment has no hesitation to conclude that the same has no application in the present facts and circumstances of the present case because admittedly there is no challenge to the bifurcation, moreover, it is none of the case of the petitioner that decision of bifurcation has been taken by the Department to provide quick promotional avenues to those who were lower down in the joint cadre, rather in the case at hand bifurcation of two departments was on the ground of speedy water supply and better irrigation facilities to the public at large.

23. Consequently, in view of detailed discussion made hereinabove, we see no reason to interfere in the well reasoned judgment rendered by the learned Single Judge, which otherwise appears to be based upon proper appreciation of material available on record and, as such, the same is upheld. This appeal fails and is dismissed, accordingly.

24. All interim orders are vacated and all the pending miscellaneous applications are disposed of.

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

Sharwan Kumar & Others ... ...Appellants
Versus
LAC & Others ... ...Respondents

RFA No.495 of 2012 alongwith RFA No.595 of 2012
and Cross Objection No.41 of 2014.
Date of decision: 29.08.2018

Land Acquisition Act, 1894 - Sections 18 & 54 - Acquisition of land for public purpose i.e. construction of Sanjauli-Dhalli Bypass – Reference - District Judge awarding compensation at rate of Rs.2,34,500/- per bigha irrespective of classification of acquired land – RFA - On fact, Apex Court granting compensation at rate of Rs.9,05,071/- per bigha in respect of land acquired under same Notification - Held, appellants also entitled for compensation at same rate in respect of other lands. (Paras 12 & 16)

Land Acquisition Act, 1894 - Sections 18 & 23 - Acquisition of land for public purpose – Reference – Compensation - Land though belonging to State but building over it owned by someone else - Whether owner of building entitled for compensation? - Held, building cannot stand without land and though building also becomes part of land, yet State can acquire building by paying adequate compensation in accordance with law. (Paras 20 to 25)

Case referred:

State of Maharashtra and Others vs. Reliance Industries Limited and Others, (2017)10 SCC 713

RFA No.495 of 2012

For the Appellants:	Mr.Chander Paul Sood & Mr.Dibender Ghosh, Advocates.
For Respondents-State:	Mr.S.C. Shrama, Mr.Dinesh Thakur, Additional Advocate Generals and Mr.Amit Dhumal, Deputy Advocate General.

RFA No.595 of 2012 & CO No.41 of 2014

For the Appellants-State:	Mr.S.C. Sharma, Mr.Dinesh Thakur,
Non-Objectors:	Additional Advocate Generals and Mr.Amit Dhumal, Deputy Advocate General.
For the Respondents-:	Mr.Chander Paul and Mr.Dibender
Cross Objectors	Ghosh, Advocates.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Since both the above captioned appeals as well as Cross Objections, having been filed by the respective parties, are directed against the award dated 23.3.2012 passed by learned District Judge, Shimla, the same are being taken up together for adjudication with the consent of learned counsel representing the parties.

2. By way of two appeals bearing ***RFA No.495 of 2012 and RFA No.595 of 2012,*** filed under Section 54 of the Land Acquisition Act, 1894 *(hereinafter referred to as the Act),* as well as Cross Objections under Order 41 Rule 22 of the Code of Civil Procedure *(hereinafter after referred to as 'CPC'),* challenge has been laid to award dated 23.3.2012 passed by learned District Judge, Shimla in Land Reference petition No.1-S/4 of 2005, as described in the award.

3. It is pertinent to mention here that Smt.Sarla Devi (appellant No.2 in *RFA No.495 of 2012* and respondent No.6 in *RFA No.595 of 2012 as well as in C.O. No.41 of 2014*) died during the pendency of the appeal and her legal representatives have already been brought on record as respondents No.2A to 2C.

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

5. It is not in dispute that suit land belonging to claimants *(appellants as well as respondents No.3 to 6 in RFA No.495 of 2012 and respondents in RFA No.595 of 2012),* came to be acquired for public purpose; namely; construction of Sanjauli - Dhalli bye-pass road and acquisition proceedings commenced with the issuance of Notification under Section 4 of the Act on 18.11.2003. The Land Acquisition Collector *(for short 'LAC')* passed award No.26 of 2004 on 08.12.2004. It is not in dispute that market value of acquired land came to be determined/assessed at the rate of Rs.80,000/- per bigha irrespective of the classification of the land.

6. Claimants, being aggrieved and dissatisfied with the amount awarded by LAC, preferred reference petition No.1-S/4 under Section 18 of the Act, seeking therein enhancement of compensation. Learned District Judge, Shimla, after framing issue and recording evidence of both the parties as well as after hearing the parties, vide impugned award dated 23.3.2012, re-determined the market value of the acquired land @ Rs.5,32,416/- per bigha as against Rs.80,000/- determined by the Land Acquisition Collector.

7. Being aggrieved and dissatisfied with the impugned award dated 23.3.2012, passed by learned District Judge, Shimla in reference petition No.1-S/4, having been filed under Section 18 of the Act, the appellants-claimants in ***RFA No.495 of 2012*** have approached this Court for modification of the award and the appellants-State in ***RFA No.595 of 2012*** have approached this Court for setting aside the impugned award.

8. It is not in dispute before this Court that similar situate claimants, whose land also came to be acquired for construction of Sanjauli - Dhalli bye pass road in the acquisition proceedings commenced with the publication of Notification issued under Section 4 of the Act on 18.11.2003, had filed land reference petitions before the learned District Judge, Shimla, praying therein to enhance the compensation awarded by LAC, which were decided and the compensation enhanced. The award(s) so passed were under challenge in this Court in several other appeals. One of such appeals, ***RFA No.42 of 2009, titled: Dr.Saif Ali Khan vs. State of Himachal Pradesh and another,*** came to be decided alongwith its connected matters by a Co-ordinate Bench of this Court vide judgment dated 23.3.2016. It is seen that this Court on re-appraisal of the given facts and circumstances and also the evidence available on record has re-determined the market value of the acquired land as Rs.9,05,107/- per bigha and enhanced the compensation alongwith other statutory benefits accordingly.

9. Careful perusal of material available on record suggests that the State of Himachal Pradesh had approached the Hon'ble Apex Court against RFA Nos.181/2009 and 44/2009 by way of ***Special Leave to Appeal(C) No(s).4473-4474/2017*** in the case ***titled as: State of Himachal Pradesh & Anr. vs. Geeta Devi & Ors.***, which appeals were dismissed by Hon'ble Apex Court vide order dated 11.12.2017 with the following observations:

> ***"Delay Condoned.***
>
> ***No ground for interference is made out in exercise of our jurisdiction under Article 136 of the Constitution of India.***
>
> ***The special leave petitions are accordingly dismissed. Pending application, if any, stands disposed of."***

10. True, it is, that the land in the present case was acquired by the same notification as was issued in the case of *Dr.Saif Ali Khan's* case *supra* and even for the same public purpose, i.e. construction of Sanjauli-Dhalli bye-pass road, therefore, in view of ***Dr.Saif Ali Khan's*** case *supra*, the market value of the acquired land should also be at the rate of Rs.9,05,107/- per bigha.

11. Mr.Chander Paul Sood, learned counsel for the claimants, has acceded to the market value of the land determined by a Co-ordinate Bench of this Court in ***Dr.Saif Ali Khan's*** case *supra*. During the course of arguments, learned Additional Advocate General, did not point out as to why the compensation in respect of the acquired land should not be enhanced to Rs.9,05,107/- per bigha, instead of Rs.2,34,500/-.

12. Mr.S.C. Sharma, learned Additional Advocate General, representing the respondents-State, while fairly acknowledging the factum with regard to passing of judgment dated 23.3.2016 in ***RFA No.42 of 2009***, conceded that claimants in the cases at hand are also entitled to enhanced market value of acquired land at the rate of Rs.9,05,107/- per bigha, as has been held by this Court in ***RFA No.42 of 2009*** *supra*.

13. At this stage it may be noticed that appellants-claimants; namely; Shri Sharwan Kumar, Smt.Sarla Devi and Smt.Maya Devi, (who are respondents No.1, 6 and 7 in *RFA No.595 of 2012,* having been filed by the Land Acquisition Collector), filed *RFA No.495 of 2012* praying therein for enhancement of compensation for acquired land qua their 3/4th share.

14. Besides above, above-named appellants-claimants in *RFA No.495 of 2012* also claimed that they are entitled to ½ of compensation qua the house situated on Khasra No.29/1 and Khasra No.816/31.

15. Other claimants-cross objectors, namely; Smt.Rani Devi, Shri Ashok Kumar, Shri Narinder Kumar and Kumari Vandana, (who are respondents No.2 to 5 in *RFA No.595 of 2012,* filed by the Land Acquisition Collector), filed Cross Objections bearing C.O.No.41 of 2014 under Order 41 Rule 22 CPC praying therein for enhancement of award amount of acquired land qua their 1/4th share as well as compensation on account of their house situated on Khasra No.29/1 and Khasra No.816/31. As has been noticed hereinabove, by way of cross objections at hand, cross objectors-claimants have prayed for enhancement of compensation of award passed by learned District Judge qua the acquired land.

16. Since this Court has held appellants-claimants in *RFA No.495 of 2012*, (who are respondents No.1, 6 and 7 in *RFA No.595 of 2012*, namely; Sharawan Kumar, Sarla Devi and Maya Devi), entitled for enhanced market value of acquired land at the rate of Rs.9,05,107/- per bigha, instead of Rs.2,34,500/-, in view of judgment rendered by a Co-ordinate Bench of this Court in ***Dr.Saif Ali Khan's*** case *supra*, Mr.S.C. Sharma, learned Additional Advocate General, fairly conceded that cross-objectors-claimants *(in C.O. No.41 of 2014 in RFA No.595 of 2012)* are also entitled to enhancement of compensation qua their acquired land as per their share.

17. Mr.Chander Paul Sood, learned counsel representing claimants-cross objectors also acceded to the market value of the land determined by a Co-ordinate Bench of this Court in ***Dr.Saif Ali Khan's*** case *supra* and, accordingly, it is ordered that directions contained in ***Dr.Saif Ali Khan's*** case *supra*, shall mutatis mutandis apply to the case of claimants-cross objectors also.

18. Next question, which arises for consideration of this Court in the present proceedings, is that ***"Whether respondents No.1, 6 and 7 in RFA No.595 of 2012,***

namely; Sharawan Kumar, Sarla Devi and Maya Devi and cross-objectors Nos.2 to 5 in RFA No.595 of 2012 a/w C.O. No.41 of 2014, namely; Smt.Rani Devi, Shri Ashok Kumar, Shri Narinder Kumar and Kumari Vandana, are also entitled to compensation on account of acquisition of house situated on Khasra Nos.29/1 and 816/31".

19. Factum with regard to acquisition of house situated on Khasra Nos.29/1 and 816/31 is also not in dispute, rather claim set up for award of compensation in this regard came to be rejected by the Collector on the ground that respondents No.1, 6 & 7 and cross objectors-respondents No.2 to 5 *(hereinafter referred to as the 'claimants')* have never been owners of Khasra Nos.29/1 and 816/31. Having examined material adduced on record by the cross-objectors, this Court is persuaded to agree with the contention of Shri Chander Paul Sood, learned counsel representing the cross-objectors, that it stands duly established on record that at the time of acquisition of land, respondents-claimants-cross-objectors were in possession of the house situated on the land bearing Khasra Nos.29/1 and 816/31.

20. Material evidence, be it ocular or documentary, led on record by the respective parties, clearly reveals that predecessor-in-interest of claimants had purchased possessory rights qua Khasra No.29/1 from one late Shri Gulam Baksh. Perusal of Ex.PW-1/A clearly suggests that land comprised in Khasra No.29/1, Khewat No.290 min, Khatauni No.343, measuring 8 biswas, situate in same village, was in possession of one late Shri Gulam Baksh and subsequently it came to be purchased by late Shri Babu Lal i.e. predecessor-in-interest of claimants in the year 1945 for a consideration of Rs.250/-. It has also come in evidence that in the year 1970, Shri Babu Lal, predecessor-in-interest of the claimants, after having dismantled the old house, started constructing R.C.C. structure on the aforesaid Khasra Numbers and after his death, claimants completed two storeys and raised pillars for the third storey on the area. It is also not in dispute that at the time of issuance of notification under Section 4 of the Act, late Shri Babu Lal and after his death, claimants had already completed two storeys and had raised pillars for the third storey.

21. Close scrutiny of Ex.PW-1/A, Ex.PW-4/F and Ex.PW-4/G suggests that predecessor-in-interest of the claimants and thereafter, the claimants were in possession of the land comprised in Khasra No.29/1 and they had possessory rights qua the same and, as such, they are well within their rights to seek compensation qua the house situate on the land comprised in Khasra No.29/1.

22. Factum with regard to possession of the predecessor-in-interest of the claimants and thereafter the claimants, on the land in question, is not in dispute, rather it stands duly admitted that property in question came to the possession of the predecessor-in-interest of claimants in the year 1970, whereafter predecessor-in-interest of the claimants, after having dismantled the old house, started raising new construction. There is no document, if any, led on record by the authorities to demonstrate that objection, if any, was ever raised by the land owners i.e. State at the time of construction being raised on the land bearing Khasra No.29/1. Similarly, there is no material led on record suggestive of the fact that eviction proceedings, if any, were initiated against the predecessor-in-interest of the claimants. Rather, careful perusal of Ex.PW-4/B i.e. Jamabandi for the year 1995-96 and Ex.PW-4/F clearly reveals that Gulam Baksh from whom predecessor-in-interest of the claimants had purchased the land in question, was recorded in the column of possession as *"Gair Maurusi"*. Aforesaid document reflects the entry showing Gulam Baksh to be in unauthorized occupation of the land in question, but, perusal of Ex.PW-4/F suggests that the land in question was came to be recorded as *"Bartan Bashingdan Deh"*, meaning thereby that the same was being used by the villagers or the residents of the area.

23. Cross-examination conducted upon PW-4 Sharawan Kumar, who happened to be claimant-respondent No.1, clearly suggests that respondent-State was unable to establish on record that predecessor-in-interest of the claimants and thereafter the claimants were not in possession of the house situate on Khasra No.29/1 at the time of acquisition of land. No suggestion worth the name has either been put to claimant-respondent No.1 or the other claimants-respondents that land comprised in Khasra No.29/1, over which house exists, was never purchased by his/their predecessor-in-interest and there was no building existing on the same. Similarly, no suggestion worth the name with regard to possession of the claimants over the land bearing Khasra No.29/1 came to be put to them, as such, this Court is of the view that the claimants are entitled for the compensation qua the house situate over Khasra No.29/1 as per their shares.

24. Hon'ble Apex Court in ***State of Maharashtra and Others vs. Reliance Industries Limited and Others, (2017)10 SCC 713,*** while dealing with the situation where the owner of the land is/was State and owner of the building standing upon the land was someone else, held that since, building cannot stand without the land, the building also becomes part of the land. However, since the owner of the building is different from the owner of the land, and if a portion of the building is required for public purpose, it is open for the State to acquire that portion of the building by paying adequate compensation in respect of that portion of the building, as well as, in respect of proportionate diminution of the user if any of the land under Section 23 of the Land Acquisition Act, 1894, in accordance with law. The Hon'ble Apex Court has further held as under:-

> ***"28. The Land Acquisition Act, 1894 was enacted since the Act of 1870 was found entirely ineffective for the protection either of the persons interested in lands taken up or of the public purse. The object of the Land Acquisition Act, 1894 was to amend the then existing law for acquisition of law for public purpose and to determine the adequate amount of compensation to be paid on account of such acquisition.***
>
> ***29. By looking at the definition as a whole in the scheme of the entire Land Acquisition Act and by reference to what preceded the enactment and the reasons for it, we have interpreted the word 'includes'. The word 'include' is opposite to the word 'exclude'. If the interpretation as suggested by the learned counsel for the respondents is accepted, then the definition of the land could not become an inclusive definition but the definition of "land" excludes certain factors. The expression 'land' includes benefits arising out of the land and things attached to the earth or permanently fastened to anything attached to the earth. The portion of the building cannot survive independent of the building and the building without the land. The word "land" should be understood having been covered by the elongated definition since it defines with inclusiveness that part of the building.***
>
> ***30. Having regard to the true intent of the meaning of the word 'land', the only interpretation possible in the context is the interpretation as made by us, inasmuch as such interpretation will not take away the very meaning of the land. In the matter on hand, owner of the land is the State whereas the owner of the building is a respondent. Since, building cannot stand without the land, the building also becomes part of the land. However, since the owner of the building is different from the owner of the land, and if a portion of the building is required for public purpose, it is open for the State to acquire that portion of***

the building by paying adequate compensation in respect of that portion of the building, as well as, in respect of proportionate diminution of the user if any of the land under Section 23 of the Land Acquisition Act, 1894, in accordance with law."

25. In the case at hand, as has been discussed hereinabove, the claimants were in possession of house situate on Khasra No.29/1 and they had acquired possessory rights qua the same after having purchased the land in question from Gulam Baksh, who stood recorded in revenue record as encroacher. Leaving that apart, perusal of Ex.PW-4/F clearly reveals that subsequently land in question (over which house is raised), came to be recorded as *"Bartan Bashingdan Deh"* establishing the fact that predecessor-in-interest of the claimants and thereafter the claimants had right to use the same and same was being used peacefully and uninterruptedly by them till the time of acquisition of land in question.

26. Next question which remains to be decided is that "To what amount respondents-claimants-cross-objectors are entitled qua the house situate on Khasra No.29/1, which admittedly came to be acquired for construction of road in question?"

27. Respondents-claimants-cross-objectors with a view to prove market value of the property situate on Khasra No.29/1 examined PW-3 Vivek Karol, who assessed market value at the rate of Rs.7,50,000/-, whreas Executive Engineer, determined the value of the house/property at the rate of Rs.6,86,508/-, but it clearly emerge from the evidence that PW-3 carried out assessment purely on the basis of PWD schedule of rates while determining the market value of the house situate on the land in question, but no evidence is led on record by the respondents-claimants-cross-objectors to the effect that house/property in question was constructed on the basis of PWD schedule and as such, this Court is of the view that respondents-claimants-cross-objectors are entitled to the compensation on the basis of assessment made by the Executive Engineer of the department i.e. Rs.6,86,508/- for the house situate on Khasra No.29/1.

28. Consequently, in view of detailed discussion made hereinabove as well as fair stand adopted by Mr.S.C. Sharma, learned Additional Advocate General representing the respondents-State, ***RFA No.595 of 2012*** is dismissed and ***RFA No.495 of 2012*** as well as ***Cross Objections No.41 of 2014*** in ***RFA No.595 of 2012*** are allowed and it is ordered that directions contained in ***RFA No.42 of 2009, titled as: Dr.Saif Ali Khan vs. State of Himachal Pradesh and another*** shall *mutatis mutandis* apply in ***RFA No.495 of 2012*** and ***Cross Objection No.41 of 2014*** *in* ***RFA No.595 of 2012.***

29. Similarly, the claimants (respondents No.1, 6 & 7 as well as respondents-cross-objectors No.2 to 5 in ***Cross Objection No.41 of 2014),*** are also held entitled for the compensation to the tune of Rs.6,86,508/- on account of acquisition of house situated over Khasra No.29/1 to the extent of their shares, besides all statutory benefits available to them on account of compensation awarded by this Court qua the property in question. The award passed by learned District Judge, Shimla is modified to the aforesaid extent.

30. Respondent-State is directed to deposit the entire award amount in the Registry of this Court within a period of eight weeks from today.

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

****

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

M/s.Mohan Meakin Limited ....Complainant-Petitioner
Versus
M/s.Spirit and Beverages L-1 ....Respondent-Accused

Cr.M.P.1388 of 2018 In
Cr.Appeal No.592 of 2017
Date of decision: 18.09.2018

Negotiable Instruments Act, 1881 (Act) - Sections 138 & 147- **Code of Criminal Procedure, 1973 (Code)**- Section 320 - Dishonour of cheque - Complaint - Whether composition of offence permissible after conviction but before passing of order of sentence ? – Held, Act is special statute and has overriding effect over provisions of Section 320 of Code – Section 147 of Act is independent provision enabling composition of offence vis-a-vis Section 320 of Code - As such offence can be compounded with leave of court after conviction but before passing of order of sentence. (Paras 12-13)

Cases referred:
Damodar S. Prabhu Vs. Sayed Babalal H (2010)5 SCC 663
K. Subramanian Vs. R.Rajathi, (2010)15 SCC 352

For the Complainant- Petitioner Mr.K.D. Sood, Senior Advocate with Mr.Shubham Sood, Advocate.
For the Respondent-Accused. Mr.Sudhir Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of instant application filed under Section 147 of the Negotiable Instruments Act, 1881, *(hereinafter referred to as the 'Act'),* a joint prayer has been made on behalf of the parties to the *lis* for compounding the offence committed by the respondent-accused punishable under Section 138 of the Act being compromised.

2. Vide judgment dated 22nd June, 2018 passed in *Criminal Appeal No.592 of 2017, titled: M/s.Mohan Meakin Limited vs. M/s.Spirit and Beverages L-1*, this Court held respondent-accused guilty of having committed offence punishable under Section 138 of the Act and directed respondent-accused to remain present in the Court on 6th July, 2018.

3. On 6th July, 2018, the case came to be adjourned to 10th July, 2018 on the request having been made by the respondent-accused, who had come present in the Court. Subsequently, on 10th July, 2018, respondent-accused apprised this Court through his counsel that after recording of conviction by this Court vide judgment dated 22nd June, 2018, parties have resolved their dispute amicably *interse* them, whereby both the parties have agreed in principle that in case an amount of Rs. ten lacs in lump sum is paid to the complainant, complainant shall have no objection in getting the matter compounded in terms of Section 147 of the Act.

4. Though Mr.K.D. Sood, learned Senior Counsel representing the complainant fairly acknowledged the factum with regard to aforesaid compromise arrived *interse* parties,

but he contended that prayer for compounding the offence under Section 147 of the Act may be considered after receipt of entire amount to be paid by the respondent-accused. This Court with a view to verify the correctness of aforesaid submissions having been made by learned counsel for the parties adjourned the matter to 16th July, 2018 directing the parties to remain present in the Court.

5. On 16th July, 2018, this Court recorded the statement of Shri Sudesh Kumar, an authorized representative of M/s.Mohan Meakin Limited i.e. complainant, who stated on oath before this Court that the parties have resolved to settle their dispute amicably *interse* them. This Court, taking note of aforesaid statement having been made by authorized representative of the complainant as well as compromise placed on record passed the following detailed order:-

> ***"Pursuant to judgment dated 22nd June, 2018, whereby this Court while allowing the criminal appeal filed by the appellant, held respondent-accused guilty of having committed the offence punishable under Section 138 of the Negotiable Instruments Act, respondent-accused has come present in Court.***
>
> *2. On the last date of hearing i.e. 10th July, 2018, learned counsel representing the parties, on instructions of their respective clients, stated before this Court that after recording of conviction vide judgment dated 22nd June, 2018 by this Court, parties have resolved their dispute amicably inter se them. By way of amicable settlement, both the parties have agreed that in case an amount of Rs. 10 lac in lump sum is paid to the complainant, complainant shall have no objection in getting the matter compounded under Section 147 of the Act (for short 'Act'). But since on the last date, there was none to make definite statement with regard to compromise, matter was adjourned for today with direction to the complainant or his authorized representatives to remain present in Court.*
>
> *3. Today, during the proceedings of the case, a joint application under Section 147 of the Act, has been filed on behalf of the respondent-accused and the complainant/petitioner, placing therewith compromise arrived inter se the parties. Application is ordered to be taken on record and it be registered. It has been averred in the application that the parties have resolved to settle their matter amicably in terms of the compromise, wherein respondent/accused has agreed to pay a sum of Rs. 10 in lump sum to the complainant/petitioner towards his liability. As per agreement, respondent/accused shall pay Rs. 5,00,000/- to the complainant within a period of one month, whereas remaining amount of Rs. 5,00,000/- within two months from today i.e on or before 15th September, 2018. It has been also agreed inter se parties that after receipt of entire amount, matter shall be compromised. Though, there is specific averment in the application with regard to compromise/settlement arrived inter se parties, but this Court solely with a view to ascertain the correctness and genuineness of the compromise arrived inter se parties, also recorded the statement of Sh. Sudesh Kumar, authorized representative of complainant/ petitioner, who otherwise had filed complaint on behalf of the appellant/complainant under Section 138 of the Act, in the competent Court of law Sh. Sudesh Kumar, stated on oath that application under Section 147 of the Act, praying therein for compounding the offence has been filed jointly on behalf of the complainant as well as accused and it also bears his signatures. He further stated on oath that as per the settlement/compromise, arrived inter se parties, respondent/accused has agreed to pay total sum of Rs. 10 lac to the complainant towards his liability and in case such amount is paid within two installments as agreed between the parties, complainant/petitioner shall have no*

objection in getting the matter compounded under Section 147 of the Act. Mr. Sudesh Kumar also stated that in case entire amount as per agreement is received within stipulated time, conviction awarded by this Court can also be quashed and set-aside, but compounding, if any, under Section 147 of the Act, be ordered after receipt of the full payment.

4. There is no dispute that this Court vide judgment dated 22nd June, 2018 has held respondent-accused guilty of having committed the offence punishable under Section 138 of the Act and now adequate sentence and compensation was left to be awarded to the respondent/accused. But in view of the aforesaid developments, no final order till date has been passed as far as quantum is concerned. Now, question remains that whether this Court after recording conviction has power to compound the case under Section 147 of the Act or not?.

5. Learned counsel representing the parties, while inviting attention of this Court to the judgment rendered by Hon'ble Apex Court in Damodar S. Prabhu Vs. Sayed Babalal H (2010)5 SCC 663, fairly submitted that even after recording conviction under Section 138 of the Act, this Court has power to compound the offence while exercising power under Section 147 of the Act. In the aforesaid judgment, Hon'ble Apex Court while laying certain guidelines has held that in case accused intends to compromise the matter under Section 147 of the Act, which is otherwise a special Act after recording of conviction, prayer made in that regard can be accepted with the leave of the Court. Hon'ble Apex Court further held that as far as non-obstante clause included in Section 147 of the 1881 Act is concerned, the 1881 Act being a special statute, shall have overriding effect over the provisions of Section 320 of Cr.P.C, relating to compounding of offence and as such, prayer for compounding of offence can be considered by the Court without being influenced by provision contained under Section 320 of Cr.P.C. It would be profitable to reproduce following paras NO. 6 to 15 of the judgment herein:-

6. Before examining the guidelines proposed by the learned Attorney General, it would be useful to clarify the position relating to the compounding of offences under the Negotiable Instruments Act, 1881. Even before the insertion of Section 147in the Act (by way of an amendment in 2002) some6. Before examining the guidelines proposed by the learned Attorney General, it would be useful to clarify the position relating to the compounding of offences under the Negotiable Instruments Act, 1881. Even before the insertion of Section 147in the Act (by way of an amendment in 2002) some High Courts had permitted the compounding of the offence contemplated by Section 138during the later stages of litigation. In fact in O.P. Dholakia v. State of Haryana, (2000) 1 SCC 672, a division bench of this Court had permitted the compounding of the offence even though the petitioner's conviction had been upheld by all the three designated forums. After noting that the petitioner had already entered into a compromise with the complainant, the bench had rejected the State's argument that this Court need not interfere with the conviction and sentence since it was open to the parties to enter into a compromise at an earlier stage and that they had not done so. The bench had observed:-

> ***"... Taking into consideration the nature of the offence in question and the fact that the complainant and the accused have already entered into a compromise, we think it appropriate to grant permission in the peculiar facts and circumstances of the present case, to compound."***

7. Similar reliefs were granted in orders reported as Sivasankaran v. State of Kerala & Anr., (2002) 8 SCC 164, Kishore Kumar v. J.K. Corporation Ltd., (2004) 12 SCC 494 and Sailesh Shyam Parsekar v. Baban, (2005) 4 SCC 162, among other cases. As mentioned above, the Negotiable Instruments Act, 1881 was amended by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 which inserted a specific provision, i.e. Section 147`to make the offences under the Act compoundable'. We can refer to the following extract from the Statement of Objects and Reasons attached to the 2002 amendment which is self- explanatory:-

> ***"Prefatory Note - Statement of Objects and Reasons. -The Negotiable Instruments Act, 1881 was amended by the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 wherein a new Chapter XVII was incorporated for penalties in case of dishonour of cheques due to insufficiency of funds in the account of the drawer of the cheque. These provisions were incorporated with a view to encourage the culture of use of cheques and enhancing the credibility of the instrument. The existing provisions in the Negotiable Instruments Act, 1881, namely, Sections 138to 142in Chapter XVII have been found deficient in dealing with dishonour of cheques. Not only the punishment provided in the Act has proved to be inadequate, the procedure prescribed for the courts to deal with such matters has been found to be cumbersome. The courts are unable to dispose of such cases expeditiously in a time bound manner in view of the procedure contained in the Act. ..."***
>
> ***(emphasis supplied)***

In order to address the deficiencies referred to above,Section 10of the 2002 amendment inserted Sections 143, 144, 145, 146and 147into the Act, which deal with aspects such as the power of the Court to try cases summarily (Section 143), Mode of service of summons (Section 144), Evidence on affidavit (Section 145), Bank's slip to be considered as prima facie evidence of certain facts (Section 146) and Offences under the Act to be compoundable (Section 147). At present, we are of course concerned with Section 147of the Act, which reads as follows:-

> ***"147. Offences to be compoundable. - Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable.***

8. At this point, it would be apt to clarify that in view of the non-obstante clause, the compounding of offences under the Negotiable Instruments Act, 1881 is controlled by Section 147and the scheme contemplated by Section 320of the Code of Criminal Procedure [Hereinafter `CrPC'] will not be applicable in the strict sense since the latter is meant for the specified offences under the Indian Penal Code. So far as the CrPCis concerned, Section 320deals with offences which are compoundable, either by the parties without the leave of the court or by the parties but only with the leave of the Court. Sub-section (1) of Section 320enumerates the offences which are compoundable without the leave of the Court, while sub- section (2) of the said section specifies the offences which are compoundable with the leave of the Court. Section 147of the Negotiable Instruments Act, 1881 is in the nature of an enabling provision which provides for the compounding of offences prescribed under the same Act, thereby serving as an exception to the general

rule incorporated in sub-section (9) of Section 320of the CrPC which states that `No offence shall be compounded except as provided by this Section'. A bare reading of this provision would lead us to the inference that offences punishable under laws other thanthe Indian Penal Codealso cannot be compounded. However, since Section 147was inserted by way of an amendment to a special law, the same will override the effect of Section 320(9)of the CrPC, especially keeping in mind that Section 147carries a non-obstante clause

9. In Vinay Devanna Nayak v. Ryot Sewa Sahakari Bank Ltd., (2008) 2 SCC 305, this Court had examined `whether an offence punishable under Section 138of the Act which is a special law can be compounded'. After taking note of a divergence of views in past decisions, this Court took the following position (C.K. Thakker, J. at Para. 17):-

> *" ... This provision is intended to prevent dishonesty on the part of the drawer of negotiable instruments in issuing cheques without sufficient funds or with a view to inducing the payee or holder in due course to act upon it. It thus seeks to promote the efficacy of bank operations and ensures credibility in transacting business through cheques. In such matters, therefore, normally compounding of offences should not be denied. Presumably, Parliament also realised this aspect and inserted Section 147by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 (Act 55 of 2002). ..."*

In the same decision, the court had also noted (Para. 11):-

> *"... Certain offences are very serious in which compromise or settlement is not permissible. Some other offences, on the other hand, are not so serious and the law may allow the parties to settle them by entering into a compromise. The compounding of an offence signifies that the person against whom an offence has been committed has received some gratification to an act as an inducement for his abstaining from proceeding further with the case."*

10. It would also be pertinent to refer to this Court's decision in R. Rajeshwari v. H.N. Jagadish, (2008) 4 SCC 82, wherein the following observations were made (S.B. Sinha, J. at Para. 12):-

> *"Negotiable Instruments Actis a special Act. Section 147provides for a non obstante clause, stating:*
>
> *147. Offences to be compoundable. - Notwithstanding anything contained in the Codeof Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable.*

Indisputably, the provisions of the Codeof Criminal Procedure, 1973 would be applicable to the proceedings pending before the courts for trial of offences under the said Act. Stricto sensu, however, the table appended to Section 320of the Code of Criminal Procedure is not attracted as the provisions mentioned therein refer only to provisions of the Penal Codeand none other."

11. The compounding of the offence at later stages of litigation in cheque bouncing cases has also been held to be permissible in a recent decision of this Court, reported as K.M. Ibrahim v. K.P. Mohammed & Anr., 2009 (14) SCALE 262, wherein Kabir, J. has noted (at Paras. 11,12):-

> *"11. As far as the non-obstante clause included in Section 147of the 1881 Act is concerned, the 1881 Act being a special statute, the provisions of Section 147will have an overriding effect over the provisions of the Coderelating to compounding of offences. ...*
>
> *12. It is true that the application under Section 147of the Negotiable Instruments Act was made by the parties after the proceedings had been concluded before the Appellate Forum. However, Section 147of the aforesaid Act does not bar the parties from compounding an offence under Section 138even at the appellate stage of the proceedings. Accordingly, we find no reason to reject the application underSection 147of the aforesaid Act even in a proceeding under Article 136of the Constitution."*

***12.** It is evident that the permissibility of the compounding of an offence is linked to the perceived seriousness of the offence and the nature of the remedy provided. On this point we can refer to the following extracts from an academic commentary [Cited from: K.N.C. Pillai, R.V. Kelkar's Criminal Procedure, 5th edn. (Lucknow: Eastern Book Company, 2008) at p. 444]:-*

> *"A crime is essentially a wrong against the society and the State. Therefore, any compromise between the accused person and the individual victim of the crime should not absolve the accused from criminal responsibility. However, where the offences are essentially of a private nature and relatively not quite serious, the Code considers it expedient to recognize some of them as compoundable offences and some others as compoundable only with the permission of the court. ..."*

In a recently published commentary, the following observations have been made with regard to the offence punishable under Section 138 of the Act [Cited from: Arun Mohan, Some thoughts towards law reforms on the topic of Section 138, Negotiable Instruments Act - Tackling an avalanche of cases (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009) at p. 5]

> *"... Unlike that for other forms of crime, the punishment here (in so far as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque.*

If we were to examine the number of complaints filed which were `compromised' or `settled' before the final judgment on one side and the cases which proceeded to judgment and conviction on the other, we will find that the bulk was settled and only a miniscule number continued."

***13.** It is quite obvious that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect. There is also some support for the apprehensions raised by the learned Attorney General that a majority of cheque bounce cases are indeed being compromised or settled by way of compounding, albeit during the later stages of litigation thereby contributing to undue delay in justice- delivery. The problem herein is with the tendency of litigants to belatedly choose compounding as a means to resolve their*

dispute. Furthermore, the written submissions filed on behalf of the learned Attorney General have stressed on the fact that unlike Section 320 of the CrPC, Section 147 of the Negotiable Instruments Act provides no explicit guidance as to what stage compounding can or cannot be done and whether compounding can be done at the instance of the complainant or with the leave of the court. As mentioned earlier, the learned Attorney General's submission is that in the absence of statutory guidance, parties are choosing compounding as a method of last resort instead of opting for it as soon as the Magistrates take cognizance of the complaints. One explanation for such behaviour could be that the accused persons are willing to take the chance of progressing through the various stages of litigation and then choose the route of settlement only when no other route remains. While such behaviour may be viewed as rational from the viewpoint of litigants, the hard facts are that the undue delay in opting for compounding contributes to the arrears pending before the courts at various levels. If the accused is willing to settle or compromise by way of compounding of the offence at a later stage of litigation, it is generally indicative of some merit in the complainant's case. In such cases it would be desirable if parties choose compounding during the earlier stages of litigation. If however, the accused has a valid defence such as a mistake, forgery or coercion among other grounds, then the matter can be litigated through the specified forums.

14. It may be noted here that Section 143 of the Act makes an offence under Section 138 triable by a Judicial Magistrate First Class (JMFC). After trial, the progression of further legal proceedings would depend on whether there has been a conviction or an acquittal.

In the case of conviction, an appeal would lie to the Court of Sessions under Section 374(3)(a) of the CrPC; thereafter a Revision to the High Court under Section 397/401 of the CrPC and finally a petition before the Supreme Court, seeking special leave to appeal under 136 of the Constitution of India. Thus, in case of conviction there will be four levels of litigation. 7 In the case of acquittal by the JMFC, the complainant could appeal to the High Court under Section 378(4) of the CrPC, and thereafter for special leave to appeal to the Supreme Court under Article 136. In such an instance, therefore, there will be three levels of proceedings.

15. With regard to the progression of litigation in cheque bouncing cases, the learned Attorney General has urged this Court to frame guidelines for a graded scheme of imposing costs on parties who unduly delay compounding of the offence. It was submitted that the requirement of deposit of the costs will act as a deterrent for delayed composition, since at present, free and easy compounding of offences at any stage, however belated, gives an incentive to the drawer of the cheque to delay settling the cases for years. An application for compounding made after several years not only results in the system being burdened but the complainant is also deprived of effective justice. In view of this submission, we direct that the following guidelines be followed:-

THE GUIDELINES

(i) In the circumstances, it is proposed as follows:

(a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second

hearing of the case and that if such an application is made, compounding may be allowed by the court without imposing any costs on the accused.(b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

(c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

(d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount.

Let it also be clarified that any costs imposed in accordance with these guidelines should be deposited with the Legal Services Authority operating at the level of the Court before which compounding takes place. For instance, in case of compounding during the pendency of proceedings before a Magistrate's Court or a Court of Sessions, such costs should be deposited with the District Legal Services Authority. Likewise, costs imposed in connection with composition before the High Court should be deposited with the State Legal Services Authority and those imposed in connection with composition before the Supreme Court should be deposited with the National Legal Services Authority.

6. Consequently, in view of the aforesaid law laid down by the Hon'ble Apex Court coupled with the facts that this Court enjoys power under Section 147 of the Act, to compound the offence, joint prayer made on behalf of the parties for compounding the offence deserves to be considered. Since final order, if any, in term of the joint prayer made in the application is to be passed after receipt of full payment agreed to be made by the accused, this Court deems it fit to adjourn this Case till 17th August, 2018, on which date, respondent-accused shall pay an amount of Rs. 5,00,000/- as per compromise.

7. However, it is made clear that prayer for compounding the offence shall be considered and decided by this Court after receipt of full payment i.e. Rs. 10 lac on or before 15th September, 2018.

8. Needless to say, in case first installment as agreed by the respondent-accused is not paid on or before 17thAugust, 2018, he shall surrender before this Court on the next date of hearing in terms of the judgment passed by this Court.

List on 17th August, 2018."

6. On 17th August, 2018, Mr.D.S. Kanwar, respondent-accused, who had come present in person, informed that in the compliance of order dated 16.7.2018 an amount of Rs.five lacs stands paid to the complainant through demand draft which fact was not disputed by the learned counsel representing the appellant-complainant. Since remaining amount was to be paid on or before 15th September, 2018, this Court on the request having been made by the learned counsel for the parties adjourned the matter to 17th August, 2018.

7. Today, during the proceedings of the case, learned counsel representing the parties stated before this Court that the entire amount in terms of compromise i.e. Rs.ten lacs stands paid and as such joint prayer having been made by the parties by way of application filed under Section 147 of the Act may be considered and respondent-accused be acquitted.

8. At the cost of repetition, it may be noticed that this Court vide judgment dated 22nd June, 2018 passed in Criminal Appeal No.592 of 2017 held the respondent-accused guilty of having committed offence under Section 147 of the Act, but before the accused could be heard on quantum of sentence, parties entered into compromise and jointly moved an application under Section 147 of the Act, praying for compounding the offence under Section 147 of the Act.

9. The question which remains to be decided by this Court is. ***"Whether, at this stage, offence, alleged to have been committed by the respondent-accused, can be ordered to be compounded by this Court in exercise of powers under Section 147 of the Act or not?"***

10. Mr.Sudhir Thakur, learned counsel representing the respondent-accused, has invited attention of this Court to the judgment passed by High Court of Rajasthan in ***Naresh Kumar Sharma vs. State of Rajasthan & another, Criminal Misc. Application No.371 of 2016 in Criminal Revision Petition No.1267 of 2016***, to suggest that in view of amicable settlement arrived inter se parties, this Court has power to recall its judgment in light of the provisions contained in Section 147 of the Act, which permits compounding of the offence under Section 138 of the Act. At this stage, it would be profitable to reproduce following paras of the judgment passed by High Court of Rajasthan hereinbelow:-

> ***"The accused-petitioner has field this criminal misc. application under section 482 Cr.P.C read with section 147 of Negotiable Instruments Act(for short the 'Act') with a prayer to review/recall the order dated 6.10.2016 passed by this Court in SB Criminal Revision Petition No.1267/2016 in the light of compromise dated 4.11.2016 subsequently entered between the parties and as a consequences thereof to acquit the accused-petitioner for the offence under Section 138 of N.I. Act.***
>
> ***Vide order dated 6.10.2016, the aforesaid revision petition filed by the petitioner was dismissed by this Court while upholding and affirming the judgment and order of conviction and sentence passed by the trial Court as well as by the Appellate Court.***
>
> ***It was jointly submitted by the learned counsel for the parties that after the order dated 6.10.2016 the parties have amicably settled their dispute and entered into compromise and the amount in the dispute has been paid by the petitioner to the respondent-complainant. It was further submitted that although the revision petition has been dismissed by this Court on merits vide order dated 6.10.2016, but even then that order can be recalled in the light of provisions of Section 147 of N.I.Act which permits compound of the offence under Section 138 of the Act at any stage and the accused can be acquitted.***
>
> ***In support of their submissions, they relied upon the case of K. Subramanian Vs. R.Rajathi reported in (2010) 15 SCC 352 and order dated 7.7.2015 passed by a Single Bench of Hon'ble Gujarat High***

Court in S.B. Criminal Misc. Application (Recall) No.10232/2015 filed in Special Criminal Application No.3026/2014.

On consideration of submissions jointly made on behalf of the respective parties and the material including the compromise entered into between the parties and the fact that the amount in dispute has been paid by the accused-petitioner to the respondent- complainant and the principles of law laid down in the aforesaid decisions, I find it a fit case in the criminal misc. application is to be allowed and the order dated 6.10.2016 is to be recalled.

Consequently, the criminal misc. application is allowed and the order dated 6.10.2016 is recalled and all the orders whereby the accused-petitioner was convicted and sentenced for the offence under Section 138 of N.I. Act are set aside and as a consequence thereof he is acquitted therefrom."

11. The Hon'ble Apex Court in ***K. Subramanian Vs. R.Rajathi, (2010)15 SCC 352***, in similar situation also ordered for compounding of offence after recording of conviction by the courts below, wherein it has been held as under:-

> ***"6. Thereafter a compromise was entered into and the petitioner claims that he has paid Rs. 4,52,289 to the respondent. In support of this claim, the petitioner has produced an affidavit sworn by him on 1.12.2008. The petitioner has also produced an affidavit sworn by P. Kaliappan, Power of attorney holder of R. Rajathi on 1.12.2008 mentioning that he has received a sum of Rs. 4,52,289 due under the dishonoured cheques in full discharge of the value of cheques and he is not willing to prosecute the petitioner.***
>
> ***7. The learned counsel for the petitioner states at the Bar that the petitioner was arrested on 30.7.2008 and has undergone the sentence imposed on him by the trial Court and confirmed by the Sessions Court, the High Court as well as by this Court. The two affidavits sought to be produced by the petitioner as additional documents would indicate that indeed a compromise has taken place between the petitioner and the respondent and the respondent has accepted the compromise offered by the petitioner pursuant to which he has received a sum of Rs.4,52,289. In the affidavit filed by the respondent a prayer is made to permit the petitioner to compound the offence and close the proceedings.***
>
> ***8. Having regard to the salutary provisions of Section 147 of the Negotiable Instruments Act read with Section 320 of the Code of Criminal Procedure, this Court is of the opinion that in view of the compromise arrived at between the parties, the petitioner should be permitted to compound the offence committed by him under Section 138 of the Code."***

12. Having carefully perused the law laid down by Hon'ble Apex Court in ***Damodar S. Prabhu Vs. Sayed Babalal H (2010)5 SCC 663*** as well as law relied upon *supra*, this Court is of the view that in case accused intends to compromise the matter under Section 147 of the Act, which is otherwise a special statute, after recording of conviction, prayer made in that regard can be accepted with the leave of the Court. Hon'ble Apex Court in ***Damodar S. Prabhu's*** case *supra* has categorically held that as far as non-

obstante clause included in Section 147 of the 1881 Act is concerned, the same being a special statute, shall have overriding effect over the provisions of Section 320 of Cr.P.C, relating to compounding of offence and as such, prayer for compounding of offence can be considered by the Court without being influenced by provisions contained under Section 320 of Cr.P.C.

13. Hon'ble Apex Court in the aforesaid judgment has observed that the complainant's interest lies primarily in recovering the money rather than seeing the person, who issued the cheque, in jail and the threat of jail is only a mode to ensure recovery. Otherwise also if Section 147 of the Act is read in its entirety, it gives an independent power to the Court for compounding of offence committed under the Act. Power as vested in the court, under Section 147 of the Act is necessarily independent of other provisions of the Act and can be exercised by the Court for compounding the offence allegedly committed by the accused on his or her making an application even after recording of conviction, as has been clearly held by the Hon'ble Apex Court in ***Damodar S. Prabhu's*** case *supra*.

14. In view of above, this Court sees no impediment in accepting the joint application at hand, having been filed by the parties to the lis, for compounding the offence committed by the respondent-accused under Section 138 of the Act while exercising powers under Section 147 of the Act, especially, when respondent-accused has amicably settled the dispute in terms of compromise and has paid a sum of Rs.10 lacs to the complainant, which is definitely more than the cheque amount.

15. Consequently, in view of the detailed discussion made hereinabove as well as law relied upon, the application at hand is allowed and offence committed by respondent-accused under Section 138 of the Act is ordered to be compounded being compromised and accused-respondent is acquitted.

****

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

Court on its own motion ....Petitioner
Versus
State of H.P. & Others ....Respondents

CWPIL No.83 of 2018
Date of decision: 03.10.2018

Constitution of India, 1950 – Articles 21 & 226 – Public Interest Litigation - Water pollution - High Court taking *suo moto* cognizance on basis of news item regarding pollution in Giri river at Chhaila on account of discharge of filth and sullage etc - Reports of various committees including Joint Inspection Committee as well as Advocates Committee, corroborating news item - Committees also suggesting various recommendations for rectification - Held, State being welfare state under obligation to provide clean drinking water to its residents - Authorities responsible for maintaining hygiene in and around water sources in deep slumber - Authorities directed to ensure implementation of suggestions and remedial measures suggested by HP State Pollution Control Board - Deputy Commissioner, Shimla directed to ensure adequate funds for implementation of remedial suggestions. (Paras 14-15)

For the Petitioner:	Mr.Ramakant Sharma, Senior Advocate as Amicus Curiae with Mr.Basant Thakur, Advocate.
For Respondent-State:	Mr.Ashok Sharma, Advocate General with Mr.Ranjan Sharma, Ms.Rita Goswami and Mr.Adarsh Sharma, Additional Advocate Generals.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.

Instant Public Interest Litigation came to be registered on the basis of news item dated 24.04.2018, published in daily newspaper ***"Amar Ujala",*** captioned as ***"Giri mein dump ki ja rahi gandagi mouke per nahin ja rahe afsar".***

2. Realizing the seriousness of the allegations contained in aforesaid news item published in daily Hindi newspaper, this Court appointed Shri Ramakant Sharma, learned Senior Advocate, as amicus curiae to assist the Court.

3. This Court, while directing the Additional Advocate General to have instructions in the matter, also directed Mr.Sudhir Thakur and Mr.Hamender Singh Chandel, learned counsel, representing the H.P. State Pollution Control Board and Municipal Corporation, Shimla respectively, to file their response(s).

4. Municipal Corporation, Shimla, in its affidavit dated 2.5.2018 stated before this Court that the respondent-Corporation has repeatedly apprised the authorities regarding dumping of waste/polluted material into the Giri Khad at Chailla from time to time. Municipal Corporation also stated in his affidavit that the functionaries of the adjoining Gram Panchayats; namely; Sainj, Ghoond, Bagain, Kiyar and Gumma, were also apprised vide communication 29.01.2016 to educate their people not to dump/throw debris or polluted material including sullage into the Giri Khad. Municipal Corporation also apprised this Court that vide communications dated 15.7.2017, 22.12.2017 and 1.2.2018 repeated requests were made to Sub Divisional Magistrate, Theog as well as Director, Town & Country Planning Department regarding dumping of debris into Giri Khad with a request to take suitable measures in this regard.

5. Having taken note of affidavit filed by Municipal Corporation, Shimla, this Court vide order dated 3.5.2018 directed the following officers to remain present in the Court on the next date of hearing:-

> ***"1. Director, Urban Development, Shimla.***
>
> ***2. The Director, Rural Development and Panchayati Raj, Himachal Pradesh***
>
> ***3. Pradhan, Gram Panchayat Bagain, Post Office Chhaila, Tehsil Theog, District Shimla, Himachal Pradesh.***
>
> ***4. Pradhan, Gram Panchayat, Ghoond, Post Office Chhaila, Tehsil Theog District Shimla, Himachal Pradesh.***
>
> ***5. Divisional Forest Officer (Rural), Shimla."***

6. On 4.5.2018, this Court, having interacted with aforesaid officers, directed Senior Environmental Engineer, Pollution Control Board to visit the spot and ascertain the

factual position. Officers, who had come present in the Court, also volunteered that they shall fully co-operate and participate at the time of inspection.

7. Senior Environmental Engineer, Pollution Control Board visited the area concerned on 05.05.2018 and filed its Joint Inspection Report by way of affidavit dated 15.05.2018. Joint Inspect Report, filed by Senior Environmental Engineer, is reproduced here-in-below:-

"Joint Inspection Report in compliance to the orders dated 4.04.2018 passed by Hon'ble High Court in CWPIL No.83/2018."

On the basis of news published in the newspaper regarding the dumping of disposal of garbage in Chailla, the Hon'ble High Court has taken the cognizance of the matter through and CWPIL No.83/2018 titled Court on its own motion & ors. On 04.05.2018 directions was issued to the Sr.Environmental Engineer the Pollution Control Board to inspect the area concerned on 05.05.2018.

The Inspection was carried out Jointly on 05.05.2018 by the team comprising of SDM Theog, Sr.Environmental Engineer & Jr.Environmental Engineer of H.P. State Pollution Control Board, Shimla, Naib Tehsildar Theog, Panchayat Pradhan Ghoond & Bagain, Panchayat Secretary Ghoond, ASI Chailla, Kangoo Sainj, Jr.Engineer I & PH Sainj.

The finding made during the visit is as under:-

1) ***The Pradhan and Secretary, Gram Panchayat, Ghoond apprised that they have also issued the notices to individuals for discharging sewage/kitchen waste into Giri Khad/rivulet. Earlier the SDM Theog has issued notices to 27 persons for causing nuisance on account of discharging sewage water from toilets, bathrooms, kitchens and other sources to Giri Khad. The Gram Panchayat Ghoond has got constructed 10 numbers of Soak pits in order to stop the direct flow of waste water into the khad/rivulet. One number of sweeper is also deputed specially for the cleanliness of Chaila area.***
2) ***Individual's residential as well commercial establishments have constructed their own septic tank and soak pits except for few, which were directed to provide the septic tank/soak pits immediately. The observation made by the committee w.r.t. following violating persons/establishments is as under:***

S. No.	***Name & Address***	***Activities being carried out in the building***	***Violation observed***
1)	***Sh. Jai Ram S/o Sh. Devi Ram R/o Chailla Bazar, Tehsil Theog, District Shimla***	***Bank, commercial activities being carried out in different shops and residential accommodation***	***Kitchen and bathroom waste is flowing in open. Photo 1-2***
2)	***Sh. Krishan Dutt S/o Kewal Ram R/o Village Chailla Bazar, Tehsil Theog, District Shimla, H.P.***	***Dhabha, bar, vegetable shops, commercial activities being carried out in different shops and***	***Kitchen and bathroom waste is flowing in open. Photo 3-4***

		residential accommodation	
3)	***Sh. Puran Dutt, S/o Kewal Kewal Ram R/o Village Chailla Bazar, Tehsil Theog, District Shimla, H.P.***	***Vegetable shops, commercial activities being carried out in different shops and residential accommodation.***	***Kitchen and bathroom waste is flowing in open. Photo 3-4***
4)	***Police Chowki Chailla***	*--*	***Police Chowki have only constructed soak pit for treatment of sewage, kitchen waste and bathroom waste. Photo 5-6***
5)	***C & C Constructions Company camp at Bagain***	***Contractor***	***Construction of drains at Chailla. The unit has littered the cement bag sand kitchen waste from the camp was flowing in open. Photo 12-13.***
6)	***New Prem Dhaba, Bhui near Huli, District Shimla***		***Kitchen waste is flowing in open photo 14.***
7)	***Hotel Amada Royal (Farmer Nest) Bhui, near Huli, District Shimla***	***Hotel & Restaurant***	***Kitchen waste is flowing in open. Photo 15.***

8) The fruit and vegetable vendors in this area throw the bio- degradable waste in the open area.

9) There is one public toilet, which is maintained by Sulabh International at Chailla.

10) Drains at the Chaila market which are to be constructed by the C& C Construction Company has been left out incomplete in middle of the market. Which is chocked with mud, solid waste such as vegetable, plastic waste and sullage.

11) Gram Panchayat, Ghoond has provided 10 numbers of waste collection bins in Chailla area for collection of garbage but when they are filled and simultaneously burnt in those bins.

12) There are approximately 96 numbers of shops and commercial establishments in the Chailla. Out of which about 10 numbers are running dhabhas.

13) At the time of inspection, it was observed that illegal tents are made by the nomads in the right and left side of the Giri Khad/rivulet in the Chailla and using Giri Khad for bathing, washing and may be the source of water contamination (Photo 16-18).

14) The Panchayat Ghoond has constructed one number of unlined pit for disposal of garbage(Photo 19).

The site was again inspected by the Jr. Environmental Engineer of H.P. State Pollution Control Board on 09.05.2018 with respect to the directions issued by the joint committee on dated 05.05.2018 following finding were made:-

Sr. No	***Name and Address***	***Activates being carried out in the building***	***Violation observed on dated 5.05.2018***	***Status as on dated 9.05.2018***
1)	***Sh. Jai Ram S/o Sh. Devi Ram R/o Village Chailla Bazar, Tehsil Theog, District Shimla, H.P.***	***Bank, commercial activities being carried out in different shops and residential accommodation***	***Kitchen and bathroom waste is flowing in open.***	***No. improvement was observed***
2)	***Sh. Krishan Dutt, S/o Kewal Ram R/o village Chailla Bazar, Tehsil Theog, District Shimla, H.P.***	***Dhabha, bar, vegetable shops, commercial activities being carried out in different shops and residential accommodation***	***Kitchen and bathroom waste is flowing in open***	***No improvement was observed (Photo 20-21)***
3).	***Sh. Puran Chand, s/O Kewal Ram R/o Village Chailla Bazar, Tehsil Theog, District Shimla, H.P.***	***Vegetable shops, commercial activities being carried out in different shops and residential accommodation***	***Kitchen and bathroom waste is flowing in open***	***No improvement was observed (Photo 20)***
4.	***Police Chowki Chaila***	*--*	***Police Chowki have only constructed soak pit for treatment of sewage, kitchen waste and bathroom waste.***	***No improvement was observed***
5.	***C&C Constructions Company camp at Bhagain***	***Contractor***	***Construction of drains at Chailla. The unit have littered the cement bags and kitchen waste from the camp was flowing in open.***	***The collection of the littered cement bags was in progress. However, kitchen waste was flowing in open.(Photo 22-23)***
6.	***New Prem Dhaba***	***Dhabha***	***Kitchen waste is***	***Soak pit is under***

	Bhui, near Huli, District Shimla		***flowing in open***	***construction (Photo 24)***
7)	***Hotel Amada Royal (Farmer Nest) Bhui, near Huli, District Shimla***	***Hotel & Restaurant***	***Kitchen waste is flowing in open.***	***Unit has connected its kitchen pipe to its septic tank (Photo 25)***

Immediate measures suggested:

1) ***The Pradhan and Vyapaar Mandal were requested to place Board/Hoarding at Chailla Bazar at different locations for creating awareness to the general public and commercial establishment not to litter garbage.***
2) ***Solid waste generated need to be segregated by providing different bins by the Gram Panchayat. For a time being bio- degradable waste is to be disposed off through composting and non-biodegradable waste to be handed over to the Municipal Corporation, Shimla on weekly/fortnightly basis depending upon the quantity of waste.***
3). ***The septic tank constructed and which was partially demolished by the administration may be modified as a soak pit for the treatment and disposal of kitchen/bathroom waste(photo 26).***
4) ***A per mandate of Greater Shimla Water Supply and Sewerage Circle, Shimla Municipal Corporation is that it has to ensure that the water which is lifted meets the prescribed standards as per Drinking Water-Specification (ISO 10500:2012).***
5) ***Local administration shall remove the illegal structures and unauthorized temporary shops(hawkers/street vendor) and take the action against the defaulters.***
6) ***I & PH Department shall ensure that no waste water is directly drained into the Giri khad/rivulet.***
7) ***The C&C Constructions Company may also be directed to construct the drain alongwith soak pit before the final disposal at Chailla Bazar.***
8) ***The C&C Construction Company may also be directed to construct the soakpit for disposal of kitchen waste at their Bagain campsite.***

Short terms measures suggested:-

1) ***Rural Department shall explore the possibility for installation of Bio-composter/bio gas plant for disposal of Bio-degradable waste. Compost /bio gas which can be used as manure/fuel in kitchen.***
2) ***Entry points to the roads leading to the Giri khad to be closed by PWD department.***
3) ***Fencing of roadside areas by wire mesh is to be done by the quarter concerned i.e. PWD Department/Forest Department, to prevent garbage littering or throwing into the khad/rivulet.***
4) ***I & PH Department shall explore the possibility for the establishment of sewer system for Chailla to maintain the wholesomeness of the rivulet/water body.***

Long term measures suggested:

1) ***If feasible installation of Bio-composter/bio gas plant for disposal of Bio-degradable waste by Gram Panchayat Ghoond. Compost/bio gas which can be used as manure/fuel in kitchen.***
2) ***If feasible installation of sewer System for Chailla installation through I& PH Department."***

8. On 13.06.2018, another action taken report pursuant to order dated 4.5.2018 came to be placed before this Court by way of communication dated 12.6.2018, which reads as under:-

> ***"Kindly refer to your office letter no-CWPIL 83/2018-20084 dated 6-6-2018 and in continuation of this office letter No-THG/Reader/2018-1775 dated 8-6-2018 , on the subject cited above.***
>
> ***In this regard it is submitted that a committee has been constituted to take action against the defaulters as per law and electricity & water supply connection be disconnected. (Photocopy enclosed) The team constituted for the purpose visited the spot on 11-6-2018 and submitted the latest status report to this office which is as under: -***
>
> ***1. The Naib-Tehsildar Theog vide his office letter No113 dated 12-06-2018 has intimated to this office that the water and electricity connection of the defaulters have been disconnected who were not constructing the soak pits or the spot and they have been warned strictly.***
>
> ***2. The Naib Tehsildar Theog further reported that they have seized the tractor Tipper and JCB Machine in which the debris (sic. derbies) are being dropped in to the Giri River and all this machineries have been handed over in the Police custody.***
>
> ***3. The Electricity and I & PH department have been directed on the spot to take action against the defaulters as per law and action taken report be sent to this office immediately. The report received from the Naib-Tehsildar Theog is enclosed herewith for your kind perusal and further necessary action please."***

9. On 16.08.2018, this Court, taking note of the gravity and sensitivity of the matter, directed Shri Sudhir Thakur, learned counsel representing the H.P. State Pollution Control Board and Mr.Adarsh Kumar Sharma, learned Additional Advocate General, to verify the actual position as stated in various affidavits filed by the respondents, including the Superintendent of Police, Shimla and thereafter suggest that what course of action should be adopted till the time permanent solution of drinking water problem is made and remedial measures are taken, for checking the position of direct or indirect discharge of water into the river.

10. Pursuant to aforesaid directions issued by this Court, suggestions in the form of inspection report came to be filed before this Court, which reads as under:-

> ***"The officials were present on the spot and their details are being referred in Annexure –A. In presence of all the officials concerned as referred in Annexure A spot was thoroughly inspected and earlier report filed by Shri Praveen Gupta Superintending Engineer of Pollution Control Board dated 13.07.2018 was also taken into consideration during the spot inspection.***

That during spot inspection undersigned observed regarding violation as under:-

Major Causes of water contamination-

- ***Uncomplete construction of septic tank of police chowki, Chailla.***
- ***Improper management of kitchen waste by C&C Company.***
- ***Free visits of people to the river bank and throwing of solid waste into river.***
- ***Dumping of soil/debris close to river bank by C&C Company.***
- ***Unauthorized construction of temporary sheds/Jhugi alongwith river side.***
- ***Free flow of water through culvert into river.***

(i) That most of the inhabitants have developed their septic tank on the spot and department of Rural development has also constructed many soak pits for management of water as such chances of pollution in the river at Chailla has been reduced. The improvement as referred in the earlier report dated 13.07.2018 was all most found to be correct except the construction of septic tank by the police chowki, Chailla which is under construction and the same was found to be incomplete on the spot and moreover no further work of construction was found at the time of inspection as the lintel of the septic tank has not been laid and the same septic tank has not been connected with the sewerage pipes. However, the police officials i.e. ASI Purushotam Chand was present on the spot was stating that within a short period the same shall be completed.

(ii) As regard to the sewerage condition of C&C Construction Company is concerned no appropriate construction of drain and septic tank etc. was found to be there on the site and there was no proper arrangement for kitchen waste by the company. However, the officials present on the spot on behalf of the company stated that within a period of one month they are closing down the entire setup on the spot due to completion of the work hence they are in the process to shift the same set up to some other place and the same company is already de-functioning on the spot due to disconnection of the electricity.

(iii) That the undersigned further observed that there was no any proper check to the outsiders visitors and local residents for their visit on the river bank for throwing solid waste into the river and they are directly reached into the river bank for throwing their solid waste, for washing their clothes and also for their natural calls etc.

(iv) That there is dumping of debris by the C&C Construction Company on the spot just ahead of Chailla Bazaar which is gradually reaching into the river and the same debris are required to stop, as the same is also source of contamination of the water because the soil alongwith solid waste is flowing into the river.

(v) That the undersigned also found that some temporary sheds constructed unauthorizedly on the spot in the shape of (Jhugi) and persons residing therein are continues source of littering garbage into the river and also using the river bank for washing their clothes and also used the river bank as their open toilet. Moreover, in the entire market there is no sufficient dustbin to curb the garbage littering.

(vi) That the undersigned also observed that just adjoining to the police chowki one natural Nallah is flowing from the hillock to the river and adjoining the same nallah just below the main road one house is located and kitchen waste and solid waste of the said house is directly coming into the same nallah which ultimately goes into the river. The photographs showing the spot is annexed herewith as Annexure-B.

(vii) That the water through one culvert is also coming from upper side which culvert has constructed by C&C Construction Company and the same culvert is also bringing dirt into the river from the upper side village Bagian. The pradhan and other persons on the same village were also present on the spot and they told that due to shortage of funds in Panchayat the construction of soak pit could not be done and if the fund is provided then the same shall be constructed and the kitchen waste can be stop from coming into the river through the same culvert.

That with the consultation of Ld. Additional Advocate General, Ld. Advocate appearing on behalf of M.C.Shimla, Superintending Engineer Pollution Control Board and Sub-Divisional Magistrate Theog Shri Mohan Dutt and also other government officials who were present on the spot it was observed and found appropriate as under:-

Suggestive measures to stop the pollution/water contamination on the spot.

(a) To develop a park on the spot in between river bank and house/shops by the side of the road in such a manner that by raising level of the river bank throughout the Bazaar by dumping soil on the spot and if ground level is raised by putting crate wall/retaining wall by the side of the river bank to height of 10 feet or so by settling of soil on the spot. There is ample space available on the spot as the some part of the land is belonging to the private persons who are ready to donate the same land to the park and some part of the land belongs to the State of H.P. After completion of construction of park, the proper surveillance can be handed over to the police of Chailla and in the park entry gate can be installed so as to check free visit of the persons to the river bank. This proposal is practical possible on the spot with the active participation of the Government. This will not only check littering of the waste into the river but also improve the existing sanitation condition on the spot and the same can be point of attraction.

(b) The river bank near habitation should be fenced with artificial as well as natural fencing i.e. by shrubs which shall also enhance the scenic beauty of the river bank.

(c) That all habitation near river can be treated/given special status and special norms can be formed to control water pollution in the river throughout the State of Himachal Pradesh.

(d) That if Hon'ble Court deems fit then direction can be passed with regard to future construction which will take place river bank to the effect that the person who will construct a building within the radius of 10 meter from the river bed shall mandatory construct septic tank/soak pits as their own expenses so as to curb the pollution.

That undersigned inspected the spot thoroughly alongwith the officials concerned as referred above and detail report in this regard is being submitted for the kind perusal of the Hon'ble Court."

11. Having perused suggestions contained in the report, this Court was of the view that suggestions need to be implemented as the same would be in public interest. Only question which arose for the consideration of this Court at that stage was that who would bear the cost. Prima facie, this Court was of the view that it was the duty and obligation of the State to do so, but this Court also observed in order dated 6.9.2018 that the same can also be done by public participation, more particularly, when the private parties, were ready and willing to donate land and contribute for the project. Accordingly, this Court vide order dated 6.9.2018 directed the Member Secretary, H.P. State Pollution Control Board to convene a meeting with all the concerned officers and take a decision with regard to the same and file his personal affidavit.

12. Pursuant to order dated 6.9.2018, Member Secretary, H.P. State Pollution Control Board, filed his personal affidavit disclosing therein that in compliance of order dated 6.9.2018 a meeting was convened in the office of H.P. State Pollution Control Board, Shimla on 12.9.2018 with the stake holder departments/implementing agencies. During aforesaid meeting, report submitted by Advocates Committee was discussed and certain decisions were taken:-

> ***"During the meeting, major cause of water contamination pointed out by the Advocates committee were discussed and latest position/status is as follows:***
>
> ***1. Incomplete construction of septic tank of police chowki/chailla:*** *The ASI Chailla apprised that the construction work of septic tank is complete in all respects.*
>
> ***2. Improper management of kitchen waste by C&C Company:*** *Sh Ashok Rajan (representative of C & C Company) has submitted corrective compliance has been done and assured to adhere to the directions in a modest and correct demeanor.*
>
> ***3. Free visits of people to the river bank and throwing of solid waste into river:*** *Representative of Municipal Council, Theog apprised that approximately 6-7 quintal of waste is collected from jurisdiction of Municipal Council, Theog which is being transported in two trips to Waste Processing Site of Municipal Corporation, Shimla. Further it was decided that garbage shall be collected by the concerned Panchayats and transported to Municipal Council, Theog. Transpiration expenses can be borne by imposing user fees on the individuals and commercial establishments at Chailla. Municipal Council, Theiog will transport the waste received from Chailla to Waste Processing Site, Shimla.*
>
> *To check/prohibit throwing of solid waste into the river, proper fencing will be done in this regard BDO, Theog has already submitted the estimate to the Deputy Commissioner, Shimla for fencing along the river beds and solid waste disposal unit.****(Action by BDO Theog/Gram Panchayats/MC Theog)***
>
> ***4. Dumping of soil/debris close to river bank by C&C Company:*** *It was apprised by Sh Ashok Rajan, Sr.Manager (representative of C&C Company) that excavation work at this point has been finished in the year 2016. The Member Secretary, H.P. State Pollution Control Board directed the Police authorities to intimate the local administration regarding illegal dumping of debris and to initiate action against the defaulters, BDO, Theog will coordinate through the concerned Panchayats.* ***(Action by Police Authorities/BDO Theog through Panchayats)***
>
> ***5. Unauthorized construction of temporary sheds/ Jhughi alongwith river side:*** *During meeting, the BDO, Theog has apprised that now there is no*

Jhughi alongwith river side on the said spot. Regular check shall be done by police authorities/local administration/Gram Panchayat so that this practice is avoided.

(Action by SDM Theog, ASI Chailla/Gram Panchayats)

6. Free flow of water through culvert into river: *Pradhan Gram Panchayat, Ghoond apprised that C&C Company has not completed the drains at Chailla and due to which water gets accumulated and causing problem. The representative of C&C Company apprised that the work is in progress and it will be completed in due course. Gram Panchayat, Ghoond and Bhagain alongwith I&PH department shall ensure that every individual (residential or commercial) shall make provisions of the septic tank and soak pits for disposal of sewage and sullage. No waste water shall be directly discharged to these drains towards river beds.*

(Action by Gram Panchayats,

I & PH Department, C & C Company,

HPRIDC (National Highway Division, Theog)

Plan of action w.r.t. suggestive measures to stop the pollution/water contamination on the spot as pointed out by the Advocates Committee:

a. Park development: *It was discussed that before making proposal/estimate, the area needs to be demarcated by the Revenue authorities. The BDO, Theog apprised that at present situation it is not possible to conduct the demarcation due to long weeds/shrubs at the site. At this juncture Executive Engineer, HPPWD Department agreed that labour shall be deployed to remove the shrubs and clean up the area so that it can be easily demarcated for the purpose of working out the Proposal and Estimate for construction of park.*

It was further decided that Urban Development shall deploy the landscape expert/architect who shall conduct the survey on 19.09.2018 alongwith representative of Tourism Department to make the Proposal and Estimate for construction of park. The representative of Tourism Department assured to explore the possibility for funds for construction of park. The Proposal/Estimate shall be submitted to Deputy Commissioner, Shimla and Tourism Department for further necessary action. The Member Secretary, HPSPCB suggested acupressure track may also be proposed in the park. It was discussed that the above concerned to submit the detailed report within 15 days.

(Action by SDM Theog/Urban Development/

Rural Development/Tourism Department)

b. *The Forest Department to coordinate with the concerned Panchayats for plantation along the river for clean environment. BDO, Theog has already submitted the estimate to the Deputy Commissioner, Shimla for fencing along the river beds.*

(Action by Forest Department/ BDO Theog)

c-d *It was discussed that while issuing the NOC for release of water and power connection for construction of building the Gram Panchayat should incorporate the condition that individual shall provide septic tank and soak pits. I & PH Department and HPSEB Ltd. while issuing permanent power and water*

connection, shall ensure whether individual has provided septic tank and soak pit.

(Action by Gram Panchayats,

I & PH Department and HPSEBL)

In addition to above following issues were discussed and deliberated.

Pradhan Gram Panchayat, Ghoond has apprised that 10 numbers of waste collection bins in Chailla area has been provided and there are approximately 96 numbers of shops and commercial establishments in Chailla, out of which about 10 numbers are running dhabhas. The garbage generated is being dumped in the open pits. Representative of Department of Rural Development apprised that the funds which are available with Rural Development & Panchayati Raj are released at District level and are not transferred directly to Panchayat. It was decided that Department of Rural Development shall take necessary action as per rule no.13 of Solid Waste Rules, 2016, wherein following function has to be performed:

(a) *prepare a state policy and solid waste management strategy for the state or the union territory in consultation with stakeholders including representative of waste pickers, self help group and similar groups working in the field of waste management consistent with these rules, national policy on solid waste management and national urban sanitation policy of the ministry of urban development, in a period not later than one year from the date of notification of these rules;*

(b) *while preparing State policy and strategy on solid waste management, lay emphasis on waste reduction, reuse, recycling, recovery and optimum utilization of various components of solid waste to ensure minimization of waste going to the landfill and minimize impact of sold waste on human health and environment;*

(c) *state policies and strategies should acknowledge the primary role played by the informal sector of waste pickers, waster collectors and recycling industry in reducing waste and provide broad guidelines regarding integration of waste picker or informal waste collectors in the waste management system.*

(d) *ensure implementation of provisions of these rules by all local authorities;*

(e) *direct the town planning department of the State to ensure that master plan of every city in the State or Union territory provisions for setting up of solid waste processing and disposal facilities except for the cities who are members of common waste processing facility or regional sanitary landfill for a group of cities; and*

(f) *ensure identification and allocation of suitable land to the local bodies within one year for setting up of processing and disposal facilities for solid waste and incorporate them in the master plans (land use plan) of the State or as the case may be, cities through metropolitan and district planning committees or town and country planning department;*

(Action by Rural Development)

- *The BDO, Theog was directed to submit the Plan for collection/transportation and disposal of garbage at Chailla to Municipal Council, Theog which shall be further transported to Waste Processing Site, Shimla. He apprised that there are no additional funds available in this office. However, it was informed by BDO, Theog that estimate to the Deputy Commissioner, Shimla for fencing along the river beds and garbage disposal unit has already been submitted.*

(Action by Rural Development)

- *The Member Secretary, H.P. State Pollution Control Board apprised that Department of Environment, Science and Technology, Government of Himachal Pradesh has empowered various departments under Himachal Pradesh Non-Biodegradable Act, 1995 for compounding the offences related to littering. The copy of notification was also circulated. The stake holders said that they don't have Challan books. Further it was decided that respective representative/ department/ stake holders take up the matter with the Department of Environment, Science and Technology, Government of Himachal Pradesh to issue the Challan books.*

(Action by Department of Environment, Science and Technology, Government of Himachal Pradesh)

- *It was decided that special cleanliness drive shall be started on 24th September, 2018 and if found, challan for littering will be done.*

(Action by Gram Panchayats/
Local Administration/ Police Authorities/
Pollution Control Board)

- *It was decided that the awareness campaign shall be conducted by the BDO, Theog I & PH Department and Pollution Control Board alongwith concerned Panchayat w.r.t. construction of septic tank and soak pit and littering of non-biodegradable waste. The Pollution Control Board shall fix the hoardings to make aware the general public regarding the fine which shall be imposed against the defaulters found littering of non-biodegradable waste.*

(Action by local Administration, I&PH Department,
Pollution Control Board Gram Panchayat)

- *It was also decided that I&PH Department and Pollution Control Board shall conduct joint sampling of water from the khad/ rivulet at Chailla and I&PH Department shall take necessary action as desired.*

(Action by I&PH Department,
Pollution Control Board)

- *Both the Panchayats shall form local committee as their own level for daily surveillance and report to the concerned authorities for necessary action.*

(Action by BDO Theog, Gram Panchayats)

- *SDM Theog as he was not present in the meeting is directed to coordinate with BDO Theog and local officer for the implementation of suggestion given by Advocates.*

(Action by SDM Theog)

13. Since certain remedial measures were proposed to be taken by the Committee, this Court directed, Deputy Commissioner, Shimla to file his personal affidavit specifically dealing with the issue with regard to funding of the project. Pursuant to aforesaid direction issued by this Court, Deputy Commissioner, Shimla, filed his affidavit stating therein as under:-

> ***"2. That in compliance to the directions issued by the Hon'ble High Court, it is submitted that the funds in the office of the replying deponent are received from government under the 5% SDP (Sectoral Decentralized Planning) Head.***

3. That as per the SDP guidelines, this fund is to be disbursed amongst all the 363 Panchayats of the District for providing missing links in road connectivity, water supply schemes, Community Centres, Shamshanghats, Rain shelters and other assets so created for benefit of the community.

4. That from the perusal of the affidavit filed by the Member Secretary H.P. State Pollution Control Board, it has been found that at present the funds are required to be provided for the fencing along the river bed at Chailla and for the construction of park. In this regard it is submitted that the Block Development Officer, Theog has prepared the estimate of Rs.9,05,500 for construction of drainage and soak pits in Village Chailla, Lalupul, Mipul and fencing of the river bed at Chailla. The copy of the estimate has been sent to the Director, Rural Development Department Shimla vide letter No.DRDA(S) SBM(Rural)-2014-15-Vol-XVI-2388-90 dated 27.6.2018 for sanction of the said amount but till date no sanction of the said amount has been received. The copy of the letter No.DRDA(S) SBM (Rural)-2014-15-Vol-XVI-2388-90-dated 27.6.2018 is annexed as annexure R/1.

5. That as far as the requirement of funds for construction of park at Chailla is concerned in this regard it is submitted that no proposal qua the construction of park has been received in this office till date. However, it is submitted that the funds for the construction of the park are to be provided by the Tourism department as under the (Sectoral Decentralized Planning) Head, small funds are provided for construction of missing links in road connectivity, water supply schemes, Community Centres, Shamshanghats, Rain sheltrs and other assets so created for benefit of the community approximately in equal share in all the 363 panchayats of the district. The compliance affidavit may please be taken on record and appropriate orders be passed after taking into account the above mentioned averments."

14. Having carefully perused status reports, as well as affidavits in response thereto filed by authorities concerned, this Court finds that contents of news items contained in ***"Amar Ujala",*** which came to be registered as Public Interest Litigation, are true and situation on the ground is very alarming and incase remedial measures, as proposed and suggested by various authorities including H.P. State Pollution Control Board as well as Advocates Committee, are not taken with utmost promptitude there may be outbreak of epidemic. It appears that respondents have not learnt lesson from the similar kind of situation happened in Ashwani Khad, Shimla, which not only took ghastly shape of epidemic, but also many persons lost their lives. State being welfare State is under obligation to provide clean drinking water to its residents, but, this Court, having perused material available before it, has no hesitation to conclude that authorities, responsible for maintaining hygiene in and around water sources, are least bothered and they are in deep slumber. It may be noticed that at the time of issuance of notice, respondent-State was not only in total denial mode, but persistently claimed before this Court that everything is fine on the spot, but, subsequently, the reports indicating polluting of Giri River came to be filed in the Court through their officers. Though, this Court having perused report of Joint Inspection Committee would have not hesitated to recommend action against erring officers/officials, but taking note of the fact that now certain steps have been taken to salvage the situation, this Court restrained itself from taking such action.

15. Since certain decisions have been taken by the authorities to prevent pollution in River Giri at Chailla, this Court sees no reason to keep the present petition alive, however, before parting deems it necessary to issue following directions:-

(1) Deputy Commissioner, Shimla as well as Member Secretary, H.P. State Pollution Control Board, Himachal Pradesh shall ensure implementation of suggestions as well as remedial measures contained in proceedings of the meeting held on 12.9.2018 at Conference Hall of H.P. State Pollution Control Board in compliance to order dated 6.9.2018 passed by this Court.

(2) Deputy Commissioner, Shimla, shall ensure that adequate funds are made available for implementation of suggestions/remedial work to be done at the spot. Since matter is directly linked with the health of general public, this Court hopes and trust that necessary funds are provided on the top most priority so that remedial steps are taken on spot at the earliest and no danger is posed to the health of the public at large. In case Deputy Commissioner, Shimla, finds it difficult to arrange the funds, he shall take up the matter with Chief Secretary to the Government of Himachal Pradesh, who, in turn, shall ensure that adequate funds are made available without any delay. Necessary affidavit of compliance shall be filed by Deputy Commissioner,Shimla within a period of two weeks with the Registry of this Court. Registry after having received affidavit shall place the matter before this Court.

16. We also wish to place on record appreciation qua the efforts put in by Mr.Ramakant Sharma, Senior Advocate as Amicus Curiae, who, on the instructions of this Court, obtained necessary feed back.

17. Registry is directed to send a copy of this judgment to the Chief Secretary to the Government of Himachal Pradesh, Deputy Commissioner, Shimla as well as Member Secretary, H.P. State Pollution Control Board, Himachal Pradesh for necessary action at their end.

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

Sahil and Others ....Petitioners

Versus

State of H.P. & Another ....Respondents

CWP No.2138 of 2018
Date of decision: 03.10.2018

Constitution of India, 1950 - Article 226 – Rustication from college – Challenge thereto - Writ jurisdiction - College administration rusticating petitioners for one academic year for assaulting Assistant Professor - Petitioners challenging order of rustication by way of writ - Rustication order found having been passed after affording opportunity of being heard to petitioners - Conduct of petitioners totally unbecoming of student - Keeping in view future of petitioners, High Court persuading college administration to reconsider matter - On suggestion of Court, rustication order withdrawn by College administration after accepting

unconditional apology of petitioners and their parents/ guardians subject to certain conditions - Writ disposed of. (Paras 5, 6, 9 &10)

For the Petitioners:	Mr.B.N.Sharma, Advocate.
For the Respondents-State:	Mr.Ashok Sharma, Advocate General with Mr.Ranjan Sharma, Ms.Rita Goswami, Mr.Adarsh K.Sharma and Mr.Nand Lal Thakur, Additional Advocate Generals.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.

Petitioners, who are students of Government College, Rampur Bushahr, District Shimla, H.P., have approached this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein for the following relief(s) amongst others:-

> ***"(a) A writ in the nature of certiorari may kindly be issued, quashing the impugned order dated 14th August, 2018 (Annexure P-3) whereby the petitioners have been rusticated from the college with immediate effect for one academic year.***
>
> ***(b) That the petitioners may kindly be ordered to be allowed to continue with their studies in their respective classes.***
>
> ***(c) That the respondent No.2 may kindly be directed to solve the matter amicably and FIR lodged against the petitioners may kindly be dropped."***

2. In nutshell, facts of the case, as emerge from the record, are that on 7th August, 2018, petitioners, named hereinabove, not only misbehaved with one of the Assistant Professors of the G.B. Pant Memorial Government Degree College, Rampur Bushahr, *(hereinafter referred to as the "College")* but also gave him beatings, as a consequence of which, Assistant Professor concerned, not only filed complaint with Principal of the College, but he also lodged an FIR with the police.

3. Subsequently, Principal of the College, having taken note of complaint lodged by Assistant Professor, ordered inquiry/investigation and vide order dated 14th August 2018 rusticated the petitioners, named hereinabove, on account of their misconduct and assault done by them on the Assistant Professor.

4. Perusal of order dated 14th August, 2018 (Annexure P-3) suggests that proper investigation was carried out by the Principal, wherein both the parties i.e. present petitioners and Assistant Professor, to whom beatings were allegedly given, were provided an opportunity of being heard.

5. Though, this Court, having taken note of seriousness of the matter and uncalled behaviour of the petitioners, was not inclined to intervene however, taking note of the fact that career/future of the petitioners would be ruined, this Court requested learned Advocate General to have the matter discussed with Principal of the College.

6. On 24th September, 2018, Shri P.C. Kashyap, Principal and Mr.Bharat Bhushan, Assistant Professor, came present in the Court and apprised this Court that the

behaviour of the petitioners is unbecoming of good students and in case no stern action is taken against them, it would give wrong signal to the other students studying in the College. Petitioners as well as their parents, who had also come to the Court, tendered their unconditional apology to the Principal as well as Assistant Professor in the Court and assured that they will not indulge in any unlawful activity in future. In view of aforesaid apologetic attitude of the petitioners, who have a long career ahead, this Court requested the Principal as well as Assistant Professor to consider the matter afresh in light of unconditional apology tendered by the petitioners.

7. Today, during the proceedings of the case, Ms.Rita Goswami, learned Additional Advocate General, while placing on record communication dated 29th September, 2018 issued by Principal, apprised this Court that in view of apologetic attitude of the petitioners and their parents/guardians, college administration has decided to forgive all above mentioned petitioners and has recommended the revocation of rustication of the petitioners subject to certain conditions. Action taken report enclosed with aforesaid communication is reproduced hereinbelow:-

"Action Taken Report in r/o CWP 2138/2018

In view of apologetic attitude of the students i.e. Sahil, Kapil Kaushal, Sanjeev, Mohan Singh and Nikhil Kumar and their parents/guardians, the repentance expressed by them for their belligerent act in the class of Prof.Bharat Bhushan and promise to not to repeat such cantankerous behaviour in future, the college administration has decided to forgive all above mentioned students and recommends the revocation of rustication of the students before the hon'ble high court of Himachal Pradesh vide CWP 2138/2018 subject to the fulfillment of following conditions by concerned students:-

1. ***That they must always keep their identity cards with them while in college campus.***
2. ***That they will have to attend their respective classes regularly.***
3. ***That they will be under surveillance of the college disciplinary committee, from which they must get affirmative report regarding their conduct and behavior in campus on monthly basis for the academic session 2018-19 i.e. purposed period of rustication.***
4. ***That they will not move in the groups inside the college campus and will not disturb the academic atmosphere by playing musical instruments in college premises.***
5. ***That the sound renting system owned by any of these students shall not be allowed in college campus along with all hostels lying in the college.***
6. ***That no outsider shall accompany these students in college campus.***
7. ***They will not indulge in any act of misconduct and indiscipline in the college campus.***

Any violation of above conditions shall lead to reinforcement of rustication order (No.EDN (C) 2(B) 6-17/2018-795-802 o/o the Principal Govt.College Rampur Bsr. Distt.Shimla dated: 14/08/2018) of these students from college and they shall be entirely responsible for such situation.

Further, since the matter is subjudice, therefore, the entry of concerned students in the campus will not be allowed till the final decision of the hon'ble high court of Himachal Pradesh.

We all are agreed to above mentioned terms & conditions."

8. Having carefully perused aforesaid order passed by the Principal, this Court sees no reason to pass any further order and, as such, deems it fit to close the present petition. However, before parting, we wish to place on record a word of appreciation for the Principal and especially Shri Bharat Bhushan, Assistant Professor for acceding to the request having been made by the petitioners, whose act, by no stretch of imagination, could be said to be of becoming good student.

9. Since decision to revoke the rustication of the petitioners-students is subject to certain conditions, as have taken note hereinabove, it is clarified that in case the petitioners again indulge in such unlawful activities and commit breach of conditions contained in the order of revocation of the rustication, college administration shall be at liberty to take disciplinary action against them. All the petitioners, present in the Court, undertake before this Court that they shall not indulge in such illegal activities in future and shall abide by all terms and conditions put by the college administration while revoking their rustication.

10. In view of the discussion made hereinabove, present petition is disposed of. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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

Jaswant Singh & Ors. ....Petitioners-Appellants-Defendants
Versus
Iqwal Singh ....Respondent-Plaintiff

Review Petition No.38 of 2018 in
RSA No.231 of 2006
Date of decision: 08.10.2018

Code of Civil Procedure, 1908 - Order XLVII Rules 1 & 2 – Review – Maintainability - Held, petitioner cannot be permitted to seek review of judgment or order on ground which was never pleaded or raised during trial or at first appellate stage.(Para 9)

Cases referred:
Akhilesh Yadav Etc. vs. Vishwanath Chaturvedi, (2013)2 SCC 1
Kamlesh Verma vs. Mayawati & Ors, (2013)8 SCC 320

For the Petitioners: Mr.Vishal Sharma, Advocate.
For the Respondent: Mr.N.K. Thakur, Senior Advocate with Mr.Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Per Sandeep Sharma, J.:

By way of present Review Petition filed under Order 47, Rules 1 & 2 of the Code of Civil Procedure, a prayer has been made on behalf of the petitioners-defendants-appellants to review and recall the judgment dated 17.03.2018, passed by this Court in ***Regular Second Appeal No.231 of 2006, titled as: Jaswant Singh & Others vs. Iqwal Singh***, whereby this Court upheld the judgment dated 23.2.2006 passed by learned Additional District Judge, Una in Civil Appeal No.59/2002, affirming the judgment and decree dated 25.6.2002 passed by learned Sub Judge Ist Class, Court No.2, Amb, District Una, in Civil Suit No.196 of 1993.

2. In nutshell ground, as set up in the present petition for seeking review of the judgment dated 17.03.2018 passed by this Court in RSA No.231 of 2006, is that this Court has failed to appreciate that the petitioners-appellants-defendants *(hereinafter referred to as 'defendants')* are the lawful owners of the land measuring 0-02-70 hectares bearing Khewat No.21 min, Khatauni No.60 min, comprised in Khasra Nos.642, 643 & 642/1 to the extent of ½ share only, situate in village Mubarikpur, Tehsil Amb, District Una, H.P., as per Farad Jamabandi for the year 1953-54. Defendants have averred in the petition that though trial Court in para-8 of its judgment dated 25.6.2002 has considered Farad Jamabandi for the year 1953-54 Ex.PX-1, but has failed to indicate the name of Ms.Asha Devi widow of Hari Singh, who was equal co-sharer alongwith the defendants. Defendants have further averred that learned trial Court wrongly concluded that it was in the exclusive *Hissedari* possession of the plaintiff-respondent *(hereinafter referred to as the 'plaintiff')* by ignoring the well settled principle of law that possession by one co-sharer is considered as possession by all the co-sharers.

3. Apart from above, it has further been averred in the review petition that this Court has failed to appreciate the aforesaid Farad Jamabandi for the year 1953-54, which otherwise stands duly discussed in para-8 of the judgment of the learned trial Court and it has been wrongly concluded by this Court in para-11 of judgment, sought to be reviewed in the instant petition, that defendants failed to adduce any evidence of their rights, whereas, as a matter of fact, the possession of the defendants stood duly proved to the extent of their share on the basis of the said Farad Jamabandi for the year 1953-54 and this document fortified the pleadings of the defendants that they were coming in possession of the suit land from the time of their ancestors to the extent of their shares.

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

5. After having heard learned counsel for the parties and carefully perused the material adduced on record vis-à-vis impugned judgment sought to be reviewed, this Court has no hesitation to conclude that there is no mistake or error apparent on the face of the record, which could persuade this Court to review its judgment. Bare perusal of pleadings, adduced on record by respective parties during the trial, clearly suggests that it was none of the case of the defendants that they are co-sharers in the suit land, rather defendants by way of filing joint written statement refuted the claim put forth by the plaintiff on the ground that the suit land comprised in Khasra No.643 is in their possession since the time of their ancestors and they are using the same for storing fuel wood and also to go to answer the call of nature as a matter of right.

6. Apart from above, defendants also claimed that they have become owners by way of adverse possession. Defendants also claimed before the trial Court that there exists an old cattle shed over Khasra No.642, which was reconstructed by their father in the

month of June, 1960 over the same place and land of Khasra No.642 denoted by letters EFGJ is situated in between the cattle shed, *Abadi* and court-yard of defendants. According to defendants, they are coming in open, continuous and peaceful possession of the suit land to the knowledge of plaintiff and they are in hostile and adverse possession of the same and as such have become owners with the passage of time.

7. Most importantly, document Ex.PX-1 i.e. Jamabandi for the year 1953-54, sought to be relied upon, never came to be placed on record by the defendants, rather the same was placed on record by the plaintiff, perusal whereof though suggests that Heera Singh, predecessor-in-interest of the defendants, was shown to be co-sharer to the extent of ½ share in the land comprised in Khasra Nos.1709, 1710 and 1711 (old), measuring 0-13 hectares, but careful perusal of subsequent Jamabandies pertaining to the years 1964-65 and 1988-89 clearly suggests that the name of predecessor-in-interest of defendants was not reflected in the column of ownership qua the land in question, but, at no point of time objection, if any, was ever raised by the predecessor-in-interest of the defendants or his legal representatives.

8. Pleadings available on record clearly reveals that the plaintiff filed a Civil Suit, praying therein for decree of permanent prohibitory injunction or possession restraining the defendants from interfering in any manner in the suit land owned and possessed by him specifically averring therein that he is owner in possession of the land measuring 0-02-70 hectares bearing Khewat No.21 min, Khatauni No.66 min, Khasra Nos.642, 643 and 642/1, as entered in Missalhaquiat for the year 1988-89, situate in village Mubarikpur, Tehsil Amb, District Una, H.P. Plaintiff sought injunction squarely on the basis of entry in his favour made in Jamabandi pertaining to the year 1988-89, wherein he is shown to be owner in possession of suit land as detailed hereinabove.

9. As has been taken note hereinabove, it was not the case set up by the defendants that their predecessor-in-interest was co-sharer alongwith the predecessor-in-interest of the plaintiff, rather entire endeavour in written statement is/was to project the case that they have become owners of the suit land by way of adverse possession. Otherwise also, there is no evidence adduced on record by the defendants that the proceedings, if any, were ever initiated by them or their predecessor-in-interest for correction of revenue entry, especially when, in the year 1964-65, name of their predecessor-in-interest did not figure in the column of ownership as owner in possession qua the suit land. Defendants did not raise a plea of being co-owner in the written statement nor lead any evidence in this regard. Moreover, defendants did not even raise it as a ground in the grounds of appeal before the first appellate Court nor any substantial question of law, in this regard, has been formulated in the Regular Second Appeal also. Now, at this stage, the defendants cannot be permitted to raise a question, which was neither pleaded nor put in issue for adjudication before the learned first appellate Court or before this Court. The present petition is not only misconceived but frivolous one.

10. Hence, this Court sees no material irregularity manifest in the order, undermining its correctness or resulting into miscarriage of justice. Needless to say that the review is not an appeal in disguise, entitling a party to be heard, simply because the party wants decision to be otherwise.

11. Consequently, in view of above, as well as principles laid down in the judgment rendered by Hon'ble Apex Court in ***Kamlesh Verma vs. Mayawati & Ors, (2013)8 SCC 320*** and ***Akhilesh Yadav Etc. vs. Vishwanath Chaturvedi, (2013)2 SCC 1,*** present petition is dismissed. Pending applications, if any, are also disposed of.

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

State of Himachal Pradesh ....Appellant
Versus
Uday Ram ....Respondent-Accused

Cr.M.P.(M) No.1325 of 2018 and
Cr.Appeal No.401 of 2018
Date of decision: 11.10.2018

Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 18 (c) - **Code of Criminal Procedure, 1973** - Section 377 – Opium-poppy cultivation – Confession - Inadequacy of sentence – Appeal - On confession of accused, Special Judge sentencing accused to imprisonment for period already undergone and fine for opium-poppy cultivation in his land without licence – State filing appeal on ground of inadequacy of sentence - Held, Section 18(c) of Act does not provide 'small quantity' or 'commercial quantity' with respect to cultivation of opium-poppy - Courts while awarding sentence under Section 18 (c) shall of their own wisdom taking note of quantity and bulk of opium-poppy shall award sentence - On facts, accused found having planted 22 plants of opium - No material suggesting his previous involvement in such kind of activities - Accused poor person and sole bread earner of family - No reason to differ with order of sentence of Special Judge - Appeal dismissed. (Paras 9, 14 &15)

For the Petitioner: Ms.Reeta Goswami & Mr.Vikas Rathaur, Additional Advocate Generals.
For the Respondent: None.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Cr.M.P.(M) No.1325 of 2018

Averments contained in the application, which is duly supported by an affidavit, suggest that the matter remained pending with the Law Department for quiet considerable time and, as such, delay of 72 days in filing the appeal has occurred, which delay has otherwise been sufficiently explained in the application.

2. Having carefully perused averments contained in the application, we are convinced and satisfied that delay in maintaining the accompanying appeal is neither willful nor intentional, rather the same is occurred on account of lengthy administrative process. This application is accordingly allowed. The delay in filing the appeal is condoned in the interest of justice. The application is disposed of.

3. Appeal be registered.

Cr.Appeal No.401 of 2018

4. Having carefully perused grounds taken in the appeal vis-à-vis impugned order of acquittal dated 9.5.2018 recorded by learned Special Judge-II, Kinnaur at Rampur in case No.5-R13 of 2017, this Court deems it fit to dispose of the present petition at the admission stage.

5. For having bird's eye view, facts on record are that on 8.5.2016, police party, after having received a secret information, visited the fields owned by respondent-accused *(hereinafter referred to as the 'accused')* at village Shandal, where owner of the aforesaid fields accused Mr.Udham Singh @ Uday Ram was also present on spot, who on inquiry admitted the fields to be his own. At the spot, Investigating Agency found accused to have grown 22 plants of opium poppy, which were uprooted and were packed in a bag and bag was sealed in cloth parcel with three seal impressions of 'T'. Investigating Officer, during investigation, also got the land demarcated and found that the same was in possession of accused. After completion of investigation, police presented the challan under Section 18 of the Narcotic Drugs and Psychotropic Substances Act *(for short 'Act')* against the accused in the competent Court of law.

6. The learned Court below, on being satisfied that prima facie case exists against the accused, summoned the accused in the Court. At the time of framing of charge, accused pleaded guilty and did not claim trial. Record reveals that accused was informed by the Court that he was not bound to make confession and if the same is made by him, it can be used against him for conviction and sentence purpose.

7. Learned Court below, after having recorded the statement of the accused Uday Ram, convicted him for having committed offence punishable under Section 18 of Act. Subsequently, vide impugned order, on the same day, learned Court below, while hearing the accused on quantum, sentenced him to imprisonment already undergone by him during investigation and trial of the case and to pay an amount of Rs.8,000/- as fine. Court below further ordered that in default of payment of fine, the convict would further undergo simple imprisonment for one month. In the aforesaid background, appellant-State has approached this Court in the instant proceedings, praying therein for enhancement of conviction awarded by the Court below.

8. Having carefully perused the material available on record vis-a-vis reasoning assigned in the impugned judgment/order of conviction passed by the Court below, this Court is not persuaded to agree with the contention raised by Ms.Reeta Goswami, learned Additional Advocate General representing the appellant-State, that the trial Court, while holding accused guilty of having committed offence punishable under Section 18 of the Act, has awarded inadequate sentence.

9. Admittedly, in the instant case, accused fairly admitted the factum with regard to his having planted 22 plants of opium and no material whatsoever came to be placed on record by the prosecution suggestive of the fact that accused remained involved in such kind of activities in past also, rather record clearly reveals that convict is a poor person and sole bread earner of the family and apart from above, he is the first offender.

10. Section 18 of the Act reads as under:-

> ***"18. Punishment for contravention in relation to opium poppy and opium.—Whoever, in contravention of any provision of this Act or any rule or order made or condition of order made or condition of licence granted thereunder, cultivates the opium poppy or produces, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses opium shall be punishable,—***

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees which may extend to two lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees;

(c) in any other case, with rigorous imprisonment which may extend to ten years and with fine which may extend to one lakh rupees."

11. Section 18 of the Act, reproduced hereinabove, clearly provides that where the contraband involves small quantity accused may be sentenced for rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both.

12. "Small Quantity" and "Commercial Quantity" with respect to cultivation of opium poppy is not specified separately in the Act as offence in this regard is covered under clause (c) of Section 18 of the Act.

13. In the case at hand, it is not in dispute that only 22 opium plants came to be recovered by the Investigating Agency from the fields of the accused, which in no terms can be deemed to be a "Commercial Quantity" and, as such, this Court finds no illegality and infirmity in the impugned order passed by the Court below while sentencing the accused for imprisonment already undergone by him.

14. Otherwise also, in terms of Section 18(c) person can be sentenced with rigorous imprisonment which may extend to ten years and with fine which may extend to one lakh rupees. Since "Small Quantity" & "Commercial Quantity" with respect to cultivation of opium poppy has not been prescribed in the Act itself, offence in this regard is covered under Section 18(c), wherein legislature has very carefully used words "in any other case", meaning thereby Courts while awarding sentence under Section 18(c) shall of its own wisdom, taking note of quantity/bulk of cultivation of opium poppy, award sentence. In the instant case, admittedly, only 22 plants of opium came to be recovered from the fields of the accused and as such punishment awarded by Court below cannot be said to be inadequate.

15. Consequently, in view of the detailed discussion made herein above, this Court sees no reason to differ with the impugned order passed by the learned court below and the same is accordingly upheld. Accordingly, the appeal is dismissed being devoid of any merits.

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

Om Prakash & Others ... ...Appellants

Versus

LAC & Others ... ...Respondents

RFA No.367 of 2018
Date of decision: 26.10.2018

Land Acquisition Act, 1894 - Section 54 - **Limitation Act, 1963** - Section 5 - Delay in filing appeal – Condonation - Conditions thereof – Principles - Held, in land acquisition matters while condoning delay in filing appeal, approach of court should be pragmatic and not pedantic - Substantive rights of parties should not be allowed to be defeated on technical grounds - When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred. (Paras 2 & 3)

Case referred:
Dhiraj Singh (Dead) through Legal Representatives and Others vs. State of Haryana and Others, (2014)14 SCC 127

For the Appellants:	Mr.Vinay Kuthiala, Senior Advocate with Ms.Vandana Kuthiala, Advocate.
For Respondents No.1 & 3:	Mr.Dinesh Thakur, Additional Advocate General.
For Respondent No.2:	Mr.Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

CMP(M) No.824 of 2018

Heard.

Despite repeated opportunities, none of the respondents have filed reply. Averments contained in the application, which is duly supported by an affidavit, clearly suggest that the applicants were unable to maintain accompanying appeal well within stipulated time on account of non-availability of sufficient funds. Applicants have categorically stated that they were informed by the counsel representing them that they are required to pay Court fee on an amount of Rs.90 lacs approximately and they did not have that much amount, but subsequently when they came to know that similarly situate persons came to be awarded enhanced compensation at the rate of Rs.4.5 lacs per bigha in the appeals having been filed by them, they arranged money from their near and dears and requested their counsel to prepare and file appeal on their behalf.

2. Hon'ble Apex Court in ***Dhiraj Singh (Dead) through Legal Representatives and Others vs. State of Haryana and Others, (2014)14 SCC 127,*** while dealing with the land acquisition matters, has categorically held that approach of the Court, while condoning the delay in filing the appeal, should be pragmatic and not pedantic. Court has further held that the substantive rights of the appellants should not be allowed to be defeated on technical grounds by taking hyper technical view of self-imposed limitation. The Hon'ble Apex Court has held as under:-

> ***"16. The principles regarding condonation of delay particularly in land acquisition matters, have been enunciated in Collector (LA) v. Katiji, (1987)2 SCC 107, wherein it is stated in para 3 as under: (SCC p.108)***

"(3). The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice--that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

1. ***Ordinarily a litigant does not stand to benefit by lodging an appeal late.***
2. ***Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.***
3. ***"Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.***
4. ***When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.***
5. ***There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.***
6. ***It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."***

(emphasis in original)

17. The aforesaid judgment was followed by this Court in DDA vs. Bhola Nath Sharma, (2011)2 SCC 54, which was also a matter concerning land acquisition.

18. We, accordingly, allow these appeals. Impugned orders of the High Court are set aside. Delay in filing the LPAs is condoned. It is held that the appellants shall be entitled to enhanced compensation @ Rs.200 per square yard. However, for the period of delay in approaching the High Court by way of LPAs, in all these cases, no interest should be paid to them. Compensation shall be worked out accordingly and paid to the appellants within a period of three months from today."

3. In the aforesaid judgment Hon'ble Apex Court has reiterated that when substantial justice and technical considerations are pitted against each other, cause of

substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

4. In the case at hand, as has been taken note hereinabove, applicants-appellants have fairly stated that they were unable to file the appeal well within time on account of non-availability of funds for affixing Court fee, but subsequently, factum with regard to enhancement of compensation to the similar situate persons came to their knowledge and as such they arranged money and filed appeal without any further delay. In the case at hand, if delay is not condoned, great prejudice would be caused to the applicants. Applicants have certainly not gained anything by not filing the appeal within prescribed period of limitation, rather, in the event of dismissal of their appeal on the ground of delay, they would loose opportunity to get the compensation enhanced by approaching this Court in the appropriate proceedings, laying therein challenge to the award passed by the reference Court.

5. Consequently, in view of aforesaid law laid down by the Hon'ble Apex Court as well as explanation rendered in the application, this Court is convinced and satisfied that delay in maintaining the accompanying appeal deserves to be condoned. This application is accordingly allowed. The delay of 5 years 7 months and 2 days in maintaining the appeal, which has sufficiently been explained, is condoned in the interest of justice. The application is disposed of.

6. Appeal be registered.

RFA No.367 of 2018

7. By way of aforesaid appeal filed under Section 54 of the Land Acquisition Act, 1894 *(hereinafter referred to as the Act),* challenge has been laid to award dated 08.11.2012 passed by learned District Judge(Forest), Shimla in various Land Reference petitions as described in the award.

8. Undisputedly, the suit land belonging to claimants, situate in Mohal Garyana, Tehsil Sunni, District Shimla, H.P., came to be acquired for public purpose; namely; construction of Kol Dam and acquisition proceedings commenced with the issuance of Notification under Section 4 of the Act on 18.12.2000. The Land Acquisition Collector *(for short 'LAC')* passed award No.35/2005, dated 23.9.2005. It is not in dispute that market value of acquired land came to be determined/assessed on different rates, classification/ category-wise, ranging from Rs.87,376/- to Rs.3,93,170/- per bigha.

9. Claimants, being aggrieved and dissatisfied with the amount awarded by LAC, preferred reference petition under Section 18 of the Act, seeking therein enhancement of compensation, however, fact remains that vide impugned award dated 08.11.2012 learned District Judge(Forest) rejected the claim put forth by claimants for enhancement of compensation.

10. Being aggrieved and dissatisfied with the rejection of their claim for enhancement of original award passed by LAC vide its award dated 23.09.2005, claimants have approached this Court in the instant proceedings, laying therein challenge to award dated 08.11.2012, passed by learned District Judge(Forest), Shimla in the petition having been filed under Section 18 of the Act.

11. It is not in dispute before this Court that similar situate claimants, whose land also came to be acquired for construction of Kol Dam in the acquisition proceedings commenced with the publication of Notification issued under Section 4 of the Act on 18.12.2000, had filed land reference petitions before the learned District Judge(Forest),

Shimla, praying therein to enhance the compensation awarded by LAC in award No.36 of 2005 dated 23.09.2005. As has been noticed above, LAC, while passing award No.36 of 2005, dated 23.9.2005, determined the market value of acquired land on different rates, classification/category-wise, ranging from Rs.87,376/- to Rs.3,93,170/- per bigha. However, fact remains that similar situated claimants, being dissatisfied with quantum of compensation awarded by LAC in award No.36 of 2005, dated 23.9.2005, filed reference petitions under Section 18 of the Act and those reference petitions were clubbed and disposed of by a common award passed in ***Reference Petition No.15-S/4 of 2008/06, titled as: Krishan Chand vs. NTPC,*** wherein the Reference Court re-determined the market value of entire land irrespective of classification on uniform basis and awarded a sum of Rs.4.5 lacs per bigha.

12. Being aggrieved and dis-satisfied with the aforesaid award passed by learned District Judge(Forest), Shimla, respondent No.2 NTPC, filed ***RFA No.481 of 2012, titled as: NTPC Limited vs. Krishan Chand Sharma & Others,*** in this Court.

13. A Coordinate Bench of this Court vide judgment dated 26.11.2016, passed in aforesaid *RFA No.481 of 2012*, upheld the award dated 30.10.2009 passed by District Judge(Forest), Shimla in the aforesaid ***Reference Petition No.15-S/4 of 2008/06, titled as: Krishan Chand vs. NTPC*** and reiterated the market value of entire acquired land irrespective of its category and classification as done by Reference Court.

14. Mr.Vinay Kuthiala, learned Senior Counsel representing the appellants, while placing reliance upon the aforesaid judgment dated 26.12.2016, passed in *RFA No.481 of 2012,* by the Coordinate Bench of this Court, contended that the appeal at hand also deserves to be allowed in terms of aforesaid judgment because undisputedly claimants in the case at hand alongwith the claimants who had filed ***Reference Petition No.15-S/4 of 2008/06, titled as: Krishan Chand vs. NTPC***, were awarded compensation vide common award. No.36 of 2005. He further argued that since this Court had upheld the findings of Reference Court, returned in the aforesaid Reference Petition No. 15-S/4 of 2008/06, therefore, the claimants in the instant case are also entitled to market value of entire acquired land irrespective of its category/classifications by uniformly awarding a sum of Rs.4.5 lacs per bigha.

15. Mr.Neeraj Gupta, learned counsel representing respondent No.2, while fairly acknowledging the factum with regard to passing of judgment dated 26.12.2016, passed in *RFA No.481 of 2012*, conceded that claimants in the case at hand are also entitled to enhanced market value of acquired land @ Rs.4.5 lacs per bigha, as has been held in ***Reference Petition No.15-S/4 of 2008/06, titled as: Krishan Chand vs. NTPC*** which has further been upheld by this Court in *RFA No.481 of 2012*.

16. Consequently, in view of aforesaid discussion as well as fair stand adopted by Mr.Neeraj Gupta, learned counsel representing respondent No.2, present appeal is allowed and it is ordered that directions contained in ***RFA No.481 of 2012, titled as: NTPC Limited, Kol Dam vs. Krishan Chand Sharma & Others*** shall *mutatis mutandis* apply to the present case also. However, it is made clear that since appellants in the instant appeal arranged the Court fee after considerable delay of 5 years 7 months and 2 days, they shall not be entitled for interest qua the aforesaid period, as has been held by Hon'ble Apex Court in ***Dhiraj Singh's*** case *supra.*

17. Respondent No.2 is directed to deposit the entire award amount in the Registry of this Court within a period of eight weeks from today.

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

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

Anant Ram and Others ....Petitioners
Versus
Pawan Kumar & Others ....Respondents

CMPMO No.543 of 2017
Date of decision: 14.11.2018

Code of Civil Procedure, 1908 - Order VI Rule 17 – Amendment of written statement – Permissibility - Plaintiffs filing suit for injunction and in alternative for possession of suit land - Defendants claiming possession and also mentioning pendency of demarcation proceedings before Revenue Officer in their written statement - Demarcation revealing possession of defendants over more land than pleaded in written statement - Trial court dismissing application of defendants for amending written statement intending to incorporate area found in their possession after demarcation - Petition against - Held, all amendments which are necessary for proper adjudication of case should be allowed - Defendants already pleaded their possession over suit land - By way of amendment they simply want to incorporate exact area found in their possession after demarcation – They could not have taken this plea at time of filing of written statement since demarcation took place thereafter - Petition allowed - Order of trial court set aside - Amendment allowed. (Paras 9 to13)

Cases referred:
Chakreshwari Construction Private Limited vs. Manohar Lal, (2017)5 SCC 212
Khushbir Singh vs. Gurdeep Singh and Others, (2016)14 SCC 638
Rameshkumar Agarwal vs. Rajmala Exports Private Limited and others, (2012)5 SCC 337
Revajeetu Builders and Developers vs. Narayanaswamy and Sons and Others, (2009)10 SCC 84

For the Petitioners : Mr.Hamender Singh Chandel, Advocate.
For Respondents : Mr.B.L. Soni and Mr.Aman Parth Sharma, Advocates.

The following judgment of the Court was delivered:

Sandeep Sharma,J.(Oral)

Being aggrieved and dis-satisfied with the impugned order dated 9.10.2017 passed by learned Civil Judge (Jr.Division), Court No.3, Ghumarwin, District Bilaspur, H.P., whereby an application under Order 6 Rule 17 of the Code of Civil Procedure *(for short 'CPC')* having been filed by the petitioners-defendants *(hereinafter referred to as the 'defendants'),* praying therein for amendment of written statement as well as counter claim, came to be dismissed, the defendants have approached this Court in the instant proceedings filed under

Article 227 of the Constitution of India, praying therein to allow the aforesaid application after setting aside impugned order dated 9.10.2017, passed by the Court below.

2. Necessary facts, as emerge from the record, are that the respondents-plaintiffs *(hereinafter referred to as the 'plaintiffs')* filed a suit for permanent prohibitory injunction and in the alternative for possession of the suit land. Defendants by way of written statement refuted the claim put forth by the plaintiffs and also raised certain claims in counter claim (Annexure P-1 Colly.).

3. During the pendency of the suit, referred hereinabove, an application under Order 6 Rule 17 CPC, seeking amendment of the written statement as well as counter claim, came to be filed on behalf of the defendants (Annexure P-2). However, fact remains that vide order dated 9.10.2017 (Annexure P-3) learned Court below rejected the same. In the aforesaid background, the defendants approached this Court in the instant proceedings.

4. Defendants averred in the application filed under Order 6 Rule 17 CPC that matter with regard to demarcation of the suit land remained pending before the revenue authorities as well as appellate authorities and only after order passed by learned Collector, Sub Division, Ghumarwin, District Bilaspur, it transpired that defendants No.1 to 3 were in possession of the land measuring 6.1 bighas. Since the revenue staff without preparing tatima told the defendants that they were in possession of 3.2 bighas of the suit land, factum with regard to their being in possession of 6.1 bighas of suit land could not be stated in the written statement. However, after demarcation and preparation of tatima, as referred hereinabove, defendants found it necessary to amend their written statement to incorporate in the written statement as well as in counter claim that they were in possession of 6.1 bighas of suit land instead of 3.2 bighas of suit land, as originally stated in the written statement as well as counter claim.

5. Interestingly, reply to the application filed by the plaintiffs, clearly suggests that plaintiffs have admitted the factum with regard to demarcation carried out by the Local Commissioner on 1.5.2012, wherein he has reported that the defendants are in possession of land measuring 6.1 bighas. Though, in para-3 of reply to the application, the plaintiffs have stated that the Local Commissioner has wrongly mentioned that the defendants are in possession of land, but fact remains that the averments with regard to demarcation carried out by the Local Commissioner on 1.5.2012 and his report, as averred in application, stand admitted in so many words by the plaintiffs and as such there appears to be considerable force in the arguments of Shri Hamender Singh Chandel, learned counsel representing the petitioners-defendants, that in any case dispute *interse* parties remains with regard to 6.1 bighas of land and proposed amendment would not change the nature of the plea of defence taken by the defendants-respondents in written statement. Moreover, in the counter claim also the area of the land in question was required to be mentioned correctly as per the tatima prepared by the revenue agency which showed land as measuring 6.1 bighas. Otherwise also, this Court finds from the perusal of impugned order that learned Judge below, while rejecting the prayer for amendment having been made by the defendants, has gone totally stray and has not touched the aforesaid aspect of the matter because there is no finding to this effect that, *"whether proposed amendment in any way would change the complexion of case or not?"*. Rather, as has been taken note hereinabove, dispute *interse* parties remains with regard to 6.1 bighas of land and proposed amendment would not change the nature of the plea of defence taken by the respondents-defendants.

6. True, it is, that as per own pleadings set up by the defendants, demarcation was conducted on 1.5.2012 and tatima was also prepared and the actual extent of the possession of the petitioners-defendants to the extent of 6.1 bighas was noted, whereas

application came to be filed on 2.1.2014, which fact has also been wrongly recorded by the Court below in the impugned order. Learned Court below has recorded in the impugned order that application has been filed on 5.8.2015, whereas date mentioned on the application suggests that the same was filed on 2.1.2014, which fact is otherwise not disputed by the learned counsel representing the plaintiffs.

7. It has been repeatedly held by the Hon'ble Apex Court as well as by this Court that the Court should adopt liberal approach instead of hyper-technical approach, in allowing the amendment. Amendment, seeking to introduce facts/evidence in support of contention already pleaded, is permissible.

8. In the case at hand, if written statement having been filed by the defendants, is perused who subsequently moved an application for amendment of written statement as well as counter claim, it clearly suggests that factum qua pendency of matter with regard to demarcation of the suit land before the revenue authorities as well as appellate authorities stands duly mentioned in the written statement and it was only after the orders passed by the learned Collector, Sub Division, Ghumawin, Dsitrict Bilaspur, demarcation of the suit land was conducted, wherein factum with regard to defendants' possession over the land measuring 6.1 bighas came to the fore and as such it cannot be said that amendment sought to be made by the defendants in written statement as well as in counter claim was afterthought, rather, it was necessitated on account of subsequent development which has direct bearings on the case.

9. It is well settled that the Court may at any stage of proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties, provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial.

10. In the case at hand, as has been taken note hereinabove, dispute *interse* parties otherwise is with regard to 6.1 bighas of land as has otherwise been admitted by the plaintiffs in their reply to the application for amendment, but, since report of Local Commissioner came subsequent to the filing of the written statement, it can be said or presumed that inspite of due diligence, party concerned was unable to raise matter before the commencement of trial. Otherwise also, this Court finds from the impugned order itself that the plaintiffs' evidence is yet to commence and as such no prejudice, whatsoever, would be caused to the plaintiffs in case the application for amendment, as prayed for, is allowed. Reliance is placed upon ***Rameshkumar Agarwal vs. Rajmala Exports Private Limited and others, (2012)5 SCC 337***, wherein the Hon'ble Apex Court has held as under:-

> ***"14. Order 6 Rule 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") makes it clear that every pleading shall contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence but not the evidence by which they are to be proved. Sub-rule (2) of Rule 2 makes it clear that every pleading shall be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph. Sub- rule (3) of Rule 2 mandates that dates, sums and numbers shall be expressed in a pleading in figures as well as in words.***

15. Order 6 Rule 17 of the Code enables the parties to make amendment of the plaint which reads as under;

> ***"17. Amendment of pleadings – The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:***
>
> ***Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."***

11. The Hon'ble Apex Court in ***Chakreshwari Construction Private Limited vs. Manohar Lal, (2017)5 SCC 212,*** has culled out certain principles while allowing or rejecting the application for amendment, which are as under:-

> ***"13. The principle applicable for deciding the application made for amendment in the pleadings remains no more res integra and is laid down in several cases. In Revajeetu Builders and Developers vs. Narayanaswamy & Sons, (2009)10 SCC 84, this Court, after examining the entire previous case law on the subject, culled out the following principle in para 63 of the judgment which reads as under: (SCC p.102)***
>
> > ***"63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:***
> >
> > ***(1) whether the amendment sought is imperative for proper and effective adjudication of the case;***
> >
> > ***(2) whether the application for amendment is bona fide or mala fide;***
> >
> > ***(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money.***
> >
> > ***(4) refusing amendment would in fact lead to injustice or lead to multiple litigation.***
> >
> > ***(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and***
> >
> > ***(6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.***
> >
> > ***These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."***

12. 1 If the facts of the present case are considered in the light of aforesaid parameters laid down by the Hon'ble Apex Court, this Court is of the view that amendment sought is imperative for proper and effective adjudication of the case and application for amendment is bonafide and no prejudice would be caused to the opposite party, rather amendment would help in proper adjudication of the case. ***(See: Revajeetu Builders and***

Developers vs. Narayanaswamy and Sons and Others, (2009)10 SCC 84 and Khushbir Singh vs. Gurdeep Singh and Others, (2016)14 SCC 638).

13. Consequently, in view of the discussion made hereinabove as well as law laid down by Hon'ble Apex Court, this Court is of the view that impugned order dated 9.10.2017 passed by Court below is not sustainable in the eye of law and as such same is quashed and set aside. The application filed by the petitioners-defendants before the Court below is allowed. Learned Court below is directed to take the amended written statement as well as counter claim on record. Needless to say that the respondents-plaintiffs shall be afforded opportunity to file replication to the amended written statement as well as reply to the counter claim.

14. Learned counsel representing the parties undertake to appear before the Court below on ***12.12.2018***. Record, if any, of Court below be sent back forthwith to enable it to do the needful within stipulated time.

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

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

Ashutosh Sharma ....Non-applicant-Plaintiff
Versus
Janak Dulari .... Applicant-Defendant

OMP No.453 of 2018 In Civil Suit No.44 of 2016
Judgment Reserved on: 19.11.2018
Date of decision: 29.11.2018

Code of Civil Procedure, 1908- Order VIII Rules 6-A(1) and 9 - Counter claim - Filing, after submitting written statement - Whether can be maintained?- Held, counter claim can be filed after filing of written statement provided cause of action had accrued to defendant before he had delivered his defence or before expiry of time fixed for delivery of defence - On facts, defendant permitted to raise counter claim for damages on account of plaintiff's failure to pay balance sale price and get sale deed executed - Application allowed. (Paras 15, 23, 25 & 26)

Cases referred:
Mahendra Kumar and another vs. State of Madhya Pradesh and others, AIR 1987 SC 1395
Mohinder Singh vs. Karnail Singh and others, (2013)5 RCR (Civil)

For the Plaintiff- Non-Applicant Mr.Ajay Kumar, Senior Advocate with Mr.Dheeraj K.Vashishat, Advocate.
For Defendant- Applicant Mr.Sudhir Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.(Oral)

By way of instant application filed under Order 8 Rule 9 read with Section 151 of the Code of Civil Procedure *(for short 'CPC'),* leave/permission of this Court has been sought on behalf of the applicant-defendant to raise counter claim by way of subsequent pleading to the tune of Rs.50 lacs against the non-applicant-plaintiff.

2. Necessary facts for adjudication of the present application are that non-applicant-plaintiff filed a suit for specific performance of contract dated 3.6.2013 with respect to suit land as described in the plaint and for permanent perpetual prohibitory injunction restraining the non-applicant-defendant from transferring or alienating or changing the nature of the suit land or interfere with the possession of the plaintiff or from creating any encumbrances or charge on the suit land etc. In the alternative, non-applicant-plaintiff also prayed for decree for recovery of Rs.93,10,000/-.

3. Defendant contested the suit having been filed by the plaintiff by way of written statement, wherein she has specifically taken plea that it was the plaintiff, who is not willing to perform the agreement dated 3.6.2013 and agreement being time bound was required to be executed on or before 2.12.2013 in any case. Defendant further averred in the written statement that on account of failure on the part of plaintiff, sale deed could not be executed within the stipulated time as per terms and conditions of the agreement, whereas, she always remained ready and willing to perform her part of the contract and also pleaded that on humanitarian ground, despite expiry of time as stipulated in agreement, she again issued legal notice to the plaintiff vide registered post dated 4.12.2013 calling upon him to register a sale deed on or before 27.12.2013, specifically indicating therein that, failing which earnest money received by her would be forfeited. Notice, referred hereinabove, was duly received by the plaintiff, who, instead of coming forward with the remaining sale consideration, again made excuses in his reply by referring that the title deeds have not been produced, which averments are nothing but lame excuses on the part of the plaintiff to avoid the execution and registration of sale deed and to save the remaining sale consideration.

4. The applicant-defendant has further averred in the application that the applicant-defendant vide rejoinder-cum-notice dated 27.12.2013 again requested the non-applicant-plaintiff to get the title verified by referring the number of registration of the sale deed by which the applicant-defendant acquired the title of the same land and further extended the time and plaintiff was again required to execute the sale deed on or before 16.1.2014, failing which the earnest money paid by the non-applicant-plaintiff was to be forfeited.

5. It is pertinent to mention here that, on the request of learned Senior Counsel representing the plaintiff, this Court vide order dated 1.9.2016 directed that the present suit be listed alongwith Civil Suit No.43 of 2016.

6. Defendant has further averred that vide order dated 9.11.2016, passed by this Court, matter was referred to the learned Mediator before whom applicant-defendant again showed her willingness to execute the sale deed. However, on 20.3.2017, matter was adjourned to 11.4.2017 to enable the plaintiff to ascertain the authenticity of the documents and thereafter further time was sought by the plaintiff to verify the documents and the matter was adjourned to 7.7.2017. On 7.7.2017, non-applicant-plaintiff was called in person by this Court and matter was again adjourned to 28.7.2017, on which date parties were directed to remain present in the Court in person on 1.9.2017.

7. Applicant-defendant has further averred that non-applicant-plaintiff took as many as nine months period for getting the sale deed executed, after institution of suit and,

accordingly, this Court vide order dated 6.10.2017, passed in OMP 206/2016 in Civil Suit No.43 of 2016, vacated the interim order dated 30.6.2016, whereby applicant-defendant was restrained from alienating, encumbering or selling the suit land or changing its nature in any manner, whatsoever.

8. Applicant-defendant has further averred that from the acts and conduct of non-applicant-plaintiff, she has been put to a great loss and, as such, she is entitled to raise counter claim by way of subsequent pleadings to the tune of Rs.50 lacs on account of damages. She has averred in the application that in the written statement, having been filed by her, she has specifically pleaded that she has suffered huge loss of more than Rs.25 lacs on account of default of the non-applicant-plaintiff in making remaining sale consideration. She has further averred that applicant-defendant has suffered huge loss of more than Rs.25 lacs and hence the amount paid by the non-applicant-plaintiff is liable to be forfeited.

9. Apart from above, on account of neglected conduct of the non-applicant-plaintiff, she is also liable to pay damage on account of default which she assessed to the tune of Rs.50 lacs alongwith future interest @ 12% per annum till the actual realization of amount.

10. Applicant-defendant has averred that necessity to file the present counter claim against the non-applicant-plaintiff has arisen during the pendency of suit and even prior to filing of the written statement, but when non-applicant-plaintiff has shown his absolute neglect/indifference to the agreement dated 3.6.2013 and refused to perform his part of the contract leading to huge loss to the applicant-defendant, which fact has otherwise been pleaded in her written statement, and as such, application may be allowed and she be permitted to raise counter claim by way of subsequent pleadings.

11. Aforesaid prayer having been made by the applicant-defendant has been opposed by the non-applicant-plaintiff by way of reply, wherein averments contained in the application have been denied in toto. It has been stated in the reply that pleas being taken in the application by the applicant-defendant are self- defeating and contradictory to the stand taken in the notices and reply to notices and the written statement. On the one hand stand of the defendant is that she had forfeited the amount of earnest money as the plaintiff allegedly failed to perform his part of the agreement and now the defendant is taking a new stand that she has allegedly suffered loss or damages on account of alleged acts of the plaintiff or alleged non performance of the agreement. It has further been averred that under the law in the matters of contract of sale of immovable property no such plea of damages is available in view of Section 74 of the Indian Contract Act.

12. I have heard learned counsel for the parties and gone through the pleadings adduced on record by the respective parties.

13. Since by way of instant application filed under Order 8 Rule 9 read with Section 151 CPC a prayer has been made by applicant-defendant to allow her to raise counter claim by way of subsequent pleadings to the tune of Rs.50 lacs on account of damages to the applicant-defendant against non-applicant-plaintiff, in view of subsequent cause of action arisen during the pendency of the suit and, as such, question of maintainability of counter claim in the given facts and circumstances of the case cannot be seen in the present proceedings, rather in the present proceedings, this Court is only required to determine, *"whether on account of subsequent development/ subsequent cause of action, if any, has arisen during the pendency of the suit in favour of the applicant-defendant, entitling him to raise counter claim after filing the written statement or not".*

14. Question with regard to maintainability of counter claim would come lateron in case this Court finds/holds applicant-defendant entitled to raise counter claim on account of subsequent development/subsequent cause of action.

15. Argument, having been advanced by Shri Ajay Kumar, learned Senior Counsel representing the non-applicant-plaintiff that applicant-defendant cannot be permitted to file counter claim after filing of written statement, stands duly settled/answered by Hon'ble Apex Court in ***Mahendra Kumar and another vs. State of Madhya Pradesh and others, AIR 1987 SC 1395,*** wherein it has been categorically held that under Order VIII, Rule 6A(1) CPC, counter claim can be filed after filing of written statement, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not. The Hon'ble Apex Court in ***Mahendra Kumar's*** case *supra* has held as under:-

> ***"5. After the filing of the written statement, the appellants filed a counter-claim claiming title to the treasure. It is not necessary for us to state the basis of the claims of the parties to the treasure. The respondents Nos. 2 to 5 filed an application praying that the counter-claim should be dismissed contending that it was barred by limitation as prescribed under section 14 of the Act and that it was also not maintainable under Order VIII, Rule 6A(1) of the Code of Civil Procedure. The learned District Judge came to the finding that the counter-claim was barred by section 14 of the Act and, in that view of the matter, dismissed the counter-claim. Being aggrieved by the said order of the learned District Judge, the appellants and the said respond- ents Nos. 6 to 8 moved the High Court in revision against the same. The High Court upheld the order of the learned District Judge that the counterclaim was barred by limita- tion as prescribed by section 14 of the Act.The High Court further held that the counter-claim having been filed after the filing of the written statement, it was not maintainable under Order VIII, Rule 6A(1) of the Code of Civil Procedure. Hence this appeal by special leave.***
>
> ***15. The next point that remains to be considered is whether Rule 6A(1) of Order VIII of the Code of Civil Procedure bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for Rule 6A(1) does not, on the face of it, bar the filing of a counter-claim by the defendant after he had filed the written statement. What is laid down under Rule 6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of Rule 6A(1) in holding that as the appellants had filed the counter-claim after the filing, of the written statement, the counter-claim was not maintainable. The finding of the High Court does not get any support from Rule 6A(1) of the Code of Civil Procedure. As the cause of action for the counter- claim had arisen before the filing of the written statement, the counter-claim was, therefore, quite maintainable. Under Article 113 of the Limitation Act, 1963, the period of limitation of three years from the date the right to sue accrues, has been provided***

for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counter-claim, which is treated as a suit under section 3(2)(b) of the Limitation Act has been filed by the appellants within three years from the date of accrual to them of the fight to sue. The learned District Judge and the High Court were wrong in dismissing the counter-claim."

16. Placing reliance upon aforesaid judgment, Punjab and Haryana High Court in ***Mohinder Singh vs. Karnail Singh and others, (2013)5 RCR (Civil)*** has reiterated that counter claim can be filed, even subsequent to filing of the written statement, subject to the condition that cause of action for filing the counter claim should have accrued before the filing of the written statement. In the aforesaid judgment, Punjab and Haryana High Court has held that counter claim can be entertained even if the same was not included in the written statement, subject to the aforesaid condition. The Court has held as under:-

"5. Counsel for the petitioner contended that defendant No.7 was submitting his written statement by including the counter claim therein, but the trial court did not admit the counter claim of defendant No.7. Counsel for respondent No.1, however, contended that counter claim was not part of the written statement that was filed by the petitioner in the trial court. Counsel for the petitioner submitted that even if counter claim was not part of the written statement, the same can be filed even thereafter. Reliance in support of this contention has been placed on two judgments of this Court i.e. Raghubir Singh and others v. Tajinder Pal Singh and others reported as 2009(4) Civ.C.C. 755 and Nini Kumar Jain v. Neena Devi and others reported as 2006(4) R.C.R. (Civil) 770. On the other hand, counsel for respondent No.1, relying on judgment of Gujarat High Court in the case of Sidi Muslim Jamat Bilali v. Kasamsha Hasisha Sotiayara reported as 2010(85) AIC 345 and judgment of Hon'ble Supreme Court in the case of Bollepanda P.Poonacha and another v. K.M. Madapa reported as 2008(3) R.C.R (Civil) 150, contended that counter claim cannot be filed subsequent to the filing of the written statement.

6. Having carefully considered the aforesaid contentions, I have come to the conclusion that counter claim can be filed even subsequent to the filing of the written statement, subject to the condition that cause of action for filing the counter claim should have accrued before the filing of the written statement. Consequently, counter claim fo defendant No.7-petitioner can be entertained even if the same was not included in the written statement, subject to the aforesaid condition. In this view, I am supported by judgments of this Court in the cases of Raghubir Singh (supra) and Nini Kumar Jain (supra). In those cases, judgment of Hon'ble Supreme Court namely Mahdndra Kumar v. State of M.P. reported as AIR 1987 Supreme Court 1395 (1) was also relied on. Judgment of Gujarat High Court in the case of Sidi Muslium Jamat Bilali of curse supports the contention of counsel for respondent No.1, but the same cannot be preferred over judgment of this Court referred to herein before, which also relied on judgment of Hon'ble Supreme Court in the case of Mahendra Kumar (Supra). In so far as judgment of Hon'ble Supreme Court in the case of Boilepanda P.Poonacha (supra), cited by counsel for respondent No.1 is concerned, in the said case, no such proposition of law, as sought to be canvassed

by counsel for respondent No.1, has been laid down. On the contrary, in that case, counter claim was sought to be filed after the suit had already been decreed. It was held that counter claim could not be filed after the suit had been decreed. In the said judgment, it was also observed that for filing counter claim, cause of action should have accrued before filing of the written statement. However, it was not laid down that counter claim should be filed before filing of written statement. On the contrary, in view of judgment of Hon'ble Supreme Court in the case of Mahendera Kumar (supra) also, counter claim can be filed even subsequent to filing of written statement.

7. For the reasons aforesaid, it becomes manifest that impugned order of the trial court is patently perverse and illegal, and therefore, unsustainable in the eyes of law. The instant revision petition is therefore allowed. Impugned order (Annexure P-10) passed by the trial court is set aside. Application (Annexure P-9) moved by defendant No.7-petitioner in the trial court is allowed and defendant No.7-petitioner is permitted to file counter claim in the trial court subject to the condition that cause of action to file counter claim should have accrued before filing of the written statement."

17. It is not in dispute that applicant-defendant had agreed to sell the suit land to the non-applicant-plaintiff in terms of sale agreement dated 3.6.2013 and as such, this Court, after having noticed the fact that the applicant-defendant after having received a sum of Rs.11 lacs, as part payment of sale consideration, failed to execute the sale deed within stipulated time, proceeded to pass interim order dated 30.6.2016, restraining the applicant-defendant from alienating, encumbering or selling the suit land or changing its nature in any manner, whatsoever.

18. Non-applicant-plaintiff also claimed before this Court that at the time of execution of agreement to sell dated 3.6.2013 possession of suit land was delivered, which fact was disputed by applicant-defendant by way of reply to the application. After passing of order dated 30.6.2016, an application bearing OMP No.206/2016 in Civil Suit No.43 of 2016 came to be filed on behalf of applicant-defendant praying therein for vacation of interim order dated 30.6.2016, wherein applicant-defendant, while acknowledging the factum with regard to receipt of sum of Rs.11 lacs, as part payment of sale consideration, contended that he/she is/was ready and willing to perform his/her part of agreement, but despite repeated opportunities, non-applicant-plaintiff failed to perform his part of contract within the time stipulated in the terms and condition of agreement and as such, he is not entitled for the discretionary relief of Specific Performance of Contract as well as injunction.

19. This Court, after having taken note of the pleadings and documents adduced on record by the respective parties, referred the matter to the Mediator. However, record reveals that despite readiness and willingness expressed by the applicant-defendant, non-applicant/plaintiff failed to perform his part of the agreement on one pretext or the other and as such, this Court vide order dated 6.10.2017, passed in OMP No.206 of 2016 in Civil Suit No.43 of 2016, vacated the interim order by way of passing detailed order. In the aforesaid order, this Court has specifically recorded that despite various opportunities having been afforded by this Court, plaintiff has failed to perform his part of the agreement to sell and as such, there appears to be no justification in continuing with the order dated 30.6.2016, whereby applicant-defendant has been restrained from alienating, encumbering or selling the suit land or changing its nature in any manner, rather this Court after having carefully noticed the fair stand adopted by the applicant-defendant as well as repeated

statements made by him, be it before this Court or before learned Mediator, has no hesitation to conclude that an irreparable loss would be caused to the applicant-defendant in case the interim order dated 30.6.2016 is allowed to continue.

20. At this stage, it may be noticed that applicant-defendant in his written statement has specifically stated in para-2 of reply on merits that she and her husband suffered huge loss of more than Rs.25 lacs on account of default of non-applicant/plaintiff in making the remaining sale consideration demanded by the applicant-defendant. In the same para, applicant-defendant has further mentioned that aforesaid amount has required by her and her husband for carrying out reconstruction of their old house at Delhi, which is situate at M.P-2, Moryan Enclave, Pritampura, Delhi and due to undue delay on the part of non-applicant/plaintiff construction work got delayed and prices have gone up i.e. more than 25% higher and the entire plan of the applicant-defendant and her husband has come to an end and as such she has suffered a loss of more than Rs.25 lacs and as such amount paid by the non-applicant-plaintiff as an earnest money is liable to be forfeited on account of the default by the non-applicant/plaintiff. Again in para-4 of the written statement applicant-defendant has reiterated that she has suffered a loss of more than Rs.25 lacs on account of default of non-applicant/plaintiff and as such there is no force in the argument of Shri Ajay Kumar, learned Senior Counsel representing the non-applicant/plaintiff that no cause of action, if any, has accrued to the applicant-defendant for raising counter claim, rather this Court is convinced and satisfied that the cause of action for filing the counter claim had actually accrued to the applicant-defendant before filing the written statement, as has been taken note hereinabove.

21. Another argument advanced by Mr.Ajay Kumar, learned Senior Counsel representing the non-applicant/plaintiff, that since earnest money paid by the non-applicant/plaintiff at the time of execution has been forfeited by the applicant-defendant for alleged default on the part of the non-applicant/plaintiff, there is no question of raising counter claim, is also not tenable because forfeiture, if any, of earnest money is in terms of agreement and conditions contained in agreement, whereas counter claim is being raised on account of damages on account of undue delay in making balance payment as agreed by applicant-defendant vide agreement dated 3.6.2016. The question, *"whether applicant-defendant is entitled to any sum of amount on account of damages, if any, suffered by him on account of non-payment of balance consideration by non-applicant-plaintiff"* would be decided by this Court while disposing of counter claim on merits and not in these proceedings, where only question for determination is *"whether applicant-defendant is entitled to raise counter claim for damages after filing of the written statement or not?"*

22. Mr.Sood, learned Senior Counsel representing the non-applicant-plaintiff, contended that in view of the provisions contained in Section 74 of the Indian Contract Act, 1872, which is reproduced hereinbelow, the applicant-defendant cannot be permitted to raise counter claim, as prayed for in the present petition:-

> ***"74. Compensation for breach of contract where penalty stipulated for:-***
>
> ***[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding***

the amount so named or, as the case may be, the penalty stipulated for.

Explanation.— A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]

Exception — When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the [35] [Central Government] or of any [36] [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.— A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."

23. In view of the aforesaid provisions contained in Section 74 of the Indian Contract Act, 1872 *supra,* the another argument raised by Shri Ajay Kumar, learned Senior Counsel representing the non-applicant-plaintiff, that applicant-defendant cannot be allowed to claim compensation by way of counter claim, over and above the amount so agreed in the agreement, in the event of default, by way of penalty, is also not required to be considered and decided by this Court, at this stage, because in the instant proceedings this Court is only required to determine the question, *"whether the applicant-defendant can be allowed to raise counter claim for damages after filing of written statement?".*

24. Otherwise also, as has been taken note hereinabove, applicant-defendant in her written statement has categorically stated that she has suffered damages on account of delay in payment by the non-applicant/plaintiff in terms of agreement to sell. The question, whether the applicant-defendant is entitled to sum, as claimed by way of counter claim, would be determined/decided by this Court on the basis of evidence, if any, led on record by the parties to the *lis*.

25. Hon'ble Apex Court in ***Mohinder Kumar's*** case *supra* has clearly laid down that Rule 6(A)(1) of Order VIII of CPC does not, on the face of it, bar the filing of a counter-claim by the defendant after he has filed the written statement. Under Rule 6A(1) of Order 8 CPC, a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not. Cause of action to file counter claim in the case at hand had definitely arisen before filing of the written statement and as such application at hand is maintainable and deserves to be allowed.

26. Consequently, in view of the discussion made hereinabove as well as law laid down by Hon'ble Apex Court, this application is allowed and the applicant-defendant is permitted to raise the counter claim, as prayed for, subject to affixation of requisite/prescribed Court fee in accordance with law.

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

Ashutosh Sharma ....Non-applicant-Plaintiff

Versus

Ram Lubhaya .... Applicant-Defendant

OMP No.454 of 2018 In
Civil Suit No.43 of 2016
Judgment Reserved on: 19.11.2018
Date of decision: 29.11.2018

Code of Civil Procedure, 1908- Order VIII Rules 6-A(1) and 9 - Counter claim - Filing, after submitting written statement - Whether can be maintained?- Held, counter claim can be filed after filing of written statement provided cause of action had accrued to defendant before he had delivered his defence or before expiry of time fixed for delivery of defence - On facts, defendant permitted to raise counter claim for damages on account of plaintiff's failure to pay balance sale price and get sale deed executed - Application allowed. (Paras 15, 23, 25 & 26)

Cases referred:
Mahendra Kumar and another vs. State of Madhya Pradesh and others, AIR 1987 SC 1395
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For the Plaintiff- Non-Applicant Mr.Ajay Kumar, Senior Advocate with Mr.Dheeraj K.Vashishat, Advocate.
For the Defendant- Applicant Mr.Sudhir Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.(Oral)

By way of instant application filed under Order 8 Rule 9 read with Section 151 of the Code of Civil Procedure *(for short 'CPC'),* leave/permission of this Court has been sought on behalf of the applicant-defendant to raise counter claim by way of subsequent pleading to the tune of Rs.50 lacs against the non-applicant-plaintiff.

2. Necessary facts for adjudication of the present application are that non-applicant-plaintiff filed a suit for specific performance of contract dated 3.6.2013 with respect to suit land as described in the plaint and for permanent perpetual prohibitory injunction restraining the non-applicant-defendant from transferring or alienating or changing the nature of the suit land or interfere with the possession of the plaintiff or from creating any encumbrances or charge on the suit land etc. In the alternative, non-applicant-plaintiff also prayed for decree for recovery of Rs.1,09,90,000/-

3. Defendant contested the suit having been filed by the plaintiff by way of written statement, wherein he has specifically taken plea that it was the plaintiff, who is not willing to perform the agreement dated 3.6.2013 and agreement being time bound was required to be executed on or before 2.12.2013 in any case. Defendant further averred in the written statement that on account of failure on the part of plaintiff, sale deed could not be executed within the stipulated time as per terms and conditions of the agreement, whereas, he always remained ready and willing to perform his part of the contract and also pleaded that on humanitarian ground, despite expiry of time as stipulated in agreement, he again issued legal notice to the plaintiff vide registered post dated 4.12.2013 calling upon him to register a sale deed on or before 27.12.2013, specifically indicating therein that, failing which earnest money received by him would be forfeited. Notice, referred

hereinabove, was duly received by the plaintiff, who, instead of coming forward with the remaining sale consideration, again made excuses in his reply by referring that the title deeds have not been produced, which averments are nothing but lame excuses on the part of the plaintiff to avoid the execution and registration of sale deed and to save the remaining sale consideration.

4. The applicant-defendant has further averred in the application that the applicant-defendant vide rejoinder-cum-notice dated 27.12.2013 again requested the non-applicant-plaintiff to get the title verified by referring the number of registration of the sale deed by which the applicant-defendant acquired the title of the same land and further extended the time and plaintiff was again required to execute the sale deed on or before 16.1.2014, failing which the earnest money paid by the non-applicant-plaintiff was to be forfeited. Defendant has further averred that vide order dated 9.11.2016, passed by this Court, matter was referred to the learned Mediator before whom applicant-defendant again showed his willingness to execute the sale deed. However, on 20.3.2017, matter was adjourned to 11.4.2017 to enable the plaintiff to ascertain the authenticity of the documents and thereafter further time was sought by the plaintiff to verify the documents and the matter was adjourned to 7.7.2017. On 7.7.2017, non-applicant-plaintiff was called in person by this Court and matter was again adjourned to 28.7.2017, on which date parties were directed to remain present in the Court in person on 1.9.2017.

5. Applicant-defendant has further averred that non-applicant-plaintiff took as many as nine months period for getting the sale deed executed, after institution of suit and, accordingly, this Court vide order dated 6.10.2017, passed in OMP 206/2016, vacated the interim order dated 30.6.2016, whereby applicant-defendant was restrained from alienating, encumbering or selling the suit land or changing its nature in any manner, whatsoever.

6. Applicant-defendant has further averred that from the acts and conduct of non-applicant-plaintiff, he has been put to a great loss and, as such, he is entitled to raise counter claim by way of subsequent pleadings to the tune of Rs.50 lacs on account of damages. He has averred in the application that in the written statement, having been filed by him, he has specifically pleaded that he has suffered huge loss of more than Rs.25 lacs on account of default of the non-applicant-plaintiff in making remaining sale consideration. He has further averred that applicant-defendant has suffered huge loss of more than Rs.25 lacs and hence the amount paid by the non-applicant-plaintiff is liable to be forfeited.

7. Apart from above, on account of neglected conduct of the non-applicant-plaintiff, he is also liable to pay damage on account of default which he assessed to the tune of Rs.50 lacs alongwith future interest @ 12% per annum till the actual realization of amount.

8. Applicant-defendant has averred that necessity to file the present counter claim against the non-applicant-plaintiff has arisen during the pendency of suit and even prior to filing of the written statement, but when non-applicant-plaintiff has shown his absolute neglect/indifference to the agreement dated 3.6.2013 and refused to perform his part of the contract leading to huge loss to the applicant-defendant, which fact has otherwise been pleaded in his written statement, and as such, application may be allowed and he be permitted to raise counter claim by way of subsequent pleadings.

9. Aforesaid prayer having been made by the applicant-defendant has been opposed by the non-applicant-plaintiff by way of reply, wherein averments contained in the application have been denied in toto. It has been stated in the reply that pleas being taken in the application by the applicant-defendant are self- defeating and contradictory to the

stand taken in the notices and reply to notices and the written statement. On the one hand stand of the defendant is that he had forfeited the amount of earnest money as the plaintiff allegedly failed to perform his part of the agreement and now the defendant is taking a new stand that he has allegedly suffered loss or damages on account of alleged acts of the plaintiff or alleged non performance of the agreement. It has further been averred that under the law in the matters of contract of sale of immovable property no such plea of damages is available in view of Section 74 of the Indian Contract Act.

10. I have heard learned counsel for the parties and gone through the pleadings adduced on record by the respective parties.

11. Since by way of instant application filed under Order 8 Rule 9 read with Section 151 CPC a prayer has been made by applicant-defendant to allow him to raise counter claim by way of subsequent pleadings to the tune of Rs.50 lacs on account of damages to the applicant-defendant against non-applicant-plaintiff, in view of subsequent cause of action arisen during the pendency of the suit and, as such, question of maintainability of counter claim in the given facts and circumstances of the case cannot be seen in the present proceedings, rather in the present proceedings, this Court is only required to determine, *"whether on account of subsequent development/subsequent cause of action, if any, has arisen during the pendency of the suit in favour of the applicant-defendant, entitling him to raise counter claim after filing the written statement or not".*

12. Question with regard to maintainability of counter claim would come lateron in case this Court finds/holds applicant-defendant entitled to raise counter claim on account of subsequent development/subsequent cause of action.

13. Argument, having been advanced by Shri Ajay Kumar, learned Senior Counsel representing the non-applicant-plaintiff that applicant-defendant cannot be permitted to file counter claim after filing of written statement, stands duly settled/answered by Hon'ble Apex Court in ***Mahendra Kumar and another vs. State of Madhya Pradesh and others, AIR 1987 SC 1395,*** wherein it has been categorically held that under Order VIII, Rule 6A(1) CPC, counter claim can be filed after filing of written statement, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not. The Hon'ble Apex Court in ***Mahendra Kumar's*** case *supra* has held as under:-

> ***"5. After the filing of the written statement, the appellants filed a counter-claim claiming title to the treasure. It is not necessary for us to state the basis of the claims of the parties to the treasure. The respondents Nos. 2 to 5 filed an application praying that the counter-claim should be dismissed contending that it was barred by limitation as prescribed under section 14 of the Act and that it was also not maintainable under Order VIII, Rule 6A(1) of the Code of Civil Procedure. The learned District Judge came to the finding that the counter-claim was barred by section 14 of the Act and, in that view of the matter, dismissed the counter-claim. Being aggrieved by the said order of the learned District Judge, the appellants and the said respond- ents Nos. 6 to 8 moved the High Court in revision against the same. The High Court upheld the order of the learned District Judge that the counterclaim was barred by limita- tion as prescribed by section 14 of the Act.The High Court further held that the counter-claim having been filed after the filing of the written statement, it was***

not maintainable under Order VIII, Rule 6A(1) of the Code of Civil Procedure. Hence this appeal by special leave.

15. The next point that remains to be considered is whether Rule 6A(1) of Order VIII of the Code of Civil Procedure bars the filing of a counter-claim after the filing of a written statement. This point need not detain us long, for Rule 6A(1) does not, on the face of it, bar the filing of a counter-claim by the defendant after he had filed the written statement. What is laid down under Rule 6A(1) is that a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counterclaim is in the nature of a claim for damages or not. The High Court, in our opinion, has misread and misunderstood the provision of Rule 6A(1) in holding that as the appellants had filed the counter-claim after the filing, of the written statement, the counter-claim was not maintainable. The finding of the High Court does not get any support from Rule 6A(1) of the Code of Civil Procedure. As the cause of action for the counter- claim had arisen before the filing of the written statement, the counter-claim was, therefore, quite maintainable. Under Article 113 of the Limitation Act, 1963, the period of limitation of three years from the date the right to sue accrues, has been provided for any suit for which no period of limitation is provided elsewhere in the Schedule. It is not disputed that a counter-claim, which is treated as a suit under section 3(2)(b) of the Limitation Act has been filed by the appellants within three years from the date of accrual to them of the fight to sue. The learned District Judge and the High Court were wrong in dismissing the counter-claim."

14. Placing reliance upon aforesaid judgment, Punjab and Haryana High Court in ***Mohinder Singh vs. Karnail Singh and others, (2013)5 RCR (Civil)*** has reiterated that counter claim can be filed, even subsequent to filing of the written statement, subject to the condition that cause of action for filing the counter claim should have accrued before the filing of the written statement. In the aforesaid judgment, Punjab and Haryana High Court has held that counter claim can be entertained even if the same was not included in the written statement, subject to the aforesaid condition. The Court has held as under:-

"5. Counsel for the petitioner contended that defendant No.7 was submitting his written statement by including the counter claim therein, but the trial court did not admit the counter claim of defendant No.7. Counsel for respondent No.1, however, contended that counter claim was not part of the written statement that was filed by the petitioner in the trial court. Counsel for the petitioner submitted that even if counter claim was not part of the written statement, the same can be filed even thereafter. Reliance in support of this contention has been placed on two judgments of this Court i.e. Raghubir Singh and others v. Tajinder Pal Singh and others reported as 2009(4) Civ.C.C. 755 and Nini Kumar Jain v. Neena Devi and others reported as 2006(4) R.C.R. (Civil) 770. On the other hand, counsel for respondent No.1, relying on judgment of Gujarat High Court in the case of Sidi Muslim Jamat Bilali v. Kasamsha Hasisha Sotiayara reported as 2010(85) AIC 345 and judgment of Hon'ble Supreme Court in the case of Bollepanda P.Poonacha and another v. K.M. Madapa reported

as 2008(3) R.C.R (Civil) 150, contended that counter claim cannot be filed subsequent to the filing of the written statement.

6. Having carefully considered the aforesaid contentions, I have come to the conclusion that counter claim can be filed even subsequent to the filing of the written statement, subject to the condition that cause of action for filing the counter claim should have accrued before the filing of the written statement. Consequently, counter claim fo defendant No.7-petitioner can be entertained even if the same was not included in the written statement, subject to the aforesaid condition. In this view, I am supported by judgments of this Court in the cases of Raghubir Singh (supra) and Nini Kumar Jain (supra). In those cases, judgment of Hon'ble Supreme Court namely Mahdndra Kumar v. State of M.P. reported as AIR 1987 Supreme Court 1395 (1) was also relied on. Judgment of Gujarat High Court in the case of Sidi Muslium Jamat Bilali of curse supports the contention of counsel for respondent No.1, but the same cannot be preferred over judgment of this Court referred to herein before, which also relied on judgment of Hon'ble Supreme Court in the case of Mahendra Kumar (Supra). In so far as judgment of Hon'ble Supreme Court in the case of Boilepanda P.Poonacha (supra), cited by counsel for respondent No.1 is concerned, in the said case, no such proposition of law, as sought to be canvassed by counsel for respondent No.1, has been laid down. On the contrary, in that case, counter claim was sought to be filed after the suit had already been decreed. It was held that counter claim could not be filed after the suit had been decreed. In the said judgment, it was also observed that for filing counter claim, cause of action should have accrued before filing of the written statement. However, it was not laid down that counter claim should be filed before filing of written statement. On the contrary, in view of judgment of Hon'ble Supreme Court in the case of Mahendera Kumar (supra) also, counter claim can be filed even subsequent to filing of written statement.

7. For the reasons aforesaid, it becomes manifest that impugned order of the trial court is patently perverse and illegal, and therefore, unsustainable in the eyes of law. The instant revision petition is therefore allowed. Impugned order (Annexure P-10) passed by the trial court is set aside. Application (Annexure P-9) moved by defendant No.7-petitioner in the trial court is allowed and defendant No.7-petitioner is permitted to file counter claim in the trial court subject to the condition that cause of action to file counter claim should have accrued before filing of the written statement."

15. It is not in dispute that applicant-defendant had agreed to sell the suit land to the non-applicant-plaintiff in terms of sale agreement dated 3.6.2013 and as such, this Court, after having noticed the fact that the applicant-defendant after having received a sum of Rs.11 lacs, as part payment of sale consideration, failed to execute the sale deed within stipulated time, proceeded to pass interim order dated 30.6.2016, restraining the applicant-defendant from alienating, encumbering or selling the suit land or changing its nature in any manner, whatsoever.

16. Non-applicant-plaintiff also claimed before this Court that at the time of execution of agreement to sell dated 3.6.2013 possession of suit land was delivered, which

fact was disputed by applicant-defendant by way of reply to the application. After passing of order dated 30.6.2016, an application bearing OMP No.206/2016 came to be filed on behalf of applicant-defendant praying therein for vacation of interim order dated 30.6.2016, wherein applicant-defendant, while acknowledging the factum with regard to receipt of sum of Rs.11 lacs, as part payment of sale consideration, contended that he is/was ready and willing to perform his part of agreement, but despite repeated opportunities, non-applicant/plaintiff failed to perform his part of contract within the time stipulated in the terms and condition of agreement and as such, he is not entitled for the discretionary relief of Specific Performance of Contract as well as injunction.

17. This Court, after having taken note of the pleadings and documents adduced on record by the respective parties, referred the matter to the Mediator. However, record reveals that despite readiness and willingness expressed by the applicant-defendant, non-applicant/plaintiff failed to perform his part of the agreement on one pretext or the other and as such, this Court vide order dated 6.10.2017 vacated the interim order by way of passing detailed order. In the aforesaid order, this Court has specifically recorded that despite various opportunities having been afforded by this Court, plaintiff has failed to perform his part of the agreement to sell and as such, there appears to be no justification in continuing with the order dated 30.6.2016, whereby applicant-defendant has been restrained from alienating, encumbering or selling the suit land or changing its nature in any manner, rather this Court after having carefully noticed the fair stand adopted by the applicant-defendant as well as repeated statements made by him, be it before this Court or before learned Mediator, has no hesitation to conclude that an irreparable loss would be caused to the applicant-defendant in case the interim order dated 30.6.2016 is allowed to continue.

18. At this stage, it may be noticed that applicant-defendant in his written statement has specifically stated in para-2 of reply on merits that he and his wife suffered huge loss of more than Rs.25 lacs on account of default of non-applicant/plaintiff in making the remaining sale consideration demanded by the applicant-defendant. In the same para, applicant-defendant has further mentioned that aforesaid amount has required by him and his wife for carrying out reconstruction of their old house at Delhi, which is situate at M.P-2, Moryan Enclave, Pritampura, Delhi and due to undue delay on the part of non-applicant/plaintiff construction work got delayed and prices have gone up i.e. more than 25% higher and the entire plan of the applicant-defendant and his wife has come to an end and as such he has suffered a loss of more than Rs.25 lacs and as such amount paid by the non-applicant-plaintiff as an earnest money is liable to be forfeited on account of the default by the non-applicant/plaintiff. Again in para-4 of the written statement applicant-defendant has reiterated that he has suffered a loss of more than Rs.25 lacs on account of default of non-applicant/plaintiff and as such there is no force in the argument of Shri Ajay Kumar, learned Senior Counsel representing the non-applicant/plaintiff that no cause of action, if any, has accrued to the applicant-defendant for raising counter claim, rather this Court is convinced and satisfied that the cause of action for filing the counter claim had actually accrued to the applicant-defendant before filing the written statement, as has been taken note hereinabove.

19. Another argument advanced by Mr.Ajay Kumar, learned Senior Counsel representing the non-applicant/plaintiff, that since earnest money paid by the non-applicant/plaintiff at the time of execution has been forfeited by the applicant-defendant for alleged default on the part of the non-applicant/plaintiff, there is no question of raising counter claim, is also not tenable because forfeiture, if any, of earnest money is in terms of agreement and conditions contained in agreement, whereas counter claim is being raised on

account of damages on account of undue delay in making balance payment as agreed by applicant-defendant vide agreement dated 3.6.2016. The question, *"whether applicant-defendant is entitled to any sum of amount on account of damages, if any, suffered by him on account of non-payment of balance consideration by non-applicant-plaintiff"* would be decided by this Court while disposing of counter claim on merits and not in these proceedings, where only question for determination is *"whether applicant-defendant is entitled to raise counter claim for damages after filing of the written statement or not?"*

20. Mr.Sood, learned Senior Counsel representing the non-applicant-plaintiff, contended that in view of the provisions contained in Section 74 of the Indian Contract Act, 1872, which is reproduced hereinbelow, the applicant-defendant cannot be permitted to raise counter claim, as prayed for in the present petition:-

> ***"74. Compensation for breach of contract where penalty stipulated for:-***
>
> ***[When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.***
>
> ***Explanation.— A stipulation for increased interest from the date of default may be a stipulation by way of penalty.]***
>
> ***Exception — When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the [35] [Central Government] or of any [36] [State Government], gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.***
>
> ***Explanation.— A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."***

21. In view of the aforesaid provisions contained in Section 74 of the Indian Contract Act, 1872, the another argument raised by Shri Ajay Kumar, learned Senior Counsel representing the non-applicant-plaintiff, that applicant-defendant cannot be allowed to claim compensation by way of counter claim, over and above the amount so agreed in the agreement, in the event of default, by way of penalty, is also not required to be considered and decided by this Court, at this stage, because in the instant proceedings this Court is only required to determine the question, *"whether the applicant-defendant can be allowed to raise counter claim for damages after filing of written statement?".*

22. Otherwise also, as has been taken note hereinabove, applicant-defendant in his written statement has categorically stated that he has suffered damages on account of delay in payment by the non-applicant/plaintiff in terms of agreement to sell. The question, whether the applicant-defendant is entitled to sum, as claimed by way of counter claim, would be determined/decided by this Court on the basis of evidence, if any, led on record by the parties to the *lis*.

23. Hon'ble Apex Court in ***Mohinder Kumar's*** case *supra* has clearly laid down that Rule 6(A)(1) of Order VIII of CPC does not, on the face of it, bar the filing of a counter-claim by the defendant after he has filed the written statement. Under Rule 6A(1) of Order 8 CPC, a counter-claim can be filed, provided the cause of action had accrued to the defendant before the defendant had delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not. Cause of action to file counter claim in the case at hand had definitely arisen before filing of the written statement and as such application at hand is maintainable and deserves to be allowed.

24. Consequently, in view of the discussion made hereinabove as well as law laid down by Hon'ble Apex Court, this application is allowed and the applicant-defendant is permitted to raise the counter claim, as prayed for, subject to affixation of requisite/prescribed Court fee in accordance with law. The application is disposed of.

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

Thakur Dass ....Petitioner
Versus
Sukhdev & Others ....Respondents

CMPMO No.388 of 2018
Date of decision: 05.12.2018

Specific Relief Act, 1963 - Section 34 - **Code of Civil Procedure, 1908** - Order VIII - Rule 9 – Order XXXII Rules 3, 4 & 12 - Subsequent pleadings - Additional written statement - Whether minor defendants can file additional written statement on attaining majority without repudiating stand taken by guardian *ad–litem*? – Guardian *ad-litem* admitting execution of Will set up plaintiff - Defendants on attaining majority intending to file additional written statement by averring themselves to be exclusive owner of suit property pursuant to subsequent Will - Trial court allowing application and permitting them to file additional written statement - Challenge thereto - Plaintiff contended that on attaining majority defendants cannot file additional written statement and take contrary stand than what is pleaded in written statement - Further alleging that application having been filed to fill up lacunae – Held, when a minor on attaining majority can assail alienation made by father or guardian then there is no question as to why they cannot file additional written statement and take stand contrary to what is pleaded by guardian on their behalf - Petition dismissed - Order upheld. (Paras 14 to 16 & 23)

Cases referred:

Abhishek Suresh Umbarkar vs. Prashant Vidyadharrao Deotalo and another, 2009(5) BCR 673

Kaliammal vs. G.N. Ramaswami Goundar, 1957 AIR (Madras) 629

Nishan Singh vs. Paramjit Kaur and Ors., CR No.222 of 2014, decided on 11.11.2014

Rajeev vs. Devi Narain Mathur, 1997(3) RCR (Civil) 97

S.Malla Reddy vs. Future Builders Cooperative Housing Society and Others, (2013)9 SCC 349

Shiva Kumar Singh v. Kari Singh and others, 1962 AIR (Patna) 159

Vanimisatti Anil Kumar and others v. Jayavarapu Krishna Murty and others, 1995 AIR (AP) 105

For the Petitioner :	Mr.Abhey Kaushal, Advocate.
For Respondent No.1:	Ex-parte.
For Respondents No.2 & 3:	Mr.Umesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.(Oral)

Being aggrieved and dis-satisfied with the impugned order dated 11.01.2018, passed by learned Civil Judge (Jr.Division), Court No.3, Ghumarwin, District Bilaspur, H.P., whereby an application under Section 151 of the Code of Civil Procedure *(for short 'CPC')* having been filed by the respondents-defendants No.2 & 3 *(hereinafter referred to as 'defendants No.2 & 3'),* seeking therein permission to file separate written statement came to be allowed, the petitioner-plaintiff *(hereinafter referred to as 'plaintiff')* has approached this Court in the instant proceedings filed under Article 227 of the Constitution of India, with a prayer to set aside the impugned order referred hereinabove.

2. Briefly stated facts, as emerge from the record, are that the plaintiff filed a suit under Section 34 of the Specific Relief Act for declaration to the effect that the plaintiff and defendant No.1 are co-owners in joint possession in equal share qua the share of their father Shri Munshi Ram @ Munshi in the suit land as described in the plaint on the basis of registered Will dated 23.4.1997 executed by him. Plaintiff by way of aforesaid suit also sought declaration that if any other document purporting to be Will is produced by the defendants then same be declared illegal, wrong, null and void and result of fraud, undue influence and mis-representation. Plaintiff further prayed that the defendants may be restrained from creating any charge, cutting the trees, changing the nature, alienating the land, raising any construction and getting the mutation sanctioned on the basis of the alleged Will dated 11.12.2009.

3. Aforesaid suit, having been filed by the plaintiff, came to be resisted by way of written statement, having been filed on behalf of defendants No.1 to 3 and 13, wherein defendant No.1, father of defendants No.2 and 3, who were minors at that time, admitted factum with regard to execution and registration of Will dated 23.4.1997. During the pendency of suit, referred hereinabove, defendants No.2 and 3 filed application under Section 151 CPC, seeking therein permission of Court to file their separate written statement. In the said application, defendants No.2 and 3 averred that in a suit having been filed by the plaintiff they were earlier being represented by their father, defendant No.1 Shri Sukh Dev, whose interest is adverse to their interest. They further averred in the application that after attaining the majority, they were summoned by Court to defend their case and when they engaged their counsel, it transpired that interest of defendant No.1 is with that of plaintiff, wherein he has admitted the claim of plaintiff which is against the interest of applicant. Defendants No.2 and 3 averred in the application that defendant No.1, whose interest is with the plaintiff, could not be the guardian of defendants No.2 and 3 and as such he has no right to file written statement on their behalf.

4. Plaintiff contested the aforesaid application, wherein it is stated that defendants No.2 and 3 are residing with their father defendant No.1 in joint house and as such it cannot be said that their interest is not protected by defendant No.1. Plaintiff in his reply stated that defendants No.2 and 3 are guided and misled by advise given to them for

filing this application because it is clear that they have filed the application in league with father. Plaintiff further averred that defendants were aware regarding the subject matter of suit and as such application deserves to be rejected.

5. Learned Court below, on the basis of pleadings adduced on record by respective parties, allowed the application and permitted defendants No.2 and 3 to file written statement on their own behalf. In the aforesaid background, the plaintiff has approached this Court in the instant proceedings.

6. I have heard learned counsel for the parties and gone through the material available on record.

7. Question which needs to be decided in the instant proceedings is, *"whether a minor, after attaining the age of majority, has a right to file an additional written statement, without repudiating the averments made in the written statement filed on his/her behalf by his guardian?"*

8. Mr.Tara Singh Chauhan, learned counsel representing the plaintiff, vehemently argued that it is apparent from the record that defendants No.2 and 3, being sons of defendant No.1, reside with him under one roof and as such it cannot be said that their interest is not protected by defendant No.1. He further contended that defendants No.2 and 3 had definite knowledge with regard to pendency of suit having been filed by plaintiff, wherein he, on the strength of Will dated 23.4.1997, had claimed that he and defendant No.1 are co-owners in joint possession in equal shares of the suit land, which factum was otherwise admitted by defendant No.1 in the written statement. However, defendants No.2 and 3, who enjoy cordial relations with defendant No.1, solely with a view to fill up the lacunae, which crept in the case of defendant No.1 on account of his admission made in the written statement, moved an application, seeking therein permission to file separate written statement, which could not be allowed at the belated stage.

9. Mr.Tara Singh Chauhan, further contended that otherwise also plaintiff by way of suit has already laid challenge to subsequent Will dated 11.12.2009 allegedly executed by the father of plaintiff and defendant No.1 in favour of defendants No.2 and 3 and as such no fruitful purpose would be served in case defendants No.2 and 3 are allowed to file written statement, who otherwise claim that they have acquired ownership qua the suit property on the basis of Will dated 11.12.2009, but in case impugned order passed by Court below is allowed to sustain, great prejudice would be caused to the plaintiff who is definitely benefited by admission made by defendant No.1 in his written statement with regard to execution of Will dated 23.4.1997 by late Shri Munshi Ram.

10. This Court having carefully perused material available on record vis-à-vis reasoning assigned by the learned Court below in the impugned order, is not persuaded to agree with the contention raised by Shri Tara Singh Chauhan, learned counsel representing the plaintiff, because admittedly at the time of filing of suit by the plaintiff, defendants No.2 and 3 were minor and they were being sued through their father defendant No.1. It is also not in dispute that written statement, if any, on behalf of defendants No.2 and 3 came to be filed by defendant No.1, who in his written statement admitted execution of Will dated 23.4.1997 executed by late Shri Munshi Ram in favour of the plaintiff and defendant No.1, whereas careful perusal of plaint set up by the plaintiff itself suggests that he had specifically prayed for injunction against defendants by stating that the defendants may be restrained from creating any charge, cutting the trees changing the nature, alienating the land, raising any construction and getting the mutation sanctioned on the basis of the alleged Will dated 11.12.2009, meaning thereby that the Will dated 11.12.2009, if any,

executed in favour of defendants No.2 and 3, was very much in existence at the time of filing of plaint by the plaintiff and as such it cannot be said that defendants No.2 and 3, who happened to be sons of defendant No.1, after having attained majority have sought permission of Court to file separate written statement solely with a view to defeat the claim of plaintiff, rather there appears to be considerable force in the arguments of Shri Umesh Kanwar, learned counsel representing the defendants No.2 and 3 that defendant No.1 despite having known the fact with regard to execution of Will dated 11.12.2009 in favour of defendant No.2 and 3, admitted factum of registration of Will dated 23.4.1997, whereby Munshi Ram allegedly bequeathed the suit property in favour of plaintiff and defendant No.1 causing serious prejudice to defendants No.2 and 3. Since factum with regard to execution of Will dated 11.12.2009 by late Munshi Ram in favour of defendants No.2 and 3, who at the time of filing the written statement, were minor, was in knowledge of defendant No.1, he ought not have admitted the claim of plaintiff and as such defendant No.2 and 3, after having attained majority, rightly claimed that interest of defendant No.1 is adverse to their interest and as such they are entitled to file separate written statement.

11. As per Section 3 of The Majority Act, 1875, every person domiciled in India attains the age of majority on his completing the age of eighteen years and not before and for the purpose of computing the age of any such person, the day on which he was born is to be included as a whole day and is deemed to have attained majority at the beginning of the eighteenth anniversary of that day.

12. Article 60(a) of the Limitation Act, 1963 provides a period of three years, after attaining the age of majority, to a ward to challenge any transfer of the property made by his guardian.

13. Order 8 Rule 9 of CPC provides that no pleading subsequent to the written statement of a defendant other than by way of defence to set-off or counter-claims can be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same.

14. In terms of aforesaid provisions, a minor, after attaining the age of majority, can challenge the alienations/transfers made on his behalf by his guardian within a period of 3 years and the Court can also allow additional written statement.

15. Contention put forth by Shri Tara Singh Chauhan, learned counsel appearing for the petitioner, that the defendants on attaining majority have no right to take different stand superseding the earlier written statement filed by the guardian on their behalf, cannot be accepted. Every minor has a right to repudiate any action of the guardian upon attaining the majority by way of additional written statement. He/she has certainly a right to repudiate such action and to file his/her separate written statement and his/her own defence which he may think appropriate. Reliance, as placed upon the judgment of Hon'ble Apex Court in ***S.Malla Reddy vs. Future Builders Cooperative Housing Society and Others, (2013)9 SCC 349*** by Mr.Tara Singh Chauhan, learned counsel representing the petitioner, is highly misplaced.

16. Mr.Umesh Kanwar, learned counsel representing the respondents, is right in saying that if a minor has a right to challenge the alienation made by the guardian, there is no reason why he can't resist such transfer to be effected soon after attaining majority. Similarly, when minor can file the suit after attaining the age of majority, he can also file additional written statement in terms of Order 8 Rule 9 CPC. In this regard reliance is placed upon the judgment of Punjab and Haryana High Court in case titled: ***Nishan Singh***

vs. Paramjit Kaur and Ors., CR No.222 of 2014, decided on 11.11.2014, wherein the Court has relied upon the following judgments:

1. ***Abhishek Suresh Umbarkar v. Prashant Vidyadharrao Deotalo and another, 2009(5) BCR 673;***
2. ***Rajeev V. Devi Narain Mathur, 1997(3) RCR (Civil) 97;***
3. ***Vanimisatti Anil Kumar and others v. Jayavarapu Krishna Murty and others, 1995 AIR (AP) 105;***
4. ***Kaliammal v. G.N. Ramaswami Goundar, 1957 AIR (Madras) 629; and***
5. ***Shiva Kumar Singh v. Kari Singh and others, 1962 AIR (Patna) 159.***

17. In ***Abhishek Suresh Umbarkar's*** case *(supra),* the Bombay High Court has made the following observations:-

> ***"7. The only contention that is required to be considered is whether the defendant/minor, upon attaining majority, has right to put defence which may not be in consonance with the earlier written statement. It was contended that the defendant on attaining majority has no right to take different stand superseding the earlier written statement filed by the guardian on his behalf. This contention cannot be accepted. Every minor has a right to repudiate any action of the guardian upon attaining the majority by way of additional written statement. He has certainly a right to repudiate such action and to file his separate statement and his own defence which he may think appropriate. In this case particularly the minor on attaining majority has such right. If a minor has a right to challenge the alienation made by the guardian, there is no reason why he can resist such transfer to be effected soon after attaining majority.***

18. In ***Rajeev's*** case *(supra),* following observations have been made by the Rajasthan High Court:-

> ***"8. In support of his contention advanced at the bar, learned counsel for the respondents has placed reliance upon the judgment of the Madras High Court in the matter of Verkataswami v. U.V. Vilasa Nidhi, AIR 1935 Madras 117 and in the matter of Ramakhelawan Singh v. Ganga Prasad, AIR 1937 Patna 625 and the VINOD KUMAR 2014.11.18 10:21 I attest to the accuracy and authenticity of this document Chandigarh CR No.2222 of 2014 [8] ***** judgment of this Court in the matter of Milkiyat Singh and another v. Om Prakash and others, 1995(1) WLC Raj. 191. I have gone through the ratio of the above judgments and in my opinion the ratio of the Patna High Court as well as of the Madras High Court in the aforesaid judgments are distinguishable and not applicable to this case. I am further of the opinion that the ratio of the decision of this Court in Malkiyat Singh and another v. Om Parkash and others (supra), is applicable to this case and it helps in advancing the case of the petitioner rather than that of the respondent. In the said judgment, learned Single Judge of this Court has observed with respect as to what safeguards should be adopted by the trial Court while allowing permission to file additional written statement when the minor attains the age of majority. It was guardian ad-litem, on attaining the majority pending litigation there is no prohibition or bar***

to his filing additional written statement by advancing such pleas which earlier could not be raised on his behalf by his guardian. What the Court has to safeguard is that the application for leave of the Court to file a fresh written statement should not be ordinarily declined but the Court has to see that the application has been moved bona fide and has not been moved with ulterior motives."

2. In ***Vanimisatti Anil Kumar's*** case *(supra),* the Andhra Pradesh High Court has held as under:-

> ***"20. It is settled law that, a minor, after he becomes major, is always entitled to question the transactions, done on his behalf during his minority, by his guardian, by filing a separate suit. In the instant case, the 2nd defendant attained majority during the pendency of the suit itself. Therefore, there is no illegality or irregularity in filing a separate written statement by the 2nd defendant, contrary to the averments already made by the 1st defendant in the written statement filed by him for himself and on behalf of his minor son - the 2nd defendant."***

20. In ***Shiva Kumar Singh's*** case *(supra),* the Patna High Court has observed as under:-

> ***"A minor defendant when he attains majority can file another written statement with the leave of the Court granted under Order 8, Rule 9 of the Code; but that is subject to the provisions of Order 6, Rule 17. He can also amend his written statement, but that is also subject to the provisions of Order 6 Rule 17 and to the well established principles of law in the matter of allowing amendment of pleadings."***

21. In ***Abhishek vs. Prashant Vidyadharrao Deotale and Others, Writ Petition No.5350 of 2008, decided on 09.07.2009***, the High Court of Judicature at Bombay Nagpur Bench at Nagpur has held as under:-

> ***"6. In the decision reported in AIR 1935 Madras-117 Venkataswami Naidu vs. U. V. Vilasa Nidhr Ltd. the Madras High Court held that a minor defendant is not entitled on attaining majority to put in additional written statement without leave of Court. It is therefore obvious that with the leave of the Court, minor defendant is allowed to file separate written statement. Such a leave has already been granted and against that part of the order the plaintiff has not preferred any revision or writ petition. That part, therefore, assumes finality and the said part therefore need not be interfered into.***
>
> ***7. The only contention that is required to be considered is whether the defendant-minor upon attaining majority, has right to put defence which may not be in consonance with the earlier written statement. It was contended that the defendant on attaining majority has no right to take different stand superseding the earlier written statement filed by the guardian on his behalf. This contention cannot be accepted. Every minor has a right to repudiate any action of the guardian upon attaining the majority by way of additional written statement. He has certainly a right to repudiate such action and to file his separate statement and his own defence which he may think appropriate. In***

this case particularly the minor on attaining majority has such right. If a minor has a right to challenge the alienation made by the guardian, there is no reason why he can resist such transfer to be effected soon after attaining majority."

22. Reliance is also placed upon the judgment passed by Hon'ble Supreme Court in ***Vanimisatti Anil Kumar and Others vs. Jayavarapu Krishna Murty and Others, AIR 1995 AP 105,*** wherein the Hon'ble Apex Court has held as under:-

> ***"20. It is settled law that, a minor, after he becomes major, is always entitled to question the transactions, done on his behalf during his minority, by his guardian, by filing a separate suit. In the instant case, the 2nd defendant attained majority during the pendency of the suit itself. Therefore, there is no illegality or irregularity in filing a separate written statement by the 2nd defendant, contrary' to the averments already made by the 1st defendant in the written statement filed by him for himself and on behalf of his minor son -- the 2nd defendant. The learned counsel for the plaintiffs/respondents, relying upon the provisions of Order VI, Rule 17, Civil Procedure Code, viz., -- "no pleading shall, except by way of amendment raise any new ground to claim or contend any allegation of fact inconsistent with the previous pleadings of the party pleading the same"--, contended that the contrary pleas taken by the 2nd defendant in his subsequent written statement filed, have to be ignored. Order VI, Rule 17, C.P.C. will apply to a case where a separate written statement is sought to be filed by the same defendant contrary to the averments already made by him in the earlier or previous written statement. The provisions of O. VI, R. 17, C.P.C. will not apply to the case of a minor filing a separate written statement, on attaining majority. As stated already, the minor can, after his attaining majority, within the time prescribed, question the transactions done by his guardian on his behalf, during his minority. Therefore, I hold that there is no illegality or irregularity in filing a separate written statement by the 2nd defendant on his attaining majority, contrary to the averments already made on his behalf, by his guardian --the 1st defendant, in the earlier written statement."***

23. It is quiet apparent from the aforesaid exposition of law that if a minor has a right to repudiate any action of his guardian upon attaining the age of majority by filing a suit within a period of 3 years, he would certainly have a right to take extra pleadings after attaining the age of majority which were not taken by the Court Guardian/Guardian due to ignorance and which could adversely affect the interest of such a person who could not plead his case on his own due to his legal disability at that time.

24. Consequently, in view of the detailed discussion made hereinabove as well as law laid down *supra*, the question, formulated above, is answered accordingly. This petition is dismissed and impugned order dated 11.01.2018 passed by Court below is upheld.

25. Learned counsel representing the parties to appear before the Court below on ***28.12.2018***. Record, if any, of Court below be sent back forthwith.

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

****

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

CWP Nos.2061 of 2018 alongwith CWP 2292 of 2018
Order Reserved on: 26.11.2018
Date of decision: 12.12.2018

1. CWP No.2061 of 2018
Shri S.C. Kainthla ....Petitioner
Versus
State of H.P. & Others ....Respondents

2. CWP No.2292 of 2018
Shri Rajeev Bhardwaj ....Petitioner
Versus
State of H.P. & Others ....Respondents

Constitution of India, 1950 - Articles 14 , 16 & 226 - Writ jurisdiction - Dispute regarding inter-se seniority of judicial officers – Plea seeking recusal of Hon'ble Judge of Bench from hearing matter – Sustainability - Private respondents seeking recusal of Hon'ble Judge of Bench from hearing writ of petitioners on ground that Hon'ble Judge was member of Judges Committee and author of report, petitioners praying implementation of – Facts revealing that Hon'ble Judges Committee was constituted by Hon'ble Chief Justice pursuant to directions of Hon'ble Supreme Court asking High Court to determine inter-se seniority of officers as per 34 point roster keeping in view of various judgments given in **'All India Judges Association Case'** - Committee's report accepted by Hon'ble Full Court and only then filed before Supreme Court – Representations and objections of private respondents kept alive by Hon'ble Judges Committee and Hon'ble Full Court – Committee's report strictly in accordance with directions of Hon'ble Supreme Court - However, no adjudication made by Apex Court qua report submitted before it on behalf of High Court - **Held, (As Per Hon'ble Shri Justice Sandeep Sharma)** though no independent view was expressed by members of Judges Committee and logic given by private respondents for recusal was equally applicable to every Hon'ble Judge of High court being part of that Full Court which accepted Judges Committee's report yet justice should not only be done but should manifestly and undoubtedly be seem to be done – Judges recuse from hearing case in order to uphold credibility and integrity of institution - Hon'ble Judge recused from hearing case - Registry directed to place matter before Hon'ble Chief Justice for constitution of fresh Bench. (Paras 12-15 & 33)

Constitution of India, 1950- Article 226 - Writ jurisdiction – Recusal of Judge - Need to disclose reasons - Held, litigants would also like to know why Judge recused from hearing case or did not recuse to hear despite request – As such reasons are required to be indicated broadly. (Para 30)

Constitution of India, 1950- Article 226 - Writ jurisdiction – Recusal of Judge – Impartiality - Held, impartiality is essential to proper discharge of judicial office - It applies not only to decision itself but also to process by which decision is made - A Judge shall disqualify himself from participating in any proceeding in which he is unable to decide

matter impartially or in which it may appear to reasonble observer that Judge is unable to decide matter impartially. (Para 28)

Constitution of India, 1950- Article 226 - Writ jurisdiction – Recusal of Judge - Bias- Test for determination - Held, to disqualify person from adjudicating on ground of interest in subject matter of *lis*, test of real likelihood of bias is to be applied - Issue of bias is to be seen from angle of reasonable objective and informed person - It is his apprehension that is of paramount importance. (Paras 25 & 26)

Cases referred:

All India Judges' Association and Others vs. Union of India and Others (2002)4 SCC 247

All India Judges' Association and Others vs. Union of India and Others (2010)15 SCC 170

Direct Recruit Class-II Engineering Officers Association vs. State of Maharashtra 1990(2) SCC 715

P.D. Dinakaran (I) vs. Judges Inquiry Committee and Others, (2011)8 SCC 380

Sujasha Mukherji vs. High Court of Calcutta through Registrar and Others, (2015)11 SCC 395

Supreme Court Advocates-on-Record Association and another vs. Union of India (Recusal Matter), (2016)5 SCC 808

For the Petitioner:	Mr.Shrawan Dogra, Senior Advocate with Ms.Nishi Goel, Advocate in CWP No.2061 of 2018 and Mr.R.K. Bawa, Senior Advocate with Mr.Prashant Kumar Sharma, Advocate in CWP No.2292 of 2018.
For Respondent No.1:	Mr.Vinod Thakur, Additional Advocate General with Mr.Bhupinder Thakur, Deputy Advocate General.
For Respondent No.2:	Ms.Shalini Thakur, Advocate.
For Respondents 3 & 4:	Mr.R.L. Sood, Senior Advocate with Mr.Arjun Lall, Advocate.
For Respondents 5 & 6:	Mr.B.C. Negi, Senior Advocate with Mr.Pranay Pratap Singh. Advocate.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.

Initially, on 5th September, 2018 cases captioned hereinabove came to be listed before a Bench comprising of Justice Dharam Chand Chaudhary and Justice Vivek Singh Thakur, JJ., however, on that day Justice Vivek Singh Thakur, J. recused. Careful perusal of subsequent orders dated 13.9.2018 and 14.9.2018 passed by Division Bench suggest that two Hon'ble Judges; namely; Justice Chander Bhushan Barowalia and Justice Ajay Mohan Goel, JJ. have also recused.

2. On 2nd November, 2018, matter came to be listed before this Division Bench. However, on that day learned counsel representing respondents No.3 and 4 stated that his clients have exception to this matter being heard by one of us *(Justice Sandeep Sharma,J.)* because the petitioners have not only relied upon the report, co-authored by him, but, have also sought implementation of the same.

3. On 16th November, 2018, learned counsel representing respondents No.3 and 4 again reiterated his aforesaid submission and accordingly this Court directed him to file written objections, if any, to this effect. Pursuant to aforesaid order, aforesaid respondents

have filed their affidavits, which are verbatim same. It would be profitable to take note of contents of one of the affidavits.

4. In the aforesaid affidavits respondents have stated that Hon'ble Mr.Justice Vivek Singh Thakur and Hon'ble Mr.Justice Sandeep Sharma *(for short 'Judges Committee'),* had prepared/authored the report Annexure P-12 in question, knowing fully well that the same was to be considered for its judicial correctness and applicability by the Hon'ble Apex Court, in terms of ***order dated 28.4.2016, passed by the Hon'ble Apex Court in I.A. No.334 of 2014 in Writ Petition (Civil) No.1022 of 1989, titled: All India Judges Association & Others vs. Union of India & Others*** and as such it cannot be said that aforementioned report authored by Hon'ble Judges Committee is a mere exercise on Administrative side, rather said report is result of judicial scrutiny and application of the minds of the Members of the Hon'ble Judges Committee. Respondents have stated in the aforesaid affidavits that there is reasonable apprehension in their minds that they may not be able to persuade me *(Justice Sandeep Sharma)* to change my mind and thereafter return a judicial finding, which is not in consonance with the judicial conclusions already reached by the Hon'ble Judges Committee in the report Annexure P-12 in question.

5. Mr.R.L. Sood, learned Senior Counsel representing respondents No.3 and 4, while inviting the attention of this Court to para-9 of affidavit, which has otherwise been taken note hereinabove, contended that though deponents have complete and absolutely firm faith, and believes in the fairness in the present Bench, but since one of us *(Justice Sandeep Sharma,J.)* has authored report Annexure P-12, which is being relied upon by the petitioners, it would be in the interest of justice in case *Justice Sandeep Sharma,J.* recuses from hearing the case. While referring to the report Annexure P-12, Mr.Sood made a serious attempt to persuade this Court to agree with this contention that Hon'ble Members of Committee, while furnishing its report in continuance to orders passed by Hon'ble Apex Court, has not merely decided claims and counter claims of parties rather has returned categorical findings in terms of directions issued by Hon'ble Apex court on 28.4.2016 in I.A. No.334 of 2014 in Writ Petition (Civil) No.1022 of 1989.

6. Mr.Sood further contended that perusal of specific reference made to Hon'ble Judges Committee for adjudication itself suggests that report Annexure P-12 is result of judicial scrutiny, based upon judgments passed by Hon'ble Apex Court in ***All India Judges' Association and Others vs. Union of India and Others (2002)4 SCC 247*** and ***All India Judges' Association and Others vs. Union of India and Others (2010)15 SCC*** *170 (for short 'All India Judges Association')* and as such it would not be proper and in the interest of justice in case, cases at hand are heard and decided by a Bench in which one of us *(Justice Sandeep Sharma,J.)* is a Member.

7. Mr.Sood, while referring to the report Annexure P-12 submitted by Hon'ble Judges Committee, also contended that Committee has held petitioners senior to respondents No.2 and 3, while interpreting judgment laid down by Hon'ble Apex Court in ***All India Judges Association's*** case *(supra)* and as such it can be easily interferred and presumed that Justice Sharma, being a Member of that Committee, has/had formed a definite opinion with regard to claim of seniority, which is cause of dispute *interse* between parties. He further contended that since Justice Sharma has already formed an opinion, being a Member of Committee in favour of one of the parties, the respondents, who are definitely aggrieved of the report Annexure P-12, cannot be presumed to have unreasonable apprehension in their mind with regard to bias, rather they are well within their rights to contend that since Justice Sharma, being Member of the Committee, has already applied his mind and arrived at one decision, they may not be able to persuade him to change his mind.

8. Lastly, Mr.Sood contended that since Justice Sandeep Sharma has given report Annexure P-12 alonwith Justice Vivek Singh Thakur, who has already recused, he would be pre-determined to hold the same to be valid and legal. In support of his contention, Mr.Sood placed reliance upon the judgments of Hon'ble Supreme Court in ***P.D. Dinakaran (I) vs. Judges Inquiry Committee and Others, (2011)8 SCC 380, Sujasha Mukherji vs. High Court of Calcutta through Registrar and Others, (2015)11 SCC 395*** and ***Supreme Court Advocates-on-Record Association and another vs. Union of India (Recusal Matter), (2016)5 SCC 808.***

9. After having heard learned counsel appearing for the parties and perused affidavits filed by the respondents, we reserved the order on the question, ***"Whether one of Members of the present Bench i.e. Justice Sandeep Sharma,J. should recuse from hearing the present petition for the reasons that he was Member of Judges Committee, which gave the report Annexure P-12?***

10. It may be noticed here that since the question of recusal pertains to me *(Justice Sandeep Sharma),* I proceed to pass instant order to answer the same, in view of the aforesaid submissions made by the learned counsel appearing for the parties.

11. Before deliberating upon the question framed hereinabove it may be noticed that the then Chief Justice vide order dated 12th August, 2016/4th October, 2016 constituted Committee of Justice Vivek Singh Thakur and Justice Sandeep Sharma to submit report in compliance of directions issued by Hon'ble Apex Court on 28.4.2016 in I.A. No.334 of 2014 in Writ Petition (Civil) No.1022 of 1989, wherein Hon'ble Apex Court passed following order:-

> ***"Having regard to the specific direction of this Court in the judgment referred to above in Paragraph 23, we are of the view that it is required to ascertain as to how the 34 point roster for the three different channels are to be worked out. The High Court is, therefore, directed to apply Rule-13 which prescribes as to how seniority to be drawn by applying the said Rules, ascertain the roster point for the three different categories of promotees and direct recruits and carry out the said exercise from 31.03.2003."***

12. It is also matter of record that pending consideration matter before Committee, representations having been filed by the direct recruits judicial officers (respondents herein) were also referred to the Committee by Hon'ble Acting Chief Justice which were taken into consideration by the Committee before giving its final report Annexure P-12. It is also matter of record that before report could be filed by aforesaid Committee, Hon'ble Apex Court passed order dated 25.4.2017 in IA Nos.334, 345 of 2014 & 2 of 2016 in IA No.334 of 2014 in Writ Petition (Civil) No.1022 of 1989, titled: All India Judges Asson. & Ors. vs. Union of India & Ors. which reads:-

> ***"Having heard learned counsel for the parties, we request the High Court to submit the report through the counsel by second week of July, 2017. Needless to emphasize, the report of the Committee shall be in consonance with the principal judgments i.e. All India Judges' Association and Others vs. Union of India and Others (2002)4 SCC 247 and All India Judges' Association and Others vs. Union of India and Others (2010)15 SCC 170. We are sure that the High Court shall analyze the judgments and submit the report which will be in accord with both the judgments. When we say in accord with the judgments, the High Court will appreciate both the verdicts in letter and spirit."***

13. Vide aforesaid order, Hon'ble Apex Court observed that Committee would analyze the judgments passed by Hon'ble Apex Court in ***All India Judges' Association's*** cases *(supra)* and submit the report which will be in accord with both the judgments. Hon'ble Apex Court categorically stated that when we say in accord with the judgments, the High Court will appreciate both the verdicts in letter and spirit.

14. Though careful perusal of report Annexure P-12 itself suggests that entire exercise has been done by the Committee in terms of direction contained in judgment rendered by Hon'ble Apex Court in ***All India Judges Association's*** case *(supra)*. While specifically dealing with the representations having been filed by direct recruits (respondents herein) all the legal questions were left open to be decided by the Hon'ble Apex Court in the pending litigation. Committee, in its report Annexure P-12, while referring to the contentions raised by direct recruits (respondents herein) supported by various legal pronouncements, has categorically observed that the scope of present exercise is limited to the extent of preparation of report, drawing seniority of three different categories of promotees and direct recruits and to carry out the said exercise w.e.f. 31st March, 2003, however, it is for the Hon'ble Apex Court to consider legal proposition raised by direct recruits while passing further orders as to the implementation of this report. If report Annexure P-12 in question is read in its entirety, it clearly reveals that Committee gave its report as per reference made to it, whereby it was called upon to ascertain as to how the 34 point roster of the three different channels are to be worked out. Hon'ble Apex Court directed High Court to apply Rule 13 which prescribes as to how seniority is to be drawn by applying the said rule ascertaining the roster point of three different categories of the promotees and direct recruits and accordingly Committee carried out the said exercise w.e.f. 31st March, 2013. No doubt, subsequently, vide order dated 25.4.2017 Hon'ble Apex Court observed that High Court shall analyze the judgment passed by it in ***All India Judges Association's*** case *(supra)* and submit the report, which shall be in strict accord with both the judgments and hence it can be said that the endeavour has been made by the Committee to give its report in consonance with the judgments passed by Hon'ble Apex Court in ***All India Judges Association's*** case *(supra)*

15. It is not in dispute that the report submitted by Committee came to be accepted by Full Court of this High Court and was subsequently submitted before Hon'ble Apex Court, who had actually vide order dated 9.10.2017 directed High Court to file comprehensive affidavit with regard to the decision taken by the High Court, and also indicate whether the decision taken by the High Court is in consonance with the judgments rendered by this Court in ***All India Judges Association's*** case *(supra)***.** However, fact remains that vide subsequent order dated 13.3.2018 passed in I.A. No.334 of 2014 in Writ Petition (Civil) No.1022 of 1989, Hon'ble Apex Court declined to entertain the said I.A. and observed that:-

> ***"I.A. No.334 of 2014 in WP (C) No.1022/1989***
>
> ***This issue raised in I.A. No.334 of 2014 in Writ Petition (Civil) No.1022/1989, as it appears to us from the materials on record, relates to the dispute inter se between the individuals/groups, which, in our considered view, would not be appropriate for determination by this Cort in an I.a. (No.334 of 2014) filed in W.P.(C No.1022/1989 (all India Judges Association & Ors. Vs. Union of India & Ors.). We, therefore, decline to entertain the I.A. any further leaving the parties to have resort to such remedies as may be available to them in law.***
>
> ***I.A. No.334 of 2014 in Writ Petition (Civil) No.1022/1989 is disposed of in the above terms."***

16. In the aforesaid background, petitioners have approached this Court in the instant proceedings praying therein for the following main relief(s):-

> ***"(i) Create the cadre of Civil Judge Senior Division w.e.f. 1.7.1996 in accordance with the directions of the Hon'ble Supreme Court of India in All India Judges' Association and Others Vs. Union of India and Others (2002)4 SCC 247 and I.A. no.334 of 2014 in Writ Petition (Civil) dated 28.04.2016 and to grant consequential benefits to the petitioner;***
>
> ***(ii) follow the post-based roster w.e.f 31.3.2013 by following the report of the Hon'ble Judges Committees and declare the petitioner senior to Respondents no.3 & 4 and to grant all consequential benefits to the petitioner, including considering him for elevation as Judge of High Court by placing relevant material before the competent authority.***
>
> ***(iii) quash the seniority/gradation lists circulated w.e.f. 1.1.2005 onwards particularly gradation list Annexure P-16 circulated on 18.1.2018 showing petitioner junior to respondents No.3 and 4, as being contrary to the directions of the Hon'ble Supreme Court of India in All India Judges Association Case (Surpa) and H.P. Judicial Services Rules, 2004."***

17. From the aforesaid given scenario, it is quiet apparent that there is no finding, if any, given by Hon'ble Apex Court, qua the report Annexure P-12 given by the Committee, which has otherwise been accepted by Full Court of this High Court. It is also not in dispute that this Court, by way of an affidavit in compliance to order dated 9.10.2017 submitted to Hon'ble Apex Court, has stated that the Committee has carried out exercise in terms of judgment passed by Hon'ble Apex Court in ***All India Judges Association's*** case *(supra),* however, in para-5 of the aforesaid affidavit (which is available at page No.231 of the present writ petition) High Court has categorically stated that the direct recruits (respondents herein) had relied upon judgment rendered by the five Hon'ble Judges' Bench of the Hon'ble Apex Court in ***Direct Recruit Class-II Engineering Officers Association vs. State of Maharashtra 1990(2) SCC 715*** and other judgments also, however, the said judgments were not considered by the Committee as it was beyond its competence and purview to go into such questions, especially in light of the aforesaid directions of the Hon'ble Apex Court.

18. Now, in the aforesaid background, question which needs to be decided is that *"whether I (Justice Sandeep Sharma), who was Member of Committee who gave report Annexure P-12 in terms of direction issued by Hon'ble Apex Court, should hear present lis or not?.*

19. One thing is quiet apparent from the discussion made hereinabove that entire exercise done by the Committee is strictly in terms of orders dated 28.4.2016 and 25.10.2017 passed by Hon'ble Apex Court in I.A. No.334 of 2014 in Writ Petition (Civil) No.1022/1989, whereby specific direction was issued to this High Court to carry out certain exercise in terms of para-23 of judgment rendered by Hon'ble Apex Court in ***All India Judges Association's*** case *(supra).* Hence, it can be said that while giving effect to judgment passed by Hon'ble Apex Court in ***All India Judges Association's*** case *(supra),* Committee, while submitting its report in terms of orders dated 28.4.2016 and 25.10.2017, has certainly interpreted the judgment in its own wisdom. It is also not in dispute, rather matter of record, that respondents, who were afforded an opportunity of being heard, had cited certain judgments before Committee to distinguish judgment passed by Hon'ble Apex

Court in ***All India Judges Association's*** case *(supra),* but those were not considered and taken into consideration on the ground that since specific reference has been made to the Committee, Committee is not competent to go beyond the same.

20. Truly speaking, Committee interpreted judgment to the best of its ability and then submitted its report, as a result whereof respondents, who were objected to the matter being heard by me *(Justice Sandeep Sharma),* would become junior to the petitioners, in case report is given effect to. No doubt, report submitted by Committee stands accepted by Full Court of this High Court, but at the same time Hon'ble Apex Court, while disposing of *I.A. No.334 of 2014 in Writ Petition (Civil) No.1022/1989, titled All India Judges Association and Others vs. Union of India and Others*, in which Committee was ordered to be constituted, observed that keeping in view the dispute *interse* between parties, same cannot be decided in the instant proceedings and as such it declined to entertain the I.A., leaving the parties to have resort to such remedies as may be available to them as per law, meaning thereby there is no adjudication, if any, by the Hon'ble Apex Court qua the correctness of report, which was otherwise called by Hon'ble Apex Court.

21. There is another aspect of the matter that report filed by Committee stands accepted by this Court and implementation thereof is being sought for by the petitioner in the instant petition. Since the Hon'ble Apex Court has not rendered any adjudication qua the claim of petitioners, wherein they had claimed that they are liable to be treated senior to the respondents in view of judgment rendered by Hon'ble Apex Court in ***All India Judges Association's*** case *(supra)*, this Court would be necessarily obliged/required to go into that question in the instant proceedings.

22. At the cost of repetition, it may be observed that though I am of the view that the Committee in its wisdom has attempted to give report in accordance with the judgment rendered in ***All India Judges Association's*** case *(supra)* and no independent view has been expressed by the Members of the Committee qua the dispute *interse* between parties, but solely with a view to uphold the principle i.e. justice should not only be done, but should manifestly and undoubtedly be seen to be done, I deem it fit not to hear the matter, in view of the affidavits having been filed by the respondents coupled with the fact that the only other Member of the Committee Justice Vivek Singh Thakur,J. has already recused from the matter.

23. When my recusal was sought from the Bench on 2.11.2018, I had expressed unequivocally to my elder brother that I have no desire to hear the matter, but, at that time one thing which bothered me was that once report submitted by Committee stands already accepted/ratified by Full Court, my recusal from the case may not be the solution because argument, as is being applied in my case, if is accepted, no other Judge would be eligible to hear the case. However, on my persuasion my elder brother ordered the matter to be placed before Hon'ble the Chief Justice, who again persuaded me to hear the matter. On 16th November, 2018, on which date objection to hear the matter by me came on record by way of affidavits, though for the reasons recorded hereinabove, I would have recused then and there, but I thought it proper to pass reasoned order for recusal because definitely one of the reasons for recusal of a Judge is that litigant/the public might entertain a reasonable apprehension about his impartiality. It is always in order to uphold the credibility, integrity of the institution, the Judge recuses himself from hearing the case.

24. A Judge, while assuming office, takes an oath as prescribed under Schedule III to the Constitution of India, that:-

"…. I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill will and that I will uphold the Constitution and the laws,"

While having taken oath, as referred hereinabove, a Judge is always expected to discharge his duties without fear or favour, affection or ill will. It is only desirable, if not proper, that a Judge, for any unavoidable reason like some pecuniary interest, affinity or adversity with the parties in the case, direct or indirect interest in the outcome of the litigation family directly involved in litigation on the same issue elsewhere, the Judge being aware that he or someone in his immediate family has an interest, financial or otherwise that could have a substantial bearing as a consequence of the decision in the litigation, etc. to recuse himself from the adjudication of a particular matter. It would be profitable to take note of judgment rendered by Hon'ble Apex Court ***in P.D. Dinakaran (I) vs. Judges Inquiry Committee and others, (2011)8 SCC 380,*** wherein the Hon'ble Court has held as under:-

"42. A pecuniary (bias) interest, however small it may be, disqualifies a person from acting as a Judge. Other types of bias, however, do not stand on the same footing and the Courts have, from time to time, evolved different rules for deciding whether personal or official bias or bias as to subject matter or judicial obstinacy would vitiate the ultimate action/order/decision.

50. It is, of course, clear that any direct pecuniary or proprietary interest in the subject-matter of a proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias. What interest short of that will suffice?

57. It is, thus, evident that the English Courts have applied different tests for deciding whether non-pecuniary bias would vitiate judicial or quasi judicial decision. Many judges have laid down and applied the `real likelihood' formula, holding that the test for disqualification is whether the facts, as assessed by the court, give rise to a real likelihood of bias. Other judges have employed a `reasonable suspicion' test, emphasizing that justice must be seen to be done, and that no person should adjudicate in any way if it might reasonably be thought that he ought not to act because of some personal interest.

60. The five members of the Bench speaking through Gleeson, C.J., referred to the test applied in Australia in determining whether a Judge was disqualified by reason of the appearance of bias, i.e. whether a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial and unprejudiced mind to the resolution of the question require to be decided and gave the following reasons for making a departure from the test applied in England:

"That test has been adopted, in preference to a differently expressed test that has been applied in England, for the reason that it gives due recognition to the fundamental principle that justice must both be done, and be seen to be done. It is based upon the need for public confidence in the administration of justice. "If

fair-minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision." The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is "a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial"."

71. The principles which emerge from the aforesaid decisions are that no man can be a Judge in his own cause and justice should not only be done, but manifestly be seen to be done. Scales should not only be held even but it must not be seen to be inclined. A person having interest in the subject matter of cause is precluded from acting as a Judge. To disqualify a person from adjudicating on the ground of interest in the subject matter of lis, the test of real likelihood of the bias is to be applied. In other words, one has to enquire as to whether there is real danger of bias on the part of the person against whom such apprehension is expressed in the sense that he might favour or disfavour a party. In each case, the Court has to consider whether a fair minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially. To put it differently, the test would be whether a reasonably intelligent man fully apprised of all the facts would have a serious apprehension of bias. In cases of non-pecuniary bias, the `real likelihood' test has been preferred over the `reasonable suspicion' test and the Courts have consistently held that in deciding the question of bias one has to take into consideration human probabilities and ordinary course of human conduct. We may add that real likelihood of bias should appear not only from the materials ascertained by the complaining party, but also from such other facts which it could have readily ascertained and easily verified by making reasonable inquiries.

74. It is not in dispute that respondent No.3 participated in the seminar organised by the Bar Association of India of which he was Vice-President. He demanded public inquiry into the charges levelled against the petitioner before his elevation as a Judge of this Court. During the seminar, many eminent advocates spoke against the proposed elevation of the petitioner on the ground that there were serious allegations against him. Thereafter, respondent No.3 drafted a resolution opposing elevation of the petitioner as a Judge of this Court. He along with other eminent lawyers met the then Chief Justice of India. These facts could give rise to reasonable apprehension in the mind of an intelligent person that respondent No.3 was likely to be biased. A reasonable, objective and informed person may say that respondent No.3 would not have opposed elevation of the petitioner if he was not satisfied that there was some substance in the allegations levelled against him.

75. It is true that the Judges and lawyers are trained to be objective and have the capacity to decipher grain from the chaff, truth from the falsehood and we have no doubt that respondent No.3 possesses these qualities. We also agree with the Committee that objection by both sides perhaps "alone apart from anything else is sufficient to confirm his impartiality". However, the issue of bias of respondent No.3 has not to be seen from the view point of this Court or for that matter the Committee. It has to be seen from the angle of a reasonable, objective and informed person. What opinion he would form! It is his apprehension which is of paramount importance. From the facts narrated in the earlier part of the judgment it can be said that petitioner's apprehension of likelihood of bias against respondent No.3 is reasonable and not fanciful, though, in fact, he may not be biased."

25. In nutshell, what emerges from the aforesaid judgment is that while determining whether non-pecuniary bias would vitiate judicial or quasi judicial decision, one should rely a `reasonable suspicion' test emphasizing that justice must be seen to be done, and that no person should adjudicate in any way if it might reasonably be thought that he ought not to act because of some personal interest. Another principle, which emerge from the aforesaid judgment, which has otherwise taken note of, is that no man can be a Judge in his own cause and justice should not only be done, but manifestly be seen to be done. Scales should not only be held even but it must not be seen to be inclined. A person having interest in the subject matter of cause is precluded from acting as a Judge. To disqualify a person from adjudicating on the ground of interest in the subject matter of lis, the test of real likelihood of the bias is to be applied. Hon'ble Apex Court has held in the aforesaid judgment that one has to enquire as to whether there is real danger of bias on the part of the person against whom such apprehension is expressed in the sense that he might favour or disfavour a party.

26. Though in the aforesaid judgment Hon'ble Apex Court has categorically held that the Judges and lawyers are trained to be objective and have the capacity to decipher grain from the chaff, truth from the falsehood. However, the issue of bias is to be seen from the angle of reasonable, objective and informed person. What opinion he would form! It is his apprehension which is of paramount importance.

27. Recently, Hon'ble Apex Court had an occasion to deal with similar situation in a case title ***Supreme Court Advocates-on-Record Association and Another vs. Union of India (Recusal Matter), (2016)5 SCC 808,*** wherein Hon'ble Apex Court decided the issue and laid down certain guidelines, relevant portions of the judgment are reproduced hereinbelow:-

"10. It is one of the settled principles of a civilised legal system that a Judge is required to be impartial. It is said that the hallmark of a democracy is the existence of an impartial Judge.

11. It all started with a latin maxim Nemo Judex in Re Sua which means literally – that no man shall be a judge in his own cause. There is another rule which requires a Judge to be impartial. The theoretical basis is explained by Thomas Hobbes in his Eleventh Law of Nature. He said:

> ***"If a man be trusted to judge between man and man, it is a precept of the law of Nature that he deal equally between them. For without that, the controversies of men cannot be determined but by***

war. He therefore, said that is partial in judgment doth what in him lies, to deter men from the use of judges and arbitrators; and consequently, against the fundamental law of Nature, is the cause of war."

12. Grant Hammond, a former Judge of the Court of Appeal of New Zealand and an academician, in his book titled "Judicial Recusal" (R.Grant Hammond, Judicial Recusal: Principles, Process and Problems (Hart Publishing, 2009) traced out principles on the law of recusal as developed in England in the following words :-

> ***"The central feature of the early English common law on recusal was both simple and highly constrained: a judge could only be disqualified for a direct pecuniary interest. What would today be termed 'bias', which is easily the most controversial ground for disqualification, was entirely rejected as a ground for recusal of judges, although it was not completely dismissed in relation to jurors.***
>
> ***This was in marked contrast to the relatively sophisticated canon law, which provided for recusal if a judge was suspected of partiality because of consanguinity, affinity, friendship or enmity with a party, or because of his subordinate status towards a party or because he was or had been a party's advocate."***

He also pointed out that in contrast in the United States of America, the subject is covered by legislation.

13. Dimes v. Grand Junction Canal, (1852) 10 ER 301, is one of the earliest cases where the question of disqualification of a Judge was considered. The ground was that he had some pecuniary interest in the matter. We are not concerned with the details of the dispute between the parties to the case. Lord Chancellor Cottenham heard the appeal against an order of the Vice-Chancellor and confirmed the order. The order went in favour of the defendant company. A year later, Dimes discovered that Lord Chancellor Cottenham had shares in the defendant company. He petitioned the Queen for her intervention. The litigation had a long and chequered history, the details of which are not material for us. Eventually, the matter reached the House of Lords. The House dismissed the appeal of Dimes on the ground that setting aside of the order of the Lord Chancellor would still leave the order of the Vice-Chancellor intact as Lord Chancellor had merely affirmed the order of the Vice-Chancellor. However, the House of Lords held that participation of Lord Cottenham in the adjudicatory process was not justified. Though Lord Campbell observed: (Dimes case, ER p.315)

> ***"...No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern: but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest***
>
> ***.... This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal***

interest, but to avoid the appearance of labouring under such an influence."

14. Summing up the principle laid down by the abovementioned case, Hammond Op cit fn 5 observed as follows:

> ***"The 'no-pecuniary interest' principle as expressed in Dimes requires a judge to be automatically disqualified when there is neither actual bias nor even an apprehension of bias on the part of that judge. The fundamental philosophical underpinning of Dimes is therefore predicated on a conflict of interest approach."***

15. The next landmark case on the question of "bias" is R. v. Gough, (1993) AC 646. Gough was convicted for an offence of conspiracy to rob and was sentenced to imprisonment for fifteen years by the Trial Court. It was a trial by Jury. After the conviction was announced, it was brought to the notice of the Trial Court that one of the jurors was a neighbour of the convict. The convict appealed to the Court of Appeal unsuccessfully. One of the grounds on which the conviction was challenged was that, in view of the fact that one of the jurors being a neighbour of the convict presented a possibility of bias on her part and therefore the conviction is unsustainable. The Court of Appeal noticed that there are two lines of authority propounding two different tests for determining disqualification of a Judge on the ground of bias:

> ***(1) "real danger" test; and***
>
> ***(2) "reasonable suspicion" test.***

The Court of Appeal confirmed the conviction by applying the "real danger" test.

16. The matter was carried further to the House of Lords. Lord Goff noticed that there are a series of authorities which are "not only large in number but bewildering in their effect". After analyzing the judgment in Dimes, Lord Goff held: (R. v. Gough, 1993 AC 646, AC p.661 F-G)

> ***"In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand."***

In other words, where a Judge has a pecuniary interest, no further inquiry as to whether there was a "real danger" or "reasonable suspicion" of bias is required to be undertaken. But in other cases, such an inquiry is required and the relevant test is the "real danger" test. (ough case, AC pp.661 G-H-662 A-B)

> ***"...But in other cases, the inquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand. Such a question may arise in a wide variety of circumstances. These include .... cases in which the member of the tribunal has an interest in the outcome of the proceedings, which falls short of a***

direct pecuniary interest. Such interests may vary widely in their nature, in their effect, and in their relevance to the subject matter of the proceedings; and there is no rule .... that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be considered on its own facts. "

17. The learned Judge examined various important cases on the subject and finally concluded: (Gough case, AC p.670 E-G)

"...Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him...."

18. Lord Woolf agreed with Lord Goff in his separate judgment. He held:

"... There is only one established special category and that exists where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings as in Dimes v. Proprietors of Grand Junction Canal, 3 H.L. Case 759. The courts should hesitate long before creating any other special category since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category. The real danger test is quite capable of producing the right answer and ensure that the purity of justice is maintained across the range of situations where bias may exist."

19. In substance, the Court held that in cases where the Judge has a pecuniary interest in the outcome of the proceedings, his disqualification is automatic. No further enquiry whether such an interest lead to a "real danger" or gave rise to a "reasonable suspicion" is necessary. In cases of other interest, the test to determine whether the Judge is disqualified to hear the case is the "real danger" test.

20. The Pinochet case added one more category to the cases of automatic disqualification for a judge. Pinochet, a former Chilean dictator, was sought to be arrested and extradited from England for his conduct during his incumbency in office. The issue was whether Pinochet was entitled to immunity from such arrest or extradition. Amnesty International, a charitable organisation, participated in the said proceedings with the leave of the Court. The House of Lords held that Pinochet did not enjoy any such immunity. Subsequently, it came to light that Lord Hoffman, one of the members of the Board which heard the Pinochet case, was a Director and Chairman of a company (known as A.I.C.L.) which was closely linked with Amnesty International. An application was made to the House of Lords to set aside the earlier judgment on the ground of bias on the part of Lord Hoffman.

21. The House of Lords examined the following questions;

(i) Whether the connection of Lord Hoffman with Amnesty International required him to be automatic disqualified?

(ii) Whether an enquiry into the question whether cause of Lord Hoffman's connection with Amnesty International posed a real danger or caused a reasonable apprehension that his judgment is biased – is necessary?

(iii) Did it make any difference that Lord Hoffman was only a member of a company associated with Amnesty International which was in fact interested in securing the extradition of Senator Pinochet?

22. Lord Wilkinson summarised the principles on which a Judge is disqualified to hear a case. As per Lord Wilkinson: (Pinochet case, AC pp.132 G-H-133 A-C) -

> ***"The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.***
>
> ***In my judgment, this case falls within the first category of case, viz. where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure...."***

And framed the question: (AC p.134B-C)

> ***"...the question then arises whether, in non-financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause." (emphasis supplied)***

He opined that although the earlier cases have

> ***"all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification." (AC p.135B)***

23. Lord Wilkinson concluded that Amnesty International and its associate company known as A.I.C.L., had a non-pecuniary interest established that Senator Pinochet was not immune from the process of extradition. He concluded that,

> ***"....the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties"***

24. After so concluding, dealing with the last question, whether the fact that Lord Hoffman was only a member of A.I.C.L. but not a member of Amnesty International made any difference to the principle, Lord Wilkinson opined that: (Pinochet case, AC p.132H-133A)

> ***even though a judge may not have financial interest in the outcome of a case, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial ....***

and held that: (AC p.135 E-F)

> ***"... If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions...."***

This aspect of the matter was considered in P.D. Dinakaran (I) v. Judges Inquiry Committee, (2011)8 SCC 380) case,

25. From the above decisions, in our opinion, the following principles emerge;

25.1 If a Judge has a financial interest in the outcome of a case, he is automatically disqualified from hearing the case.

25.2 In cases where the interest of the Judge in the case is other than financial, then the disqualification is not automatic but an enquiry is required whether the existence of such an interest disqualifies the Judge tested in the light of either on the principle of "real danger" or "reasonable apprehension" of bias.

25.3 The Pinochet case added a new category i.e that the Judge is automatically disqualified from hearing a case where the Judge is interested in a cause which is being promoted by one of the parties to the case.

26. It is nobody's case that, in the case at hand, Justice Khehar had any pecuniary interest or any other interest falling under the second of the above-mentioned categories. By the very nature of the case, no such interest can arise at all.

27. The question is whether the principle of law laid down in Pinochet case is attracted. In other words, whether Justice Khehar can be said to be sharing any interest which one of the parties is promoting. All the parties to these proceedings claim to be promoting the cause of ensuring the existence of an impartial and independent judiciary. The only difference of opinion between the parties is regarding the process by which such a result is to be achieved. Therefore, it cannot be said

that Justice Khehar shares any interest which any one of the parties to the proceeding is seeking to promote."

28. Hon'ble Apex Court in the aforesaid judgment has reiterated that impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary. A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially.

29. In the aforesaid judgment Hon'ble Mr.Justice Kurian Josph,J., who was one of the Members on the Bench, while concurring entirely with Hon'ble Mr.Justice Jasti Chelameswar and Hon'ble Mr.Justice A.K. Goel, JJ. and partly disagreeing with Hon'ble Mr.Justice Madan B. Lokur,J. has held as under:-

"70. Guidelines on the ethical conduct of the Judges were formulated in the Chief Justices' Conference held in 1999 known as "Restatement of Judicial Values of Judicial Life". Those principles, as a matter of fact, formed the basis of "The Bangalore Principles of Judicial Conduct, 2002" formulated at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague. It is seen from the Preamble that the Drafting Committee had taken into consideration thirty two such statements all over the world including that of India. On Value 2 "Impartiality", it is resolved as follows:

"Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that

the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."

71. The simple question is, whether the adjudication by the Judge concerned, would cause a reasonable doubt in the mind of a reasonably informed litigant and fair-minded public as to his impartiality. Being an institution whose hallmark is transparency, it is only proper that the Judge discharging high and noble duties, at least broadly indicate the reasons for recusing from the case so that the litigants or the well- meaning public may not entertain any misunderstanding that the recusal was for altogether irrelevant reasons like the cases being very old, involving detailed consideration, decision on several questions of law, a situation where the Judge is not happy with the roster, a Judge getting unduly sensitive about the public perception of his image, Judge wanting not to cause displeasure to anybody, Judge always wanting not to decide any sensitive or controversial issues, etc. Once reasons for recusal are indicated, there will not be any room for attributing any motive for the recusal. To put it differently, it is part of his duty to be accountable to the Constitution by upholding it without fear or favour, affection or ill-will. Therefore, I am of the view that it is the constitutional duty, as reflected in one's oath, to be transparent and accountable, and hence, a Judge is required to indicate reasons for his recusal from a particular case. This would help to curb the tendency for forum shopping.

72. In Public Utilities Commission of District of Columbia v. Pollak, 1952 SCC OnLine US SC 69, the Supreme Court of United States dealt with a question whether in the District of Columbia, the Constitution of the United States precludes a street railway company from receiving and amplifying radio programmes through loudspeakers in its passenger vehicles. Justice Frankfurter was always averse to the practice and he was of the view that it is not proper. His personal philosophy and his stand on the course apparently, were known to the people. Even otherwise, he was convinced of his strong position on this issue. Therefore, stating so, he recused from participating in the case. To quote his words: (SCC OnLine US SC paras 33-34)

"33. The judicial process demands that a judge move within the framework of relevant legal rules and the covenanted modes of thought for ascertaining them. He must think dispassionately and

submerge private feeling on every aspect of a case. There is a good deal of shallow talk that the judicial robe does not change the man within it. It does. The fact is that on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self- discipline and that fortunate alchemy by which men are loyal to the obligation with which they are entrusted. But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact.

34. This case for me presents such a situation. My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it. I am explicit as to the reason for my non-participation in this case because I have for some time been of the view that it is desirable to state why one takes himself out of a case."

73. According to Justice Mathew in S. Parthasarathi v. State of A.P., (1974)3 SCC 459], in case, the right-minded persons entertain a feeling that there is any likelihood of bias on the part of the Judge, he must recuse. Mere possibility of such a feeling is not enough. There must exist circumstances where a reasonable and fair-minded man would think it probably or likely that the Judge would be prejudiced against a litigant. To quote: (SCC pp.465-66, para 16)

"16. The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The Court must look at the impression which other people have. This follows from the principle that Justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the inquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The Court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, H.R. in (Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon etc. (1968) 3 WLR 694 at 707). We should not, however, be understood to deny that the Court might with greater propriety apply the "reasonable suspicion" test in criminal or in proceedings analogous to criminal proceedings."

74. ***There may be situations where the mischievous litigants wanting to avoid a Judge may be because he is known to them to be very strong and thus making an attempt for forum shopping by raising baseless submissions on conflict of interest. In the Constitutional Court of South Africa in The President of the Republic of South Africa etc. v. South African Rugby Football Union,(1999)4 SA 147, has made two very relevant observations in this regard: (ZACC para 46)***

> ***"46. ... 'Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.' ...***
>
> ***'It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.'"***

75. ***Ultimately, the question is whether a fair-minded and reasonably informed person, on correct facts, would reasonably entertain a doubt on the impartiality of the Judge. The reasonableness of the apprehension must be assessed in the light of the oath of Office he has taken as a Judge to administer justice without fear or favour, affection or ill-will and his ability to carry out the oath by reason of his training and experience whereby he is in a position to disabuse his mind of any irrelevant personal belief or pre-disposition or unwarranted apprehensions of his image in public or difficulty in deciding a controversial issue particularly when the same is highly sensitive.***

76. ***These issues have been succinctly discussed by the Constitutional Court in The President of the Republic of South Africa, (1999)4 SA 147 on an application for recusal of four of the Judges in the Constitutional Court. After elaborately considering the factual matrix as well as the legal position, the Court held as follows: (ZACC para 104)***

> ***"104. ...While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law". To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary***

would be undermined, and in turn, the Constitution itself." (Emphasis supplied)

77. The above principles are universal in application. Impartiality of a Judge is the sine qua non for the integrity institution. Transparency in procedure is one of the major factors constituting the integrity of the office of a Judge in conducting his duties and the functioning of the court. The litigants would always like to know though they may not have a prescribed right to know, as to why a Judge has recused from hearing the case or despite request, has not recused to hear his case. Reasons are required to be indicated broadly. Of course, in case the disclosure of the reasons is likely to affect prejudicially any case or cause or interest of someone else, the Judge is free to state that on account of personal reasons which the Judge does not want to disclose, he has decided to recuse himself from hearing the case."

30. In the aforesaid judgment, Hon'ble Apex Court has held that litigants would always like to know that why Judge has recused from hearing the case or has not recused to hear despite request and as such reasons are required to be indicated broadly.

31. In the case at hand respondents No.2 and 3 have expressed reasonable apprehension that since I have already applied my judicial mind while furnishing report Annexure P-12, in terms of orders dated 28.4.2016 and 25.10.2017 passed by Hon'ble Apex Court in I.A. No.334 of 2014 in Writ Petition (Civil) No.1022/1989, whereby High Court was specifically asked to submit its report in accord with judgment passed by Hon'ble Apex Court in ***All India Judges Association's*** case *(supra)*, I deem it proper not to hear the matter because in the instant proceedings question which necessarily would arise for determination is *"whether technically petitioners are justified in claiming seniority over direct recruits (respondents herein) in terms of judgment rendered by Hon'ble Apex Court in* ***All India Judges Association's*** *case (supra) or not"*, qua which definitely, I, being Member of Judges Committee, have carried out certain exercise in compliance to order passed by Hon'ble Apex Court in ***All India Judges Association's*** case *(supra)* and as such it would not be in the interest of justice to hear the present matter.

32. Consequently, in view of detailed discussion made herein above as well as law laid down by Hon'ble Apex Court, I, *(Justice Sandeep Sharma)* hereby recuse to hear the present matter in the interest of justice. The aforesaid question is answered, accordingly.

33. In view of the aforesaid order, the Registry may place this file before Hon'ble the Chief Justice to constitute a fresh Bench.

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

Sunish Aggarwal ....Appellant

Versus

State of H.P. & Another ....Respondents

LPA No.194 of 2016
Judgment Reserved on: 29.11.2018

Date of decision: 27.12.2018

Constitution of India, 1950- Article 311- **Himachal Pradesh Judicial Service Rules, 2004 –** Rules 10 & 11 – Probation - Discharge from service without inquiry - Challenge thereto - High Court discharging appellant from service during probation after holding discreet inquiry on ground of non-suitability - Hon'ble Single Judge dismissing appellant's writ seeking reinstatement – LPA - Appellant contending that discharge from service since preceded by discreet inquiry, he could not have been discharged without affording opportunity of being heard to him - Held, though discreet inquiry was conducted on complaints but inquiry report was never made basis for discharge of petitioner from service during probation - It was on basis of overall performance of petitioner - Discharge neither stigmatic nor punitive in nature - No opportunity of being heard was required to be given to him - LPA dismissed. (Paras 4, 6, 8, 13, 17, 18, 24 & 31)

Constitution of India, 1950- Article 311- **Himachal Pradesh Judicial Service Rules, 2004**-Rules 10 & 11 – Probation - Discreet inquiry - Purpose – Held, purpose of discreet inquiry is to ascertain correctness of allegations. (Para 17)

Constitution of India, 1950- Article 311- Removal from service - When amounts to punishment - Held, when termination is found on misconduct, negligence or inefficiency, it amounts to punishment. (Para 19)

Constitution of India, 1950 - Article 311- Termination from service - Held, service of public servant can be terminated when authority is satisfied regarding his inadequacy for job or unsuitability for temperamental or other reasons not involving moral turpitude. (Para 19)

Constitution of India, 1950 - Article 311 - **Himachal Pradesh Judicial Service Rules, 2004 –** Rules 10 & 11 – Probation - Termination from service without inquiry, when bad? Held, order of discharge passed against probationer at his back on basis of inquiry conducted into allegations made against him and if same formed foundation of discharge order, is bad in eyes of law on ground of violations of rules of natural justice. (Para 19)

Cases referred:

Chandra Prakash Shahi Vs. State of U.P. & Ors, (2000)5 SCC 152

Jai Singh vs. Union of India & Ors, (2006)9 SCC 717

Mathew P.Thomas Vs. Kerala State Civil Supply Corpn. Ltd. & ors. (2003)3 SCC 263

Nepal Singh Vs. State of U.P. & ors, (1980)3 SCC 288

Pradip Kumar vs. Union of India & ors., (2012)13 SCC 182

Radhey Shyam Gupta Vs. U.P. State Agro Industries Corporation Ltd. & anr., (1999)2 SCC 21

Rajesh Kohli vs. High Court of Jammu and Kashmir and Another, (2010)12 SCC 783

Registrar General, High Court of Gujarat & anr. vs. Jayshree Chaman Lal Buddhbhatti, (2013)16 SCC 59

Registrar, High Court of Gujarat and anr. Vs. C.G. Sharma, (2005)1 SCC 132

Shamsher Singh vs. State of Punjab & anr., (1974)2 SCC 831 (Constitution Bench);

State Bank of India & ors vs. Palak Modi & anr, (2013)3 SCC 607

The State of Orissa & anr Vs. Ram Narayan Das, AIR 1961 SC 177 (Constitution Bench)

Union of India & ors vs. Mahaveer C.Singhvi, (2010)8 SCC 220

For the Appellant:	Mr.Amit Goel, Advocate.
For Respondent No.1:	Mr.Vikas Rathore, Additional Advocate General with Mr.Kunal Thakur, Deputy Advocate General.

For Respondent No.2: Mr.Dilip Sharma, Senior Advocate with Ms.Sunita Sharma, Advocate.

The following judgment of the Court was delivered:

Per Sandeep Sharma,J.:

Instant Letters Patent Appeal is directed against the judgment dated 5.10.2016, passed by learned Single Judge of this Court in CWP No.3174 of 2014, titled: Sunish Aggarwal vs. State of H.P. & anr., whereby writ petition having been filed by the petitioner, seeking therein relief that ***"this writ petition may kindly be allowed throughout with costs and after summoning the records of the case and granting an opportunity of being heard, a writ of certiorari or any other appropriate writ, order or direction may be passed quashing and setting aside the impugned decision of the Hon'ble Administrative Committee of the respondent no.2 dated 17th September 2013 (Annexure P-22), impugned order of the Hon'ble Full Court of respondent no.2 dated 18th September 2013 (Annexure P-23), and impugned notification issued by the respondent no.1 dated 19th September 2013 (Annexure P-8), consequently reinstating the petitioner to his original batch of 2009 of the Himachal Judicial Services along with all consequential seniority and benefits including entire salary during his period of discharge,"*** came to be dismissed.

2. For having bird's eye view, necessary facts, which may be relevant for proper adjudication of the case at hand, are that appellant-petitioner *(hereinafter referred to as 'the petitioner')* was appointed as Civil Judge(Junior Division) on 26.3.2010. He, after having completed his requisite training, came to be posted as Civil Judge(Junior Division)-cum-Judicial Magistrate Ist Class, Dharamshala, District Kangra from where he was transferred to Anni, District Kullu. On 10.5.2013, while he was traveling with his family and cousins to Jawalamukhi temple in District Kangra, he was stopped by Shri Rajesh Tomar, who was then serving as Civil Judge (Senior Division)-cum-Chief Judicial Magistrate, Kangra. Later on, Shri Rajesh Tomar submitted some complaint to the Registrar General of this Court against indecent behaviour of the petitioner. Record further reveals that above-named Rajesh Tomar, Chief Judicial Magistrate, Kangra also lodged an FIR with the Police at Anni regarding threatening calls being received by him over his official telephone. Though initially such action was imputed to the petitioner, however, subsequently it was found that some advocate was making these calls and he was then arrested on 10.7.2013, pursuant to FIR dated 3.7.2013.

3. On the basis of complaint lodged by Shri Rajesh Tomar, a discreet inquiry was ordered against the petitioner by the Registrar(Vigilance) of this Court, who in turn submitted his report dated 26.8.2013. On 16.9.2013, report submitted by Registrar(Vigilance) was placed before learned Administrative Judge, who, after having perused the same, directed that report be placed before Hon'ble the Chief Justice, who in turn ordered that the matter be placed before the Hon'ble Administrative Committee on the same day. On 17.9.2013, the matter came to be placed before Hon'ble Administrative Committee of this Court, wherein a decision was taken to discharge the petitioner from service during his probation period. Aforesaid decision was further ratified by the Hon'ble Full Court on 18.9.2013, which ultimately led to issuance of formal notification by the State Government on 19.9.2013, whereby the petitioner came to be discharged from the service.

4. In the aforesaid background, the petitioner approached this Court by way of writ petition averring therein that order of discharge is not simpliciter, but, is punitive and

based upon a complaint submitted by Shri Rajesh Tomar and, as such, order of discharge, passed against him without affording him opportunity of being heard, is illegal and violative of provisions of Constitution of India.

5. High Court, while refuting the aforesaid claim put forth by the petitioner, averred in its reply that the petitioner rightly came to be discharged from service during the period of his probation, as he was not found suitable to hold the post of Civil Judge(Junior Division). Respondent-State also defended its action on the ground that petitioner was ordered to be discharged from service on the basis of recommendations made by the High Court.

6. Learned Single Judge vide impugned judgment dated 5.10.2016 dismissed the petition and held that order of discharge is simpliciter and not punitive in nature and as such no opportunity of being heard was required to be afforded to the petitioner before discharging him from service. Learned Single Judge further held that order is ex facie innocuous and it does not cast any stigma on the petitioner or visit him with penal consequences and it does not attract Article 311 of the Constitution of India.

7. Being aggrieved and dis-satisfied with the aforesaid judgment passed by learned Single Judge, petitioner has approached this Court in the instant proceedings, praying therein for his reinstatement after setting aside order of Hon'ble Full Court, notification issued by the Government discharging him from service and impugned judgment dated 5.10.2016 passed by learned Single Judge.

8. Mr.Amit Goel, learned Advocate, who initially argued on behalf of petitioner, almost reiterated the submissions/ arguments, which were made before learned Single Judge at the time of hearing of CWP No.3174/2014. Learned counsel argued that learned Single Judge dismissed the petition in a very slipshod manner without taking into consideration real controversy. He contended that learned Single Judge failed to lift the veil behind the innocuously worded order of discharge from the proceedings which immediately preceded or which prompted the Hon'ble Administrative Committee to pass the order of discharge. He contended that if totality of circumstances and facts, which lead to discharge of petitioner, are read in conjunction, it cannot be said that order of discharge is simplicitor, but definitely it is punitive in nature, based upon the complaint submitted by Shri Rajesh Tomar, which culminated into discreet inquiry and therefore no order of discharge could have been passed without affording an opportunity of being heard to the petitioner. He further contended that the true flavour of the discharge order is to be gathered from material on the basis of which the decision of the Hon'ble Administrative Committee was based upon, which was overlooked by the learned Single Judge of this Court. He contended that decision of Hon'ble Administrative Committee, not to continue the petitioner on probation and to discharge him, appears to be innocuous in language, but, not in substance and the language used in the discharge order by the Hon'ble Administrative Committee or the Hon'ble Full Court may not be conclusive and the Court can peep through the veil in order to ascertain whether under the garb of order of discharge simpliciter the employer had in fact punished the employee by casting remarks on his conduct and behaviour. He further contended that learned Single Judge failed to ascertain the true character of the order and failed to lift veil and to examine the whole record placed by the petitioner, whereby discreet inquiry was got conducted against the petitioner. He contended that had the learned Single Judge bothered/cared to go into the material placed by the petitioner, he would have easily gathered that form of the order is merely a camouflage for an order of dismissal for misconduct.

9. While referring to para-41 of the judgment rendered by learned Single Judge, learned counsel made a serious attempt to persuade us to agree with his contention that findings returned by learned Single Judge to the effect that order of discharge is ex facie innocuous and it does not cast any stigma on the petitioner because such findings as per learned counsel are based on non-application of mind. Learned Single Judge got swayed by the plain words used in the discharge order passed by the Hon'ble Administrative Committee which in turn was ratified by the Hon'ble Full Court on the administrative side.

10. Lastly, learned counsel representing the petitioner referred to remarks given by the learned Administrative Judge on the report submitted by Registrar(Vigilance) to demonstrate that learned Singe Judge completely overlooked the conclusion of guilt arrived at by the learned Administrative Judge qua the misconduct and indecent behaviour and that too behind the back of the petitioner and as such by no stretch of imagination it can be said that order of discharge is simplicitor, rather the same is punitive and based upon complaint submitted by Shri Rajesh Tomar and as such petitioner ought to have been granted opportunity of being heard before passing any order. Learned counsel placed reliance on the following judgments:-

"1. Shamsher Singh vs. State of Punjab & anr., (1974)2 SCC 831 (Constitution Bench);

2. Union of India & ors vs. Mahaveer C.Singhvi, (2010)8 SCC 220;

3. Pradip Kumar vs. Union of India & ors., (2012)13 SCC 182;

4. State Bank of India & ors vs. Palak Modi & anr, (2013)3 SCC 607; and

5. Registrar General, High Court of Gujarat & anr. vs. Jayshree Chaman Lal Buddhbhatti, (2013)16 SCC 59."

11. Mr.Dilip Sharma, learned Senior Counsel, representing the High Court, while refuting aforesaid contention made by Mr.Amit Goel, contended that order of discharge, by no stretch of imagination, can be termed to be punitive rather same is simpliciter. He further contended that discreet inquiry conducted on the petitioner, on the complaint of Shri Rajesh Tomar, could at best be a motive, but definitely not foundation of his discharge. He contended that decision taken by Hon'ble Full Court clearly suggests that the petitioner, who at that relevant time was working as Civil Judge (Junior Division)-cum-JMIC, Anni on probation, was not found suitable to continue in service on probation and was discharged from the service forthwith. Mr.Sharma further contended that though record reveals that complaint was filed by Shri Rajesh Tomar, on the basis of which discreet inquiry was conducted, but definitely conclusion, if any, drawn in that inquiry was not made basis of the discharge, rather Hon'ble Administrative Committee in its own wisdom found the petitioner not suitable to continue in service on probation and accordingly he was discharged, which decision of the Hon'ble Administrative Committee was further ratified by the Hon'ble Full Court. Mr.Sharma also placed reliance upon following judgments, which have otherwise been taken note of by the learned Single Judge:-

"1. The State of Orissa & anr Vs. Ram Narayan Das, AIR 1961 SC 177 (Constitution Bench);

2. Nepal Singh Vs. State of U.P. & ors, (1980)3 SCC 288;

3. Radhey Shyam Gupta Vs. U.P. State Agro Industries Corporation Ltd. & anr., (1999)2 SCC 21;

4. Chandra Prakash Shahi Vs. State of U.P. & Ors, (2000)5 SCC 152;

5. ***Mathew P.Thomas Vs. Kerala State Civil Supply Corpn. Ltd. & ors. (2003)3 SCC 263;***

6. ***Registrar, High Court of Gujarat and anr. Vs. C.G. Sharma, (2005)1 SCC 132; and***

7. ***Jai Singh vs. Union of India & Ors, (2006)9 SCC 717."***

12. We have heard learned counsel for the parties and gone through the record of the case.

13. Having heard learned counsel for the parties and perused the material available on record vis-a-vis reasoning assigned by learned Single Judge, we are not persuaded to agree with the contention of Shri Amit Goel, learned counsel representing the petitioner, that the findings arrived at by learned Single Judge are based upon incorrect application of law to the facts of the present case, rather this Court has no hesitation to conclude that judgment passed by learned Single Judge is based upon proper appreciation of facts as well as law laid down by the Hon'ble Apex Court and as such we see no reason to interfere with the same. Similarly, we are unable to agree with the contention/submission of learned counsel representing the petitioner that learned Single Judge has dismissed the petition on a slipshod manner, rather careful perusal of impugned judgment passed by learned Single Judge clearly suggests that each and every aspect of the matter has been carefully dealt with by the learned Single Judge. Though in the case at hand record reveals that discreet inquiry came to be instituted against the present petitioner on the basis of complaint filed by Shri Rajesh Tomar, who at that relevant time was working as Chief Judicial Magistrate, Kangra, but we are not convinced and persuaded to agree with the contention raised by learned counsel representing the petitioner that inquiry report submitted, pursuant to aforesaid discreet inquiry, was made basis by the Hon'ble Administrative Committee for discharge of the petitioner, who was definitely on probation at the time of discharge. On the basis of complaint made by Shri Rajesh Tomar, Registrar(Vigilance) of this Court conducted discreet inquiry Annexure P-19 (available at page 105 of the writ file), which itself suggests that inquiry was not pursuant to some disciplinary proceedings purposed to be initiated against the petitioner, rather Registrar(Vigilance) (on the basis of complaint made by the complainant Rajesh Tomar), solely with a view to ascertain the correctness and genuineness of the complaint, conducted discreet inquiry. Though Registrar(Vigilance) in his inquiry concluded that there appears to be no reason for Shri Rajesh Tomar to level false allegations against Shri Suneesh Aggarwal, but, no action, if any, against the petitioner, was ever proposed by Registrar(Vigilance) in that discreet inquiry, which itself suggests that very purpose of inquiry was to ascertain correctness and genuineness of the complaint made by the fellow Judicial Officer. No doubt, such report came to be placed before the learned Administrative Judge, who, while ordering the matter to be placed before Hon'ble the Chief Justice, observed that, "From the perusal of the discreet enquiry report, it cannot be said that the allegations leveled by the complainant against the erring Officer are either false or baseless. In my considered view, the matter should be taken to its logical end and prompt appropriate action be taken in accordance with law". (Annexure P-21 at page 118 of the writ file), but no decision was taken by the Hon'ble Administrative Committee, on the basis of aforesaid observation made by the learned Administrative Judge.

14. Subsequently, matter came to be placed before Hon'ble Administrative Committee in its meeting held on 17.9.2013, wherein admittedly matter regarding misconduct and indecent behaviour of Shri Suneesh Aggarwal, JMIC, Anni (petitioner herein) came up for consideration of Hon'ble Administrative Committee as "Item No.3". Simultaneously another "Item No.5" i.e. "Consideration of the matter to consider the

continuation, confirmation or suitability of Shri Suneesh Aggarwal, Civil Judge (Junior Division)-cum-JMIC, Anni, (petitioner herein) in service" also came to be placed before the Hon'ble Administrative Committee for consideration.

15. Record reveals that Hon'ble Administrative Committee did not take any decision qua "Item No.3" and simply recorded "Subject to decision taken on item No.5" and qua "Item No.5" Hon'ble Administrative Committee recorded its decision as under:-

> ***"Item No.5***
>
> ***Considered all aspects of the matter. We are of the considered view not to allow Shri Suneesh Aggarwal, Civil Judge (Junior Division)-cum-JMIC, Anni to continue in service on probation. He be discharged from service forthwith."***

16. Aforesaid decision of Hon'ble Administrative Committee subsequently came up for consideration of the Hon'ble Full Court on 18.9.2003, where decision of the Hon'ble Administrative Committee taken on 17.9.2013, with regard to discharge of Shri Suneesh Aggarwal, Civil Judge(Junior Division)-cum-JMIC, Anni, to not continue him on probation and to discharge him forthwith, came to be ratified. (Annexure P-23 at page 121 of writ file).

17. Having carefully perused the record, excerpts whereof have been reproduced hereinabove, nowhere persuade us to disagree with the findings returned by learned Single Judge that decision taken by Hon'ble Administrative Committee, which in turn was ratified by Hon'ble Full Court, that the decision taken not to continue the petitioner on probation and his consequent discharge is neither stigmatic nor punitive in nature, rather the same is simpliciter discharge. Though this Court is of firm/definite view that discreet inquiry was got conducted to ascertain the correctness and genuineness of the complaint made against the petitioner by fellow Judicial Officer, but, even if, for the sake of argument, it is presumed that some inquiry was conducted, this Court has no hesitation to conclude that same was not a motive much less a foundation for the discharge of the petitioner, who was on probation. In normal routine, complaint filed against him ought to have been placed before the learned Administrative Judge of that District by the Registrar concerned. Learned Administrative Judge of the District concerned, having perused the complaint and report of discreet inquiry, ordered the matter to be placed before Hon'ble the Chief Justice so that the matter is taken to its logical end.

18. The fact remains that though the matter with regard to misconduct and indecent behaviour of Suneesh Aggarwal (present petitioner) came up for discussion before Hon'ble Administrative Committee, but Hon'ble Administrative Committee did not take any decision qua the same and simply skipped the same by observing that "Subject to decision taken on Item No.5". Vide "Item No.5" matter was with regard to consideration of matter with regard to continuation, confirmation or suitability of Shri Suneesh Aggarwal, Civil Judge (Junior Division)-cum-JMIC, Anni, in service on probation. Hon'ble Administrative Committee, after having considered all aspects of the matter, decided not to continue petitioner in service on probation and accordingly, recommended that he be discharged from service forthwith. It is quite apparent from the record that discharge of the petitioner from service was not on the basis of so called inquiry conducted by Registrar(Vigilance) on the basis of report submitted by Shri Rajesh Tomar, rather discharge was based upon over all performance of the petitioner.

19. Since learned Single Judge has already dealt with each and every judgments relied upon by learned counsel representing the petitioner before us, we deem it not necessary to deal with the same again. However, crux of all the judgments, as have been

referred by the petitioner, is that probationer has no right to continue to hold the post and, therefore, the termination of his service does not operate as forfeiture of any right and is to be distinguished from dismissal, removal or reduction in rank, Hon'ble Apex Court has categorically laid down that it is punishment only when the termination is founded on misconduct, negligence or inefficiency the motive being irrelevant. However, it has been clearly laid down in the aforesaid judgment that services of the petitioner can be terminated when the authority is satisfied regarding his inadequacy for the job or unsuitability for temperamental or other reasons not involving moral turpitude or when his conduct may result in dismissal or removal but without a formal enquiry. In the judgments relied upon by learned counsel representing the petitioner, Hon'ble Apex Court has held that if order of discharge is passed against the probationer at his back on the basis of inquiry conducted into the allegations made against him or her and if same formed foundation of discharge order, same would be bad and liable to be set aside. Where competent authority holds an inquiry or test or other evaluation method for judging the suitability of probationer for confirmation and such inquiry or test or other evaluation method forms basis for termination order, even then, action of the competent authority cannot be castigated as punitive. However, if an allegation of misconduct constitutes the foundation of the action taken, the ultimate decision taken by the competent authority can be nullified on the ground of violation of the rules of natural justice.

20. Now, this Court would specifically proceed to deal with arguments advanced by learned counsel representing the petitioner that learned Single Judge failed to lift the veil behind the innocuously worded order of discharge from the proceedings which immediately preceded or which prompted the Hon'ble Administrative Committee to pass the order of discharge.

21. In this regard he specifically referred the judgment rendered by Hon'ble Apex Court in ***State Bank of India and Ors. vs. Palak Modi & anr., (2013)3 SCC 607,*** which has otherwise been taken note of by learned Single Judge, wherein the Hon'ble Apex Court has held that though termination order, prima facie, is non stigmatic, Court can lift veil and examine whether in garb of termination simpliciter, employer had in fact punished employee for misconduct. In support of aforesaid contention, learned counsel also pressed into service judgment rendered by Hon'ble Apex Court in ***Shamsher Singh vs. State of Punjab & anr., (1974)2 SCC 831*** (already taken note of by learned Single Judge), wherein Hon'ble Apex Court has held that even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity.

22. Learned counsel also made this Court to specifically peruse the judgment rendered by Hon'ble Apex Court in ***Registrar General, High Court of Gujarat & anr. vs. Jayshree Chaman Lal Buddhbhatti, (2013)16 SCC 59,*** which otherwise find mention in judgment rendered by learned Single Judge, to convey that, if it is a case of deciding the suitability of probationer, and for that limited purpose any inquiry is conducted, the same cannot be faulted as such. However, if, during the course of such an inquiry, any allegations are made against the person concerned, which result into a stigma, he ought to be afforded the minimum protection which is contemplated under Article 311(2) of the Constitution of India even though he may be a probationer. Learned counsel representing the petitioner also laid emphasis on the judgment passed by Hon'ble Apex Court in ***Ratnesh Kumar Choudhary vs. Indira Gandhi Institute of Medical Sciences, Patna, Bihar and Others, (2015) 15 SCC 151.***

23. We are not inclined to agree with contention raised by counsel that learned Single Judge did not lift the veil to ascertain the true character of order of discharge by ignoring the background of facts and material placed on record, which found the very basis of discharge of the petitioner, rather careful perusal of record vis-à-vis impugned judgment passed by learned Single Judge embolden us to conclude that findings returned by learned Single Judge are based upon proper appreciation of facts as well as law and as such call for no interference.

24. At the cost of repetition, it may be observed that in the case at hand though discreet inquiry was conducted on the complaint by fellow Judicial Officer against the petitioner, but, definitely that was not made basis to discharge the petitioner from service, rather Hon'ble Administrative Committee, having considered all aspects of the matter, found the petitioner not suitable to continue in service on probation and accordingly recommended him to be discharged and decision of the Hon'ble Administrative Committee was then ratified by the Hon'ble Full Court.

25. Though, we have no doubt in our mind that learned Single Judge, while recording impugned judgment, has carefully perused record, but even for the sake of argument, it presumed that he failed to lift the veil behind the innocuously worded order of discharge, as has been argued by learned counsel representing the petitioner, even then there is no force in the arguments of learned counsel for the petitioner because now, while deciding instant appeal, we have carefully examined the record, perusal whereof clearly suggests that discharge of the petitioner is not on the basis of discreet inquiry conducted by Registrar(Vigilance) on the complaint of fellow Judicial officer, rather discharge is on the decision of Hon'ble Administrative Committee, who, after having carefully considered all aspects of the matter, found petitioner not suitable to continue on probation. Mere recommendations of learned Administrative Judge, who had an occasion to peruse the discreet inquiry conducted against the petitioner by Registrar(Vigilance) to place the matter before Hon'ble the Chief Justice with the observation that the matter be taken to its logical end, cannot be a ground for the petitioner to conclude that allegations, contained in the inquiry conducted at his back, were made basis for his discharge, as such, he ought to have been afforded an opportunity of being heard.

26. There cannot be any quarrel with the aforesaid exposition of law laid down by Hon'ble Apex Court, but, law, laid down by Hon'ble Apex Court in cases referred hereinabove, is not applicable in the facts and circumstances of the present case.

27. Having perused the matter from all angle, we are unable to agree with learned counsel for the petitioner that misconduct imputed to petitioner in the discreet inquiry conducted by Registrar(Vigilance) of the High Court was made basis to discharge him rather material, as has been discussed hereinabove, clearly reveals that Hon'ble Administrative Committee, after having considered all aspects of the matter, did not find petitioner suitable to continue on probation and accordingly recommended him to be discharged which recommendation of its came to be accepted by the Hon'ble Full Court.

28. Needless to say, during the period of probation employee remains under watch and his service and conduct is under scrutiny. In the case at hand petitioner came to be appointed as a Judicial Officer on 26.3.2010 on temporary basis for a period of two years on probation. The services rendered by Judicial Officer during probation are assessed not solely on the basis of judicial performance, but also on the probity as to how one has conducted himself or herself and as such arguments advanced by learned counsel representing the petitioner that during period of probation petitioner had cleared all departmental examination successfully in Higher Standard cannot be a ground to conclude

that he was suitable for the post in question rather overall work and conduct of officer during probation is taken into consideration by the authority at the time of regularizing the services of the person, who was on probation. In the case at hand, record clearly reveals that Hon'ble Administrative Committee, while recommending discharge of the petitioner, took into consideration overall record of the petitioner. Mere recording of factum with regard to unsatisfactory service and even mentioning the same in the order would not amount to casting any aspersion on the petitioner nor it could be said that stating in the order that his service is unsatisfactory amounts to a stigmatic order.

29. Reliance is placed upon the judgment of Hon'ble Apex Court in ***Rajesh Kohli vs. High Court of Jammu and Kashmir and Another, (2010)12 SCC 783,*** wherein the Hon'ble Apex Court has held as under:-

> *"17. This Court in Satya Narayan Athya v. High Court of M.P., (1996) 1 SCC 560 case held at paras 3 & 5 that : (SCC pp.561-62)*
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> *"3. .....A reading thereof would clearly indicate that every candidate appointed to the cadre shall undergo training initially for a period of six months before he is appointed on probation for a period of two years. On his completion of two years of probation, it may be open to the High Court either to confirm or extend the probation. At the end of the probation period, if he is not confirmed on being found unfit, it may be extended for a further period not exceeding two years.* ***It is seen that though there is no order of extension, it must be deemed that he was continued on probation for an extended period of two years. On completion of two years, he must not be deemed to be confirmed automatically. There is no order of confirmation. Until the order is passed, he must be deemed to continue on probation.***
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> *5. Under these circumstances, the High Court was justified in discharging the petitioner from service during the period of his probation. It is not necessary that there should be a charge and an enquiry on his conduct since the petitioner is only on probation and during the period of probation, it would be open to the High Court to consider whether he is suitable for confirmation or should be discharged from service." (emphasis supplied)*
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> *18. During the period of probation an employee remains under watch and his service and his conduct is under scrutiny. Around the time of completion of the probationary period, an assessment is made of his work and conduct during the period of probation and on such assessment a decision is taken as to whether or not his service is satisfactory and also whether or not on the basis of his service and track record his service should be confirmed or extended for further scrutiny of his service if such extension is permissible or whether his service should be dispensed with and terminated. The services rendered by a judicial officer during probation are assessed not solely on the basis of judicial performance, but also on the probity as to how one has conducted himself.*
>
> *19. The aforesaid resolution taken by the full court on its administrative side clearly indicates that the matter regarding his confirmation or otherwise or extension of his probation period for another one year was considered by the full court but since his service was not found to be satisfactory on consideration of the records, therefore, the full court decided not to confirm him in service and to dispense with his service and accordingly recommended for dispensation of his service. On the basis of the aforesaid recommendation of*

the High Court, an order was passed by the Government of Jammu & Kashmir dispensing with the service of the petitioner.

20. *These facts clearly prove and establish that the order of termination of service of the petitioner was not issued by the Jammu & Kashmir High Court but it only recommended his termination as his service was not found to be satisfactory. The aforesaid recommendation was accepted by the Government which finally ordered the termination of his service. The aforesaid order was an order of the competent authority and issued by the Government of Jammu & Kashmir. Since the said order was issued by the competent authority, it was a valid order and should be treated as such, although it was specifically not issued in the name of the Governor.*

21. *In the present case, two orders are challenged, one, which was the order of the High Court based on the basis of the resolution of the full court and the other one issued by the Government of Jammu & Kashmir on the ground that they were stigmatic orders.*

22. *In our considered opinion, none of the aforesaid two orders could be said to be a stigmatic order as no stigma is attached. Of course, aforesaid letters were issued in view of the resolution of the full court meeting where the full court of the High Court held that the service of the petitioner is unsatisfactory. Whether or not the probation period could be or should be extended or his service should be confirmed is required to be considered by the full court of the High Court and while doing so necessarily the service records of the petitioner are required to be considered and if from the service records it is disclosed that the service of the petitioner is not satisfactory it is open for the respondents to record such satisfaction regarding his unsatisfactory service and even mentioning the same in the order would not amount to casting any aspersion on the petitioner nor it could be said that stating in the order that his service is unsatisfactory amounts to a stigmatic order.*

23. *This position is no longer res integra and it is well- settled that even if an order of termination refers to unsatisfactory service of the person concerned, the same cannot be said to be stigmatic. In Pavanendra Narayan Verma v. Sanjay Gandhi PGI of Medical Sciences, (2002) 1 SCC 520, this Court has explained at length the tests that would apply to determine if an order terminating the services of a probationer is stigmatic. On the facts of that case it was held that the opinion expressed in the termination order that the probationer's "work and conduct has not been found satisfactory" was not ex facie stigmatic and in such circumstances the question of having to comply with the principles of natural justice does not arise.*

24. *In Verma case this court had the occasion to determine as to whether the impugned order therein was a letter of termination of services simpliciter or stigmatic termination. After considering various earlier decisions of this Court in para 21 of the aforesaid decision it was stated by this Court thus: (SCC p. 528)*

"21. One of the judicially evolved tests to determine whether in substance an order of termination is punitive is to see whether prior to the termination there was (a) a full-scale formal enquiry (b) into allegations involving moral turpitude or misconduct which (c) culminated in a finding of guilt. If all three factors are present the termination has been held to be punitive irrespective of the form of the termination order. Conversely if anyone of the three factors is missing, the termination has been upheld."

In para 29 of the judgment, it further held thus: (SCC, pp.529-30)

> *"29. Before considering the facts of the case before us one further, seemingly intractable, area relating to the first test needs to be cleared viz. what language in a termination order would amount to a stigma? Generally speaking when a probationer's appointment is terminated it means that the probationer is unfit for the job, whether by reason of misconduct or ineptitude, whatever the language used in the termination order may be. Although strictly speaking, the stigma is implicit in the termination, a simple termination is not stigmatic* ***. A termination order which explicitly states what is implicit in every order of termination of a probationer's appointment, is also not stigmatic.*** *The decisions cited by the parties and noted by us earlier, also do not hold so. In order to amount to a stigma, the order must be in a language which imputes something over and above mere unsuitability for the job."* ***(emphasis supplied)***

25. *In Krishnadevaraya Education Trust v. L.A. Balakrishna, (2001) 9 SCC 319, the services of respondent-Assistant Professor were terminated on the ground that his on the job proficiency was not upto the mark. This Court held that merely a mention in the order by the employer that the services of the employee are not found to be satisfactory would not tantamount to the order being a stigmatic one. This Court held in paras 5 & 6 thus: (SCC pp.320-21)*

> *"5. There can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the recruit/appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job, then the employer has a right to terminate the services as a reason thereof. If the termination during probationary period is without any reason, perhaps such an order would be sought to be challenged on the ground of being arbitrary. Therefore, normally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged, without assigning any reason. If the order on the face of it states that his services are being terminated because his performance is not satisfactory, the employer runs the risk of the allegation being made that the order itself casts a stigma. We do not say that such a contention will succeed. Normally, therefore, it is preferred that the order itself does not mention the reason why the services are being terminated."*
>
> *6. If such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer were terminated.* ***Mere fact that in response to the challenge the employer states that the services were not satisfactory would not ipso facto mean that the services of the probationer were being terminated by way of punishment. The probationer is on test and if the services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services."***
>
> ***(emphasis supplied)***

26. *In Chaitanya Prakash v. H. Omkarappa, (2010) 2 SCC 623, the services of respondent were terminated by the appellant company. During the period of probation, his services were not found to be satisfactory and he was also given letters for improvement of his services and his period of service was also extended and ultimately company terminated him. Court after referring to a*

series of cases held that the impugned order of termination of respondent is not stigmatic.

27. In State of Punjab v. Bhagwan Singh, (2002) 9 SCC 636 this Court at paras 4 & 5 held as follows: (SCC p.637)

"4. ..... In our view, when a probationer is discharged during the period of probation and if for the purpose of discharge, a particular assessment of his work is to be made, and the authorities referred to such an assessment of his work, while passing the order of discharge, that cannot be held to amount to stigma.

5. The other sentence in the impugned order is, that the performance of the officer on the whole was "not satisfactory". Even that does not amount to any stigma."

28. In the present case, the order of termination is a fall out of his unsatisfactory service adjudged on the basis of his overall performance and the manner in which he conducted himself. Such satisfaction even if recorded that his service is unsatisfactory would not make the order stigmatic or punitive as sought to be submitted by the petitioner. On the basis of the aforesaid resolution, the matter was referred to the State Government for issuing necessary orders."

30. In ***Rajesh Kumar Srivastava vs. State of Jharkhand and Others, (2011)4 SCC 447,*** the Hon'ble Apex Court has held:-

"9. The records placed before us disclose that at the time when the impugned order was passed, the appellant was working as a Probationer Munsif. A person is placed on probation so as to enable the employer to adjudge his suitability for continuation in the service and also for confirmation in service. There are various criteria for adjudging suitability of a person to hold the post on permanent basis and by way of confirmation. At that stage and during the period of probation the action and activities of the appellant are generally under scrutiny and on the basis of his overall performance a decision is generally taken as to whether his services should be continued and that he should be confirmed, or he should be released from service. In the present case, in the course of adjudging such suitability it was found by the respondents that the performance of the appellant was not satisfactory and therefore he was not suitable for the job.

10. The aforesaid decision to release him from service was taken by the respondents considering his overall performance, conduct and suitability for the job. While taking a decision in this regard neither any notice is required to be given to the appellant nor he is required to be given any opportunity of hearing. Strictly speaking, it is not a case of removal as sought to be made out by the appellant, but was a case of simple discharge from service. It is, therefore, only a termination simpliciter and not removal from service on the grounds of indiscipline or misconduct. While adjudging his performance, conduct and overall suitability, his performance record as also the report from the higher authorities were called for and they were looked into before any decision was taken as to whether the officer concerned should be continued in service or not.

11. In a recent decision of this Court in Rajesh Kohli vs. High Court of J & K & Anr., (2010) 12 SCC 783, almost a similar issue cropped up for consideration, in which this Court has held that the High Court has a solemn duty to consider

and appreciate the service of a judicial officer before confirming him in service and for this not only judicial performance but also probity as to how one has conducted himself is relevant and important. It was also held in the same decision that upright and honest judicial officers are needed in the district judiciary, which is the bedrock of our judicial system.

12. The order of termination passed in the present case is a fall out of his unsatisfactory service adjudged on the basis of his overall performance and the manner in which he conducted himself. Such decision cannot be said to be stigmatic or punitive. This is a case of termination of service simpliciter and not a case of stigmatic termination and therefore there is no infirmity in the impugned judgment and order passed by the High Court."

31. After having carefully examined each and every aspect of the matter, we are of the view that order of discharge is simpliciter and not punitive in nature and, as such, learned Single Judge rightly arrived at a conclusion that no opportunity of being heard was required to be afforded to the petitioner before discharging him from service and order of discharge being ex facie innocuous does not cast any stigma on the petitioner or visit him with penal consequences and it does not attract Article 311 of the Constitution of India

32. Consequently, in view of detailed discussion made hereinabove, we see no reason to interfere in the well reasoned judgment rendered by the learned Single Judge, as such, the same is upheld. This appeal fails and is dismissed, accordingly.

33. All interim orders are vacated and all the pending miscellaneous applications are disposed of.

****

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

Kewal Krishan Sehgal and others ...Petitioners/Tenants.

Versus

Rajeshwar Kumar and another ....Respondents/Landlords.

C.R. No. 127 of 2016
Reserved on: 28.12.2018
Date of decision: 03.01.2019

Code of Civil Procedure, 1908 – Section 115 – **Himachal Prades Urban Rent Control Act, 1987 (Act)** -Section 24(5) - Revision - Scope – Revisional power of High Court under Act may be wider than Revisional jurisdiction exercisable by it under Code - But it is not as wide as power of Appellate Court/ Authority - Such power cannot be exercised as cloak of an appeal in disguise (Para 8)

Code of Civil Procedure, 1908 – Order II Rule 2 - **Himachal Pradesh Urban Rent Control Act, 1987 (Act)** – Section 14 – Splitting of grounds of eviction - Permissibility- Landlord filing eviction suit against tenant on ground of *bona fide* requirement - Another suit on ground of building having become unsafe and unfit for human habitation already pending before Rent Controller - Tenant disputing subsequent suit on ground of maintainability - Held, Act provides different grounds to landlord to seek eviction of tenant - Mere pendency of rent suit on different ground would not bar subsequent rent suit seeking eviction on different grounds. (Para 16)

Himachal Pradesh Urban Rent Control (as amended by Amendment Act, 2009) Act, 1987 (Act) – Section 14- Eviction suit - *Bona fide* requirement - Non-residential building – Permissibility - Landlord filing eviction suit against tenant on ground of building required by him for setting up internet café - Rented premises non-residential one - Rent Controller ordering eviction of tenant - Appellate Authority upholding order – Revision - Tenant submitting that eviction from non-residential building was not provided in the Act when rent suit was filed - Rent suit itself was not maintainable and orders being without jurisdiction - Held, Act stood amended vide Amendment Act, 2009 enabling landlord to seek eviction from non-residential building for *bona fide* requirement - Amendment Act will apply to pending proceedings with retrospective effect. (Para 14)

Cases referred:

Arulvelu and another vs. State Represented by the Public Prosecutor and anr, (2009) 10 SCC 206

Ashok Kumar vs. Ved Parkash (2010) 2 SCC 264

Chaman Lal Bali vs. State of Himachal Pradesh and another, AIR 2016 (HP)168

Dhannalal vs. Kalawatibai and others, (2002) 6 SCC 16

Harbilas Rai Bansal vs. State of Punjab, 1995 (2) RCR 672: (1996) 1 SCC 1

Hari Dass Sharma vs. Vikas Sood and others, (2013) 5 SCC 243

Hindustan Petroleum Corporation Limited vs. Dilbahar Singh, (2014) 9 SCC 78

India Umbrella Manufacturing Co. and others vs. BhagabandeiAgarwalla (dead) by LRs Savitri Agarwalla (Smt.) and others, (2004) 3 SCC 178

Kanta Goel vs. B.P.Pathak and others, (1977) 2 SCC 814

Pal Singh vs. Sunder Singh (dead) by LRs and others, (1989) 1 SCC 444

Satya Wati vs. Union of India, 2008 (2) SLJ 721

Sri Ram Pasricha vs. Jagannath and others, AIR 1976 SC 2335

For the Petitioners	Mr. Ramakant Sharma, Senior Advocate, with Ms. Devyani Sharma and Mr. Basant Thakur, Advocates.
For the Respondents	Mr. Ashok Kumar Sood and Mr. Dhiraj Thakur, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioners are the tenants, who after having an order of eviction at the hands of the learned Rent Controller as affirmed by learned Appellate Authority, have filed the instant revision petition.

The parties shall be referred to as the 'Landlords' and the 'Tenants'.

2. Briefly stated the facts of the case are that the landlords filed a petition under Section 14 of the Himachal Pradesh Urban Rent Control Act, (for short 'Act'), seeking eviction of the tenants from the tenanted premises comprising a shop No.61, measuring 9.60 x 4.20 meters, constructed on khasra No. 125 and 126 at Up-mohal Sanjauli Bazar. It was averred by the landlords that their predecessor-in-interest had rented out the shop in the year 1945 and the premises in occupation of the tenants are bonafidely required by the landlords for setting up of office-cum-business premises of respondent No.1 and his daughter Mrs. Itee. It was averred that respondent No.1 is 65 years of age and is graduate in Engineering and he retired as Chief Engineer from H.P. State Electricity Board and has got

experience of 35 years in the field of Engineering and he wants to augment his income by utilizing his experience which he gained in service with Himachal Pradesh State Electricity Board. It was further averred that there is no suitable accommodation for running proposed professional work except the premises occupied by the tenants. It was averred that he was already doing consultancy but no suitable accommodation is available with him in the market for this purpose. It was averred that he has no son to look after him and his wife who is an old aged lady, and therefore, he has decided to shift his daughter to Shimla so that she can reside at Shimla with him and take care of him and his wife in their old age. It was averred that his daughter is doing private job and her husband is also doing private work and they have experience in Information Technology and advertising and for that purpose also they require suitable accommodation for settling at Shimla and they have proposed to start internet cafe in a place where customers are offered with high speed internet access of national and international level along with other computer services and variety of PC games and other allied computer services. It was further averred that the demised premises is bonafidely required by respondent No.1 and he does not have any vacant shop/ commercial premises in the main market in Urban area of Shimla for carrying work and also for establishing his daughter and son in law.

3. The said petition was contested and resisted by the tenants on various grounds inter alia maintainability and the landlords are estopped from filing and maintaining the present eviction petition and the same is bad for mis-joinder and non-joinder of necessary parties. It was further averred that the present petition is barred by the provisions of Order 2 Rule 2 of the Code of Civil Procedure and this ground of eviction is not available under the Act and the petition has been filed with malafide intention and with a view to get the rent increased. It was also averred that the landlords have failed to plead and prove the necessary ingredients which are essential to evict the tenants from the premises. It was further averred that the premises in question is non-residential and the ground of bonafide requirement for eviction is not available for such premises. The petition was sought to be dismissed being barred under the principle of res judicata. Similarly, it was averred that neither the premises are required by the landlords nor for his daughter who is settled at Panchkula. It was averred that another petition filed by the landlords seeking eviction of the present petitioners on the ground of bonafide requirement by pleading that the building has become unfit and unsafe for human habitation and use which is still pending in the court of leaned Rent Controller, Court No.6, Shimla. It was further stand of the tenants that respondent No.1 has got independent house at Lower Jakhoo, Shimla where he has sufficient accommodation in case he wants to start consultancy business and so far as the averment that the same is required for his daughter Mrs. Itee is concerned, that also denied on the ground that she is happily living with her in-laws and she is also having an independent family and she has no interest to do any business at Shimla and the plea of bonafide requirement has been raised by respondent No.1 with the sole motive to harass the present petitioners.

4. The learned Rent Controller after framing the issues, put the parties on trial and vide judgment dated 8.7.2015 allowed the petition on the ground of bonafide requirement for the purpose of running consultancy as well as for settling his daughter at Shimla.

5. Aggrieved by the order of eviction, the tenants filed an appeal before the learned Appellate Authority, however, the same also came to be dismissed vide judgment dated 2.5.2016, constraining the tenants to file the instant revision petition.

6. It has been vehemently argued by Mr. Ramakant Sharma, Senior Advocate, assisted by Ms. Devyani Sharma, Advocate, that:

(i) the eviction petition itself was not maintainablee on the ground that eviction qua non-residential premises was not available to the landlords on the date of filing of the petition and, therefore, eviction orders being contrary to law, deserve to be set-aside on this ground alone;

(ii) the eviction petition was barred under the provisions of Order 2 Rule 2 of CPC as another eviction petition on the ground of rebuilding and reconstruction had already been filed by the landlords and thereafter withdrawn unconditionally;

(iii) the eviction petition was bad for non-joinder of necessary parties as the other co-owners of the building had not been arrayed as parties to the petition; and

(iv) the findings recorded by the leaned authorities below are perverse inasmuch as they have not properly appreciated the statement of son-in-law of the landlord PW-3 in its proper perspective and thereby reached on wrong conclusion.

7. On the other hand, learned counsel for the respondents / landlords would argue that the judgments passed by learned authorities below cannot be held to be perverse, therefore, these findings warrant no interference.

I have heard learned counsel for the parties and have gone through the material placed on record carefully.

8. At the outset, the scope of revisional jurisdiction which Court can exercise must borne in mind, as the Constitution Bench of the Hon'ble Supreme Court in ***Hindustan Petroleum Corporation Limited vs. Dilbahar Singh (2014) 9 SCC 78*** laid down certain broad principles for exercise of revisional jurisdiction which can be summarized as under:

(i) *The term 'propriety' would imply something which is legal and proper.*

(ii) The power of the High Court even though wider than the one provided under Section 115 of the Code of Civil Procedure is not wide enough to that of the appellate Authority.

(iii) Such power cannot be exercised as the cloak of an appeal in disguise.

(iv) Issues raised in the original proceedings cannot be permitted to be reheard as a appellate Authority.

(v) The expression "revision" is meant to convey the idea of much narrower expression than the one expressed by the expression "appeal". The revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the CPC but certainly it is not wide enough to make the High Court a second court of first appeal. While holding so the Court reiterated the view taken in DattonpantGopalvaraoDevakate vs. VithalraoMaruthiraoJanagawal, (1975) 2 SCC 246.

(vi). The meaning of the expression "legality and propriety" so explained in Ram Dass vs. Ishwar Chander, (1988) 3 SCC 131 was only to the extent that exercise of the power is not confined to jurisdictional error alone and has to be "according to law".

(vii) Whether or not the finding of fact is according to law or not is required to be seen on the touch stone, as to whether such finding of fact is based on some legal evidence or it suffers from any illegality like misreading of the evidence;

overlooking; ignoring the material evidence all together; suffers from perversity; illegality; or such finding has resulted into gross miscarriage of justice. Court clarified that the ratio of Ram Dass (supra) does not exposit that the revisional power conferred upon the High Court is as wide as an appellate power to reappraise or reassess the evidence for coming to a finding contrary to the findings returned by the authority below.

(viii) In exercise of its revisional jurisdiction High Court shall not reverse findings of fact merely because on reappreciation of the evidence it may have a different view thereupon.

(ix) The exercise of such power to examine record and facts must be understood in the context of the purpose that such findings are based on firm legal basis and not on a wrong premise of law.

(x) Pure findings of fact are not to be interfered with. Reconsideration of all questions of fact is impermissible as Court cannot function as a Court of appeal.

(xi) Even while considering the propriety and legality, high Court cannot reappreciate the evidence only for the purposes of arriving at a different conclusion. Consideration of the evidence is confined only to adjudge the legality, regularity and propriety of the order.

(xii) Incorrect finding of fact must be understood in the context of such findings being perverse, based on no evidence; and misreading of evidence."

9. In the aforesaid decision, the Hon'ble Supreme Court was dealing with the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965, T. N. Buildings (Lease and Rent Control) Act, 1960 and Haryana Urban (Control of Rent and Eviction) Act, 1973. The incongruity in the decisions rendered by the Hon'ble Supreme Court in Rukmini Amma Saradamma vs. KallyaniSulochana, (1993) 1 SCC 499 and Ram Dass (supra) was the backdrop in which the Constitution Bench was called upon to decide the scope of the revisional jurisdiction and the expression "legality and propriety" provided in the relevant statues. The essential question being as to whether in exercise of such powers, the revisional authority could reappreciate the evidence or not. Finally the Hon'ble Supreme Court answered the reference by making the following observations:-

"43. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the first appellate court/first appellate authority because on reappreciation of the evidence, its view is different from the court/authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the court/authority below is according to law and does not suffer from any error of law. A finding of fact recorded by court/authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself as to the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned

> *decision or the order, the High Court shall not exercise its power as an appellate power to reappreciate or reassess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers."*

10. Bearing in mind the law propounded in the aforesaid decision, this Court will now proceed to answer point-wise contentions raised by the tenants.

POINT No.(i):

11. It is not in dispute that the premises in question are 'non-residential'. It is further not in dispute that it was vide amendment carried out in the Rent Act which came into force w.e.f. 16.3.2012 that eviction could be sought from 'non-residential premises' on the ground of bonafide requirement. However, before the amendment was in fact carried out, the Hon'ble Supreme Court in ***Harbilas Rai Bansal vs. State of Punjab 1995 (2) RCR 672 : (1996) 1 SCC 1,*** struck down a same or similar provision that existed in the East Punjab Urban Rent Restriction Act wherein also there was no provision in the Rent Act seeking eviction on the ground of bonafide requirement of 'non-residential premises'. It was held that the provisions in the Rent Act which deprives the landlord of their right to seek ejectment from the non-residential premises are violative of Article 14 of the Constitution of India and classification created in this Act between residential and non-residential for bonafide of landlord has no reasonable nexus with the object sought to be achieved under the Rent Act. It was in this background that the Himachal Pradesh Urban Rent Control Act came to be amended and brought in conformity with the law as laid down in ***Harbilas Rai Bansal's*** case (supra).

12. Subsequently, the Hon'ble Supreme Court in ***Satya Wati vs. Union of India 2008 (2) SLJ 721*** and ***Ashok Kumar vs. Ved Parkash (2010) 2 SCC 264.*** In ***Satya Wati's*** case (supra) the Hon'ble Supreme Court was dealing with the Delhi Rent Act, whereas in ***Ashok Kumar's*** case (supra) , the Hon'ble Supreme Court was dealing with the Haryana Rent Control Act that was the subject matter of the lis. In ***Ashok Kumar's*** case it was specifically held that it will not make difference that ***Harbilas's***case was under the Rent Act enacted by the legislature of State of Punjab, whereas the Haryana Rent Act was enacted by the different legislature of the State of Haryana and, therefore, negated the contention that because of the legislature having been enacted by two different States, the ratio in ***Harbilas***case would not apply as was contended by the tenants therein. Rather the Hon'ble Supreme Court held that the judgment in ***Harbilas*** was applicable to the Haryana Rent Act as it has persuasive value for the Court while considering the constitutionality of a very similar provision albeit in different Legislation. It shall be apposite to refer to the relevant provisions as contained in paras 21 to 24 of the judgment, which reads thus:

> "*21. Thus, in view of the overall discussions made hereinabove, we are unable to accept the submission of the learned counsel for the appellant that an eviction petition filed by a landlord for eviction of a tenant cannot be filed under Section 13 of the Act when such eviction proceeding relates to a non-residential building.*
>
> *22. Before parting with this Judgment, a short submission of the learned counsel for the appellant needs to be dealt with. According to the learned counsel for the appellant, the case of Harbilas (supra) and Rakesh Vij vs. Dr. Raminder Pal Singh Sethi, (2005) 8 SCC 504, were rendered on the amendments made to East Punjab Rent Act, whereas the case of Mohinder*

Prasad Jain vs. Manohar Lal Jain, (2006) 2 SCC 724 and the issue before us concerned removing a classification which existed from the inception of the legislation. Therefore, according to the learned counsel for the appellant, a decision and reasoning concerning East Punjab Rent Act cannot apply to a question with respect to the present Act because both the legislations are products of different legislatures and the rationale behind one cannot be compared at par with that of the other.

23. The learned counsel for the appellant, in support of this contention, relied on a decision of this Court in the case of State of Madhyapradesh v. G.C.Mandawar, AIR 1954 SC 493 and strong reliance on para 9 of this decision was pressed by the learned counsel for the appellant, which may be quoted :-

> *"9....It is conceivable that when the same Legislature enacts two different laws but in substance they form one legislation, it might be open to the Court to disregard the form and treat them as one law and strike it down, if in their conjunction they result in discrimination. But such a course is not open where, as here, the two laws sought to be read in conjunction are by different Governments and by different legislatures."*

24. There is no quarrel in the aforesaid principle laid down by this Court in the aforesaid decision. However, we do not see why the decision concerning one legislation cannot hold persuasive value for the Court while considering the constitutionality of a very similar provision, albeit in a different legislation."

13. As observed above, the provisions of Rent Act have now been amended and brought in conformity with the judgment laid down in ***Harbilas***case (supra). The Hon'ble Supreme Court in ***Hari Dass Sharma vs. Vikas Sood and others (2013) 5 SCC 243*** has itself applied the provisions of the amending Act to the pending proceeding before it as would be evident from para-19 of the report which reads thus:

> *"19. We accordingly allow the appeals, set aside the directions contained in para 27 of the impugned judgment of the High Court, but grant time to the respondents to vacate the building within three months from today. We make it clear that it will be open for the respondents to apply for re-entry into the building in accordance with the proviso to clause (c) of Section 14(3) of the Act introduced by the Amendment Act, 2009. Considering, however, the peculiar facts and circumstances of the cases, there shall be no order as to costs."*

14. In view of the law expounded in ***Hari Dass***case (supra), it can conveniently be held that the provisions of the amending Act have retrospective operation and this was so noticed by learned Division Bench of this Court in ***Chaman Lal Bali vs. State of Himachal Pradesh and another AIR 2016 (HP)168.***

15. In view of the aforesaid discussion, it can conveniently be held that the eviction petition filed by the landlord even prior to the amendment so carried out in the Rent Act, was maintainable.

POINT NO. (ii):

16. Under Section 14 of the Rent Act, a landlord is entitled to seek eviction of his tenant on various grounds. All these grounds are separate and distinct and, therefore, the mere fact that the landlord had instituted another petition seeking eviction on the ground of rebuilding and reconstruction would not in any manner have bearing upon the instant

petition as the withdrawal of the other petition has no effect upon the maintainability of this petition which has been filed on separate and distinct grounds, which otherwise were available to the landlord.

POINT No. (iii):

17. It has way back in 1976 that a bench of three Hon'ble Judges in ***Sri Ram Pasricha vs. Jagannath and others AIR 1976 SC 2335*** held that a co-owner is as much an owner of the entire property as sole owner of the property is, therefore, can maintain an eviction petition. The aforesaid judgment was thereafter followed by a bench of three Hon'ble Judges in ***Kanta Goel vs. B.P.Pathak and others (1977) 2 SCC 814***. Similar reiteration of law can be found in ***Pal Singh vs. Sunder Singh (dead) by LRs and others (1989) 1 SCC 444***, ***Dhannalal vs. Kalawatibai and others (2002) 6 SCC 16*** and ***India Umbrella Manufacturing Co. and others vs. BhagabandeiAgarwalla (dead) by LRs Savitri Agarwalla (Smt.) and others (2004) 3 SCC 178.***

18. In view of the law propounded in all the aforesaid judgments, it can be taken to be well settled that one of the co-owners can file a suit for eviction of a tenant in the property generally owned by the co-owners. This principle is based on the doctrine of agency. One co-owner filing a suit for eviction against the tenant does so on his own behalf in his own right and as an agent of the other co-owners. The consent of other co-owners is assumed as taken unless it is shown that the other co-owners were not agreeable to eject the tenant and the suit was filed in spite of their disagreement.

19. Adverting to the facts of the case, it would be noticed that there is nothing on record to even remotely indicate that other co-owners were not agreeable to eject the tenants and yet the eviction petition had been filed despite such disagreement.

POINT No. (iv):

20. As regards the perversity in the judgment, it is necessary to understand the meaning of perversity.

21. What is 'perverse' was considered by the Hon'ble Supreme Court in a detailed judgment in ***Arulvelu and another*** *vs.* ***State Represented by the Public Prosecutor and another (2009) 10 SCC 206*** wherein it was held as under:-

> "*26. In M. S. Narayanagouda v. Girijamma& Another AIR 1977 Kar. 58, the Court observed that any order made in conscious violation of pleading and law is a perverse order. In Moffett v. Gough, (1878) 1 LR 1r 331 the Court observed that a perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence. In Godfrey v. Godfrey 106 NW 814, the Court defined `perverse' as turned the wrong way, not right; distorted from the right; turned away or deviating from what is right, proper, correct etc.*
>
> *27. The expression "perverse" has been defined by various dictionaries in the following manner:*
>
> *1. Oxford Advanced Learner's Dictionary of Current English Sixth Edition*
>
> *PERVERSE:- Showing deliberate determination to behave in a way that most people think is wrong, unacceptable or unreasonable.*
>
> *2. Longman Dictionary of Contemporary English - International Edition*

PERVERSE: Deliberately departing from what is normal and reasonable.

3. The New Oxford Dictionary of English - 1998 Edition

PERVERSE: Law (of a verdict) against the weight of evidence or the direction of the judge on a point of law.

4. New Webster's Dictionary of the English Language (Deluxe Encyclopedic Edition)

PERVERSE: Purposely deviating from accepted or expected behavior or opinion; wicked or wayward; stubborn; cross or petulant.

5. Stroud's Judicial Dictionary of Words & Phrases, Fourth Edition

PERVERSE: A perverse verdict may probably be defined as one that is not only against the weight of evidence but is altogether against the evidence.

28. In Shailendra Pratap & Another v. State of U.P. (2003) 1 SCC 761, the Court observed thus: (SCC p.766, para 8

"8...We are of the opinion that the trial court was quite justified in acquitting the appellants of the charges as the view taken by it was reasonable one and the order of acquittal cannot be said to be perverse. It is well settled that appellate court would not be justified in interfering with the order of acquittal unless the same is found to be perverse. In the present case, the High Court has committed an error in interfering with the order of acquittal of the appellants recorded by the trial court as the same did not suffer from the vice of perversity."

29. In Kuldeep Singh v. The Commissioner of Police & Others (1999) 2 SCC 10, the Court while dealing with the scope of Articles 32 and 226 of the Constitution observed as under: (SCC p.14, paras 9-10)

"9. Normally the High Court and this Court would not interfere with the findings of fact recorded at the domestic enquiry but if the finding of "guilt" is based on no evidence, it would be a perverse finding and would be amenable to judicial scrutiny.

10. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

30. The meaning of `perverse' has been examined in H. B. Gandhi, Excise and Taxation Officer-cum- Assessing Authority, Karnal & Others v. Gopi Nath & Sons & Others 1992 Supp (2) SCC 312, this Court observed as under: (SCC pp. 316-17, para 7)

"7. In the present case, the stage at and the points on which the challenge to the assessment in judicial review was raised and entertained was not appropriate. In our opinion, the High Court was in error in constituting itself into a court of appeal against the assessment. While it was open to the respondent to have raised and for the High Court to have considered whether the denial of relief

under the proviso to Section 39(5) was proper or not, it was not open to the High Court re-appreciate the primary or perceptive facts which were otherwise within the domain of the fact-finding authority under the statute. The question whether the transactions were or were not sales exigible to sales tax constituted an exercise in recording secondary or inferential facts based on primary facts found by the statutory authorities. But what was assailed in review was, in substance, the correctness - as distinguished from the legal permissibility - of the primary or perceptive facts themselves. It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

22. It is vehemently argued by Mr. Ramakant Sharma, learned Senior Counsel that the eviction of the tenants has been ordered solely on the ground that daughter and son-in-law of the landlord intend to settle at Shimla, whereas the statement of the son-in-law, who appeared as PW-3 was to the contrary and as regards the daughter, she did not even appear in the witness box and, therefore, an adverse inference ought to have been drawn against the landlord. Even this contention of the tenants is without any basis.

23. PW-3 Vinay Sharma, son-in-law of landlord No.1 and husband of Ms. Itee, daughter of this landlord, while appearing as PW-3 not only corroborated but supported the testimony of the landlord, who appeared as PW-1 and stated that he was power of attorney of his wife, who could not appear due to her ill health. He further states that he was post graduate and diploma holder and had earlier worked with B.R. advertising company from the year 1999 uptil the year 2010. His wife was working in Lozing Company and he is doing the work of advertising from his house. She had done digital marketing and content writing in Graphy Company Panchkula. He specifically deposed that he and his wife wanted to come to Shimla to look after his in-laws, who were in advance stage and not keeping good health. He and his wife intended to start advertising and cyber cafe business in the demised premises. His uncles had also settled in Shimla and, therefore, he and his wife will have no inconvenience and difficulty for settling in Shimla. Even though, PW-3 was cross-examined in length, but nothing material could be elicited so as to dent his testimony. In such circumstances, merely because the statement of PW-3 is not to the liking of the tenants, it cannot be held that the findings recorded by the authorities below are in any manner perverse.

24. It cannot be said that the evidence has not been read and appreciated or that there has been misreading of evidence by the leaned authorities below so as to warrant interference by this Court.

25. In view of the aforesaid discussion, no interference warranted on the findings rendered by the authorities below. There is neither any illegality nor any perversity in the same. The testimonies of the witnesses stand correctly and completely appreciated. The oral and documentary evidence also stand considered in its right perspective and even the provisions of law have been correctly applied to the given facts and circumstances of the case. This petition is devoid of any merit and is dismissed as such alongwith all pending application(s), leaving the parties to bear their own costs.

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

Pooja Kumari ...Petitioner.
Versus
State of H.P. and others. ...Respondents.

CWP Nos. 1843, 1844, 2890 & 2905 of 2017
Reserved on: 28.12.2018
Decided on: 03.01. 2019

Administrative Law - Executive Orders - Judicial Review - Scope- Held, Orders of executive authority can be challenged before High Court - But scope of judicial review is confined and limited. Writ court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter action is in realm of contract. While exercising judicial review jurisdiction, court cannot sit in arm-chair of administrator to decide whether more reasonable decision or course of action could have been taken in circumstances. (Paras 7 & 8)

Constitution of India, 1950 – Articles 14 & 226 - Contractual Employees – Efflux of contractual period – Effect - Petitioners rendering services as Assistant Professors on contractual basis – State advertising posts after expiry of contractual period - Petitioners filing writs and continuing on posts because of stay orders of court - Petitioners challenging advertisement on ground that contractual employees cannot be replaced by other employees to be engaged on contract basis – Held, person who enters through back-door or side door has to leave from same door - Once appointments were purely contractual then by efflux of time as envisaged in contract itself, same came to an end and persons holding such posts can have no right to continue or renewal of contract of service as matter of right - Petitioners accepted engagement under contract - They are bound by terms of contract - They cannot claim higher rights than available under contract - Petitions dismissed - State permitted to conduct interview pursuant to advertisement and proceed further. (Paras 6 & 7)

Doctrine of legitimate expectation – Applicability - Held, appointments offered to petitioners were limited one and respondents had not at any given time offered to petitioners that they would continue in service till perpetuity or till date they attain age of superannuation. Question of legitimate expectation to continue in service does not arise. Petitioners at time of entering into contractual appointment were fully aware of consequences of appointments being contractual in nature, therefore, such persons cannot invoke theory of legitimate expectation for being continued in posts. (Para 13)

Cases referred:

Gridco Ltd. & Another vs. Sadananda Doloi&Ors, AIR 2012 SC 729

Secretary, State of Karnataka and others vs. Uma Devi (3) and others, (2006) 4 SCC 1

For the Petitioner(s): Mr. Naresh K. Sharma, Advocate, for the petitioner(s) in CWP Nos. 1843 & 1844 of 2017.
Mr. Vinod Thakur, Advocate, for the petitioners in CWP Nos. 2890 & 2905 of 2017.

For the Respondent(s): Mr. Vinod Thakur, Addl. A.G. with Ms.SvaneelJaswal, Dy. A.G., for respondent No. 1 in all petitions.

Mr. K. D. Sood, Sr. Advocate with Mr. Shubham Sood, Advocate, for respondents No. 2 to 4 in all petitions.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

CWP Nos. 1843 and 1844 of 2017 have been filed by the Assistant Professors, who after completion of the period of the contract are continuing under the orders of the Court. Whereas CWP Nos. 2890 and 2905 of 2017 have been filed by the candidates, who pursuant to the advertisement issued by the respondents for the post of Assistant Professors have competed but are not being selected and appointed on account of the said orders passed by this Court.

2. Ms. Pooja Kumari, Petitioner in CWP No. 1843 of 2017, was appointed as Assistant Professor in Chemistry for a period of 89 days. Earlier to that she had served as PTA Lecturer w.e.f. 23.08.2016 to 31.0.2016 and from 1.12.2016 to 31.03.2017. In between she was given break in service during winter vacation from 01.01.2017 to 10.02.2017 at the end of academic session 2016-17. She was thereafter relieved from her duties as per the decision taken by the PTA of the College.

3. The petitioner apprehending the cessation of employment on completion of 89 days, approached this Court and obtained stay order by continuing that contract employee could not be replaced by another contract employee.

4. The case of the Rishu Kumari, Petitioner in CWP No. 1844 of 2017 is no better as she volunteered to render gratuitous service in the college as is evident from the application submitted by her on 20.03.2017 (Annexure R-2), which reads thus:-

सेवामें,

प्रिंसिपलमहोध्य,

बाबाबालनाथडिग्रीकॉलेज,

चकमोह!

विषय:- समाजशास्त्रप्रवक्ताकेपदपरआवनैतिकतौरपरकार्यकरनेकीअनुमतिदेनेहेतु!

श्रीमानजी,

विनम्रनिवेदनयहहैकीमैंरिशुकुमारीसपुत्रीश्रीप्रकाशचाँदगांववडाकघरचकमोह,तहसीलबरसरजिलाहमीरपुरकीस्थाईनिवासीहूँ! मैंनेहिमाचलप्रदेशविश्वविद्यालयशिमलासे2015मेएम. ए.(समाजशास्त्र) मे66. 08 % नंबरप्राप्तकिये! जिसमेमैंनेतृतीयस्थान(Bronze Medal) हासिलकिया! अबमैंपीएचडी(समाजशास्त्र) ज्योतिविद्यापीठमहिलाविश्वविद्यालय, जयपुरसेकररहीहूँ! जोकीजुलाई2019मेपूर्णहोजाएँगी! अतःमहोध्यसेअनुरोधहैकीजबतकमेरीपीएचडीपूरीनहींहोजातीतबतकमुझेबाबाबालनाथडिग्रीकॉलेज, चकमोहमेसमाजशास्त्रप्रवक्ताकेपदपरआवनैतिकसेवाएंप्रदानकरनेकीअनुमतिदें! आपकीमहानकृपाहोगी

धन्यावाद

Sd/-

Rishu Kumari

Dated: 20.03.2017

5. In her case, there was no selection whatsoever, yet she managed to get stayed the interviews that were fixed on 19.08.2017 on the ground that her services could not be replaced by contractual or guest faculty lecturer.

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

6. It is more than settled that a person who enters through the back-door or side door has to leave from the same door. Therefore, once the appointments were purely contractual then by efflux of time as envisaged in the contract itself, the same came to an end and the persons holding such posts can have no right to continue or renewal of contract of service as a matter of right. It lies best in the wisdom of the employer to grant such appointments on contract on various terms and unless the decision making process is established to be arbitrary on the face of it, the Court will be loath to exercise its extra-ordinary jurisdiction to quash such appointment of fixed term basis.

7. There is a clear distinction between public employment governed by the statutory rules and private employment governed purely by contract. No doubt with the development of law, there has been a paradigm shift with regard to judicial review of administrative action whereby the writ court can examine the validity of termination order passed by the public authority and it is no longer open to the authority passing the order to argue that the action in the realm of contract is not open to judicial review. However, the scope of interference of judicial review is confined and limited. The writ court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract.

8. However, judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the administrator to decide whether more reasonable decision or course of action could have been taken in the circumstances. (Refer ***Gridco Ltd. & Another*** vs. ***Sadananda Doloi&Ors***, AIR 2012 SC 729).

9. It may be noticed that the petitioners had voluntarily accepted the appointment granted to them subject to the conditions clearly stipulated in the contract or the terms of appointment. These appointments subject to the conditions have been accepted with their eyes wide open, therefore, now the petitioners cannot turn around claiming higher rights ignoring the conditions subject to which the appointments had been accepted.

10. Moreover, advertising the posts, as fixed term contractual appointment initially and thereafter permitting the incumbents so appointed to continue till the age of superannuation, would amount to playing fraud with those multitude of people, who would otherwise be eligible to apply and may have skipped the employment process thinking that it is only for a temporary period or a contractual period.

11. In ***Secretary, State of Karnataka and others*** vs. ***Uma Devi (3) and others***, (2006) 4 SCC 1, the Hon'ble Supreme Court had clearly held that the courts are not to be swayed by the consideration that the concerned person has worked for some time or for a considerable length of time as the person, who is engaged on such appointment is temporary or casual or contractual, is fully aware of the nature of his employment and having accepted such appointments with eyes open cannot turn around and claim permanency or continuation as this would create another mode of employment, which is not permissible. It is relevant to reproduce relevant observations as under:

> *[45] While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain not at arms length since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other, words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the constitution of India.*

12. As a last ditch effort, learned counsel for the petitioners would then contend that they have legitimate expectation to continue in service.

13. As already observed earlier, appointments offered to the petitioners were limited one and the respondents had not at any given time offered to the petitioners that they would continue in service till perpetuity or till the date they attain the age of superannuation. It is not even the case of the petitioners that there was any uncertainty or ambiguity in the appointments made by the respondents insofar as the tenure to which they were appointed. Therefore, the question of legitimate expectation to continue in service does not arise. The petitioners at the time of entering into contractual appointment were fully aware of the consequences of appointments being contractual in nature, therefore, such a person(s) cannot invoke the theory of legitimate expectation for being continued in the post.

14. Identical issue has already been considered by the Constitution Bench in ***Uma Devi's*** case (supra) and it was negated by observing as under:

> *[46] Learned senior counsel for some of the respondents argued that on the basis of the doctrine of legitimate expectation, the employees, especially of the Commercial taxes Department, should be directed to be regularized since the decisions in dharwad (supra) , Piara Singh (supra) jacob, and Gujarat Agricultural University and the like, have given rise to an expectation in them that their services would also be regularized. The doctrine can be invoked if the decisions of the Administrative authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision- maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn {see Lord diplock in Council of Civil Service unions v. Minister for the Civil Service, national Buildings Construction Corpn. v. S. Raghunathan, and Dr. Chanchal goyal v. State of Rajasthan. There is no case that any assurance was given by the government or the concerned department while making the appointment on daily wages that the status conferred on him will not be withdrawn until some rational reason comes into existence for withdrawing it. The very engagement was against the constitutional scheme. Though, the commissioner of the Commercial taxes Department sought to get the appointments made permanent, there is no case that at the time of appointment any promise was held out. No such promise could also have been held out in view of the circulars and directives issued by the Government after the dharwad decision. Though, there is a case that the State had made regularizations in the past of similarly situated employees, the fact remains that such regularizations were done only pursuant to judicial directions, either of the Administrative Tribunal or of the High Court and in some case by this court. Moreover, the invocation of the doctrine of legitimate expectation cannot enable the employees to claim that they must be made permanent or they. must be regularized in the service though they had not been selected in terms of the rules for appointment. The fact that in certain cases the Court had directed regularization of the employees involved in those cases cannot be made use of to found a claim based on legitimate expectation. The argument if accepted would also run counter to the constitutional mandate. The argument in that behalf has therefore to be rejected.*
>
> *[47] When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the state has held out any promise while engaging these persons*

either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

15. As observed above, the petitioners having accepted the offer of appointment with eyes open cannot turn around by claiming higher rights ignoring the conditions subject to which the appointments had been accepted. There was no uncertainty or ambiguity in the appointments made by the respondents insofar as the tenure to which they were appointed.

16. In view of the aforesaid discussion, I find no merit in CWP Nos. 1843 and 1844 of 2017 and the same are accordingly dismissed. As regards CWP Nos. 2890 and 2905 of 2017, the same are allowed by directing the respondents to hold the interviews pursuant to the advertisement already issued by them and thereafter take the selection process to its logical end. The parties are left to bear their costs. All interim orders are vacated.

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

State of Himachal Pradesh .. Appellant
Versus
Sukh Dev and others .. Respondents

Cr. Appeal No. 54 of 2007
Decided on: January 2, 2019

Punjab Excise Act,1914 (as applicable to the State of Himachal Pradesh)- Section.61(1)(a) - Recovery of country and Indian made foreign liquor (IMFL) without permit - On tip off, Police laying Naka and intercepting vehicles of accused and recovering huge quantity of Country and IMFL being transported by them without permit - Trial court convicting accused - Appellate court reversing trial court's judgment and acquitting accused – State in appeal - State contending wrong appreciation of evidence by Sessions Court - Facts showing (i) place of recovery being highway, a busy road, surrounded by many houses and shops and independent witnesses easily available but no independent witness associated (ii) statements of prosecution witnesses examined during trial inspiring no confidence as these riddled with material contradictions and inconsistencies (iii) samples from entire recovered stuff not taken – Held - Evidence on record does not warrant interference with judgment of acquittal - Appeal dismissed. (Paras 8,9 &14)

Cases referred:

C. Magesh and others vs. State of Karnataka (2010) 5 SCC 645
State of HP vs. Jagjit Singh, Latest HLJ 2008 (HP) 919
State of Himachal Pradesh vs. Rakesh Kumar, Latest HLJ 2018 (HP) 73
Surender Singh. vs. State of H.P.", Latest HLJ 2013 (2) 865

For the appellant: Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General with Mr. Amit Kumar, Deputy Advocate General.
For the respondents: Mr. Paras Dhaulta, Advocate, for respondent No.1.

Mr. B.R. Sharma, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:(oral)

By way of present appeal filed under S.378 CrPC, challenge has been laid to the Judgment of acquittal dated 13.10.2006, passed by the learned Sessions Judge, Solan in Cr. Appeal No. 3-S/10 of 2006, reversing the judgment of conviction dated 29.3.2006, passed by the learned Additional Chief Judicial Magistrate, Kandaghat, District Solan, Himachal Pradesh in Cr. Case No. 11/3 of 2000, whereby learned Court below, held respondent-accused guilty of having committed offence punishable under S.61(1)(a) of the Punjab Excise Act (as applicable to the State of Himachal Pradesh), and convicted and sentenced him to undergo simple imprisonment for a period of one year and to pay a fine of Rs.5,000/-, and, in case of default of payment of fine, to further undergo simple imprisonment for three months.

2. Facts, as emerge from the record are that on 17.7.1999, SHO Vijay Kumar alongwith other police officials, laid a *Naka* near AndhaMor, Waknaghat, and at about 1.00 am, one truck came from Solan side, followed by a Maruti van. When aforesaid truck was signaled to stop, occupants of the truck on seeing the police, stopped the truck 30-40 metres away from the *Naka* and tried to run away by jumping from the truck, however, they were apprehended by the police party. Maruti Van was also stopped, but the occupants, four in number, jumped from the Maruti Van and ran towards hillside and escaped under the cover of darkness. Driver of the truck was arrested. Four persons, who had run away from the Van were heard calling each other by their names i.e. Bittu, Madan and Kaka etc. Subsequently, truck in question was searched, wherein police recovered 95 sacks of country liquor mark “Gulab”, each sack containing four bags and each bag containing 50 pouches of 180 ml country liquor and as such, in total, police recovered 19000 pouches (34,20,000 ml) of country liquor. Police also checked the Maruti Van, which allegedly had no number plate and recovered 5 sacks, each containing four bags of “Bagpiper” Whisky, each bag containing 12 bottles and in total 240 bottles containing 1,80,000 ml of Indian Made Foreign Liquor was recovered. Police took into possession Maruti Van as well as truck and during investigation found that accused Bittu alias Bhagat Singh, Madan, Kaka, Hem Raj and one person from Shimla, was involved in the illegal transportation of liquor. After completion of codal formalities on the spot, police sent *Rukka* for registration of FIR, on the basis of which FIR came to be registered against the accused. Police also took samples from the liquor recovered and sent the same to Composite Testing Laboratory (CTL) Kandaghat and report therefrom was received, which established the contents of samples to be of alcohol. On completion of investigation, police presented *Challan* against the accused persons.

3. Learned trial Court, on being satisfied that a prima facie case exists against the accused, framed charge against them under S. 61(1)(a) of the Punjab Excise Act, as applicable to the State of Himachal Pradesh (hereinafter, ‘Act’), to which they pleaded not guilty and clamed trial.

4. Subsequently, learned trial Court, vide judgment dated 29.3.2006, acquitted the accused namely Suresh Kumar, Madan Singh, Sunil Dhawan and Kusum Thakur, whereas respondents-accused-Sukh Dev Singh , Hem Raj alias Kaka and Bhagat Singh alias Bittu, came to be convicted for the commission of offence punishable under Section 61(1)(a) of the Act and convicted them as per description given herein above. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded against them, respondents-

accused preferred an appeal in the court of learned Sessions Judge, Solan, Himachal Pradesh, who, vide judgment dated 13.10.2006, acquitted them. In the aforesaid background, State has approached this court in the instant appeal praying therein for setting aside the Judgment of acquittal and to convict the respondents-accused.

5. Mr. Amit Kumar, learned Deputy Advocate General, while making this court to peruse the impugned judgment of acquittal recorded by the learned Sessions Judge, vehemently argued that the same is not sustainable in the eye of law, as the same is not based upon correct appreciation of evidence adduced on record by the prosecution, as such, prayed that the same be quashed and set aside. Mr. Amit Kumar, learned Deputy Advocate General, further contended that bare perusal of the evidence adduced on record by the prosecution, clearly suggests that the prosecution successfully proved beyond reasonable doubt that on the date of alleged incident, truck/van owned/driven by the accused was/were apprehended by the police, carrying liquor, without there being any valid permit and as such, there was no occasion, if any, for the learned Court below to have set aside the judgment of conviction recorded by the learned trial Court. While referring to the statements having been made by the prosecution witnesses, learned Deputy Advocate General made a serious attempt to persuade this court to agree with his contention that, if statements of the prosecution witnesses are read in conjunction, same clearly prove the guilt of the accused, as such, no scope, if any, was left for the court below to hold accused not guilty of commission of offence punishable under the aforesaid provisions. He further contended that since the samples were drawn from each bag, containing country and Indian Made Foreign Liquor, there was no requirement, as such, for the investigating agency to draw samples from each and every pouch/bottle, because in that eventuality, investigating agency had to draw around 19,240 samples (19000 samples from pouches and 240 samples from bottles), which was not possible. While referring to the report of the chemical analyst, he contended that it stands duly established on record that the liquor recovered from the vehicles in question, owned and driven by accused, was found to be country liquor and Indian Made Foreign Liquor, which was admittedly being transported by the accused, without there being any valid permit.

6. Mr. Paras Dhaulta and Mr. B.R. Sharma, Advocates, appearing for the respondent 1-accused and respondents No.2 and 3-accused, respectively, while supporting the impugned judgment of acquittal recorded by the learned Sessions Judge, contended that there is no illegality or infirmity in the same, rather it is based upon correct appreciation of evidence, as such, there is no scope of interference by this court. They further contended that though the alleged recovery was effected on a National Highway where vehicles ply all the time, but there is no explanation rendered on record as to why no independent witness came to be associated. He contended that despite there being availability of independent witnesses, prosecution failed to associate any independent witness, which creates serious doubt with regard to correctness of the story put forth by the prosecution. They further contended that even otherwise, if statements of prosecution witnesses are read in conjunction, there are material contradictions and inconsistencies as such, same could not be made basis for holding accused guilty of having committed offences punishable under S.61(1)(a) of the Act. Learned counsel representing the accused, vehemently argued that the learned Sessions Judge rightly upset the judgment of conviction passed by learned trial Court, as far as accused are concerned, because on the same and similar set of evidence, other accused were acquitted, who were allegedly involved in the same incident, whereas, present accused were convicted without there being any evidence against them. Lastly, learned counsel representing accused, while placing reliance upon judgment rendered by this court in case titled **State of Himachal Pradesh** vs. **Rakesh Kumar**, Latest HLJ 2018 (HP) 73, contended that once samples were drawn only from 5 bottles and 12 pouches out of

total contraband allegedly recovered from the truck and Maruti Van in question, recovery, if any, could be said to be of 5 bottles and 12 pouches against the accused. Learned counsel for the accused contended that since samples were not drawn from all the bottles and pouches allegedly recovered from the truck and van in question, recovery of 240 bottles and 19000 pouches is not proved in accordance with law, as such, learned Sessions Judge rightly acquitted them of the charges framed under aforesaid provisions of the Act.

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

8. Having heard the learned counsel for the parties and perused material available on record vis-à-vis impugned judgment recorded by the learned Court below, this court finds that alleged recovery came to be effected from the Maruti Van and the truck owned and driven by accused on 17.7.1999 at about 1.00 am, near Andha Mor, Waknaghat, which is situate on National Highway. At this stage, this court can take judicial note of the fact that the Highway in question is a busy road, on which vehicles ply day and night, as such, there appears to be considerable force in the arguments of learned counsel for the accused that despite there being availability of independent witnesses, no effort, if any, to associate any independent witness, ever came to be made on behalf of the police, which had laid *Naka,* to prove its story. Otherwise also, at the place, Waknaghat, there are many houses/ shops and independent witnesses could have been easily associated, had the police put in some efforts in this direction. Once the police had laid *Naka*, it can be presumed that it had some prior information with regard to illegal transportation/smuggling of liquor, as such, it ought to have made arrangement for associating independent witnesses in the event of effecting recovery on account of interception made by it. In the case at hand, all the prosecution witnesses are official witnesses. No doubt, version put forth by the official witnesses can not be ignored or brushed aside solely on account of non-association of independent witnesses, but, at the same time, it is settled law that the version put forth by officials witnesses needs to be taken note of with utmost caution, while ascertaining guilt of the accused, especially when it is not corroborated by any independent witnesses.

9. Otherwise also, careful perusal of the evidence led on record by the prosecution nowhere compels this court to agree with the contention of the learned Deputy Advocate General that the statements having been made by the prosecution witnesses inspire confidence, rather, there are material contradictions and inconsistencies therein, which certainly compel this court to conclude that the story put forth by the prosecution is not trustworthy. Interestingly, evidence collected by the prosecution to implicate accused Hem Raj and Bhagat Singh was that they, while leaving the spot/ Van were calling each other by their names, which fact, by no stretch of imagination, could be a basis to implead them as accused. Otherwise also, this court was unable to lay its hand to any piece of evidence, suggestive of the fact that that the accused were apprehended or caught at the spot smuggling liquor, without there being any valid permit, that is why, they came to be rightly acquitted by the trial court.

10. In the case at hand, prosecution with a view to prove the complicity of the accused also adduced on record call details of the mobile phones of accused, but prosecution was not able to link the accused with the transportation of liquor on that day. Interestingly, text of talk, if any, with regard to liquor never came to be produced in the court, as such, court below rightly observed that what exactly came to be transported and what accused were talking about with each other on the relevant day over the phone, has been not brought before it and as such, there is no connection as such of the accused with the commission of alleged offence.

11. As far as involvement of Sukh Dev is concerned, he was the only person, who was allegedly found on the spot. As per prosecution story, he was driver of the truck, but interestingly, no evidence was led on record to prove the factum that on the relevant day, he was driving truck in question. As per own case of the prosecution, person named above was not found by the police inside truck driving the same, because, as per prosecution story, all the occupants of truck, on seeing the police, had run away but they were subsequently apprehended by the police party, as has been observed above, there is no evidence led on record by the prosecution to prove that the accused Sukh Dev was the person, who was actually driving the truck. Apart from that, there is no evidence led on record against accused Sukh Dev that he was also involved in the illegal trade/transportation of liquor. Specific case against the accused Sukh Dev as put forth by the prosecution is that on date of alleged incident, he was found driving truck, carrying illicit liquor. Prosecution also set up a case that four occupants had fled away from the Maruti Van, but as has been noticed herein above, there is no link evidence available on record that who identified these four persons and merely that they were calling each other by their names, could not be made basis to hold accused as guilty.

12. Leaving everything aside, this court finds that if statements of prosecution witnesses are read in their entirety, there are material contradictions and inconsistencies as such, same could not be made basis for returning findings of guilt against accused.

13. By now it is well settled that in a criminal trial evidence of eye-witness requires careful assessment and needs to be evaluated for its creditability. Hon'ble Apex Court has repeatedly held that since fundamental aspect of criminal jurisprudence rests upon well established principle that "no man is guilty until proved so", utmost caution is required to be exercised in dealing with the situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. Most importantly, Hon'ble Apex Court has held that there must be a string that should join the evidence of all the witnesses thereby satisfying the test of consistency in evidence amongst all the witnesses. In nutshell, it can be said that evidence in criminal cases needs to be evaluated on the touchstone of consistency. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in **C. Magesh and others** versus **State of Karnataka** (2010) 5 Supreme Court Cases 645, wherein it has been held as under:-

> "45. It may be mentioned herein that in criminal jurisprudence, evidence has to be evaluated on the touchstone of consistency. Needless to emphasis, consistency is the keyword for upholding the conviction of an accused. In this regard it is to be noted that this Court in the case titled Surja Singh v. State of U.P. (2008)16 SCC 686: 2008(11) SCR 286 has held:-(SCC p.704, para 14)
>
> > "14. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witness is held to be creditworthy; ..the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> In a criminal trial, evidence of the eye witness requires a careful assessment and must be evaluated for its creditability. Since the fundamental aspect of criminal jurisprudence rests upon the stated principle that " no man is guilty until proven so," hence utmost caution is required to be exercised in dealing with situation where there are multiple testimonies and equally large number of witnesses testifying before the Court. There must be a string that

should join the evidence of all the witnesses and thereby satisfying the test of consistence in evidence amongst all the witnesses."

14. On the top of everything, this court finds that after having effected recovery, police party drew insufficient samples. As per own case of prosecution, police drew 12 samples from 19000 pouches of country liquor of "Gulab" make, whereas 5 samples out of 240 bottles of Indian Made Foreign Liquor were drawn, which were not sufficient to arrive at a conclusion that the entire bulk allegedly recovered by police was liquor/alcohol. No doubt, in the case at hand, police, with a view to prove that liquor recovered by it contained alcohol, placed on record report of the Composite Testing Laboratory (CTL), Kandaghat, but that is only qua 12 pouches and 5 bottles and as such, there is no report, if any, qua remaining bulk allegedly recovered from the truck/van owned/driven by the accused. In the aforesaid background, learned Sessions Judge, rightly held that since 12 pouches of country liquor of "Gulab" make were sent for chemical analysis, recovery, if any, from the accused could be said to be of 12 pouches only and same is the case with Indian Made Foreign Liquor where samples from 5 bottles out of 240 were sent.

15. It would be apt to reproduce following paras of the judgment rendered by this court in **Rakesh Kumar** (supra):

> 25. Leaving everything aside, it is an admitted case of the prosecution that only six bottles of mark "Saroor" out of forty cartons and six bottles of mark "Bagpiper" out of six cartons were drawn as sample and sent for examination to CTL Kandaghat, as such, from the reports of CTL Kandaghat verifying therein presence of liquor, content is only proved qua twelve bottles in all as such, recovery, of twelve bottles only is proved against the accused, whereas all 480 bottles of country made liquor mark "Saroor" and 72 bottles of foreign liquor mark "Bagpiper" allegedly recovered from the truck being driven by the accused, were required to be sent for chemical examination, but in the instant case, only twelve bottles were sent for chemical examination as such the whole of the recovery is vitiated.
>
> 26. In this regard reliance is placed upon the judgment passed by our own High Court in "**Surender Singh**. V. **State of H.P**.", Latest HLJ 2013 (2) 865, which reads as under:-
>
> > "26. In the instant case, it be also noticed that there is yet another major flaw in the investigation by the police. Assuming that the contraband was actually recovered by the police party, police did not take samples from all the boxes. Samples only from few bottles out of some of the boxes, which they had opened, were taken. None of these witnesses have deposed that the remaining boxes were sealed; from outside appeared to be of the same make or brand; bearing serial numbers; the date of manufacture; or the place and the name of the manufacturer. All that these witnesses have deposed is that boxes of alcohol, as described above, were found in the vehicle. Inside the boxes could be anything. Police could not prove that the remaining boxes actually contained liquor. The samples cannot be said to be representative in character.
> >
> > 27. In similar circumstances, this Court in Mahajan versus State of Himachal Pradesh, 2003 Cr.L.J. 1346; State of H.P. versus Ramesh Chand, Latest HLJ 2007 (2) 1017; Dharam Pal and another versus State of Himachal Pradesh, 2009 (2) Shim. LC 208; and State of Himachal Pradesh versus Kuldeep Singh & others, 2010(2) Him.L.R. 825, acquitted

the accused, as prosecution could not prove, beyond reasonable doubt, as to what was actually there in the remaining boxes.

28. As per version of PW-1, outside the boxes 'Sirmour No.1' was printed which version stands denied by PW-7. In the instant case, there is nothing on record to show that the remaining boxes were in fact containing liquor. Quantity of the remaining bottles of the boxes from which samples were drawn has also not been proved to be liquor. These aspects have not been considered by the Courts below. The cumulative effect is that the prosecution has failed to prove the charge against the accused, beyond reasonable doubt and as such judgments of the Courts below are not sustainable in law."

27. Reliance is also placed on the judgment passed by this Court **State of HP** v. **Jagjit Singh,** Latest HLJ 2008 (HP) 919, wherein this Court has observed in paras 6 and 7 as under:-

"6.At the very outset, I would like to say that neither the non-compliance of sub-section (6) of Section 100 of the Code of Criminal Procedure will render the search illegally nor the respondent can be acquitted on this sole ground. However, in the instant case the regrettable feature is that as per the case of the prosecution 72 pouches of country liquor of "Gulab" brand country liquor containing 180 ml. each were recovered from the possession of the respondent. Admittedly, one pouch of 180 ml. out of the recovered quantity was retained as a sample, which was of licit origin as opined by the Chemical Analyst.

7. There is nothing on record to show that the remaining 71 pouches alleged to have been recovered from the respondent also contain the country liquor more than the permissible quantity without the permit or licence. Before the respondent could be convicted for the offence charged, it was incumbent upon the prosecution to prove that the respondent was in actual and conscious possession of the licit liquor in excess of the prescribed limit."

28. In view of the aforesaid discussion and law laid down by the Hon'ble Apex Court as well as this Court, there are major flaws in the investigation of the prosecution and prosecution story does not appear to be believable. Besides this, there are major contradictions in the statements of the prosecution witnesses, which definitely can not be relied to hold the accused guilty of the offences alleged against him."

16. Consequently in view of discussion made herein above, there is no merit in the present appeal, which is accordingly dismissed. Bail bonds, if any, furnished by the accused are discharged. Pending applications, if any, stand disposed of. Interim directions, if any, are vacated. Case property, if not destroyed, be destroyed forthwith.

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

Sh. Padam Chand ...Petitioner

Versus

Sh. Ram Singh (deceased) through legal representatives and another ...Respondents

Civil Revision No. 254 of 2018
Decided on: January 1, 2019

Code of Civil Procedure, 1908- Order XXI Rules 34 and 58 - Decree of possession - Objections thereto – Maintainabilitiy - Decree-Holder filing application for execution and seeking delivery of possession of suit property - Objector being third party filing objections under Rule 58 and alleging that decree sought to be executed was collusive - Held, Rule 58 speaks of objections to attachment of property - Decree-Holder seeking delivery of possession of suit property and not its attachment- Objections under Rule 58 not maintainable. (Para 5)

For the petitioner: Mr. Sanjay K. Sharma, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with the order dated 15.11.2018, passed by the learned Civil Judge (Junior Division), Kandaghat, District Solan Himachal Pradesh, in Execution No. 30-1 of 2018, whereby application under Order 21 Rule 58 read with S. 151 CPC, having been filed by the petitioner-revisionist, came to be dismissed, petitioner has approached this court in the instant proceedings filed under S.115 CPC, praying therein to set aside the impugned order and allow the application in question.

2. Having heard the learned counsel for the petitioner-revisionist and perused material available on record vis-à-vis reasoning assigned by the learned Court below, while passing impugned order, this court is not persuaded to agree with Mr. Sanjay K. Sharma, learned counsel representing the petitioner-revisionist that the learned executing Court has erred, while passing impugned order, rather, this court finds that, vide impugned order dated 15.11.2018, learned Court below rightly proceeded to issue warrant of possession under the provisions of Order 21 Rule 58 CPC. Order 21 Rule 58 CPC provides that, where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provision, provided that property attached is not already sold or objections or claim, if any, of the applicant is not unnecessarily delayed.

3. In the case at hand, petitioner-revisionist, who was not a party to the suit, judgment and decree whereof are sought to be implemented by way of execution, which is subject matter of the present proceedings, filed an application under Order 21 Rule 58 CPC, averring therein that he has filed a Civil Suit for declaration to the effect that the registered gift deed No. 88, dated 25.8.1966 executed by Shri Mansa Ram in favour of the Decree Holder was executed without any right, title or interest and entries in the revenue record were illegally changed from the years 1970-71, from the name of Smt. Parwati, who was actually in possession of the suit property of Shri Ram Singh. The said property was purchased by Sobha Ram and son of one Sh. Sukh Ram, for more than `1000/- from Mansa Ram. It is further averred in the application that Sobha Ram was non-occupancy tenant under Mansa Ram, who died leaving behind Parwati as his widow and after the death of Parwati, applicant alongwith one Jash Ram became the owner of the suit land comprised in

Khasra No. 590 including the old house situated at Village Katoh, Pargana Wakna. It is also averred in the application that the house constructed over Khasra No. 590 was constructed by Sobha Ram, who was in possession of said house. Revenue entries showing the name of Parwati were continuously shown in the revenue record from 1952-53 till 1956-66, and, after her death, Yashodha, her sister, took over possession of the suit property and the Judgment debtor Leela and Yashodha were living in the said house after the death of Parwati in the year 1992. Petitioner-revisionist further claimed in the aforesaid application that he has filed a Civil Suit against the Decree Holder and judgment debtor, titled Padam Chand and another vs. Ram Singh and another being Civil Suit No. 14-K/1 of 2012, wherein collusive litigation between Ram Singh and Leela Devi has been challenged.

4. Having carefully perused the averments contained in the application filed by the petitioner-revisionist under Order 21 Rule 58 read with S.151 CPC, this court is convinced and satisfied with the reasoning assigned by the learned Court below, while dismissing the application, because, learned executing Court, while exercising power under Order 21 Rule 58 CPC, can only decide the claim/objections, if any, made to the attachment of the property in the execution of a decree on the ground that such property is not liable to such attachment.

5. No doubt, Order 21 Rule 58 (2) further provides that all questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objections and not by a separate suit, but, as has been observed herein above, present petitioner-revisionist was not a party to the suit, judgment and decree whereof are sought to be executed by way of execution petition, which is subject matter of the present suit. Had the petitioner-revisionist been party to the suit, he, while drawing strength from the provisions contained under Order 21 Rule 58(2) CPC, could move an application before the learned executing Court, praying therein to stay the execution proceedings on the ground that the question relating to right, title or interest *inter se* parties yet remained to be decided. In the case at hand, as has been taken note herein above, petitioner-revisionist, who was not party to the suit, prayed that the execution petition having been filed by Decree Holder, may be dismissed, but, probably, the learned executing Court, while exercising power under Order 21 Rule 58 CPC, had no authority, whatsoever, to look into the prayer made in the application by the petitioner-revisionist. It has been specifically recorded in the impugned order that the Decree Holder has sought assistance from the court to get the delivery of vacant possession and there is no request, if any, for attachment of property. Since mode of assistance was only to get the delivery of vacant possession, learned Court below, while dismissing the application having been filed by the petitioner-revisionist, rightly held application having been filed by the petitioner-revisionist, to be not maintainable.

6. Consequently, in view of above, present petition is dismissed, being devoid of any merit, alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Pooja Sharma ...Appellant.
Versus
Suresh Kumar ...Respondent.

Cr. Appeal No. 469 of 2018
Decided on: 04.01.2019

Code of Criminal Procedure, 1973 - Section 256 **- Negotiable Instruments Act, 1881 –** Sections 138 & 143 – Dishonour of cheque – Complaint - Dismissal of complaint for want of prosecution – Justiciability - Trial court dismissing complaint of complainant in-default for his non-appearance - Case at stage of service of accused – Appeal - Held, no doubt section 256 of Code empowers court to dismiss complaint and acquit accused when complainant does not appear before it on date of hearing but court should not resort to this procedure when presence of complainant is not necessary for further progress of case - On facts, accused was not appearing before court despite service through bailable warrants - Presence of complainant was not necessary on day complaint was dismissed in default - Order of dismissal for want of prosecution is bad in eyes of law - Complaint ordered to be restored - Matter remanded. (Paras 7, 20 & 21)

Cases referred:

Associated Cement Co. Ltd. vs. Keshvanand, (1998) 1 SCC 687
Boby vs. Vineet Kumar, Latest HLJ 2009 (HP) 723
Dole Raj Thakur vs. Jagdish Shishodia, Latest HLJ 2018 (HP) 296
Harpal Singh vs. Lajwanti, Criminal Appeal No. 559 of 2017, decided on 13th October, 2017
Hemant Kumar vs. Sher Singh, Cr. Appeal No. 301 of 2018 decided on 27.9.2018
Mohd. Azeem vs. A. Venkatesh and another, (2002) 7 SCC 726
N.K. Sharma vs. M/s Accord Plantations Pvt. Ltd. & another, 2008 (2) Latest HLJ 1249
S. Anand vs. Vasumathi Chandrasekar, (2008) 4 SCC 67
Vinay Kumar vs. State of U.P. &Anr., 2007 Cri.L.J. 3161
Vinod Kumar Verma vs. Ranjeet Singh Rathore, Criminal Appeal No. 367 of 2015, decided on 6th May, 2016

For the appellant: Mr. Naresh K. Sharma, Advocate.
For the respondent: None.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.*(Oral)*

Present appeal has been filed against impugned order dated 23rd July, 2018 passed by learned Judicial Magistrate 1st Class, Court No. III, Ghumarwin, District Bilaspur (hereinafter referred to as "Magistrate") in Criminal Case No. 41-3/2017, whereby the complaint filed by appellant-Pooja Sharma against respondent-Suresh Kumar under Section 138 of the Negotiable Instruments Act (hereinafter referred to as "NI Act"), has been dismissed in default for non-appearance of parties when the case was listed for service of respondent.

2. As the complaint filed by the appellant has been dismissed prior to the service of respondent Suresh Kumar in the trial Court and impugned order has been passed in his absence, therefore, it has not been considered appropriate to issue the notice to respondent for the purpose of deciding present appeal. However, record of the trial Court has been summoned and perused.

3. The impugned order passed by the Magistrate is reproduced herein:-

> *" xxxxxx xxx*
>
> *Called again after lunch.*
>
> ***23.07.2018***
>
> *Present: None.*
>
> *The case has been called 5-6 times since morning, but none appeared for parties. It seems that parties are not interested to pursue the present complaint. It is already 4.00 p.m. Therefore, the present complaint is dismissed in default for non appearance of the parties. The file after its due completion be consigned to record room.*
>
> *Sd/-*
>
> *Judicial Magistrate 1st Class*
>
> *Court No. 3,Ghumarwin,*
>
> *District Bilaspur H.P."*

4. In view of Section 143 of the NI Act, offence under Section 138 of the NI Act is to be tried summarily and accordingly, procedure for summons case provided in Chapter XX of the Code of Criminal Procedure (hereinafter referred to as "CrPC") is applicable during the trial initiated on filing a complaint under Section 138 of the NI Act. In this Chapter, Section 256 CrPC deals with a situation of non-appearance or death of complainant.

5. I am in agreement with finding returned by Allahabad High Court in case titled as **Vinay Kumar versus State of U.P. & Anr.,** reported in **2007 Cri.L.J. 3161,** and another judgment passed by co-ordinate Bench of this Court in case titled as **N.K. Sharma versus M/s Accord Plantations Pvt. Ltd. & another,** reported in **2008 (2)Latest HLJ 1249** with respect toapplicability ofSection 256 CrPC in a complaint filed under Section 138 of the NI Act.

6. I deem it proper to reproduce Section 256 CrPC herein:

> *"**256. Non-appearance or death of complainant.** - (1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:*
>
> *Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.*
>
> *(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."*

7. Section 256 CrPC provides discretion to the Magistrate either to acquit the accused or to adjourn the case for some other day, if he thinks it proper. Proviso to this Section also empowers the Magistrate to dispense with the complainant from his personal attendance if it is found not necessary and to proceed with the case. Also, when the

complainant is represented by a pleader or by the officer conducting the prosecution, the Magistrate may proceed with the case in absence of the complainant.

8. When the Magistrate, in a summons case, dismisses the complaint and acquits the accused due to absence of complainant on the date of hearing, it becomes final and it cannot be restored in view of Section 362 CrPC, which reads as under:

> *"**362. Court not to alter judgment.** - Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."*

9. Keeping in view the effect of dismissal of complaint under Section 138 of the NI Act, the apex Court in case titled as **Associated Cement Co. Ltd. versus Keshvanand,** reported in **(1998) 1 Supreme Court Cases 687,** after discussing the object and scope of Section 256 CrPC, has held that, though, the Section affords protection to an accused against dilatory tactics on the part of the complainant, but, at the same time, it does not mean that if the complainant is absent, the Court has duty to acquit the accused in invitum. It has further been held in the said judgment that the discretion under Section 256 CrPC must be exercised judicially and fairly without impairing the cause of administration of criminal justice.

10. Similarly, the apex Court in case titled as **Mohd. Azeem versus A. Venkatesh and another,** reported in **(2002) 7 Supreme Court Cases 726,** has considered dismissal of the complaint on account of one singular default in appearance on the part of the complainant as a very strict and unjust attitude resulting in failure of justice.

11. Also in case titled as **S. Anand versus Vasumathi Chandrasekar,** reported in **(2008) 4 Supreme Court Cases 67,** wherein the complaint under Section 138 of the NI Act was dismissed by the trial Court exercising the power under Section 256 CrPC on failure of the complainant or her power of attorney or the lawyer appointed by her to appear in Court on the date of hearing fixed for examination of witnesses on behalf of the defence, the apex Court has considered as to whether provisions of Section 256 CrPC, providing for disposal of a complaint in default, could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined and it has been held that in such a situation, particularly, when the accused had been examined under Section 313 CrPC, the Court was required to pass a judgment on merit in the matter.

12. This Court in **N.K. Sharma's case (supra)** also**,** relying upon in **Associated Cement Co. Ltd.'s case (supra),** has held that when the Court notices that complainant is absent on a particular day, the Court must consider whether the personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason and if the situation does not justify the case being adjourned, then only Court is free to dismiss the complaint and acquit the accused, but if the presence of complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of power envisaged under Section 256 CrPC.

13. This Court in another case titled as **Boby versus Vineet Kumar,** reported in **Latest HLJ 2009 (HP) 723,** has reiterated ratio of law laid down in **N.K. Sharma' case (supra),** again relying upon in **Associated Cement Co. Ltd.'s case (supra).**

14. Coordinate Bench of this Court in **Criminal Appeal No. 367 of 2015,** titled as **Vinod Kumar Verma versus Ranjeet Singh Rathore,** decided on 6th May, 2016 and

Criminal Appeal No. 559 of 2017, titled as **Harpal Singh versus Lajwanti,** decided on 13th October, 2017, has held that dismissal of the complaint in default for non-appearance of the complainant on the date fixed without affording him even a single opportunity is unjustified.

15. The same principle has been reiterated by this Court in cases titled **Dole Raj Thakur versus Pankaj Prashar,** reported in **Latest HLJ 2018(HP) 266; Dole Raj Thakur versus Jagdish Shishodia,** reported in **Latest HLJ 2018 (HP) 296** and in **Cr. Appeal No. 301 of 2018 titled Hemant Kumar vs. Sher Singh** decided on 27.9.2018.

16. It is true that Magistrate has a discretion to dismiss the complaint for default resulting into acquittal of the accused. However, in present case, for the discussions made hereinafter, I am inclined to set aside the impugned order.

17 Keeping in view the effect of dismissal in default, the Magistrate is supposed to exercise his discretion with care and caution clearly mentioning in the order that there was no reason for him to think it proper to adjourn the hearing of the case to some other day.

18. In present case, complaint was filed on 21.9.2017, whereafter it was listed for 5.10.2017 for recording preliminary evidence. On the basis of preliminary evidence recorded, notice was issued to respondent Suresh Kumar for 28.11.2017. However, respondent was not served for 28.11.2017, 28.12.2017, 22.2.2018, 26.4.2018 and 7.6.2018 despite issuance of bailable warrants against him. Complainant was duly represented throughout on the aforesaid dates and lastly the case was fixed for 23rd July, 2018, for which date, as per report of concerned dealing hand in the trial Court, respondent was served personally. However, on 23.7.2018, neither complainant nor his counsel appeared and respondent despite service of execution of bailable warrants upon him has also not put in appearance in Court.

19. In aforesaid facts, particularly when complainant continued himself to be represented either through counsel or in person, the observation of the Magistrate that complainant was not interested in continuing with the complaint is contrary to the record. In normal circumstances, no complainant will be disinterested in pursuing his complaint without any reason. In the given circumstances, it was a fit case for the Magistrate to exercise her discretion to adjourn the cae for a subsequent date.

20. In view of the aforesaid facts and circumstances and the ratio of law laid down by the apex Court and High Courts including this Court, I am of the opinion that the Magistrate was not justified in dismissing the complaint in default for absence of complainant coupled with failure of his counsel to attend the case on that date, particularly, when the complainant was pursuing his case since September, 2017 and has led preliminary evidence in support of his complaint and was being represented through counsel on numerous dates fixed for service of respondent through bailable warrants. It is also a fact that the date on which the case has been dismissed in default was listed for service of respondent and on that day, personally presence of complainant was not necessary especially when he had already engaged the counsel to represent him and the said counsel was regularly appearing before the Magistrate but except the date of passing of impugned order.

21. For aforesaid discussion, I am of the considered opinion that there is merit in the appeal and the same deserves to be allowed. Accordingly, the appeal is allowed and impugned order, dated 23rd July, 2018, passed by Judicial Magistrate 1st Class, Court No. 3, Ghumarwin District Bilaspur in Criminal Case No. 41-3 of 2017 is set aside and complaint

before Judicial Magistrate 1st Class, Court No. 3, Ghumarwin District Bilaspur is ordered to be restored to its original number and directed to be decided in accordance with law.

22. Parties are directed to appear before the Magistrate on ***19th February, 2019.***

23. Appeal is allowed in above terms alongwith all pending applications, if any.

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

Nikka Ram .....Appellant
Versus
State of H.P. .....Respondent

Cr. Appeal No. 321 of 2017
Reserved on: 14.11.2018
Decided on: 05.01.2019

Indian Penal Code, 1860 – Section 376 - **Protection of Children form Sexual Offences Act, 2012** – Sections 6, 7 and 8 **–** Rape and aggravated sexual assault - Medical jurisprudence- Held, question of victim having been sexually abused or not will normally depend on conditions of vagina and not cervix (Para 18)

For the appellant: Mr. Manoj Pathak, Advocate.
For the respondent: Mr. Narinder Guleria, Addl. A.G with Mr. Kunal Thakur, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge

Convict Nikka Ram (hereinafter referred to as the 'accused') has preferred this appeal against the judgment dated 16/29.12.2016 passed by learned Special Judge, Shimla in Sessions Trial No. 30-S/7 of 2015, whereby he has been convicted for the commission of offence punishable under Section 376 of the Indian Penal Code and Section 6 of The Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act' in short) and while holding that the punishment under Section 6 of the POCSO Act is greater in degree as compared to the punishment under Section 376 IPC, has convicted him to undergo rigorous imprisonment for a period of 12 years under Section 6 of the POCSO Act and also to pay Rs.1,00,000/- and simple imprisonment for a period of three months for the commission of offence punishable under Section 506 IPC.

2. The accused has been tried, convicted and sentenced for the commission of offence stated hereinabove with the allegations that he belongs to village Sawala and the child victim (name withheld) allegedly aged about 12 years ravished by him 13-14 days prior to 3.8.2015 at Siyalta Nallah is also the resident of same village. Prior to that also, she was subjected by him to sexual intercourse on 3-4 occasions. It is on 3.8.2015, in the evening she disclosed about her ravishment sexually by the accused to her mother PW-2. She disclosed that accused had been taking her to Siyalta Nallah and ravished her sexually there on 3-4 occasions by removing her clothes. He allegedly had been paying Rs.10/- and giving

some toffees to her on such occasions. He had been alluring her at the pretext of giving more money. When she told him that she will disclose her ravishment by him to her parents, he threatened to expose her in eyes of the school teachers and students. According to PW-2 and also PW-1, the parents of the victim, apprehending that their daughter, the victim may not be telling lie and to rule-out the false implication of the accused, asked from her repeatedly about the correctness of the disclosure she made against him, but she remained firm on the facts she disclosed. Therefore, PW-1 and PW-2 went to police station, Nerwa, Tehsil Chopal, District Shimla. The victim also went there with them. The father of the victim PW-1 has made an application Ext.PW-1/A to the Station House Officer, Police Station, Nerwa stating whatever the victim disclosed therein. On the basis of application Ext.PW-1/A, FIR Ext.PW-14/A was registered.

3. The investigation was conducted by SI/SHO Narinder Singh PW-14. An application Ext.PW-6/A was made to the Medical Officer, Civil Hospital, Nerwa for getting the medico legal examination of the victim conducted, however, no female doctor was available at Nerwa on that day, therefore, the child victim was referred to D.D.U. Zonal Hospital, Shimla for her medical examination. She was examined by PW-8 Dr. Shalini Bhardwaj, who issued MLC Ext.PW-8/A. The I.O. visited the spot on 4.8.2015 itself and prepared the spot map Ext.PW-14/C. The spot was videographed and photographed vide CDs mark X-1 to X-3. The statement of child victim Ext.PW-14/B was recorded as per her version. An application Ext.PW-14/E was made to JMIC, Chopal, District Shimla with a prayer to record the statement of child victim under Section 164 Cr.P.C. An application Ext.pW-5/A was submitted to the Headmaster, Government Middle School, Sawala for supplying the date of birth certificate of the child victim. Certificate Ext.PW-5/B was prepared and signed by the Headmaster of the school. The copy of admission and withdrawal register Ext.PW-5/C was also obtained from the school. All these documents were taken in possession by the police vide recovery memo Ext.PW-5/D. The I.O. had also made an application Ext.PW-7/A to the Secretary, Gram Panchayat, Pujarali Block Chopal, District Shimla for supply of certificate of date of birth of the child victim from the birth register. PW-7 Smt. Shyama Devi, Secretary, Gram Panchayat, Pujarli had prepared the birth certificate Ext.PW-7/B. She had also handed over the extract of birth register Ext.PW-7/C. The copy of parivar register Ext.PW-7/D was also prepared and supplied by PW-7 to the police. All these documents were taken in possession vide recovery memo Ext.PW-7/E.

4. PW-13 ASI Kuldeep Singh while conducting the investigation partly, arrested the accused in this case on 5.8.2015. He made an application Ext.PW-9/A with a prayer to conduct medical examination of the accused. He was accordingly examined and the MLC Ext.PW-9/B obtained. It is PW-13 who got recorded the statement of the child victim under Section 164 Cr.P.C. He had also collected the date of birth from the school and also the Panchayat.

5. On completion of the investigation, report under Section 173 Cr.P.C was prepared and filed in the Court. On going through the report and also the documents annexed therewith, charge for the commission of offence punishable under Section 376 and 506 IPC as well as under Section 6 of the POCSO Act was framed against the accused. He, however, pleaded not guilty to the charge and claimed trial. The prosecution has, therefore, produced the evidence in support of its case against the accused.

6. The material prosecution witnesses are the child victim (PW-3), her mother PW-2 and her father PW-1. PW-4 Khyali Ram has been examined to show that in the month of July, 2015, the accused was noticed coming from Siyalta Nallah side around 5.00-6.00 p.m. This fact was disclosed by him to the mother of the victim, PW-2. PW-5 Vidya Nand O.T. (Shastri), Government Middle School, Sawala and PW-7 Smt. Shyama Devi, Secretary,

Gram Panchayat, Pujarli have been examined to prove the date of birth certificates Ext.PW-5/B and Ext.PW-7/B respectively, which were issued from the admission and withdrawal register and also the birth register maintained in the school/Gram Panchayat. PW-8 Dr. Shalini Bhardwaj who had medically examined the child victim and issued the MLC Ext.PW-8/B. Dr. Pritam Singh Thakur PW-9 has medically examined the accused and issued the MLC Ext.PW-9/B. The remaining prosecution witnesses are formal as PW-6 LC Meera had accompanied the child victim firstly to the Civil Hospital, Nerwa and thereafter to D.D.U. Zonal Hospital, Shimla as lady Medical Officer was not posted at Civil Hospital, Nerwa at that time. She had also collected the birth certificate Ext.PW-5/B and the extract of admission and withdrawal register Ext.PW-5/C, which were taken in possession vide memo Ext.PW-5/D in her presence. PW-10 Constable Rajinder Singh accompanied by HHG Pankaj had taken the accused to Civil Hospital, Nerwa for getting his medical examination conducted. PW-11 LHC Shamim, the then MHC police station, had received the case property and retained the same in the malkhana after making entries Ext.PW-11/A in the malkhana register. The case property was sent by her to the Forensic Science laboratory vide RC Ext.PW-11/C for chemical examination. The parcels containing the case property were taken to Forensic Science Laboratory by PW-12 Constable Rumail. PW-13 and PW-14, as noticed supra, have conducted the investigation of the case.

7. On the other hand, the accused in his statement recorded under Section 313 Cr.P.C while admitting that the victim and he belongs to the same village, he is her maternal uncle (mama) in relation and used to visit her house off and on has, however, denied, the remaining prosecution case either being wrong or for want of knowledge. In his defence, a plea has been raised while answering question No.25 that he had seen the child victim and one Naku in an objectionable condition, however, before he could tell their parents about it, he was implicated falsely in this case.

8. In order to probablise the plea so taken in his defence, the accused has examined DW-1 Smt. Sunita, Pradhan, Gram Panchayat, who while in the witness box has stated that in August, 2015, the accused came to her and disclsoed that he had seen the child victim and Naku in an objectionable condition. He wanted to disclose this fact to the father of the child victim. Being Pradhan of the Gram Panchayat, she also inquired from the child victim, who told that she had friendly relations with Naku and that Nika Ram was innocent. These facts were disclosed by her to the police.

9. Learned Special Judge on appreciation of the given facts and circumstances and also the evidence available on record has concluded that the prosecution case against the accused stands proved beyond all reasonable doubt. Consequently, he was convicted and sentenced, in the manner, as pointed out at the very out set.

10. The accused aggrieved by his conviction and sentence has assailed the impugned judgment on the grounds *inter-alia* that no case is made out against him under Section 376 and 506 IPC and under Section 6 of the POCSO Act, however, irrespective of it, he has been convicted erroneously. His defence that child victim involved him falsely in this case has not been taken into consideration and to the contrary, the findings based upon conjectures and surmises. The evidence produced against him by the prosecution is stated to be not only tainted but also self-contradictory. The Court below has allegedly brushed aside the material contradictions in the statements of the witnesses by holding the same as minor ones. The impugned judgment, as such, has been sought to be quashed and set aside.

11. Mr. Manoj Pathak, learned counsel representing the appellant-convict has vehemently argued that for want of cogent and reliable evidence, the accused could have not

been convicted for the commission of alleged offence. The offence allegedly committed by him is neither proved to be punishable under Section 376 IPC nor under Section 6 of the POCSO Act. Mr. Pathak while drawing our attention to the medical evidence has argued that the same is not suggestive of the penetrative sexual assault committed by the accused upon the child victim. It is also contended that bald assertions in the application Ext.PW-1/A and in that of child victim that she was sexually ravished do not disclose the essential ingredients required to be proved to infer the commission of offence punishable under Section 376 IPC or under Section 6 of the POCSO Act. According to Mr. Pathak, if in alternative, this Court believes the prosecution story as genuine and correct, the same only disclose the commission of offence punishable under Section 8 of the POCSO Act. It is thus urged that findings of conviction and sentence recorded against the accused are not supported by the record and rather based upon conjectures and surmises, hence not legally sustainable.

12. On the other hand, Mr. Narinder Guleria, learned Additional Advocate General has, however, argued that own statement of the child victim supported by her parents lead to the only conclusion that the accused subjected her to sexual intercourse in the manner as claimed by the prosecution. According to Mr. Guleria, nothing tangible has come on record that the accused has been convicted and sentenced in this case falsely. The plea in defence that accused noticed child victim and Naku in an objectionable condition is highly imaginary and germane of the mind of the accused because had it been so, it is not understandable as to why he had not disclosed the same to her parents and chose to approach DW-1 Pradhan, Gram Panchayat. Since the accused has failed to probablise such plea he raised in his defence, therefore, the testimony of Pradhan is also doubtful. Learned Additional Advocate General has, therefore, emphasized that well reasoned judgment passed by learned Special Judge calls for no interference in the present appeal by this Court.

13. At the outset, it is worthwhile to mention here that in case of this nature, the age of the victim assumes considerable significance. In the case in hand, certificate Ext.PW-7/B issued by the Secretary, Gram Panchayat, Pujarli on an application made to her by the police on the basis of entries in the birth register, the date of birth of the child victim has been recorded as 3.8.2003. The extract of register is Ext.PW-7/C. Against the entries at Serial No. 36/03 in this document, the information qua her birth has been given to the Gram Panchayat by her father Liak Ram. The accused has not cross-examined either the victim or her parents that 9.8.2003 is not the correct date of birth of the victim. Even similar is her date of birth which finds mention in the certificate Ext.PW5/B issued by the school. Though, the same cannot be believed to be primary evidence qua her exact date of birth being issued from the middle school and not from that of primary school, where initially she was admitted in first class, yet the certificate Ext.PW-7/B and the extract of birth certificate Ext.PW-7/C is primary evidence qua her date of birth. Therefore, the prosecution has proved beyond all reasonable doubt that the victim is born on 9.8.2003. Since she allegedly was sexually ravished by the accused 13-14 days prior to 3.8.2015 and on 3-4 occasions before that also, therefore, the present is a case where it is established that her ravishment was at a stage when she was below 12 years of age.

14. Before analyzing the rival submissions and also the evidence available on record, it is desirable to take note as to what constitutes the offence of rape punishable under Section 375 IPC. For the sake of convenience, we would like to reproduce here the provisions contained under Section 375 IPC, which defines the offence of rape:-

> "**375-Rape.** A man is said to commit "rape" if he--

(a) penetrates his penis, to any extend, into the vagina, mouth, urethra or anus or a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus or a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

15. We would also like to reproduce here the offence of aggravated penetrative sexual assault defined under Section 5 of the POCSO Act and punishable under Section 6 thereof, which for the purpose of this case reads as follows:-

"**5. Aggravated penetrative sexual assault**.-

(a) to (l).....xxxxxxxxxxxxxx

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

(o) to (u).....xxxxxxxxxxxxxxxx

16. What is aggravated penetrative sexual assault, has been defined under Section 3 of the POCSO Act, which reads as follows:-

"**3**. **Penetrative sexual assault**.- A person is said to commit "penetrative sexual assault' if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

17. It is seen from the perusal of Section 375 IPC and Section 3 of the POCSO Act, referred to hereinabove, that an offender can be said to have committed the same by way of penetrating his penis or any other object into vagina, mouth, urethra or anus of the victim or by manipulating any part of her body so as to cause penetration into her vagina, urethra, anus or any other part of her body or applies his mouth to the vagina, anus, urethra of a woman.

18. Now it is the turn to examine the evidence and find out as to whether the prosecution has been able to prove beyond all reasonable doubt that the offence committed

by the accused is punishable under Section 376 IPC and Section 6 of the POCSO Act. What the victim has disclosed on 3.8.2015 to her parents is that she was taken by the accused to Siyalta Nallah 13-14 days ago, undressed her and ravished her sexually. Also that, she was taken there by him to ravish sexually earlier also on 3-4 occasions at Siyalta Nallah. Although, while in the witness box as PW-3 it is stated by her that she had been going to Siyalta Nallah to bring grass and the accused used to come there and ravish her sexually by removing her clothes, yet irrespective of such version, which is contrary to the contents of application Ext.PW-1/A and version of her parents, PW-1 and PW-2, the prosecution story cannot be said to be false for the reason that the accused has miserably failed to discredit the version of PW-1, PW-2 and PW-3 that the accused ravished the child victim in Siyalta Nallah. The evidence as has come on record to our mind, however, is not sufficient nor convincing that the accused has subjected the child victim to sexual intercourse and thereby committed the offence of rape or offence of aggravated penetrative sexual assault because as per the medical evidence i.e. MLC Ext.PW-8/A, PW-8 Dr. Shalini Bhardwaj did not notice any sign of injury on the body of the victim nor any sign of commission of forcible sexual assault with her. All her vitals were found normal. On vaginal examination, cervix was found soft without there being any sign of forced sexual assault. PW-8 has based her opinion that the child victim had intercourse one or more times, taking into consideration the condition of cervix i.e. admitting one finger loose. PW-8 has not stated anything about the condition of the vagina. On having gone through the Modi's "Medical Jurisprudence and Toxicology" 23rd Edition, the victim is raped or not depends upon the condition of her vagina and not cervix. We fail to lay our hand on any other material showing that it is only the condition of cervix to establish as to whether the sexual intercourse has been committed or not and condition of other genital including vagian and hymen etc. not relevant. The cervix is the opening part of uterus, therefore, no doubt when there is penetration in vagina, it is obvious that there will be penetration in cervix also but when there is no injury in the vagina and the only abnormality noticed by PW-8 was on the cervix of the victim i.e. admitting one finger loose, in our considered opinion, is not sufficient to disclose the commission of the offence of rape punishable under Section 376 IPC nor the offence of aggravated penetrative sexual assault punishable under Section 6 of the POCSO Act. Otherwise also, a fully grown-up male aged 52 years as the accused in this case, could have not raped the victim nor subjected her to aggravated penetrative sexual assault, that too, on many a times without causing injury in her vagina. In that event rather her health was bound to deteriorate and even could have been fatal to her life also. She to the contrary as per her own statement and also that of her parents had been going to the school regularly and attending the classes and also taking part in all activities including sports. As a matter of fact, even after the so called sexual assault also, she throughout remained normal, which could have not been expected from a girl below 12 years of age, had she been sexually abused by a fully grown-up male on number of occasions.

19. It is also not proved that the accused is maternal uncle (mama) of the victim because her father while in the witness box has stated in his cross-examination that the accused is not his relative, whereas, PW-2, the mother of the victim has said nothing about her relations with the accused as her brother or maternal uncle of her daughter. The victim though has stated in her examination-in-chief that accused is her maternal uncle (mama). The accused in his statement recorded under Section 313 Cr.P.C has also said that he is maternal uncle of the victim. However, the contrary version of her father PW-1 and the silence of mother PW-2, renders this part of the prosecution case highly doubtful and as such, it cannot be believed by any stretch of imagination that the present is a case of aggravated penetrative sexual assault within the meaning of (n) of Section 5 of POCSO Act. The prosecution case that the offence the accused has committed is punishable under Section 376 IPC and Section 6 of the POCSO Act is not proved beyond all reasonable doubt

and rather false, appears to be fabricated to implicate the accused in the commission of an offence more heinous in nature, as compared to the one which he in the given facts and circumstances and also the evidence available on record has committed.

20. The evidence as has come on record at the most discloses the commission of offence of sexual assault defined under Section 7 and punishable under Section 8 of the POCSO Act because the evidence as has come on record by way of statement of the victim that she had been undressed and ravished by the accused in Siyalta Nallah 13-14 days prior to 3.8.2015 and 3-4 occasions earlier thereto, stands proved from the evidence discussed hereinabove. The version of the victim that the accused had been undressing her and then ravishing itself is sufficient to establish the commission of an offence of sexual assault within the meaning of Section 7 of the POCSO Act, and punishable under Section 8 thereof. He, to our mind, has satisfied his lust for sex by undressing the victim and ravishing sexually as she stated while in the witness box. He, to our mind, must be alive to the adverse consequences of subjecting her to penetrative sexual assault being a child below 12 years age. It is worth mentioning here that the accused has not seriously disputed the allegations of ravishment of the victim against him specifically while cross-examining the prosecution witnesses and rather satisfied himself with mere suggestions that he has been implicated in this case falsely and that he has not ravished the child victim, which were emphatically denied by them. True it is that PW-4 Khyali Ram is a liar because, had he disclosed the factum of child victim and the accused coming from Siyalta Nallah side to PW-2, she should have disclosed so to her husband PW-1, who in turn, would have disclosed the same in the application Ext.PW-1/A, on the basis of which FIR has been registered. However, it is proved from the own statement of child victim and also her parents that accused had been taking her to Siyalta Nallah by alluring to give money and toffees to her. He, as per evidence, even used to pay Rs.10/- and some toffees to her on each and every occasion. Therefore, his intention to exploit the child victim to satisfy his lust for sex is established on record. The offence, therefore, committed by the accused in the given facts and circumstances is punishable under Section 8 of the POCSO Act and not under Section 376 IPC or under Section 6 of the Act. It is for this reason, nothing has come during the medical examination of the child victim conducted by PW-8 qua commission of forcible sexual intercourse with her. The accused has ravished the victim by touching her vagina and other parts of her body including rubbing his penis with her vagina. It is for this reason, no injury on vagina and no categoric finding qua condition of hymen etc. could be recorded by the Medical Officer.

21. The remaining evidence as has come on record by way of testimony of PW-6 LC Meera and PW-9 Dr. Pritam Singh Thakur, PW-10 Constable Rajinder Singh, PW-11 LHC Shamim, MHC Police Station, Nerwa and PW-12 Constable Rumail also supply the essential link to the prosecution story because PW-6 LC Meera had accompanied the child victim firstly to Civil Hospital, Nerwa and thereafter to D.D.U. Zonal Hospital, Shimla because lady doctor was not posted at that time at Nerwa. She has proved that the victim was subjected to medical examination in the hospital. Similarly, PW-9 also connects the accused with the commission of offence because on his examination conducted by this witness, he was found capable of performing sexual intercourse. PW-10 Constable Rajinder Singh and HHG Pankaj had taken the accused for getting his medical examination conducted. PW-11 Shamim and MHC has not only proved the prosecution case qua the case property was deposited by the I.O. with her, which she entered in the malkhana register vide entries Ext.PW-11/A and later on sent the same to the laboratory for chemical examination but the receipt of report Ext.PW-14/G also. PW-12 Constable Rumail is the person who had taken the case property to the Forensic Science Laboratory vide RC Ext.PW-11/C and deposited the same there for analysis.

22. The Investigating Officers in this case are PW-13 and PW-14 the then SI/SHO Police Station, Nerwa Narinder Singh and ASI Kuldeep Singh. They both have proved the manner in which the investigation is conducted by them. Nothing has come in their cross-examination conducted on behalf of the accused that he has been falsely implicated or nothing of the sort had taken place.

23. On the other hand, the accused has admitted the prosecution case to the extent that he belongs to the same village of which child victim is also one of the residents and that he is her maternal uncle (mama) in relation, hence used to visit her house off and on. The remaining prosecution case has either been denied by him being wrong or for want of knowledge.

24. The defence of the accused as emerges from the trend of cross-examination of the prosecution witnesses and his answer to the last question in his statement recorded under Section 313 Cr.P.C that the child victim and one Naku were noticed by him in an objectionable condition, therefore, it is for this reason, he has been implicated in this case falsely, is neither probable nor plausible and rather that such plea has been raised by him merely to get rid of this case. The prosecution witnesses have denied any objectionable relations between the child victim and Naku and rightly so because Naku is cousin of the victim as has come in the statement of her mother PW-2. Even if he had seen something objectionable between the two, would have apprised the parents of the victim qua the same. The plea so raised by the accused is also vague as he failed to disclose the day, time and place when he noticed both of them in an objectionable condition. Had he been maternal uncle of the victim and noticed something objectionable, it was his foremost and utmost duty to have apprised her parents about it. It is highly doubtful that in such a situation, a man of ordinary prudence like the accused would have visited the Pradhan, Gram Panchayat and disclosed something objectionable between the victim and Naku, that too, when he was her maternal uncle. Therefore, not only the plea raised by the accused is false and germane of his mind, but the evidence as has come on record by way of testimony of DW-1 is also highly imaginary and false. Had it been so, she should have discussed the matter with the parents of the victim and not with her. Therefore, her testimony that the victim had admitted her relations with Naku as correct and also informed DW-1 that accused was innocent has no grain of truth and rather false. DW-1, therefore, is a liar and deposed falsely to help the accused for the reasons best known to her.

25. In view of the given facts and circumstances of this case and also the evidence available on record as well as the submissions made by learned counsel representing the appellant-convict and learned Additional Advocate General, the present is a case where the commission of the offence punishable under Section 376 IPC and Section 6 of the POCSO Act is not made out against the accused. Consequently, his conviction and sentence for the commission of such offence deserves to be quashed and set aside. The evidence available on record, however, discloses the commission of the offence of sexual assault defined under Section 7 of the POCSO Act and punishable under Section 8 thereof. The prosecution has also proved beyond all reasonable doubt that the accused has threatened her with dire consequences including exposing her in the school before teachers and other students, because it is not the victim alone but her parents have also stated so while in the witness box. It has even come so in the application Ext.PW-1/A on the basis of which the FIR Ext.PW-14/A has been registered. The accused, as such, has committed the offence punishable under Section 506 of the Indian Penal Code also.

26. For all the reasons discussed hereinabove, in modification of the impugned judgment, the accused is acquitted of the charge framed against him under Section 376 IPC and Section 6 of the POCSO Act. He, however, is convicted for the commission of the offence

of sexual assault punishable under Section 8 of the Act. There is provision of sentence i.e. imprisonment for five years and imposition of fine against an offender, if held guilty for the commission of the offence of sexual assault. In the matter of sentence, keeping in view the gravity of the offence i.e. assaulting sexually a minor below 12 yeas of age, the convict deserves no leniency. Therefore, convict Nikka Ram is sentenced to undergo rigorous imprisonment for a period of five years and also to pay Rs.25,000/- as fine. In default to pay the fine, he shall undergo rigorous imprisonment for a period of six months. On deposit of the fine, the same will be paid to the victim of the occurrence as compensation. This appeal partly succeeds and the same is accordingly allowed. Consequently, the impugned judgment stands modified to the extent as indicated hereinabove.

27. The appeal stands finally disposed of in the above terms.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Bhagat Ram .....Petitioner(s)
Versus
Abhay & others .....Respondents.

CMPMO No. 514 of 2017 along with
CMPMO No. 495 of 2017
Judgment reserved on 5th November, 2018
Decided on : 8th January, 2019

Code of Civil Procedure, 1908 – Sections 47 & 146, Order XXI Rule 16 **–** Assignment of decree - Whether recognition of assignment by court necessary? - Decree-Holders transferring property covered by decree to transferee/ assignee - Transferee filing execution – Judgment-Debtors (JDs) filing objections to execution by contending that execution without issuing notice of assignment to decree holder and hearing objections thereto not maintainable - Executing Court thereafter issuing notice to Decree-Holders - Challenge thereto – JDs contending that order issuing notice to decree holder after their objections is bad – Notice, if any, could have been issued at very inception of execution application - Execution application as filed is defective and liable to be dismissed - Held, recognition of assignment of decree by court not necessary and assignee is competent to maintain execution application – Order upheld – Petition dismissed. (Paras 15 & 27)

Cases referred:

Dhani Ram Gupta and others vs. Lala Sri Ram and another, (1980)2 SCC 162
P. Janakaraj and another vs. Balasubrahmanya and others, AIR 2008 Karnataka 190
Rajbahadur Yadav and others vs. Rizvi Estates and Hotels Pvt. Ltd., 2014(SUPPL) Civil Court Cases 613 (Bombay)
SailaBalaDassi vs. Smt. Nirmala SundariDassi and another, AIR 1958 SC 394
Udayakumar vs. Muruganandham and another, AIR 1996 Madras 170

For the petitioner(s) Mr. Neeraj Gupta and Mr.Janesh Gupta Advocates.
For the respondents : Mr.Vikas Chauhan, Advocate.

The following judgment of the Court was delivered:

Justice Vivek Singh Thakur, Judge

These two petitions, preferred by the Judgment Debtor, are being decided by this common judgment as the common questions of fact and law are involved therein.

2, In both petitions, order(s) dated 18.8.2017 passed by learned Senior Civil Judge, Court No.1, Shimla (hereinafter referred to as the Executing Court) respectively, in two different execution petitions bearing No. 24-10/2015 titled Abhay and others vs. Bhagat Ram and case No. 25-10/2015 titled Abhay and others vs. Bhagat Ram have been assailed, whereby the Executing Court, during pendency of execution petition(s), on application(s) filed under Section 146 read with Order 21 Rules 11(2), 16 and 32 of the Code of Civil Procedure (in short 'CPC') by the Decree Holders/assignees, has ordered the issuance of summons to the original decree-holder.

BRIEF FACTS OF THE CASE

1. CMPMO NO. 495 OF 2017

3 Original Decree Holder (Usha Verma and her two brothers Ajay Kumar and Ashok Kumar) through their power of attorney Usha Verma had filed a civil suit No. 35/1 of 2000 titled Usha Verma and others vs. Bhagat Ram against Judgment Debtor Bhagat Ram which was decreed vide judgment and decree dated 3.3.2004 and the said decree remained intact uptil the Apex Court as the Special Leave to Appeal (Civil) preferred by Judgment Debtor against the judgment and decree affirmed against him by the High Court in Regular Second Appeal was dismissed by the Apex Court on 10.11.2014. Thereafter, respondents/assignees had purchased the entire suit land, subject matter of aforesaid decree dated 3.3.2004 vide agreement to sell dated 10.4.2015 followed by four registered sale deeds bearing registration Nos. 741/2015, dated 10.4.2015, Registration No. 742/2015 dated 10.4.2015, Registration No. 761/2015 dated 16.4.2015 and Registration No. 762/2015 dated 16.4.2015 acquiring all rights of joint Decree Holders in the suit land. In addition, original Decree Holders have also executed deed of assignment dated 24.8.2015 in favour of respondents/assignees. Being a transferee of the suit land and also as an assignee of judgment and decree dated 3.3.2004, affirmed uptil the Apex Court, respondents/assignees have filed an execution petition before the Executing Court, wherein original Decree Holder has not been arrayed as party and the Executing Court without issuing a notice to the original Decree Holder, had issued notice to Judgment Debtor, who has preferred objections dated 10.11.2016 under Section 47 of CPC against execution of judgment and decree on various grounds including that the decree passed in favour of the original Decree Holder has never been assigned in favour of the respondents/assignees.

4 Thereafter respondents/assignees had preferred an application under First Proviso to Order 21 Rule 16 of CPC for issuance of summons to the original Decree Holders which was resisted by the petitioner/Judgment Debtor mainly on the ground that execution petition itself is not maintainable as the respondents/assignees have filed the same without complying with the provisions of Order 21 Rule 16 of CPC and the said defect in proceedings is not permissible to be cured at the stage when application was preferred by the respondents/assignees.

5 The Executing Court has allowed the application vide impugned order dated 18.8.2017 filed by the respondents/assignees and has ordered to issue the summons to original Decree Holders which has been assailed before this Court in the present petition.

2. <u>CMPMO NO. 514 OF 2017</u>

6 Original Decree Holder (Usha Verma and her two brothers Ajay Kumar and Ashok Kumar) through their power of attorney Usha Verma had filed a civil suit No. 40/1 of 2003/2002 titled Usha Verma and others vs. Bhagat Ram against Judgment Debtor Bhagat Ram which was decreed vide judgment and decree dated 26.5.2004 and the said decree remained intact uptil the Apex Court as the Special Leave to Appeal (Civil) preferred by Judgment Debtor against the judgment and decree affirmed against him by the High Court in Regular Second Appeal was dismissed by the Apex Court on 10.11.2014. Respondents/assignees have acquired the rights of judgment and decree passed in civil suit No. 40/1 of 2003/2002 titled Usha Verma and others vs. Bhagat Ram, affirmed uptil the Apex Court vide deed of assignment dated 24.8.2015 executed by original Decree Holders. Being an assignee of judgment and decree dated 26.5.2004, affirmed uptil the Apex Court, respondents/assignees have filed an execution petition before the Executing Court, wherein original Decree Holder has not been arrayed as party and the Executing Court without issuing a notice to the original Decree Holder, had issued notice to Judgment Debtor, who has preferred objections dated 10.11.2016 under Section 47 of CPC against execution of judgment and decree on various ground including that the decree passed in favour of the original Decree Holder has never been assigned in favour of the respondents/assignees.

7 Thereafter respondents/assignees had preferred an application under First Proviso to Order 21 Rule 16 of CPS for issuance of summons to the original Decree Holders which was resisted by the petitioner/Judgment Debtor mainly on the ground that execution petition itself is not maintainable as the respondents/assignees have filed the same without complying with the provisions of Order 21 Rule 16 of CPC and the said defect in proceedings is not permissible to be cured at the stage when application was preferred by the respondents/assignees.

8 In this case also, the Executing Court has allowed the application vide impugned order dated 18.8.2017 filed by the respondents/assignees and has ordered to issue the summons to original Decree Holders which has been assailed before this Court in the present petition.

9 Learned counsel for the petitioner, in support of his contentions raised in petitions, has submitted that under the First Proviso to Order 21 Rule 16 CPC, Court had to issue notice to the transferor but the Executing Court has failed to do so and therefore, Court, at the later stage, on application filed by assignee, after filing of objections by Judgment Debtor, is not empowered to issue the notice to the transferor at this stage as the question of maintainability of execution petition at the time of entertaining the same has arisen on account of objections raised by the Judgment Debtor and issuance of notice to transferor at this stage after entertaining the execution petition without issuing the notice to the transferor has taken away the valuable rights of Judgment Debtor and thus issuance of notice now at this stage would amount to defeating the very purpose of provisions of Order 21 Rule 16 CPC and to overcome the present situation, application should have been filed earlier at the initial stage before filing of objections by Judgment Debtor, but at this stage, inherent defect in petition as well as illegality committed by the Executing Court cannot be cured subsequent to filing of objections by Judgment Debtor and thus now the assignee has only way out to withdraw his execution petition with liberty to file afresh in consonance with the relevant provisions including Order 21 Rule 16 CPC as at this stage passing of impugned order by the Executing Court is amounting to putting the horse behind the cart as the non-compliance of mandatory provisions of Order 21 Rule 16 CPC has affected the maintainability of execution petition because the very purpose to hear the objections of

Judgment Debtor along with original Decree Holder has been ignored by the Executing Court by entertaining the execution petition in violation of mandatory provision.

10 It is also canvassed that issuance of notice to the transferor at this stage is amounting to arrive at the conclusion that the respondents/assignees are having valid deed of assignment of decree but without adjudicating such issue raised by the petitioner/Judgment Debtor in his objections.

11 Learned counsel for the respondents/assignees has supported the impugned order for the reasons assigned therein. Referring the provisions of Section 146 and Order 21 Rule 16 CPC and by putting further reliance on the judgments in cases ***Udayakumar vs. Muruganandham and another*** reported in ***AIR 1996 Madras 170, P. Janakaraj and another vs. Balasubrahmanya and others*** reported in ***AIR 2008 Karnataka 190*** and***Rajbahadur Yadav and others vs. Rizvi Estates and Hotels Pvt. Ltd.*** reported in ***2014(SUPPL) Civil Court Cases 613 (Bombay),*** dismissal of present petition has been prayed.

12 Before proceedings further, it would be apt to reproduce the provisions of Section 146 and Order 21 Rule 16 CPC, which may be relevant for adjudicating these petitions:-

> ***"146. Proceedings by or against representatives-***
>
> ***Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.***
>
> ***Order 21 CPC Rule 16***
>
> ***16.Application for execution by transferee of decree- Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions, as if the application were made by such decree holder.***
>
> ***Provided that where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution:***
>
> ***Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.***
>
> ***(Explanation-Nothing in this rule, shall affect the provisions of Section 146, and a transferee of rights in the property, which is the subject matter of the suit, may apply for execution of the decree without a separate assignment of the decree as required by this rule.)***

13 Section 146 of CPC is general enabling provisions providing maintainability of application/ proceedings by or against any person claiming his right under another person where another person is otherwise entitled or liable to take/face such

application/proceedings. Order 21 Rule 16 CPC provides a specific procedure for execution of a decree by transferee of decree and it recognizes transfer of decree by assignment in writing or by operation of law and entitles such transferee to execute the transferred decree in his favour in the same way and subject to the same condition as if the application was made by original Decree Holder but with further rider that where the interest in decree has been transferred by assignment, notice of such application shall be given to the transferor and Judgment Debtor and decree shall be executed only after hearing their objections by Court, if any, to the execution of decree.

14 Explanation of Rule 16 provides that provisions of Section 146 CPC will not be affected by this Rule and transferee of rights in the property, which is subject matter of suit, may apply for execution of decree without a separate assignment of decree as required by this Rule.

15 In ***Dhani Ram Gupta and others vs. Lala Sri Ram and another*** reported in ***(1980)2 SCC 162*** has held that First proviso to Order 21 Rule 16 enjoins that notice of application for execution shall be given to the transferor and Judgment Debtor and that decree shall not be executed until the Court has heard their objections, if any, to its execution, however, it further lay down that property in decree passes to the transferee under a deed of assignment when the parties to the deed and assignment intend such property to pass and it does not depend on the recognition of transfer and Order 21 Rule 16 CPC neither expressly nor by implication provides that assignment of decree does not take effect until recognizes the Court. Therefore, recognition of assignment/transfer, before issuing notice to original Decree Holder/transferor, by the Court for issuing notice to Judgment Debtor does not vitiate the execution proceedings.

16 The judgment passed by the Madras High Court in ***Udayak Kumar's case*** (supra) is based on the verdict of the Apex Court in ***Dhani Ram Gupta'case (supra)*** but dealing with a case having different facts which are not applicable in the present case. However, keeping in view the ratio of law laid down by the Apex Court that transfer by assignment does not require recognition by the Court, plea of petitioner that on account of non-issuance of notice to the original Decree Holders at the initial stage, the execution petition is not maintainable, is not sustainable.

17 The Apex Court in ***Sm. Saila BalaDassi vs. Smt. Nirmala SundariDassi and another*** reported in ***AIR 1958 SC 394*** has held the object of Section 146 CPC is to facilitate the exercise of rights by person in whom they come to be vested by devolution or assignment and being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense.

18 The Karnataka High Court in ***P. Janakaraj's case*** (supra) has also relied upon this judgment and has permitted the continuation of proceedings by the assignee/Decree Holder in absence of original Decree Holder and Judgment Debtor who had failed to put in appearance despite service.

19 The Bombay High Court in ***Rajbahadur Yadav's case*** (supra) has held that it is not necessary that Decree Holder should assign the decree in favour of the subsequent purchaser as subsequent purchaser of the property, which is subject matter of decree, acquires the rights to execute the decree in view of provisions of Section 146 and Order 21 Rule 16 CPC. Therefore, after execution of sale deeds of property involved in decree, vendee enjoys status of transferee as envisaged in Order 21 Rule 16 read with Section 146 CPC.

20 In the present case, the respondents/assignees have not only purchased the suit land, but they are also holding the deed of assignment of decree. Therefore,

respondents/assignees are very much entitled to file the execution petition. Bare reading of Explanation to Rule 16 of Order 21 CPC makes it clear that for a purchaser of suit property no separate assignment of the decree, as required under this Rule, is necessary for executing the judgment and decree with respect to property, subject matter of decree, purchased by him.

21 Therefore, there is no doubt about maintainability of execution petition under Rule 16, but execution of decree is subject to hearing the objections of transferor and Judgment Debtor, if any.

22 First Proviso to Rule 16 provides issuance of notice of execution application to transferor and Judgment Debtor. It is true that it would have been better, for the purpose of convenience as well as compliance of provision of this proviso that assignee/transferee should have arrayed transferor/original Decree Holder as party but at the same time it is also clear that It does not contemplate that such notice is to be issued on asking of or filing of an application by assignee/transferee. It enjoins the duty upon the Court to issue such notice.

23 In any case, there is also no bar to the assignee seeking the execution of decree, to file an application for issuance of such notice if Court fails to issue such notice before execution of decree and also where assignee/transferee has failed to array transferor as party at initial stage.

24 In the present case, notice was issued by the Court to Judgment Debtor but not to original Decree Holder whose details were very much available in the certified copy of judgment and decree, filed with application for execution, and in any case, the Court was empowered to ask any such details, if not available on record, as it has been specifically mentioned in first para of application for execution that applicants are assignees of original decree and it is also evident from cause title of application wherein Rule 16 has also been specifically mentioned. No doubt, petitioner/Judgment Debtor has filed their objections, but the fact remains that execution application has not been decided yet in either way and respondents/assignees have preferred an application for issuance of notice to the transferor/original Decree Holder. Therefore, plea of petitioner that allowing this application at this stage has amounted to defeat the very purpose of provisions of Rule 16 is not sustainable.

25 Provisions of law are made for doing the substantial justice and unless irreparable loss or prejudice is caused to the opposite party, every procedural defect, should be permitted to be cured, for enabling the Court to do substantial justice. Therefore, I am not in agreement with the plea of petitioner that at this stage of execution petition, the defect cannot be permitted to be cured that too when it was also duty of the Court to issue the notice to original Decree Holder/transferor inviting his objections, if any, along with Judgment Debtor and assignees have themselves filed an application for summoning the original transferor before passing of an effective order to execute the decree.

26. Plea of petitioner that issuance of summons to the original Decree Holder/transferor is amounting to arrive at the conclusion that petitioners are having valid deed of assignment is misconceived as the said issue is yet under consideration of the Executing Court subject to objection of transferors if they choose to appear and file objection, if any, after service. It is also one of the purposes of provisions of Proviso to Rule 16 which provides that decree shall not be executed until the objections of transferrer/original Decree Holders and Judgment Debtor are heard. In case transferors do

not appear after proper service, assignment/transfer is to be considered valid unless proved contrary.

27. In view of above discussion, I find no irregularity or illegality or perversity in the impugned orders. Therefore, no interference by this Court is warranted. Accordingly both petitions are dismissed. No order as to costs. As on dismissal of petitions, interim stay stands vacated. Parties are directed to appear before the Executing Court on ***10th January, 2019.***

28. Copy of judgment be sent to the Executing Court, henceforth.

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

Himachal Pradesh Forest Development Corporation Limited .....Petitioner.
Versus
Shri Prem Singh .....Respondent.

Civil Revision No. 1 of 2019
alongwith Civil Revision No.
2,3,4,5 and 6 of 2019
Decided on : 3.1.2019

Arbitration and Conciliation Act, 1996 – Sections 2(1) (e) & 36 **–** Award – Execution - Principal Court of original civil jurisdiction - District Judge assigning execution of Award to Additional District Judge (ADJ) – ADJ dismissing execution on ground of award/decree not of his court nor having been transferred to it - Revision against - Held, District Judge being Principal Court of original civil jurisdiction, alone has jurisdiction to entertain execution application arising from award of Arbitrator - District Judge directed to recall execution application from court of ADJ and proceed in accordance with law. (Para 4)

Cases referred:
Jasvinder Kaur vs. Tata Motors Finance Ltd. 2013 Law Suit (HP) 649
State of West Bengal and Others vs. Associated Contractors, (2015) 1 SCC 32
Sundaram Finance Ltd. vs. Abdul Samad, (2018) 3, SCC 622

For the Petitioner(s): Mr. Rajesh Verma, Advocate.
For the Respondent(s): Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petitions stand directed against the impugned order(s) of 26.10.2016, rendered by the learned Additional District Judge-II Kangra at Dharamshala, upon Execution No(s). 2-D/2014/2012, 1-D/2014/2012, 4-D/2014/2012, 6-D/2014/2012, 5-D/2014/2012, 3-D/2014/2012, whereby it, while placing reliance upon a judgment rendered by this Court in **Jasvinder Kaur v. Tata Motors Finance Ltd. 2013 Law Suit (HP) 649**, hence dismissed the execution petition(s), primarily for the reason(s) that (a) the

award(s) being not pronounced by the afore Court, (b) nor, it being sent to this Court for execution, by the Sole arbitrator i.e Director (North) HP State Forest Development Corporation Ltd., Dharamshala, (c) but, it being directly filed in the Court of District Judge, Kangra, wherefrom it stood assigned to the afore Court.

2. Since all the Civil Revisions are carrying a common question of law, hence are amenable for meteing an adjudication, under a common judgment.

3. The afore reason(s) are merit-worthy, as, in a judgment, titled as **State of West Bengal and Others** versus **Associated Contractors,** reported in (2015) 1 SCC 32**,** relevant paragraph 25 (a) whereof stands extracted hereinafter, rather hence categorical expostulation of law, stands borne, qua only the principal Civil Court of original jurisdiction, in, a District or High Court (a) hence holding the requisite original civil jurisdiction for the purposes of entertaining a petition, cast under the provision of Section 36 of the Arbitration and Conciliation Act, (b) and obviously also for the purposes of entertaining, the, apt execution petition(s), (c) thereupon the assignment of a petition(s) cast under Section 36 of Arbitration and Conciliation Act, and, of execution petitions' by the learned District Judge, vis-a-vis, the Court of Additional District Judge-II, Kangra at Dharamshala, is, beyond the mandate of the expostulations of law, as, borne in the afore judgment.

> **" (a) Section 2 (1) (e) contains an exhaustive definition marking out only the Principal Civil Court of Original Jurisdiction in a district or a High Court having original civil jurisdiction in the State, and no other court as "Court" for the purpose of part I of the Arbitration Act, 1996."**

4. Consequently, the impugned verdict(s) are merit worthy, and, in consonance with the afore, the learned District Judge, Kangra is directed to recall, the, afore petition(s), constituted under Section 36 of the Arbitration and Conciliation Act, and, also the requisite execution petitions, from, the docket of Additional District Judge-II, Kangra at Dharamshala, and, ensure theirs being lodged in its docket, and, thereafter the latter shall render decision(s), upon, the afore, in consonance with the mandate borne in a judgment titled as **Sundaram Finance Ltd. v. Abdul Samad** reported in (2018) 3, SCC 622. The respective parties are directed to appear before the learned District Judge, Kangra at Dharamshala on 17.1.2019.

In view of the above, the present petition stands disposed of. All pending applications stand disposed of accordingly.

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

Balbir Singh ...Appellant
Versus
State of Himachal Pradesh ...Respondent

Cr. Appeal No. 557 of 2016
Reserved on: 28.11.2018
Decided on: 05.01.2019

Indian Evidence Act, 1872 - Section 9 - Last seen theory – Applicability and evidentiary value **–** Held, last seen they comes into play where time gap between point of time when accused and deceased were last seen alive together and deceased found dead is so small and possibility of any person other than accused being author of crime become impossible - Circumstance of last seen together cannot by itself form basis for holding accused guilty of offence – Other circumstances surrounding incident are also relevant. (Paras 61, 64 & 66)

Indian Evidence Act, 1872 - Section 26 - Extra-judicial confession – Admissibility - After committing murder accused attempting to commit suicide by consuming poison - Taken to hospital - Accused admitting murdering 'C' before doctor - Police also present nearby at time of making of statement by accused – Defence contending that statement made by accused before doctor inadmissible in evidence as confession ought to have been before Judicial magistrate - Held, accused was neither arrested nor in custody of police at relevant time - Confession not hit by Section 26 of Act. (Paras 69 & 70)

Indian Penal Code, 1860 – Section 302 – Murder- Proof **-** Trial court convicting and sentencing accused of murdering 'C' – Appeal - Accused arguing mis-appreciation of evidence on part of trial court - Case based on circumstantial evidence – Facts revealing- (i) accused though engaged with deceased, was liking her cousin 'S', (ii) accused also confiding 'S' that he did not like 'C', (iii) on fateful day, accused and deceased were together in jungle, (iv) accused sent younger brother of 'C' back home from jungle, (v) in evening, dead body of 'C' was found from that very spot, (vi) hammer was found lying nearby dead body, (vii) injuries were ante-mortem in nature and probable with hammer (viii) colleagues of accused found him sad in office during day time on next day (ix) accused attempting to commit suicide by consuming poison on next day, (x) accused making confessional statement of having murdered 'C' before medical officer, (xi) accused identifying place and weapon of offence - Held, chain of circumstantial evidence clearly leads towards guilt of accused - Appeal dismissed – Conviction upheld. (Paras 59-73)

Cases referred:

Ajay Singh Vs. State of Maharashtra, (2007) 12 SCC 341
Arvind @ Chottu vs. State ILR (2009) Supp. (Delhi) 704
Ashok Vs. State of Maharashtra, (2015) 4 SCC 393
Bodh Raj @ Bodha& others vs. State of J&K 2002 (8) SCC 45
Dandu Jaggaraju vs. State of Andhra Pradesh, (2011) 14 SCC 674
K.I. Pavunny vs. Assistant Collector (HQ) Central Excise Collectorate, Cochin (1997) 3 SCC 7212
kanhaiya Lal vs. State of Rajasthan (2014) 4 SCC 715
Krishnan vs. State of Tamil Nadu, 2014 (12) SCC 279
Pawan Kumar @ Monu Mittal vs. State of Uttar Pradesh and Ant, 2015 (7) SCC 148
Pudha Raja and another vs. State, represented by Inspector of Police, (2012) 11 SCC196
Rambraksh @ Jalim vs. State of Chhattisgarh, 2016(3) Criminal Court Cases 001 SC
Rishi Pal vs. State of Uttarakhand, (2013) 12 SCC 551
Salim vs. State of Kerala, 2012 (2) Criminal Court Cases 435 (Kerela) (DB)
State of Rajasthan vs. Kanshi Ram, 2006 (12) SCC 254

For the appellant	Mr. O.C. Sharma, Advocate
For the respondent	Mr. Narender Guleria, Additional Advocate General, with Mr. J.S. Guleria and Mr. Kunal Thakur, Deputy Advocates General.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, **J.**

By way of this appeal, the appellant has challenged the judgment passed by the Court of learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. in Sessions trial No. 17/7 of 2013, dated 20.01.2016, whereby the appellant-accused (hereinafter referred to as 'the accused') has been convicted and sentenced to undergo life imprisonment and to pay fine of Rs.10,000/- under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and in case of default of payment of fine, the accused ordered to further undergo simple imprisonment for a period of two months.

2. The factual matrix of the case, as set out by the prosecution, are that Ram Krishan (complainant) resident of village Bhater used to earn his livelihood by working as a labourer. He has three children, namely, Champa Devi (deceased), Pawan Kumar and Sanju. The deceased was engaged to the accused about 6-7 months prior to the incident. The accused was employed in the Irrigation and Public Health Department and after his engagement, he had been meeting the deceased. On 23.02.2013, the complainant alongwith his younger brother Rattanu and sister-in-law Reeta Devi went to Bilaspur for attending a Court case. The elder son of the complainant, Pawan Kumar had gone to school, whereas his younger son Sanju, mother, Suvidha Devi and daughter (deceased) had stayed in the home.

3. In a nutshell, prosecution story is that on 23.2.2013, when the complainant alongwith his younger brother and sister-in-law returned home at about 6-6.15 PM, they found both the sons of the complainant, his nephew Vijay Kumar, mother and Savitri Devi (wife) crying loudly and it was told that Champa Devi (deceased) died and her body was lying in the forest at Bhater. He then went to the spot and found that corpse of the deceased, where Chotu Ram, younger brother of the complainant, his uncle Sukh Dev, villagers Nand Kishore and Paramjeet were also present. On the spot, slippers and broken bangles of the deceased were lying and about 25 feet away from the dead body, in the bushes a hammer alongwith handle was found. Thereafter, the complainant made inquires from his wife and children and it was told that around 12.30 p.m. the deceased went to the forest at Bhater to bring fodder for cattle and Sanju (PW-3) accompanied her. Savitri Devi had informed the deceased and Sanju that she was going to the shop at Khakeri to purchase ration. When she reached there, her son Sanju had also come, who disclosed that he came to assist her to lift the ration. After about two hours when Savitri Devi returned back home, the deceased was not in the home. They searched for the deceased, but in vain. Thereafter, the dog was released and it started barking where the deceased was found dead. Her mobile phone having two SIMs bearing No. 98177-01634 and 88948-18414 was also lying nearby, which was lifted by Subedha (PW-5) and on being checked by Pawan Kumar (PW-8), SIM bearing No.98177-01634 was found missing from the mobile phone. The police was informed and the investigation ensued. The police clicked photographs of the dead body and the spot was videographed. The dead body was shifted to Government Primary School, Sandroti. Inspector Tilak Raj prepared inquest reports and thereafter the dead body was sent for post-mortem examination to R. H. Bilaspur under the supervision of ASI Dalip Chand and LC Hem Lata. On 24.02.2013, Dr. N.K. Sankhyan conducted the post mortem examination on the corpse of the deceased and found ante mortem injuries on her person. He opined that deceased died due to ante mortem injuries and possibility of throttling and smothering was not ruled out. He sealed parcel which contained ornaments and clothes of deceased, two sealed jars containing viscera, one sealed vial containing blood, another sealed vial containing scalp hair and a tube containing blood of deceased for DNA test. He also sealed a

parcel containing vaginal swabs and two slides of vaginal smear, one sealed envelope containing letter to Chemical Examiner RFSL, Mandi, another sealed envelope containing letter to the Director SFSL, Junga. He handed over the entire parcels etc. to the police.

4. The statement of the complainant Ram Krishan was recorded under Section 154 of the Criminal Procedure Code and it was sent to the police station through Constable Satish, whereupon F.I.R. was registered. Inspector Tilak Raj started the investigation and prepared the site plan as per the spot position. A paid of 'V' shaped slippers, broken pieces of bangles and two toffees of 'Center Fruit' were taken into possession by the police, in presence of witnesses Nand Kishore and Sukh Dev. Blood stained hair, soil smeared with blood and also control sample of soil along with grass were taken into possession. Hammer, which was found lying near the dead body was also taken into possession in presence of witnesses Nand Kishore and Sukh Dev. On 24.2.2013, MHC Police Station, KotKehloor telephonically informed the Investigating Officer that Balbir Singh (accused) consumed poison and is admitted in the hospital at Anandpur. The Investigating Officer shifted to C.H.C. Gawandal. On 25.2.2013, during inquiry, the accused in presence of Medical Officer confessed that he had murdered the deceased, so by consuming poison he attempted to commit suicide. His statement was reduced into writing and separate F.I.R. under Section 309 IPC was registered against the accused. Statements of the witnesses were recorded and it transpired that on 23.02.2013, during the day time, the accused called the deceased to the forest at Bhater and murdered her.

5. On 28.2.2013, while in the police custody the accused made a disclosure statement and consequent thereto he got recovered his pants and shirt from his house, which were taken into possession in presence of witnesses Pawan Singh and Pammi Lal. Site plan of the place of recovery was also prepared.

6. On 25.02.2013, Dr. Kapil Chopra, medically examined the accused and found him capable of performing sexual intercourse. To this extent Dr. Kapil Chopra issued MLC. Samples of pubic hair, scalp hair, finger nail, alongwith sample of blood and clothes of the accused i.e. undergarments and pullover were preserved by the Medical Officer, which were handed over to the police. All the parcels were deposited with HC Suresh Kumar. The parcels were sent by MHC to SFSL, Junga, through Constable Lal vide RC No. 18/13 on 27.02.2013 for analysis. Parcels were also sent through Constable Mukesh Kumar to RFSL, Gutkar vide R.C. No. 18/13 on 27.02.2013 for analysis. Parcels were also sent through Constable Sunil Kumar to SFSL, Junga vide R.C. No.22/13. After analysis reports from SFSL, Junga and RFSL, Gutkar were obtained.

7. On 3.3.2013, the SIM broken by the accused was recovered and to this extent seizure memo was prepared in presence of witnesses Sucha Singh, Rakesh Kumar and ASI Shyam Lal. Spot map of the place of recovery was prepared. Mobile phone having a dual SIM stated to be that of the deceased, on being produced by Pawan Kumar was taken into possession. Mobile phone, on being produced by Subedha was also taken into possession by the police. Police also took into possession Mobile phone of the accused, in presence of Pawan Singh and Shakuntla Devi. The call detail reports and billing addresses with respect to mobile phones No. 97366-60618, 88948-18415, 9882115410 and 98177001634 were obtained.

8. Dr. N.K. Sankhyan after seeing the hammer and on the basis of report of chemical examiner gave his final opinion. He also found that the head injury on the person of the deceased could be caused by the hammer. The accused made a disclosure statement to the effect that he could get the spot identified where he murdered the deceased and consequent thereto he took the police to the place of occurrence. The police prepared a

memo in this regard and also prepared site plan. Sh. Roshan Lal, Patwari, after verifying and measuring the spot, prepared the aks-sajra and jamabandi.

9. During investigation, it transpired that the accused was engaged with the deceased and used to visit the house of the complainant for meeting her and he was also in touch with the deceased on mobile phone. Simultaneously, the accused also started talking to Subedha on phone, which was objected by the deceased. Since, the accused started liking Subedha, on 23.2.2013, during day time, he called the deceased to the forest at Bhater at a lonely place and killed her with a hammer, so that he could marry Subedha.

10. On completion of investigation, report under Section173 of the Code of Criminal Procedure together with the relevant documents was filed against the accused in the Court of learned Judicial Magistrate 1st Class, Bilaspur, who vide order dated 31.7.2013, committed the case to the learned Sessions Judge Bilaspur. Charge against the accused was framed under Section 302 IPC, to which the accused pleaded not guilty and claimed to be tried in accordance with law.

11. The prosecution, in order to prove its case, examined forty witnesses. On the closure of prosecution evidence, the statement of the accused was recorded under Section 313 of the Code of Criminal Procedure, wherein he pleaded not guilty and claimed to be tried. However, in defence, the accused did not examine any witness.

12. The learned trial Court vide its judgment dated 20.01.2016, convicted the accused for the commission of the offence punishable under Section 302 IPC and sentenced him to undergo life imprisonment and to pay fine of Rs. 10,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for two months, hence the present appeal.

13. Mr. O.C Sharma, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove the guilt of accused, as the statements of the witnesses do not inspire confidence. He has further argued that as per the story of the prosecution hammer was recovered on 24th February 2013, but the witnesses have seen the hammer on 23rd February 2013 on the spot alongwith Investigation Officer. He has argued that the statement of the accused which was recorded by the police in presence of the Doctor cannot be taken as a confessional statement and the same is hit by Section 26 of the Indian Evidence Act. He has further argued that the Investigating Officer, while deposing in the Court, stated that there was no blood on the hammer, but in the FSL report the blood was found on the hammer. He has argued that the last seen theory as putforth by the prosecution is not at all reliable, as the brother of the deceased has nowhere stated that he saw the accused with the deceased in the Jungle. Lastly, it has been argued that the accused has been convicted on the basis of evidence, full of surmises, conjectures and lacunae and the judgment passed by learned trial Court, whereby the accused was convicted and sentenced is required to be set aside and the accused be acquitted.

14. In support of his argument, Mr. O.C. Sharma, learned Counsel has placed strong reliance upon 2016 (3) Criminal Court cases 1 SC, wherein vide para 10, it has been held as under:

> ***"10. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased***

is found dead, is the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused."

15. In a similar set of facts, Hon'ble Apex Court in case titled ***Krishnan vs. State of Tamil Nadu, 2014 (12) SCC 279,*** has held as under:

> ***"21. The conviction cannot be based only on circumstance of last seen together with the deceased. In ArgunMarik V. State of Bihar, 1994 Supp(2) SCC 372).***
>
> ***"31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19.07.1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would be at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstances of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded."***

16. The learned counsel for the accused has further placed reliance upon a judgment of Hon'ble Kerala High Court, rendered in ***Salim*** vs. ***State of Kerala***, 2012 (2) Criminal Court Cases 435 (Kerela) (DB), wherein vide para 33, it has been held as under:

> ***"33. Undoubtedly, the appellant was arrested by PW21. The appellant was sent to PW16 by PW21 in the custody of police officials. The arrest had already been effected. The consequent detention and custody have not been terminated. There can be no doubt or dispute on the question that the appellant was not a free bird. He could not evidently move about on his own will. In these circumstances, whether there was immediate presence of any police official or not near the appellant, according to us, is not crucial or determinative. It has got to be held that he who was arrested was in the custody of he police and continued to be under the custody of the police. If that be so, according to us, the language of Sec. 26 makes it crystal clear that a confession made by him in the custody of the police officer cannot be proved against the appellant. We need not advert to the decisions which make out a distinction between 'custody' and 'formal arrest', as in this case, the formal arrest has already been made, admittedly. The mere fact that no police official was standing near the appellant at the time when he made the alleged extra judicial confession cannot and shall not detract against the fact that he continued to be in the custody of the police officer. In that view of the matter, it appears to us to be evident that the so-called confession cannot be admitted in evidence."***

17. Conversely, Mr. J.S. Guleria, learned Deputy Advocate General, has argued that prosecution has proved the guilt of the accused conclusively by leading cogent and

reliable evidence. He has referred to the statements of PW1, PW3, PW10 (Investigation Officer) and PW38-A. He has further argued that the statements of the prosecution witnesses only lead to conclusion that it was the accused who committed the crime. He has further argued that the confessional statement recorded by the police was at the instance of the accused when he was not in custody. He has argued that this statement in all circumstances can be taken as extra judicial confession. He has further argued that the statement of PW-11 is a link to establish that the accused on the day of occurrence went to the spot after taking the lift from him. He has argued that minor discrepancies are bound to occur and these small discrepancies do not create serious dent in the prosecution story. He has argued that the judgment of conviction and sentence rendered by the learned Trial Court is result of proper appreciation of facts and law and the same needs no interference. The appeal which sans merits be dismissed.

18. In rebuttal, the learned counsel for the accused has argued that prosecution witnesses have falsely deposed in the court due to their relations with the deceased, more particularly with Ms. Subedha, as the clothes of Ms. Subedha were not produced in the Court, which, as per the prosecution, were stained with blood. He has further argued that call details do not tally with the statements of the witnesses. Ms. Subedha was continuously in touch with the accused on telephone on the previous day of the occurrence and also on the day of occurrence. However, police did not investigate the matter through this angle. The prosecution could not prove the motive of the accused and when the motive is missing, conviction on the basis of circumstantial evidence cannot be made. He has argued that PW-11 nowhere stated that accused was having hammer in his hand at that time. He has further argued that in these circumstances, the conviction recorded by the learned Court below is required to be set aside and the accused be acquitted.

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

20. The complainant, Shri Ram Krishan stepped into the witness box as PW-1. He has deposed that he works as a labourer and 5th pass. He has three children and one of them i.e. Champa (deceased), who was 8th pass, was killed. As per this witness, on 23.2.2013, he alongwith his sister-in-law and brother, went to Bilaspur to attend a Court case. His son, Pawan had gone to school on that day and another son Sanjay was at home. He has further deposed that his wife and mother along with the deceased were present in the home. In the evening, at about 6.15 pm, when he returned his family members alongwith villagers were weeping. On inquiry, it was told to him by Pawan and Sanju that the deceased is lying dead in the jungle at place called Bhater. He went to the spot and found the dead body of the deceased. He has further deposed that the slippers, yellow shawl along with broken pieces of bangle of the deceased were lying there. The deceased was having injuries on her head. At that time his brother Chotu Ram, one Nand Kishore and Paramjeet were also present there and they informed the police at Police Post, Shri Naina Devi Ji. As a sequel, three police officials reached on the spot and they showed their inability to lift the dead body and asked them to contact the police at Police Station Kot. Police were telephoned by Pradhan and 6-7 police officials along with one Lady Constable reached on the spot. Inquiries were made by the police and a hammer, which was lying at a distance of 25 feet from the dead body, was recovered. As per this witness, his wife and children told him that at about 11.30-12 O'clock, the deceased went to the jungle to fetch grass/leaves for the goats and Sanju accompanied her. The complainant was told by his wife that accused came there and he also accompanied the deceased. The accused was engaged with his daughter (deceased). His wife at that time had gone to the shop situated at Khakari to bring articles and she alongwith Sanju brought the articles from the shop. After

10-15 minutes, Sanju returned from the jungle and went with his wife to the shop. When his wife had returned home from the shop, the deceased was not found there. Thereafter, his wife alongwith his mother and Subedha went to jungle in search of the deceased and they also took their pet dog with them. In the jungle, the dog started barking. The mobile phone of the deceased was lying with her on the spot, which was two SIMs, one bearing No.88948-18415 and the other number, which he does not remember. He has further deposed that it was having digit 34 at the end and the same was given to the deceased by the accused. The SIM which the accused had given to the deceased was not there in her mobile phone. Subedha had brought the mobile phone back with her from the jungle and handed it over to Pawan (son of the complainant). He did not know on 23.2.2013 as to who had killed his daughter. Afterwards, he came to know that accused had also tried to kill himself by consuming poison and he had been taken by the police to the hospital. The accused took the police to the place where he killed the deceased. The accused also told that he killed the deceased, as he was in love with Subedha. His statement, Ext. PW-1/A, was recorded by the police, which bears his signatures encircled in circle A. In his cross examination, he deposed that his statement was recorded only once by the police on 23.2.2013. He further deposed that he was told by Pawan and Sanju at 6.15 p.m. that on the day of incidence, they saw the dead body of the deceased lying in Bhater jungle. The dog was taken to the jungle prior to his reaching home. He reached at the spot around 6.25 p.m. He gave statement that it was told to him by the three police officials that as they were not in a position to lift the dead body from the spot, they asked him to contact other police officials at police station Kot and thereafter Pradhan telephoned the police at police station. He disclosed to the police that the accused got recovered the hammer. He also told the police that the accused, the deceased and his son Sanju went together to the jungle from his home. He gave statement to the police that the SIM, having last digits as '34' had been provided to the deceased by the accused. He also stated before the police that the accused had himself consumed poison and he wanted to marry Subedha, so he killed the deceased. Ext. PW-1/A, was recorded on the spot by the police at about 12-1.00 a.m. Except his statement, no other statement of any witness was recorded on 23.2.2013 at the spot. Self stated that Ext. PW-1/A, was recorded in the room of the school, where the dead body had been kept. The hammer was sealed by the police in his presence at the spot and it was dark at that time. No finger prints were taken from the hammer. He admitted that the deceased and the accused were in deep love with each other and they engaged with the consent of their family members. He further admitted that when the accused came to know that the deceased had expired, he consumed poison, since he was in deep love with her.

21. PW-2, Savitri Devi, has deposed that she is a house wife and has three children. The deceased was her daughter and 6-7 months prior to the occurrence, she was engaged to the accused. After the engagement, the accused frequently used to meet the deceased. She further deposed that on 23.02.2013, at about 10-11.00 a.m., the deceased had gone to Bhater jungle after informing her and she was accompanied by her son Sanju, where the accused came to meet her. At that time, she had gone to Khakari to fetch articles from the shop. She asked Sanju to come to the shop, as she would not be able to carry home all the purchased articles. Sanju went to the shop after about one hour and told her that he had been sent back by the accused stating that he would send the deceased home after sometime. The deceased also asked Sanju to return back home. However, when he returned home, the deceased was not present there. Upon which, she made inquires from her mother-in-law and niece Subheda. Thereafter, she alongwith her mother-in-law and Subheda went to Bhater jungle in search of the deceased and she heard someone weeping. When she went there, she found that the deceased was lying dead and having an injury on her head. Mobile phone, broken pieces of bangles, a *dupatta* and slippers of the deceased were also lying there. On the next day, she came to know that the accused killed her daughter, as he after

consuming poison disclosed that he killed the deceased, since he was in deep love with her niece Subheda. This witness, in her cross examination, has admitted that she had not seen the deceased, the accused and her son Sanju together in the jungle. She further admitted that she has not seen any hammer lying on the spot. Self stated that it was recovered by the police. She deposed that at about 5.00 p.m. she returned home from the jungle and thereafter she did not go to jungle. Her husband after going to jungle came back home early in the next morning. This witness admitted that after the engagement and till the death of the deceased both the accused and the deceased were having affable relations. Her statement was recorded by the police on 24.02.2013. As per this witness, she, her husband and son had been tutored to give such statements in the Court. On 23.02.2013, the day her daughter died, she did not meet the accused and she saw the accused in the Court while her statement was being recorded. She further deposed that she saw the accused four days prior to 23.02.2013.

22. PW-3, Master Sanju, deposed that the deceased was his sister and she was engaged to the accused. On 23.2.2013, he had not gone to school and at about 11.00 am, he along with the deceased went to Bhater jungle, for bringing fodder for the cattle. He has further deposed that his mother had gone to the shop for purchasing articles. The accused came in the jungle and he was told by the deceased to return back to home. Thereafter, he went to the shop and around 3.00 pm, he came back to home. He deposed that his grandmother disclosed to his mother that the deceased on persistent calls did not respond. So, his mother alongwith his grand mother and cousin sister Subedha went to the jungle in search of the deceased and they also took their dog with them. As per the version of this witness, his uncle Chotu asked him to bring water so, his brother Pawan took the water. Thereafter, he went to jungle, where he saw the dead body of the deceased, which was having injury on her head. The deceased was killed by the accused. At about 6-6.30 pm, his father returned home, from the cremation ground and they heard that the accused consumed poison and he was saying that he killed his friend. In cross-examination, he could not tell the names of those boys, who told that the accused after consuming poison told that he killed the deceased. His statements were recorded at home by the police on 24.2.2013 and 26.2.2013. He denied that till 24.02.2013 it was not known as to who had killed the deceased and on 26.2.2013 he was tutored by his parents to name the accused. He denied that his statement was recorded on 24.2.2013. He admitted that the accused never gave beatings to the deceased in his presence on 23.2.2013. He further stated that he did not see the hammer on 23.2.2013 lying on the spot. He admitted that in the morning he, his father and mother were tutored outside the Court to make the statement. He denied that till 25.02.2013, the perpetrator of the offence was not known and a story was foisted only on 26.2.2013 to rope in the accused. He admitted that the deceased and the accused were having deep intimacy with each other.

23. PW-4, Suvidha, grandmother of the deceased deposed that the deceased was engaged with the accused. After the engagement, the accused once or twice visited their house. She has further deposed that on 23rd of February, 2013, the deceased went to Bhater jungle along with Sanju to bring fodder. Around 11-12 O'clock, it was raining on that day and her daughter-in-law had gone to the shop. On retuning back, her daughter-in-law asked her as to whether the deceased returned home or not. She informed that the deceased did not return home, so they started searching the deceased in the jungle. Sanju, Subedha and her daughter-in-law went to jungle and they also took their dog with them. Her daughter-in-law took a separate path and they started walking on a different path to the jungle. The dog was released and it started barking at the place, where the deceased was lying dead. At that place broken pieces of bangles, *dupatta* and slippers of the deceased were lying. In the meantime, her younger son, namely, Chottu came there, who was

informed by Subedha telephonically. Subsequently, Sukh Dev also came there and they all gathered at the place where the dead body of the deceased was lying. After some time they returned home and the dead body of the deceased was kept in the room of Kharkari School. On the next day, dead body of the deceased was cremated. She has further deposed that the people of the area, during the time of cremation, were saying that the accused killed the deceased, as he did not want to marry her. People were also saying that the accused did not like the deceased. She denied that in her presence the police did not come on the spot. As per the version of this witness, she has seen the dead body being lifted to the school. She admitted that they came to know after the death of the deceased that the accused did not like her. She further deposed that she was not told by anyone that the accused did not like the deceased, It is her own belief that the deceased had only been killed as the accused did not like her. She cannot name any of those persons, who told that the deceased was killed by the accused. She deposed that her son Ram Kishan, met her in home. Self stated that on 23.2.2013, she came to Bilaspur for attending a Court case. She denied that when she, her daughter-in-law and Subedha went to the jungle in search of the deceased, her son Ram Kishan was in the home. Ram Kishan did not meet her on the spot. They had gone about one and half kilometer on different path in search of the deceased. When they reached at the place, where the dead body of the deceased was lying, no one else was present there. People reached at the spot after half an hour, however she cannot name those persons who came there. Self stated that she remember only one name, i.e. Nand Kumar. She admitted that except for broken pieces of bangles, *dupatta* and slippers, she had not seen anything else lying on the spot. She stated that her statement was recorded by the police on 24.2.2013 at her home. Nobody informed her that her grand daughter had been killed with the hammer. Self stated that the deceased was having injuries on her head and the police recovered a hammer. She admitted that from the time of the engagement of the deceased, till her death, there never arose a situation to snap the ties.

24. PW-5, Subedha, has deposed that the deceased was her cousin sister and she was engaged to the accused. The accused works in IPH department at Meothi and after engagement, accused, as well as the deceased had been talking to each other over phone. The accused used to tell her that he like her and not her cousin sister (deceased). She further deposed that when she fell ill and was taken to Anandpur Sahib, the accused came there to see her. Thereafter, the accused also met her once or twice at her uncle's home. On 23.2.2013 when the deceased had gone to Bhater jungle alongwith Sanju to bring grass, the accused had also come there. She came to know from her grand mother that the deceased did not return home, so she along with her grand mother went in search of the deceased through different path, while the mother of the deceased took different path. The dog was also with them and when it started barking, they went to that place and found the dead body of the deceased lying there. The phone, broken bangles, *dupatta* and slippers of the deceased were also lying there. The blood smeared clothes of the deceased were taken into possession by the police, vide seizure memo, Ext. PW-5/A, which bears her signatures, as also the signatures of Pradhan Shakuntla Devi encircled A. She handed over her mobile phone to the police, which was taken into possession vide seizure memo, Ext. PW-5/B and bears her signatures encircled A. In cross-examination, she deposed that she studied upto 10th standard and she is well aware of the months and years. On 23.2.2013, the police met her at the spot around 8-9.00 p.m. Her statement was recorded by the police probably on 25 or 26.02.2013. She does not know the meaning of love. She does not remember in which month the accused expressed that he loves her. She did not disclose this fact to any one at home that the accused said her that he was in love with her. After the death of the deceased she disclosed this fact at home to her grand mother. As per this witness, she disclosed to the police that Sanju and the deceased went together to the jungle for fetching fodder, where they met the accused. It is wrong to suggest that she along with some other person killed

the deceased, so blood stains were on her clothes. She stated that she hold the dead body of the deceased for about 2-3 minutes. She cannot say as to where the blood stains were on her clothes. She handed over her clothes to the police at home, but she does not remember the exact date. She cannot tell at which time they reached the spot. The number of villagers gathered at the spot afterwards, but she cannot tell their names. The deceased had been engaged to the accused one year prior to her death. It is incorrect that she had been frequently talking to the accused over phone. Self stated that she talked to the accused once or twice over the mobile phone of the deceased. She stated that she had not seen the deceased and Sanju going together to the Jungle for bringing grass. She further stated that she had not seen the accused on the day of occurrence in the jungle.

25. PW-6, Chotu Ram, has deposed that the deceased was his niece and engaged to the accused 5-6 months prior to her death. The accused used to talk her over the phone. He also talked to the accused many times. On 23.2.2013, the accused telephoned him over his mobile phone, bearing No. 97367-44626 and on asking, the accused disclosed that he was upset, however, the accused did not disclose the cause of his being upset. On that day he had gone to his maternal uncle's house and reached back home at about 2-2.30 p.m. where he found that the deceased was not at home. Thereafter, they went in search of the deceased. The dog was also with them and it started barking at the place, where the dead body of the deceased was lying. In his cross-examination, he deposed that it was told to him by the deceased that the accused likes his daughter (Subedha). He further deposed that he did not see the accused killing the deceased with his own eyes, but Sanju told him that the deceased was killed by the accused. He also told him that he had seen the accused at the spot. He deposed that he does not know the mobile number of the accused. As per this witness, the police made inquiries from him on 25.02.2013, on which day his statement was also recorded.

26. PW-7, Nand Kishore, deposed that on 23.02 2013, he gone to Shri Naina Devi Ji. Sukh Dev called him over telephone, when he told him that he was at Naina Devi. He was asked by Sukh Dev to return back to village as early as possible. He deposed that a girl had been killed by the name of Champa Devi in Bhater jungle. Thereafter, he had gone to Bhater jungle, where dead body of the deceased was lying. The deceased was covered with a cloth and three persons, namely, Sukh Dev, Paramjeet and Chotu Ram were present there. He lifted the cloth and noticed that there were injuries on the head of the deceased. Thereafter, he rang up the police at Police Post Shri Naina Devi Ji at 6.10 pm. Two Head Constables of Police Post Shri Naina Devi Ji also came on the spot. They also saw the dead body and noticed the injuries on her head. At some distance, a hammer was found lying in the bushes by Station House Officer. Photographs of the spot were clicked. The dead body of the deceased was lifted from the spot and taken to a room of Primary School at Sandoti. There were three visible injuries on the head of the deceased. Thereafter, the dead body was taken to Bilaspur for postmortem. On 24.2.2013, he alongwith Station House Officer Kot and Police Post Shri Naina Devi went to the spot from where a hammer was recovered at a distance of 25 feet from the dead body.

27. PW-8, Pawan Kumar son of the complainant and brother the deceased was subjected to preliminary examination being a child witness. He deposed that he used to work as a salesman in a shop at Shri Naina Devi Ji. As per this witness, on 23.2.2013, he was in the school and when he returned home, he found no one in the home. So, he went to the house of his uncle Chotu Ram and found that son of his uncle, namely, Vijay Kumar, who told him that his father asked him to bring water. Thereafter, they went to jungle with water and saw the dead body of the deceased. As per the testimony of this witness, his grand mother, mother, aunt Ram Kali and cousin sister Subedha were present on the spot

and blood was oozing from the head of the deceased. The mobile phone and slippers of the deceased were lying on the spot and Subedha gave a mobile phone to him. In the evening, his maternal grand fatherSukh Dev and one Nand Kishore had come on to the spot. He and Vijay Kumar then came to home and took a cot from home to the spot. As per this witness, on 24.2.2013, he handed over a mobile phone mark OIPRO (Ext. P-26) to the police, vide seizure memo Ext. PW 7/E, which bears his signature encircled in circle B. The mobile was put in a cloth parcel and seal with six seal impressions T. Seizure memo was signed by Sukh Dev and Nand Kishore as witnesses. This witness in his cross- examination deposed that the mobile was handed over to him by Subedha Devi on the spot. Police did not reach the spot prior to his departure.

28. PW-9, Pawan Singh, the then Vice President of Gram Panchayat Kahrkari, deposed that on 25.2.2013, Suvedha had produced before the police one mobile phone having number 97367-44626, which was sealed by the police in a cloth bag, vide seizure memo Ext.PW-5/B. The seizure memo bears his signature encircled in circle B and Shakuntla Devi signed it in circle C. On the subsequent day, the accused produced a mobile phone of *Lava*, black in colour, which was also seized by the police vide seizure memo Ext. PW9/A, which bears his signatures encircled in circle 'A' and Shakuntla Devi also signed in circle 'B'. The parcel was opened and found that a mobile phone make *Lava* black in colour, Ext. P-28, is to be the same. The shirt, Ext. P-2, *Salwar*, Ext. P-3 and Shawl, Ext. P-4, are also found to be the same. As per this witness, he deposed that on 27.2.2013, the accused made a disclosure statement, Ext. PW-9/B in his presence and in the presence of Constable San Kumar. In consequence of the disclosure statement, pant and shirt were got recovered by the accused from his house, vide seizure memo, Ext.PW 9/C, which bears his signature in circle 'A' and that of Pammi Lal in circle 'B'. In his cross-examination, he stated that he does not remember the place, where the accused produced his mobile phone. He admitted that at that time, the accused was in police custody. Accused Balbir Singh was arrested after 3-4 days from 23 2.2013, when the accused made disclosure statement, Ext PW-9/B, he was in custody and made statement at Police Station. He could not name and tell the rank of the police official, who recorded the disclosure statement of the accused. He could not also tell the date on which, the accused was arrested. He has stated that on 27.2.2013, pant and shirt of the accused were seized.

29. PW-10, Pammi Lal, deposed that on 27.02.2013, the police came to the house of the accused and at that time, Pawan Singh (PW-9) was also present there. Police recovered pants Ext P.30 and shirt Ext. P-31, shown to him at his house. This witness, in his cross-examination, stated that his house at a distance of half kilometer from the house of the accused. His house comes first thereafter the house of accused comes. He denied that accused led the police party to his house and from where he got recovered his pants and shirt. He does not know that the accused told the police that he had been wearing the said pants and shirt at the time of occurrence. He further denied that pants and shirt were sealed in his presence and thereafter seized, vide memo Ext. PW-9/C. He has admitted that memo Ext. PW-9/C, bears his signature encircled in circle 'B'. He denied the fact that their signatures are there on parcel, Ext. P.29 encircled in circle 'B' and specimen of seal mark 'Z' encircled in circle 'A'. He further stated that he had not made any such statement to the police.

30. PW-11, Dharamender Singh, deposed that he remained posted as Computer Instructor at Government Senior Secondary School, Saloa. As per this witness, on 23.02.2013, he was going on his motorcycle to School, accused met him on the way, when he gave him a lift. He dropped him at Gawandal near Shri Naina Devi Ji. He stated that on 25.02.2013, he came to know that the fiancée of the accused had died. In his cross-

examination, he denied that he told the police that the accused was having an umbrella and a bag in his hand, when he gave him lift. He denied that when the bag struck his leg, while on motorcycle, he asked the accused, as to what was there in it.

31. PW-12, Neeraj Kumar, deposed that he runs a sweets shop at Gwandal Chowk, Shri Naina Devi Ji. In the morning of 23.02.2013, the accused came to his shop and purchased five *"Center Fruit"* toffees. This witness, in his cross-examination, admitted that milkmen and others purchase toffees from shop before going to the jungle for grazing graze cattle. This witness has specifically denied that on 23.02.2013 no toffees were purchased by the accused. He did not issue any cash memo qua selling the toffees to the accused. As per this witness, police made inquiries from him qua sale of the toffees. He has denied that it is wrong that police officials told him that they were to take wrappers of toffees to place them somewhere. He saw the accused for the first time on 23.02.2013 and thereafter saw him in the Court. He deposed that he could recognize the customers who purchased toffees on 23.02.2013, but, he does not know their names, parentage and places of residence. He denied that he sells illicit liquor in his shop and out of fear he became a witness.

32. PW-13, Paramjeet Singh, who is an agriculturist, deposed that on 23.02.2013, at about 03:00 p.m., after work he returned home. At about 3.30 p.m., on hearing the cries of Chhotu and others, he came to know that the daughter of Ram Krishan had died. He followed the people, who were running towards the jungle. He has further deposed that in jungle the deceased was lying dead sideways and nothing was recovered in his presence. Police reached the spot and recovered a hammer and the corpse of the deceased was shifted to hospital for postmortem examination. As per this witness, after 3-4 days the accused was arrested and on 28.02.2013 the accused, while in custody, disclosed that he could show the place where he killed the deceased. Disclosure statement in this regard is Ext. PW-13/A, which bears his signatures encircled in circle 'A' and signatures of Karam Singh and that of the accused are encircled in circles 'B' and 'C', respectively. Therefore, the accused led the police party to the place of occurrence and also to the place where he had thrown the hammer after committing the offence. He has further deposed that memo Ext. PW-13/B was prepared, which bears his signatures encircled in circle 'A' and the signatures of Karam Singh are encircled in circle 'B'. Patwari of Patwar Circle Makri and Patwari of Patwar Circle Shri Naina Devi Ji visited the spot. This witness, in his cross-examination, admitted that on 23.02.2013 the police recovered broken pieces of bangles, two Centre fruit toffees, a pair of slippers, some hair, hammer, blood soaked soil from the spot. He further admitted that it was quite dark and raining when the police reached the spot. As per this witness, firstly, the dead body was removed from the spot to Sandhot School and thereafter it was sent to the hospital. Around 08.30 p.m. the hammer was picked up by the police from the spot. He reached the spot at 03.30 p.m. where dead body was lying and the police reached there at about 07.00 p.m.. From 03.30 p.m till 08.30 p.m. he did not see the hammer and it was lying at a distance of 5 to 10 feet from the dead body. As per the deposition of this witness, the hammer was recovered by the police with the help of a search light. Police remained at the spot till 12 O'clock in the night. He has further deposed that except for the recovery of the dead body, the police did not prepare any other document on the spot.

33. PW-14, Sodhi Ram, deposed that he runs a small shop at Janali and the accused is known to him. As per this witness, on 24.02.2013 the accused came to his shop and took Rs. 50/- from him. He does not know what he did with that money. This witness, in his cross-examination, he admitted that the police made inquires from him. He further deposed that he is acquainted with Sonu. He feigned his ignorance whether the accused

gave Rs. 30/- to Sonu for purchasing insecticides for killing rats. This witness denied that he gave such statement to police and heard portion A to A of his, which is mark SR, which he stated to be incorrect. As per this witness, he did not give any such statement to the police. He has further deposed that the accused hails from his village.

34. PW-15, Master Sonu (child witness) deposed that he does not know the accused and he never met him. He saw the accused for the first time in the Court. Inquiries were made by the police from him and his statement was recorded. He denied that on 24.02.2013 the accused gave him Rs. 30/- for purchasing two packets of insecticides to kill rats. This witness also denied that he had purchased such packets from the shop of Jai Chand, which he handed over to the accused. He heard portion A to A of his statement, which is H, which he stated to be wrong and incorrect. As per this witness, he never gave such statement to the police. As per this witness, he was asked by the relatives of the accused to resile from his previous statement recorded by the police.

35. PW-16, Budhi Singh, the then Pump Operator, Water Supply Scheme at Tarwar deposed that the accused had been working as a Water Guard. On 24.02.2013 during the day time the accused came to him and at that time he was sad and he told that his friend has been killed by someone. Subsequently, he left the place. This witness, in his cross-examination, deposed that the police inquired from him. He denied that the accused confessed before him that he had murdered the deceased and committed a sin. As per this witness, he and the accused worked together for a year at the aforementioned scheme.

36. PW-17, Rakesh Kumar, who used to work in a tea stall situated at New Bus-Stand, Shri Naina Devi Ji, deposed that on 03.03.2013 police came to New Bus stand Shri Naina Devi Ji, and on search recovered a broken SIM of Reliance from besides the railing. The police took into possession the broken SIM vide seizure memo, Ext. PW-17/A, and put the same in a match box, which was sealed in a cloth parcel. As per this witness, Sucha Singh was also present there at the time. He and Sucha Singh signed the memo and their signatures are encircled in circles 'A' and 'B' respectively. He has further deposed that parcel was also signed by them. Specimen of seal 'U' was taken on a piece of plain cloth, Ext. PW-17/B, which bears his signature encircled in circle 'A' and that of Sucha Singh encircled in circle 'B'. His statement was recorded by the police at New Bus Stand Shri Naina Devi Ji. He did not disclosed to the police the SIM number in his statement.

37. PW 18, Dr. Kapil Chopra, deposed that on 27.02.2013 he medically examined the accused on an application moved by the police, copy of which is Ext. PW-18/A. As per this witness, he found nothing suggestive of the fact that the accused was incapable of performing sexual intercourse. In this regard he issued MLC, Ext. PW-18/B, which is in his hand and bears his signatures.

38. PW-19, Dr. Snita Devi, the then Medical Officer, Civil Hospital Anandpur Sahib, desposed that on 24.2.2013, he had examined the accused, at about 6.00 p.m., who had history of intake of rat poison, which he had stated to have taken in the morning. Patient was co-operative, conscious, well oriented to time, place and person and his vitals were stable. He was given I.V. Fluid and injections for vomiting during the treatment and was kept under observation. At 09.00 p.m. when the patient had altered consciousness, with irrelevant talks, although his vitals were stable, he was referred to C.H. Ropar/PGI, Chandigarh, for further treatment and management. The patient did not vomit in the hospital.

39. PW-20, Roshan Lal, the then Patwari, at Patwar Circle Shri Naina Devi Ji, deposed that on 28.2.2013 he remained associated with the police. As per this witness, on

that day Madan Lal, Patwari, Patwar Circle, Bhakra was also present, alongwith the accused and other villagers. The accused was in custody of the police and he was taken to the place of occurrence. The accused identified the spot. He took the revenue record alongwith him to the spot. He prepared *akssajra,* Ext. PW-20/A, on the spot, which bears his signatures, and in the same the exact spot of occurrence has been depicted by him through a red dot. He handed over *jamabandi,* Ext. P-20/B, and *akssajra,* Ext. PW-20/A, to the police. This witness, in his cross-examination, deposed that before 28.02.2013, police visited the spot.

40. PW-21, Jai Chand, Shopkeeper, who used to run a Grocery shop at Janali, deposed that on 24.2.2013 neither anyone came to his shop, nor anyone purchased rat poison. He denied that on 24.02.2013 one Sonu came to his shop and purchased two packets of rat poison for Rs. 30/- from him. He denied that he had read his statement, mark 'J', which was recorded by the police. As per this witness, he was compelled by the police to give statement. He deposed that he did not lodge any complaint in this regard before the Senior Police Officers. He further stated that accused is well acquainted to him as he is resident of his Panchayat.

41. PW-22, Ganga Narain Jha, the then Nodal Officer, Vodaphone Limited, deposed that on receipt of e-mail from S.P. Office Bilaspur, Ext. PW-22/A, he provided Call Detail Report qua Mobile No 97366-60618. He has further deposed that billing address of the aforesaid mobile No. was 'Balbir Singh, House No.103/1 Village Miyoth, Bilaspur'. Call Detail Report had been generated through computer system, certificate in this regard is Ext. PW-22/C. As per the version of this witness, police did not enquire from him qua the mobiles number of Subedha and the deceased.

42. PW-23, Tarsem Lal, Driver, feigned his ignorance qua any motorcycle and de deposed that on 23.02.2013, he neither met the accused nor gave him lift on the motorcycle. This witness, in his cross-examination, has feigned his ignorance that during police inquiry, he disclosed that in the afternoon of 23.02.2013, the accused met him near Balighat.

43. PW-24, Devinder Verma, the then Nodal Officer, Airtel, deposed that on receipt of e-mail from S.P. Office Bilaspur, Ext. PW-24/A, he provided Call Detail Report qua Mobile No 88948-18415, billing address whereof was 'Pawan Kumar, son of Shri Sunder Singh, r/o 3/1, Village Shari, P.S. Dhalli, Tehsil and District Shimla, H.P.'. As per the version of this witness, Call Detail Report was generated through computer, so it does not require any signatures. He did not issue any certificate to the effect that the Call Detail Report was computer generated.

44. PW-25, Shashi Kant Verma, the then Nodal Officer, IDEA Cellular Limited, deposed that on receipt of e-mail from S.P. Office, Bilaspur, Ext. PW-25/A, he provided Call Detail Report qua Mobile No. 98821-15410, which was computer generated and did not require any signatures. This witness further stated that the billing address was of the said Mobile Number was 'Balbir Singh, son of Shri Satpal Singh, resident of Village Miyoth, Tehsil Shri Naina Devi Ji, District Bilaspur H.P.' This witness, in his cross-examination, deposed that he did not give any certificate on Call Detail Report that it is computer generated.

45. PW-26, Sumit Kumar, the then Nodal Officer, Reliance Communications Ltd., deposed that on receipt of e-mail from S.P. Office Bilaspur, their mobile company provided Call Detail Report qua Mobile No. 98177-01634, which was computer generated report and did not require any signaturse. Billing address of the said Mobile Number was 'Balbir Singh, son of Shri Satpal Singh, resident of Village Miyoth, Tehsil Shri Naina Devi Ji, District

Bilaspur, H.P.' Call Detail Report had been generated through computer, certificate whereof is Ext.PW-26/C.

46. PW-27, Constable Hushan Lal, deposed that on 27.2.2013, five parcels stated to be containing clothes, vaginal swabs, vaginal slides, blood samples and hair of the deceased alongwith sample seal of RH Bilaspur and five more parcels of the exhibits lifted from the spot were handed over to him by MHC Suresh Kumar vide R.C. No. 17/13 for depositing the same at SFSL Junga. He further deposed that after depositing the said parcels in SFSL Junga on the same day, he handed over the receipt of the same to MHC Suresh Kumar and in his custody, the said parcels were not tampered with.

47. PW-28, Constable Suneel Kumar, deposed that on 4.3.2013, six parcels stated to be containing clothes, pubic hair, head hair, nail pieces, and blood samples of accused alongwith sample seal in a sealed envelope were handed over to him by MHC Suresh Kumar vide R.C. No.22/13 for their deposit at SFSL Junga, which were deposited by him on the sme day, receipt whereof was handed over to MHC Suresh Kumar. This witness further stated that till the time parcels remained with him, the same were not tampered with.

48. PW-29, Constable Satish Kumar, deposed that on 23.02.2013 information was received in the Police Station Kot that a dead body of a girl was lying in the jungle of Bhater. He, SHO and other police officials had visited the spot and as it was dark and raining, they returned. As per the version of this witness, he took photographs of the dead body and also videographed the scene of occurrence through his personal mobile phone. *Rukka,* Ext. PW-1/A, was handed over to him by the SHO, which he took the police station, whereupon FIR, Ext. PW-29/A, was registered, which bears the signature of ASI Parkash Chand in red circle 'A'. He has further deposed that he took the file from the police station to the spot and gave it to SHO. On 28.2.2013, the accused led the police party to the place of occurrence and identified the spot, where he had committed the murder. As per the version of this witness, the photographs, after being developed, were handed over to the I.O. This witness, in his cross-examination, he admitted on that day he was not shown the photographs, which he had clicked and developed. He feigned his ignorance when they reached the spot. He did not take any photographs of the police officials while they were conducting the investigation on the spot. He has further deposed that many villagers were present there. He did not see any dog on the spot, as it was dark. As per the deposition of this witness, they remained on the spot near the dead body till 01:30 p.m. on the next day and came to the police station and other police officials remained there. During the period of his stay on the spot, no statement of any of the witness was recorded.

49. PW-30, Constable Mukesh, deposed that on 27.02.2013, MHC Suresh Kumar handed over to him five sealed parcels of viscera, copy of FIR, police docket, copy of postmortem report, copy of inquest report and specimen of seal for being deposited at RFSL, Mandi, which he had deposited on the same day. He has further deposed that on his return to the police station he handed over the receipt qua deposit of the parcels in RFSL, Mandi, to MHC. As per the version of this witness, till the case property remained with him, it was not tampered with.

50. PW-31, Dr. N.K. Sankhyan, the then Medical Officer, P.G. Forensic Medicine and Toxicology, deposed that on 24.02.2013, application, Ext. PW-31/A, alongwith inquest report, Ext.PW-31/B, was moved by the police requesting him to conduct postmortem of the deceased. The dead body was brought by Lady Constable Hem Lata No. 355 and ASI Dalip Chand, Police Station Kot, District Bilaspur, H.P. Dead body was brought from a jungle of Naina Devi Ji District Bilaspur, H.P., and the same was identified by one Sant Ram and

Chhotu Ram. Police came to know about the death on 23.02.2013 at 06.10 p.m.. As per this witness, on 24.02.2013, viscera and other samples were dispatched for chemical examination at 12.15 pm. As per information furnished by the police, dead body of the deceased was found in a jungle near Village Bhather with head injury. Hammer was also found about 25 feet away from the dead body alongwith its handle (*dasta*). He has further deposed during the postmortem examination he noticed as under:

> **"Dead body was of a young adult female having length 150 cms. Deceased was wearing redish coloured "Kamij and Salwar" which were wet and soiled with earth. "Salwar" was stained from inner side on front probably with semen/secretions. Deceased was wearing cream coloured Bra golden coloured metallic nose pin, golden coloured metallic ring around index finger of left hand, golden coloured matellic ring around ring finger of left hand, red thread (Dori) around neck with silver coloured metallic locket and two glass bangles around left wrist Red "Pronda" in scalp hair with steal hair clip on left side of scalp."**

He has further stated that Rigor mortis was present all over the body, bluish purple coloured hypostasis was present on the back surface of the body and was fixed. The body was not cooled down to the room temperature, however, exact room and rectal temperature could not be recorded due to lack of facility. Pink nail polish in nails of toes and fingers and also submitted the details of antimortem. On examination of abdomen, walls, peritoneum, mouth pharynx and Esophagus were normal and as explained earlier, stomach was normal and was containing grayish semi liquid material about 10 ml. Small intestines were normal and were having fluid and gases. Large intestines were normal and having scant feces and gases. Lever, spleen and kidneys were normal and congested. Bladder was also normal and empty. No injury to external genital. Hymen was ruptured, one finger inserted easily and two fingers were going with very difficulty on P.V. examination ovaries, fallopian, tubes and uterus were normal, non gravid uterus, pubic hair were saved, vaginal swab and vaginal smear slides were taken and sealed. This witness, in his opinion, opined that the deceased died due to antemortem head injury. Possibility of attempt of throttling and smothering could not be ruled out. Possibility of sexual intercourse could not be ruled out in this case and as per his separate final opinion based on the report of the chemical examiner, no semen was detected in the exhibits collected by him. Human blood group "O" was detected on the shirt, bra and *salwar* of the deceased, the same blood group was also detected on the soil and leave lifted from the spot. Hair sample taken by him matched with the exhibit of hair lifted from the spot. The hair did not match with the hair of the accused. After going through the report of chemical analyst his final opinion remained the same as above. Probable time elapsed between injury and death was within few minutes to few hours and probable time between death and postmortem examination was 12 hours to 24 hours. He issued postmortem report, Ext. PW-31/C, which bears his signatures. He handed over the dead body of the deceased to the police after postmortem examination alongwith the postmortem report and inquest report. He also hand over the ornaments of the deceased as mentioned in the postmortem report, clothes of the deceased after being sealed in a cloth parcel with five seals. Viscera of the deceased, i.e. stomach small intestines, pieces of liver, spleen and kidney were sealed in two glass jars after adding the preservative, salt granules. One sealed vial containing blood of the deceased, another sealed vial containing scalp hair and a tube containing blood of the deceased for conducting D.N.A. test a sealed parcel containing vaginal swabs and two slides of vaginal smear, a sealed envelope containing letter for chemical examiner alongwith copy of postmortem report and inquest report, addressed to RFSL, Mandi, another sealed envelope containing a letter to Director, SFSL, Junga for examination of vaginal swab, vaginal smears, clothes for testing the presence of semen,

blood and hair for DNA testing alongwith postmortem report and inquest report alongwith two sample seals with seal impressions used for sealing as “Himachal Pradesh Kashetria Parishad Janta Janardan” handed over to the police. Hammer, Ext. P-9, was not shown to him by the police, when the postmortem had been conducted on the dead body of the deceased. He denied that better opinion could have been given, had the hammer, Ext. P-9, been shown to him at the time of conducting the postmortem. He admitted that a fissured fracture mean a linear or a crack. For the lacerated wound a blunt weapon with heavy force could have been used. Injury No. 9 fissure fracture is due to the impact of the injury No. 5. It is correct that injury No. 9 has not been caused by a separate blow, but it was caused due to the transportation of force from injury No. 5 to injury No. 9. There was no pattern of the weapon on any of the injuries. He denied that laceration is not possible with hammer, Ext. P-9. He denied that a lacerated wound is possible by a sharp edged weapon.

51. PW-32, HC Suresh Kumar, brought the requisitioned record, which was deposited by ASI Daleep Singh with him on 24.02.2013, i.e., one parcel sealed with five seals, containing clothes of the deceased, a plastic container sealed with two seals, containing stomach and small intestines of the deceased, another plastic container sealed with two seals, containing liver, spleen and kidney of the deceased, a sealed parcel sealed with three seals, containing SALT of the deceased, one glass bottle sealed with a seal, containing blood of the deceased, a glass tube sealed with a seal, containing blood of the deceased for DNA test, a glass bottle sealed with a seal, containing hair of the deceased, a cloth parcel sealed with three seals, containing vaginal swab, two slides and vaginal smear of the deceased, two sample seals of Regional Hospital, Bilaspur, one enveloped addressed to RFSL, Gutkar, duly sealed with seal and an envelope addressed to Director FSL, Junga, duly sealed. All the parcels were sealed with seals having impression "Himachal Pradesh Kshetrya Parishad Janta Janardhan”. On the same day Inspector Tilak Raj deposited with him a cloth parcel, which was sealed with three seals of impression ‘T’, which stated to have contained a hammer, another parcel duly sealed with three seals having impression ‘T’, containing ‘V’ shaped slippers, mark Lakhani, broken pieces of bangles and two Center Fruit toffees, which were lifted from the spot; a cloth parcel sealed with three seals, having impression ‘T’, containing sample of blood, blood stained soil and grass, a cloth parcel duly sealed with three seals having impressions ‘T’, containing hair of the deceased lifted from the spot, another parcel duly sealed with three seals, having impression ‘T’, a control sample of soil lifted from the spot another parcel duly sealed with three seals, having impression ‘T’, containing a white mobile phone, mark OIPROhaving one SIM card, a parcel duly sealed with six seals, having impression ‘H’, stated to have contained mobile phone having SIM card bearing No. 97367-44626 sample seal of seal impression ‘T’. As per this witness, on 26.02.2013, Inspector Tilak Raj, deposited with him a cloth parcel, duly sealed with five seals, having impressions ‘K’, which stated to have contained the clothes handed over by Subedha Kumari along with sample seal ‘K’, a parcel duly sealed with six seals, having impressions ‘A’, containing Lava mobile phone of the accused, and a sample seal. He deposed that on 27.02.2013, Inspector Tilak Raj, deposited with him a cloth parcel, which was duly sealed with six seals, having impressions ‘B’, stated to have contained the clothes of the accused, another sealed parcel sealed with three seals, having impression ‘CHC Ghawandal’, stated to have contained clothes of the accused, a parcel with sealed with three seals, having impression, ‘CHC Ghawandal’, which stated to have contained samples of pubic hair, scalp hair and finger nail of the accused, an envelope, which was duly sealed with two seals, having impressions ‘CHC Ghawandal’, stated to have contained blood sample of the accused, an envelope containing sample seal and another envelope addressed to Director FSL Junga. He has further stated that on 27.02.2013, vide R.C No. 17/13, he sent the parcels mentioned at Sr. Nos. 1, 6 to 9 and 11 of entry at Sr. No. 256, parcels mentioned at Sr. Nos. 1 to 5 of entry at Sr. No. 257 to FSL Junga, through Constable Hussan No 202,

for chemical analysis. He sent the parcels mentioned at Sr. No. 2 to 5 and 10 of entry at Sr. No. 256 alongwith sample seal to RFSL, Gutkar, for chemical analysis. He deposed that on 04.03.2013, vide R.C No. 22/13, he sent the parcels mentioned at Sr. No. 1 to 6 of entry at Sr. No. 259 to FSL Junga, through Constable Sunil Kumar No. 451, for chemical analysis. On receipt of parcels alongwith results, he made entries in the *Malkahana* register. This witness, in his cross- examination, denied that he made false entries in the *Malkhana* register as well as Road Certificate register.

52. PW-33, ASI Parkash Chand, entered *rapats* No.21 (A), dated 23.02.2013, 26 (A) and 28(A) dated 24.02.2013 in the computer installed at Police Station. No tampering or editing was done while entering the *rapats*. He also issued CIPA certificate, which is Ext.PW-33/D.

53. PW-34, ASI Parkash Chand, deposed that on 24.2.2013, he was officiating SHO of Police Station, Kot-Kehloor. On the basis of statement of Shri Kishan Singh, Ext. PW-1/A, recorded under Section 154 Cr.P.C., received through Constable Satish Kumar, he registered FIR, Ext. PW-29/A, which bears his signatures encircled in circle 'A'. He made an endorsement, in circle 'B', on the FIR, which is Ext. PW-1/A. Thereafter, he sent the case file through the same Constable to the spot. This witness, in his cross-examination, deposed that Constable reached Police Station at about 02:45 a.m.

54. PW-35, SI Jai Gopal, deposed that on 01.05.2013, he recorded the statements of Head Constable Suresh Kumar, Constable Hussan Lal, Constable Mukesh Kumar and Constable Sunil Kumar. As per this witness, on 06.05.2013, he also recorded the statement of Constable Satish Kumar.

55. PW-36, ASI Shyam Lal, deposed that on 03.03.2013, he was called by Station House Officer, Police Station, KotKehloor, in the presence of Sucha Singh and Rakesh Kumar. Station House Officer conducted a search near the railing and a SIM card broken into two pieces, was recovered, which pertained to Reliance Company. Both the pieces of SIM card, after being put in a match box, were sealed in a cloth parcel, which was sealed with three seals of impression 'U'. The seal after its use was handed over to witness Rakesh Kumar. Site plan of the spot was prepared by the Station House Officer. He has admitted that he was not aware about history of the case qua which the recovery was effected.

56. PW-37, Inspector Tilak Raj, deposed that on 23.02.2013, around 06.35 pm, he received information from Police Post, Shri Naina Devi Ji, that a dead body of a young girl aged 16-17 years was lying in Bhater forest. He alongwith SI Jagat Singh, ASI Daleep Chand, ASI Harpal, Constable Satish, Lady Constables Hem Lata and Amandeep and two Jawans of Home Guard, went to the spot. As per the version of this witness, on reaching the spot, they found a dead body of a girl and there were injuries on her head. The head was soiled with blood. Photographs of the dead body, Ext.PW37/A-1 and Ext.PW37/A-2, were clicked. The dead body was shifted to Government Primary School, Sandroti, and two police officials were deputed, as Guards on the spot. In the school premises, inquest report, Ext.PW31/B, was prepared and the dead body was sent for postmortem examination to Regional Hospital, Bilaspur, under the supervision of ASI DaleepChand and Lady Constable Hem Lata. *Rukka* was sent, through Constable Satish to Police Station, where upon FIR, Ext.PW29/A, was registered. Site plan of the spot, Ext. PW37/B, was prepared. He has further deposed that during the course of investigation, police took into possession, pair of V shaped slippers, mark Lakhani, Ext. P11, broken pieces of bangles, Ext. P12, and two toffees of center fruit, Ext. P13, were recovered, which, after being sealed in a cloth parcel, were

sealed, and taken into possession vide seizure, Ext.PW7/B, in the presence of Nand Kishore and Sukh Dev. Blood stained hair, Ext. P17 and Ext.P19, also seized from the spot after sealing in a cloth parcel and taken into possession vide seizure memo, Ext. PW7/C. Soil smeared with blood and control sample of soil, Ext. P21 and Ext. P24, alongwith grass were seized vide seizure memo, Ext. PW7/D, in the presence of Nand Kishore and Sukh Dev. As per the version of this witness, Pawan Kumar produced a dual SIM mobile phone, Ext. P26, of the deceased, which after being sealed in a cloth parcel, was seized, vide seizure Ext. PW7/E, in the presence of Nand Kishore and Sukh Dev Singh. The mobile contained a SIM and another SIM was found missing. Specimen of seals Mark-Z, Ext.PW37/C and Ext.PW37/D, were taken on plain pieces of clothes, Ext.PW13/C and Ext.PW13/D. On the same day, MHC informed him that in a poison case a boy had been admitted in hospital at Anandpur Sahib. However, he was brought to CHC Ghawandal, where he was admitted. He has further deposed that on 25.02.2013, when the accused was discharged from CHC Ghawandal, he was arrested in this case. On that day, Subedha, handed over a mobile, Ext. P6, which after being sealed in a cloth parcel was seized vide seizure memo, Ext.PW5/B, in the presence of witnesses Pawan Kumar and Shakuntla Devi. He has further deposed that on 26.06.2013, mobile phone, Ext. P28, of the accused was seized after being sealed in a cloth parcel, vide seizure memo, Ext. PW9/A, in presence of witnesses Pawan Singh and Shakuntla Devi. He stated that on the same day, Subeda handed over her shirt Ext. P2, *salwar* Ext. P3 and Shawl Ext.P4, which, after being sealed in a cloth parcel, were seized vide seizure memo, Ext. PW5/A, in presence of Pawan Singh and Shakuntla Devi. As per this witness, 27.02.2013, the accused made a disclosure statement, Ext. PW9/B, in the presence of witnesses Sanjay Kumar and Pawan Singh and pursuant thereto he recovered pants Ext. P30 and shirt Ext.P31, which were allegedly worn by the accused at the time of the incidence. They were seized vide seizure memo, Ext.PW9/C, after being sealed in a cloth parcel in presence of witnesses Pawan Singh and Pammi Lal. He has further deposed that on 03.03.2013, during the course of interrogation, the accused disclosed that after breaking the SIM, he threw it in a bus, having registration No. HP-69-1491, which leaves Naina Devi bus stand at 01.00 PM towards Nalagarh. He made inquiry from Sucha Singh, who disclosed that after cleaning the bus they threw the garbage near the railing. On search, two pieces of SIM, Ext. P34, were recovered, which after being sealed in a cloth parcel, were seized, vide seizure memo, Ext.PW17/A, in the presence of Sucha Singh, Rakesh Kumar and ASI Shyam Lal. Specimen of used seal was taken on a piece of plain cloth, Ext.PW17/B. He deposed that he recorded the statements of Tarsem Lal, Ext.PW37/J Pammi Lal, Ext. P37/K, Dharminder Singh, Ext.PW37/L, Sonu, Ext. PW37/M, Sodi Ram, Ext. PW37/N, Jai Chand, Ext. PW37/P, and Budhi Singh, Ext.PW37/Q. This witness, in his cross-examination, deposed that it was a blind murder and the accused wanted to marry the cousin sister of the deceased, namely, Subedha Devi or he wanted her to become his sister-in-law (*Bhabhi*). This fact was stated by Chhotu Ram and Subedha Devi. He admitted that there is no such mention in the statement of Subedha Devi recorded, under Section 161 Cr. P.C, earlier mark-S, Ext. DX. Subedha Devi was not an accused in the case. He denied that despite making thorough inquiries from Subedha Devi, the motive behind the murder was unearthed. He has stated that Chhotu Ram did not disclose to him that instead of the deceased, he wanted to marry his daughter Subedha Devi. He denied that on 23.02.2013 Ram Kishan (PW1), Savitri Devi (PW2), Sanju (PW3), Suvidha (PW4) and Subedha (PW5) met him on the spot. As per this witness, on 26.02.2013, statement of Sanju was recorded in the house of Ram Kishan. He denied that in order to mark the presence of Sanju in the jungle, his statement was recorded at a belated stage with due deliberation. Hammer was not recovered on the evening of 23.02.2013 and the hammer was recovered around 2.00 p.m. He has stated that he did not take any finger prints from the spot and the hammer was not blood stained. Photographs were taken with a digital camera. He admitted that on

09.04.2013 the accused was contacting Subedha over telephone, as he came to know through Call Detail Report that the accused had been telephoning Subedha. He denied that Call Detail Report was received after 09.04.2013. He admitted that Subedha handed over her blood stained clothes to the police. Clothes of Subedha were taken into possession, as before the doctor, the accused disclosed that he and Subedha murdered the deceased. This statement was made by the accused on 25.02.2013. He denied that Subedha with some other person committed the murder of the deceased.

57. PW-38, Krishan Chand, the then Criminal Ahlmad in the office of learned Chief Judicial Magistrate, Bilaspur, brought the requisitioned record, i.e. file pertaining to Criminal Case, bearing No. 118/2 of 2013, titled State of H.P vs. Balbir Singh @ Beeru. Certified copy of statement of the accused is Ext. PW-38/A, certified copy of the application for medical examination of the accused to Medical Officer, CHC, Ghawandal is Ext. PW-38/B, certified copy of Medico Legal Certificate is Ext. PW-38/, certified copy of OPD slip is Ext. PW-38/D, certified copy of application for medical examination of the accused to Medical Officer, CHC, Anandpur Sahib, is Ext. PW-38/E, certified copy of discharge slip is Ext. PW-38/F, certified copy of recovery memo is Ext. PW-38/G and certified copy of report of FSL is Ext. PW-38/H, which are true and correct as per the record which he brought in the Court. This witness, in his cross-examination, denied that all the above mentioned documents were submitted by the police and there are additions and alterations in the documents.

58. PW 39, HC Sukh Dev, brought the register and copy of FIR No.29 dated 25.2.2013, Ext.PW-39/A. PW-40, Dr. Kapil Chopra, deposed that on 24.02.2013, Police brought the accused for medical examination with the alleged history of consumption of some poisonous substance. He issued MLC, copy of which, Ext. PW-38/C. He gave written information to the police, Ext. PW 40/A, which bears his signatures. The police recorded the statement of the accused, Ext. PW-38/A, in his presence. This witness, in his cross-examination, stated that he had gone through the statement of the accused (Ext. PW-38/A).

59. As far as the recovery of the hammer is concerned, the Investigating Officer has stated that it was raining and darkness was gaining, so they deputed a guard to protect the site and brought the dead body to the primary school but on the next date they recovered the hammer, as the site was protected by appointing the guard. This Court finds that no prejudice is caused to the accused if the hammer was recovered on the next date, which was seen approximately 25 meters away from the dead body on 23rd February, 2013. No doubt, with bare eyes the Investigating Officer could not see the blood on the hammer, but it does not mean that the hammer was not the same, which was used by the accused for committing the offence. As, even the Forensic Science Laboratory expert found traces of blood on the hammer, which were not suffice for conducting tests, as the same were in very small quantity. Thus, it can be inferred that the blood was very less and it was not visible with bare eyes. Another fact, which cannot be ignored, is that it has come in the prosecution evidence that when the police visited the spot of occurrence on 23.02.2013 it was raining and dark, so there is possibility that the blood could have been washed due to rain and on the subsequent morning the hammer was recovered. So, it cannot at all be inferred that the Investigating Officer has not deposed correctly in the Court.

60. The testimony of PW-3, Sanju, brother of the deceased, is very material. He deposed that on the relevant, day he did not go to the school and about 11.00 a.m. went with the deceased to the forest at Bhater for bringing fodder for the cattle. He has further deposed that his mother had gone to the shop for purchasing ration. The accused came in the forest and his sister (the deceased) asked him (Sanju) to return back home, so he went

to the shop. When he alongwith his mother, around 3.00 p.m., returned home, the deceased was found not there. On being asked, it was told that the deceased had been called many a times, but she did not respond. He has further deposed that his mother alongwith his grandmother and cousin sister Subedha went to the forest in search of the deceased and they also took dog with them. Thereafter, his sister was seen lying dead and having injuries injury on her head. His statement unambiguously shows that the accused and deceased were last seen together by him in the jungle. Therefore, the arguments of the learned counsel for the appellant to the effect that PW-3 has not stated with respect to the accused and the deceased being seen together is not required to be appreciated in the manner as argued.

61. ***In Bodh Raj @ Bodha& others*** *vs.* ***State of J&K 2002 (8) SCC 45,*** the Hon'ble Supreme Courthas observed under vide para 31:

> ***"31. The last-seen theory comes into play where the time gape between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2."***

62. Elaborating the principle of last seen together, the Hon'ble Supreme Court in *State of Rajasthan vs. Kanshi Ram, 2006 (12) SCC 254*, has held as under vide para 23:

> ***"23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and then he parted company. He must furnish an explanation which appears to the court to be probably and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself proves an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his, innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in NainaMohd., AIR 1960 Nad 2018 : 1960 Cri LJ 620."***

63. The legal position pertaining to appreciation of circumstantial evidence of last seen has been succinctly summarized by a Division Bench of the Hon'ble Delhi High Court in a decision rendered in *Arvind @ Chottu vs. State ILR (2009) Supp. (Delhi) 704,* in the following words:

> ***"(i) Last seen is a specie of circumstantial evidence and the principles of law applicable to circumstantial evidence are fully applicable while deciding the guilt or otherwise of an accused where the last seen theory has to be applied.***
>
> ***(ii) It is not necessary that in each and every case corroboration by further evidence is required.***
>
> ***(iii) The single circumstance of last seen, if of a kind, where a rational mind is persuaded to reach an irresistible conclusion that either the accused should explain, how and in what circumstances the deceased suffered death, it would be permissible to sustain a conviction on the solitary circumstance of last seen.***
>
> ***(iv) Proximity of time between the deceased being last seen in the company of the accused and the death of the deceased is important and if the time gap is so small that the possibility of a third person being the offender is reasonably ruled out, on the solitary circumstance of last seen, a conviction can be sustained.***
>
> ***(v) Proximity of place i.e. the place where the deceased and the accused were seen alive with the place where the dead body of the deceased was found is an important circumstance and even where the proximity of time of the deceased being last seen with the accused and the dead body being found is broken, depending upon the attendant circumstances, it would be permissible to sustain a conviction on said evidence.***
>
> ***(vi) Circumstances relating to the time and the place have to be kept in mind and play a very important role in evaluation of the weightage to be given to the circumstance of proximity of time and proximity of place while applying the last seen theory.***
>
> ***(vii) The relationship of the accused and the deceased, the place where they were seen together and the time when they were last seen together are also important circumstances to be kept in mind while applying the last seen theory. For example, the relationship is that of husband and wife and the place of the crime is the matrimonial house and the time the husband and wife were last seen was the early hours of the night would require said three factors to be kept in mind while applying the last seen theory."***

64. The circumstances of last seen together cannot by itself form the basis for holding the accused guilty of the offence. *In kanhaiyaLal vs. State of Rajasthan (2014) 4 SCC 715,* the Hon'ble Supreme Court has held as under vide paras 12 and 15:

> ***"12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more***

establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

... ...

15. The theory of last seen-the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in Madho Singh v. State of Rajasthan (2010) 15 SCC 588."

65. The legal position on the subject has been enunciated in a recent judgment of the Hon'ble Supreme Court in *Pawan Kumar @ Monu Mittal vs. State of Uttar Pradesh and Ant, 2015 (7) SCC 148,* wherein, vide para 36, it was observed as under:-

"36. In case where the direct evidence is scarce, the burden of proving the case of the prosecution is bestowed upon motive and circumstantial evidence. It is the chain of events that acquires prime importance in such cases. Before analyzing the factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consist of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed (see Bodhraj v. State of J&K). In the case on hand, the evidence adduced by the prosecution as discussed above, clearly proves the chain of events connecting the accused to the guilt of the commission of the offence."

66. Their Lordships of the Hon'ble Supreme Court in Ashok Vs. State of Maharashtra, (2015) 4 SCC 393, have held that last seen together itself is not conclusive proof but alongwith other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, non-explanation of the death of the deceased etc. may lead to presumption of guilt of the accused. Their Lordships, vide para 8, have held as under:

"8. The "last seen together" theory has been elucidated by this Court in Trimukh Maroti Kirkan v. State of Maharashtra2, in the following words: (SCC p. 694, para 22) "22. Where an

> ***accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. Thus, the doctrine of last seen together shifts the burden of proof onto the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him."***

67. Dr. N.K. Sankhyan after seeing the hammer (Ext. P9) and on perusal of the report of the chemical examiner (Ext. PW31/G) issued the postmortem report (Ext. PW31/C) and gave his final opinion (Ext.PW31/D) that the cause of death was due to antemortem injuries and possibility of attempt of throttling and smothering could not be ruled out. He further opined that the injuries mentioned in the postmortem report (Ext. PW31/C) were possible with hammer (Ext. P9).

68. It is apparent from the above evidence that the deceased suffered homicidal death on account of assault made on her. PW-31, Dr. N.K Sankhyan, clearly stated that antemortem injuries mentioned in the postmortem report were sufficient in the ordinary course of nature to cause the death of the deceased and these injuries could be caused by hammer (Ext. P9). The recovery of weapon of offence, i.e., hammer (Ex. P9) was effected on 24.02.2013, at some distance from the spot, where the deceased was lying dead, hammer (Ext. P9), vide seizure memo Ext. PW7/A, in presence of witnesses namely, Nand Kishore and Sukh Dev. Nand Kishore (PW-7) has duly corroborated the version of the prosecution qua the recovery of the hammer. Learned counsel for the accused ventilated that weapon of the offence, i.e., hammer (Ext. P9), was not connected with the offence charged, as, as per the prosecution, the hammer, which was sent for forensic examination, was not having blood stains on it. However, this contention is to be rejected for the reason that during forensic examination blood traces were detected on the hammer, but the same were not sufficient for forensic analysis. Meaning thereby the blood traces were very less in quantity, thus not suffice for forensic examination. So, the non-observation of blood stains on the hammer by the Investigating Officer at the time of recovery of the hammer from the spot of occurrence cannot give any benefit to the accused and on this premise it cannot be held that hammer (Ex. P9) was not recovered from the spot. Further, this is only corroborative in nature and the other material on record leads to the conclusion that the deceased had been killed by the accused. The statements of the material witnesses, coupled with the statement of the doctor that the injuries in question were possible with hammer (Ext. P9), clearly establish that it was the same hammer, Ext. P9, which was used by the accused to inflict injuries on the head of the deceased. Even otherwise also the depositions of all other witnesses only point out that the hammer was recovered from the spot. The analyses of the sample by FSL show that the hammer was the same which was recovered from the spot. In these circumstances, this Court finds that the law, as citied by the learned counsel for the accused rendered in ***Rambraksh @ Jalim vs. State of Chhattisgarh, 2016(3) Criminal Court Cases 001 Supreme Court*** is not applicable to the facts of the present case as, as per PW-13, there is evidence on record that the accused and the deceased were together in the jungle.

69. Statement of PW-11 to the effect that the accused came to the spot by taking lift from him and he was not having any hammer will not make the case of the prosecution weak, as in the instant case the accused was not in custody of the police when he made confessional statement. In fact he was in the hospital and was not under the pressure of the police, but he made a confessional statement in presence of the doctor. Indeed, in the case in hand police officer was present near the accused when he made confessional statement, but the same cannot be proved against the accused and his confessional statement cannot be discarded in entirety, as it is clear he was not in police custody at that time. So, it is one of the circumstance which goes to prove that the accused consumed poison on the very next day he committed crime, which is a natural factor. Moreover, on the subsequent morning, colleague of the accused found him sitting sad in the office and thereafter the accused left the office, so this fact is one of the circumstances evidence, which goes against the accused. Similarly, judgment as cited by the learned counsel for the appellant, i.e., titled ***Salim Versus State of Kerala2012(2) Criminal Court Cases 435 (Kerala) (DB),*** is also not applicable to the facts of the present case.

70. The facts of the present case are different than the case cited (supra). In the instant case, the extra judicial confession was made by the accused when he was not in custody and in fact the statement was made to the Doctor. As per the prosecution, Doctor has also testified this fact while deposing in the Court that the confession was made by the accused voluntarily on the very next day after consuming the poison when he was admitted in the hospital and he confessed his guilt. Though, this confession was recorded and also certified by the police officers and at that time, accused was not in the custody. If it is assumed that this confession is inadmissible in evidence, then also the other circumstances clearly point towards the guilt of the accused, which includes the direct evidence of PWs1, 2 and 5, against the accused. Thus, it makes the confessional statement of the accused one of the strong circumstance against him. The statements of PWs 11 and 23 also suggest that accused was present on the spot on the day of occurrence and the wrappers of toffees, which he allegedly purchased, were also recovered from the spot. In these circumstances, this Court finds that even if, confessional statement is not admissible, but it is one of the circumstance alongwith the direct evidence, which leads to the conclusion that it was the accused who perpetrated committed the crime.

71. The Hon'ble Apex Court in ***K.I. Pavunny vs. Assistant Collector (HQ) Central Excise Collectorate, Cochin (1997) 3 SCC 7212,*** has held that confession is one of the species of admission and it is ordained legal position that confession can form the sole basis for conviction. Relevant para of the judgment (supra) reads as under:

> ***"20. The question then is whether the retracted confessional statement requires corroboration from any other independent evidence. It is seen that the evidence in this case consists of the confessional statement, the recovery panchnama and the testimony of PWs 2, 3 and 5. It is true that in a trial andpropriovigore in a criminal trial, courts are required to marshal the evidence. It is the duty of the prosecution to prove the case beyond reasonable doubt. The evidence may consist of direct evidence, confession or circumstantial evidence. In a criminal trial punishable under the provisions of the Indian Penal Code it is now well-settled legal position that confession can form the sole basis for conviction. If it is retracted, it must first be tested whether confession is voluntary and truthful inculpating the accused in the commission of the crime.***

Confession is one of the species of admission dealt with under S. 24 to 30 of the Evidence Act and Section 164 of the Code. It is an admission against the maker of it, unless its admissibility is excluded by some of those provisions. If a confession is proved by unimpeachable evidence and if it is of voluntary nature, it when retracted, is entitled to high degree of value as its maker is likely to face the consequences of confession by a statement affecting his life, liberty or property. Burden is on the accused to prove that the statement was obtained by threat, duress or promise like any other person as was held in Bhagwan Singh v. State of Punjab. If it is established from the record or circumstances that the confession is shrouded with suspicious features, then it falls in the realm of doubt. The burden of proof on the accused is not as high as on the prosecution. If the accused is able to prove the facts creating reasonable doubt that the confession was not voluntary or it was obtained by threat, coercion or inducement etc. , the burden would be on the prosecution to prove that the confession was made by the accused voluntarily. If the court believes that the confession was voluntary and believes it to be true, then there is no legal bar on the court for ordering conviction. However, the rule of prudence and practice does require that the court seeks corroboration of the retracted confession from other evidence. The confession must be one inculpating the accused in the crime. It is not necessary that each fact or circumstance contained in the confession is separately or independently corroborated. It is enough if it receives general corroboration. The burden is not as high as in the case of an approver or an accomplice in which case corroboration is required on material particulars of the prosecution case. Each case would, therefore, require to be examined in the light of the facts and circumstances in which the confession came to be made and whether or not it was voluntary and true. These require to be tested in the light of a given set of facts. The high degree of proof and probative value is insisted in capital offences."

72. So far as the extra judicial confession is concerned, extra judicial confession is though not admissible *ipso facto,* but the other supporting circumstances, which have come on record, forms a complete chain of events and it is so complete that the conclusion is nothing else, but that it was the accused, who on 23.02.2013 committed the murder of the deceased in the jungle by hitting the deceased with hammer on her head. As far as motive is concerned, it is not of much significance, but in the instant case motive has also been established on record, as it is clearly come on record that the accused wanted to marry Suvidha by making their parents agree for marriage, which was only possible if the deceased is eliminated.

73. Their Lordships of the Hon'ble Supreme Court in ***Ajay Singh Vs. State of Maharashtra, (2007) 12 SCC 341***, have held that extra-judicial confession must be voluntary and the person to whom confession is made should be unbiased and not inimical to the accused. It is for the Court to judge credibility and capacity of the witness and to

decide whether his or her evidence has to be accepted or not. Their Lordships have also explained the terms *"confession"* and *"statement"* as under:

> ***"8. We shall first deal with the question regarding claim of extra judicial confession. Though it is not necessary that the witness should speak the exact words but there cannot be vital and material difference. While dealing with a stand of extra judicial confession. Court has to satisfy that the same was voluntary and without any coercion and undue influence. Extra judicial confession can form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, Court has to proceed cautiously and find out whether confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word by word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra judicial confession has to be thrown out as unreliable and not useful. That cannot be a requirement in law. There can be some persons who have a good memory and may be able to repost exact words and there may he many who are possessed of normal memory and do so. It is for the Court to judge credibility of the witness's capacity and thereafter to decide whether his or her evidence has to be accepted or not. If Court believes witnesses before whom confession is made and is satisfied confession was voluntary basing on such evidence, conviction can be founded. Such confession should be clear, specific and unambiguous.***
>
> ***... ... ...***
>
> ***10. The expression 'confession' is not defined in the Evidence Act, 'Confession' is a statement made by an accused which must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. The dictionary meaning of the word 'statement' is "act of stating; that which is stated; a formal account, declaration of facts etc." The word 'statement' includes both oral and written statement. Communication to another is not however an essential component to constitute a 'statement'. An accused might have been over-heard uttering to himself or saying to his wife or any other person in confidence. He might have also uttered something in soliloquy. He might also keep a note in writing. All the aforesaid nevertheless constitute a***

statement. It such statement is an admission of guilt, it would amount to a confession whether it is communicated to another or not. This very question came up for consideration before this Court in Sahoo v. State of Uttar Pradesh, AIR 1966 SC 40: (1966 Cr1 U 68). After referring to some passages written by well known authors on the "Law of Evidence" Subba Rao, J. (as he then was) held that "communication is not a necessary ingredient to constitute confession". In paragraph 5 of the judgment, this Court held as follows:-

27. "...Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of relevant evidence presumably on the ground that as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or a confession goes not to depend upon its communication to another, though, just like any other piece of evidence, it can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only by witnesses who heard the admission pr confession. as the case may be.... If, as we have said, statement is the genus and confession is only a sub-species of that genus, we do not see any reason why the statement implied in the confession should be given a different meaning. We, therefore, hold that a statement, whether communicated or not, admitting guilt is a confession of guilt."

(Emphasis supplied).

74. The other material which came on record, i.e., last seen together, subsequent recoveries of 'Center Fruit' toffees, broken pieces of SIM, weapon of offence like hammer and the subsequent conduct of the accused and above all non-explanation or wrongful denial of circumstances provide an additional link to the prosecution case, which leads this Court to conclude that the accused is guilty of the offence charged. Further, the evidence and the circumstances, which are of conclusive nature and tendency, clearly go against the accused. Resultantly, the inescapable conclusion is that it was the accused who killed the deceased. The chain of circumstances is complete and it leaves no ground for concluding that the accused is innocent.

75. Hon'ble Supreme Court in ***Rishi Pal vs. State of Uttarakhand, (2013) 12 Supreme Court Cases 551*** has held that motive has no major role to play in the cases based the evidence of on eye witness giving account of the incident, it assumes importance in cases which rest entirely on circumstantial evidence. Their Lordships have further held that essence of requirements that must be satisfied in cases resting on circumstantial evidence is that not only the circumstances should to be proved and established against the accused beyond reasonable doubt, but also that such circumstances form a complete chain, so as to leave no option for the Court to hold that the accused is guilty of offence(s) for which he is charged. Their Lordships have held as under:

"14. The second aspect to which we must straightaway refer is the absence of any motive for the appellant to commit the alleged murder of Abdul Mabood. It is not the case of the prosecution that there existed any enmity between Abdul Mabood and the

appellant nor is there any evidence to prove any such enmity. All that was suggested by learned counsel appearing for the State was that the appellant got rid of Abdul Mabood by killing him because he intended to take away the car which the complainant-Dr. Mohd. Alam had given to him. That argument has not impressed us. If the motive behind the alleged murder was to somehow take away the car, it was not necessary for the appellant to kill the deceased for the car could be taken away even without physically harming Abdul Mabood. It was not as though Abdul Mabood was driving the car and was in control thereof so that without removing him from the scene it was difficult for the appellant to succeed in his design. The prosecution case on the contrary is that the appellant had induced the complainant to part with the car and a sum of Rs.15,000/-. The appellant has been rightly convicted for that fraudulent act which conviction we have affirmed. Such being the position, the car was already in the possession and control of the appellant and all that he was required to do was to drop Abdul Mabood at any place en route to take away the car which he had ample opportunity to do during all the time the two were together while visiting different places. Suffice it to say that the motive for the alleged murder is as weak as it sounds illogical to us. It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence. [See Sukhram v. State of Maharashtra (2007) 7 SCC 502, Sunil Clifford Daniel (Dr.) v. State of Punjab (2012) 8 SCALE 670, Pannayar v. State of Tamil Nadu by Inspector of Police (2009) 9 SCC 152]. Absence of strong motive in the present case, therefore, is something that cannot be lightly brushed aside.

... ...

19. It is true that the tell-tale circumstances proved on the basis of the evidence on record give rise to a suspicion against the appellant but suspicion howsoever strong is not enough to justify conviction of the appellant for murder. The trial Court has, in our opinion, proceeded more on the basis that the appellant may have murdered the deceased-Abdul Mabood. In doing so the trial Court over looked the fact that there is a long distance between 'may have' and 'must have' which distance must be traversed by the prosecution by producing cogent and reliable evidence. No such evidence is unfortunately forthcoming in the instant case. The legal position on the subject is well settled and does not require any reiteration. The decisions of this Court have on numerous occasions laid down the requirements that must be satisfied in cases resting on circumstantial evidence. The essence of the said requirement is that not only should the circumstances sought to be proved against the accused be established beyond a reasonable doubt but also that such circumstances form so complete a chain as leaves no option for the Court except to hold that the accused is guilty of the

offences with which he is charged. The disappearance of deceased-Abdul Mabood in the present case is not explainable as sought to be argued before us by the prosecution only on the hypothesis that the appellant killed him near some canal in a manner that is not known or that the appellant disposed of his body in a fashion about which the prosecution has no evidence except a wild guess that the body may have been dumped into a canal from which it was never recovered."

76. Hon'ble Supreme Court in **Dandu Jaggaraju vs. State of Andhra Pradesh, (2011) 14 Supreme Court Cases 674,** has held that in a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution. Their Lordships have held as under:-

"9. It has to be noticed that the marriage between P.W. 1 and the deceased had been performed in the year 1996 and that it is the case of the prosecution that an earlier attempt to hurt the deceased had been made and a report to that effect had been lodged by the complainant. There is, however, no documentary evidence to that effect. We, therefore, find it somewhat strange that the family of the deceased had accepted the marriage for about six years more particularly, as even a child had been born to the couple. In this view of the matter, the motive is clearly suspect. In a case relating to circumstantial evidence motive is often a very strong circumstance which has to be proved by the prosecution and it is this circumstance which often forms the fulcrum of the prosecution story."

77. Hon'ble Supreme Court in ***Pudha Raja and another vs. State, represented by Inspector of Police, (2012) 11 Supreme Court Cases 196*** has held that motive assumes great significance and importance in cases of circumstantial evidence and absence of motive puts Court on its guard and causes and to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjecture do not supplant proof. Their Lordships have held as under:-

"16. Furthermore, in such a case, motive assumes great significance and importance, as the absence of motive puts the court on its guard and causes it to scrutinize each piece of evidence very closely in order to ensure that suspicion, emotion or conjectures do not take the place of proof. The evidence regarding existence of motive which operates in the minds of assailants is very often, not known to any other person. The motive may not even be known, under certain circumstances, to the victim of the crime. It may be known only to the accused and to none other. It is therefore, only the perpetrator of the crime alone, who knows as to what circumstances prompted him to adopt a certain course of action, leading to the commission of the crime."

78. From the above, it is clear that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt. No other conclusion than to hold that it is the case where the accused committed murder of the deceased by causing such fatal injuries which were likely to cause her death in all probabilities.

79. In view of the foregoing discussion and considering the entire material, which has come on record, and also the settled position of law, we find that the learned Trial Court has appreciated the facts and law in right and correct perspective. So, the learned Trial Court has rightly concluded that the prosecution has proved its case beyond the shadow of reasonable doubts. Thus, we find that this Court need not interfere with the well reasoned judgment of the learned Trial Court. Accordingly, the appeal, which sans merit, deserve dismissal and is dismissed.

80. The appeal, as also pending application(s), if any, stand(s) disposed of.

****

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

Dharam Singh and others ....Appellants/Defendants.

Versus

Tulsi Ram (since deceased) through her legal heirs and others ....Respondents/Plaintiffs.

RSA No. 183 of 2005.
Reserved on : 28th December, 2018.
Decided on : 8th January, 2019.

Transfer of Property Act, 1882 – Section 62- **Limitation Act, 1963 -** Article 61- Usufructuary mortgage - Redemption - Period of - Held, period to redeem usufructuary mortgage commences from date of payment of mortgage money either from usufructs or partly from usufructs and partly from other than usufructs - Period does not commence from date of creation of mortgage or from date of attestation of mutation - Decree of District Judge holding mortagee to have become owner of mortgaged property with efflux of thirty years from date of mortgage set aside - Decree of trial court dismissing suit of mortgagee restored. (Paras 10-11)

Case referred:

Singh Ram (d) through LRS. Vs. Sheo Ram and others, (2014)9 SCC 211

For the Appellants:	Mr. K.S. Banyal, Sr. Advocate with Mr. Inder Rana, Advocate.
For Respondents 1(a) to 1(d):	Mr. Suneet Goel, Advocate.
For other Respondents:	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal, stands, directed by the defendants, who are aggrieved, by the verdict pronounced, by the learned First Appellate Court, upon, Civil Appeal No. 96 of 2003, wherethrough, the latter Court, while, allowing the plaintiffs' appeal, hence reversed the verdict pronounced by the learned trial Court, upon, C.S. No. 44/2000, wherethrough, the plaintiffs' suit, for, rendition of a declaratory decree qua his/theirs becoming owner of the suit land, by efflux of time, rather stood dismissed.

2. Briefly stated the facts of the case are that one Prabh Dayal, the predecessor-in-interest of defendants No.1 to 8, was owner of the suit land of old khasra No.255/75 (new Khasra No.49), measuring 67 kanals, tika Samtana Khurd, Tappa Dhatwal. He mortgaged the suit land with the plaintiff for consideration of Rs.1500/- on 14.12.1965 qua which mutation No.120 was sanctioned on 30.03.1966. Neither Shri Prabh Dayal, or after his death, defendant No.1 to 8 redeemed the suit land despite his requests. Hence plaintiff has become owner in possession of the suit land by efflux of time. Plaintiff assailed Rapat No.192 dated 5.2.1967 vide which defendant NO.9 got the suit land of Shri Prabh Dayal, attached for consideration of Rs.302.50. Though the amount had been received by defendant No.9 on 17.5.1967 despite it the entry was not deleted and as such is superfluous. Claim that defendants have no right, or title in the suit land. Despite it, they interfered in possession of the plaintiff and deserve to be prohibited from doing so.

3. Defendants No.1 to 4 filed joint written statement, and, defendants No.5 to 8 also filed joint written statement but they contested claim of the plaintiff to be wrong and false. It was averred that Shri Prabh Dayal, their predecessor-in-interest, never mortgaged the suit land with the plaintiff in 1965 for Rs.1500/-. Mutation of mortgage is also claimed wrong. They claimed themselves to be owners in possession of the suit land but admitted that Rs.302.50 were paid to defendant No.9 on 17.5.1967. Plaintiff is neither in possession nor became owner of the suit land by efflux of time. Preliminary objections qua maintainability, cause of action, estoppel, misjoinder, non-joinder were raised.

4. Defendant No.9 contested the suit by filing separate written statement. He has also denied that any mortgage qua the suit land was ever created by Prabh Dayal with the plaintiff. Claimed that the plaintiff is not in possession of the suit land. It is pleaded that the suit land was auctioned in 1967 and he paid the auction money and since then possessing the suit land. Plaintiff has no locus standi to sue and his suit is not maintainable and plaintiff has no cause of action.

5. The plaintiff(s) filed replication to the written statement of the defendant(s), wherein, he/they 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 the following issues inter-se the parties at contest:-

1. Whether the plaintiff is the owner in possession of the suit land, as alleged? OPP.
2. Whether the plaintiff is entitled to the injunction prayed for? OPP.
3. Whether the suit is not maintainable in the present form? OPD.
4. Whether the plaintiff has a cause of action? OPP.
5. Whether the suit is bad for non joinder and misjoinder of the necessary parties? OPD.
6. Whether the plaintiff is estopped from filing the present suit by his act and conduct? OPD.
7. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD.
8. Whether the defendants are entitled to special costs u/s 35-A CPC as claimed. If so, their quantum? OPD.
9. Relief.

7. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff(s)/respondent(s) herein. In an appeal, preferred therefrom, by, the plaintiff(s)/respondent(s) herein, before the learned First Appellate Court, the latter Court allowed, the, appeal, and, reversed the findings recorded by the learned trial Court.

8. Now the defendants/appellants herein, have instituted the instant Regular Second Appeal, before, this Court, wherein they assail the findings, recorded in its impugned judgment and decree, by the learned first Appellate Court. When the appeal came up for admission, this Court, on 26.4.2005, 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 mortgage of suit property for consideration of Rs.1500 can be created by oral sale in contravention of Section 58 of the Transfer of Property Act and Section 17 of Registration Act?
>
> 2. Whether the cogent, trustworthy and reliable evidence of defendant could be ignored solely on the basis of mutation, Ex.P-3 and D-1, whereas, the entry made therein has been duly rebutted by the appellant/defendant No.3?
>
> 3. Whether the First Appellate Court was justified to set aside the judgment and decree of the learned trial Court only on the strength of mutation EX.P-3?
>
> 4. Whether the suit of mandatory and permanent injunction is maintainable, when the plaintiff is out of possession of the said suit land?
>
> 5. Whether the suit of mandatory and permanent injunction is maintainable, when the plaintiff is out of possession of the said suit land?
>
> 6. Whether the judgment and decree of the First Appellate Court is mis-construction and misleading of Ex.P-3 and Ex.D-1 etc.?

Substantial questions of Law No.1 to 6:

9. The defendant, does not controvert the validity, of, attestation of mutation No.120, borne in Ex.P-3, (a) wherein, rather clear, and, graphic depictions hence exist qua a usufructuary mortgage, vis-a-vis, the suit land, standing, hence created inter se the mortgagor, one Prabh Dayal(the predecessor-in-interest of the defendants), and, the mortgagee (plaintiff herein). During the course of hearing of the appeal, the counsel for the aggrieved defendants also, does not, challenge the entries, existing in Ex. D-1, (b) exhibit whereof, is, the jamabandi appertaining to the suit land, and, appertaining to the year 1962-63, (c) wherein the plaintiff is reflected, as, a mortgagee, under the mortgagor, one Prabh Dayal, (e) nor he contests the subsequent thereto, entries occurring, in the thereafter prepared jamabandis, vis-a-vis, the suit land. His limited onslaught, vis-a-vis, the impugned verdict is focused, upon, mis-attraction, by the learned First Appellate Court, upon, the afore documentary evidence existing on record, rather, the, mandate of Article 61 of the Limitation Act, (f) wherein rather a period of 30 years is prescribed, vis-a-vis, the mortgagor to beget redemption of the immovable mortgaged property, (g) and, hence with the afore striving remaining unrecoursed, thereupon, the learned First Appellate Court concluded, qua, the plaintiffs' suit, for a declaratory decree qua his acquiring title, by efflux of time, rather being renderable qua him.

10. The afore contention reared before this Court by the aggrieved defendants/the mortgagors of the suit khasra numbers, is, anvilled upon a judgment rendered, by the Hon'ble Three Judges Bench, of, the Hon'ble Apex Court, in a case titled as ***Singh Ram (d) through LRS. Vs. Sheo Ram and others***, reported in ***(2014)9 SCC 211,*** (a) wherein the Hon'ble Apex Court, upon, making a conjoint reading of Section 62 of the Transfer of Property Act, provisions whereof stand extracted hereinafter, and, vis-a-vis, the mandate borne in Article 61 of the Limitation Act, provisions whereof also stand extracted hereinafter, (b) and, when in tandem therewith the extantly created mortgage, vis-a-vis, the suit khasra number, evidently falls, within, the domain of a usufructuary mortgage, (c) hence, made a conclusion that the right, of, a usufructuary mortgagor, through, styled as "right to recover possession", is, for all purposes, a right to redeem, and, to recover possession, (d) AND, while in a case of any other mortgage, the right to redeem stands covered under Section 60, contrarily rather in a case of usufructuary mortgage, the right to recover possession, falling within, the domain of Section 62, (e) and, commences on payment of mortgage money out, of, the usufructs or partly out of the usufructs, and, partly on payment or deposit, by the mortgagor, (f) and, a further expostulation, is, also borne therein, that, the mere expiry of 30 years, from, the date of creation, of, a usufructuary mortgage, rather not extinguishing the right of the mortgagor, to, within the contemplation of Section 62 of the Transfer of Property Act, hence redeem the mortgaged property. Obviously hence, the commencement of a period of 30 years, as stands statutorily hence encapsulated in Article 61, of, the Limitation Act, not being reckonable, to commence, from, the date, of execution of the relevant deed of mortgage or from the date of attestation of the apt mutation, (g) rather the afore period being reckonable to commence, from, on payment/deposit of mortgaged money out of usufructs or party out of the usufructs, and, partly on payment or deposit by the mortgagor. Provisions of 62 of the Transfer of Property Act, read as under:-

> "62. Right of usufructuary mortgagor to recover possession.—In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property 1[together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee],—
>
> (a) where the mortgagee is authorized to pay himself the mortgage-money from the rents and profits of the property,—when such money is paid;
>
> (b) where the mortgagee is authorised to pay himself from such rents and profits 2[or any part thereof a part only of the mortgage-money],—when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee 3[the mortgage-money or the balance thereof] or deposits it in Court as hereinafter provided."

Provisions of Article 61 of the Limitation Act, reads as under:

Art. 61 By a mortgagor.

(a) To redeem or recovery possession of immvable property mortgaged	Thirty years	When the right to redeem or to recover possession accrues
(b) Xxxx	Xxxx	xxxx

Re-emphasisingly a usufructuary mortgagee, is not, entitled to file a suit for declaration qua his being declared to be the owner, of, the mortgaged property, merely on the expiry of 30 years, from, the date of creation, of, mortgage.

11. Be that as it may, all the afore expostulations of law, borne in the afore verdict rendered by the Hon'ble Three Judges Bench of the Hon'ble Apex Court in Singh Ram's case (supra), (i) imperatively, and, necessarily, enjoins also eruption of evidence, and, the apt evidence also hence making, a, display qua during the currency of mortgage, (ii) the mortgagee hence utilizing, the, mortgaged property, and, his rather from the rents and the profits, as, derived therefrom, hence making apposite adjustment, towards, the interest accrued, on the mortgage debt, (iii) and, right of redemption rather hence commencing from the date, of, payment or deposit of mortgage money by the mortgagor, vis-a-vis, the mortgagee. Hereat apparently, and, evidently, the mortgagor, the appellants herein failed, to, within 30 year, rather make deposit of the mortgage money, vis-a-vis, the mortgagee, (iv) and, obviously within, the, afore expostulation of law, until, the afore endeavours commenced, rather thereupto, obviously, the commencings, of, the period of thirty years, prescribed in Article 61, of, the Limitation Act, is, not amenable for its rather being pressed into service, for, the relevant purpose, by the mortgagee, nor obviously, merely, after expiry of 30 years, since, the attestation of mutation of mortgage, as borne in Ex. D-1, the extant declaratory suit, is, maintainable, (v) rather the appropriate time, for, the afore mandate being pressed into service, arises on evident payment of mortgage money out of the usufructs or partly out of the usufructs, and, partly on payment or deposit, by the mortgagor. Since, all the afore, part payments never occurred, during, the currency of 30 years, (vi) hence, merely on expiry of 30 years, from, the date of creation, of, mortgage, and, uptill the institution of the suit, no decree for foreclosure, by elapse of statutory period, of time prescribed in Article 61 of the Limitation Act, hence was renderable nor any declaratory decree, was pronounceable qua the mortgagee hence becoming owner of the suit land, rather by efflux of time. Even otherwise, the plaintiff (mortgagee) was enjoined to maintain accounts, vis-a-vis, the profits or rents, if any derived by him, from, his utilizing the usufruct, and, the afore accounts, maintained by him, were enjoined to make clear display, that, he had proceeded to appropriate the afore derivations, towards, the interest accrued, on the mortgage debt, (vii) and, wherefrom it was fathomable that with 30 years, expiring, since his making the afore appropriations, in, the apposite books of account, (viii) thereupon, within the ambit, of, the expostulation of law, as, embodied in Singh Ram's case (supra), he, was empowered to maintain the suit for rendition, of, a declaratory decree, qua, his becoming hence owner of the suit land. However, the afore books of account, remained neither prepared nor adduced into evidence, whereas, upon the plaintiff, maintaining, the afore books of account, and, theirs making clear depictions therein, qua, upon his utilizing the usufructs, his deriving rents, and, profits therefrom, (ix) and, his also appropriating them towards the interest, of, the mortgaged debt, (x) whereupon alone he would stand facilitated, to, after elapse of 30 years therefrom, to maintain the apt suit. Consequently, the suit for declaration, cast by the plaintiff(s), on anvil of the mandate, of, Article 61 of the Limitation Act, and, his despite, all the afore requisite satiating evidence being amiss, rather claiming therein qua merely, upon, 30 years standing elapsed, from, the date of creation of mortgage, hence, his/theirs becoming owner of the suit land, was, neither maintainable nor decreeable.

12. The above discussion, unfolds, that the conclusions as arrived by the learned first Appellate Court hence being not based, upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court has excluded germane and apposite material from consideration. Accordingly, in tandem with afore discussion, all the substantial questions of law, are, answered in favour of the appellants/defendants, and, against the plaintiffs/respondents.

13. In view of the above discussion, the instant appeal is allowed and in sequel, the, judgment and decree rendered by the learned First Appellate Court, upon, Civil Appeal

No. 96 of 2003 is set aside, in sequel, the plaintiffs' suit bearing Civil Suit No. 44 of 2000 is dismissed. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs. Records be sent back forthwith.

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

National Insurance Company Ltd. .....Appellant.
Versus
Smt. Parvinder and others .....Respondents.

FAO No. 603 of 2016.
Reserved on : 4th January, 2019..
Decided on : 8th January, 2019.

Motor Vehicles Act, 1988 – Section 166 – Motor accident – Claim application – Compensation- Assessment- Self-employed person- Claims Tribunal accepting claim application of legal representatives of deceased, a tea vendor - And adding 50% to established income towards future prospects and also granting Rs. 1.00 lakh each towards loss of consortium, loss of love and affection and loss of estate - Appeal against – Held, deceased being self-employed, accretions towards future prospectus can only be to extent of 40% - Compensation under conventional heads also brought down in tune with **National Insurance Co. Ltd. vs. Pranay Sethi (2017 ACJ 2700)** - Appeal partly allowed- Award modified. (Paras 6 & 7)

Case referred:
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant: Mr. Jagdish Thakur, Advocate.
For Respondents No. 1 to 3: Ms. Ritika, Advocate, vice to Mr. Aditya Thakur, Advocate.
For Respondent No. 4 & 5: Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal-II, Solan, H.P., upon, Claim Petition No. 1-S/2 of 2013, whereunder, compensation amount comprised, in, a sum of Rs.29,85, 568/- alongwith interest accrued thereon, at the rate of 9% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing or the appellant/insurer, (i) does not contest, the validity of affirmative findings, rendered by the learned tribunal, upon, the issue, appertaining to the relevant accident, being, a, sequel of rash, and, negligent manner, of, driving of the offending vehicle, by Prithvi Singh, respondent No.5 herein, (ii) also the postmortem report, borne in Ex.PW2/A, proven by PW-2, supports the factum, of, the

demise of the afore, being sparked, by the injuries sustained by him, in the accident hence involving the offending vehicle, driven by respondent No.5 herein.

3. However, the learned counsel appearing for the insurer has contended (i) that the per mensem income, of the deceased, as, stands computed in a sum of Rs.13,042/-, and, with, computation thereof, being anvilled, upon, mark-A, mark whereof, is a copy of income tax return, filed by the deceased, rather being stained with a vice, of, infirmity given (a) the afore mark not being proven in accordance with law, (b) and, no supportive document standing appended therewith, in personification of the income tax return, filed by the deceased, appertaining to his deriving income, from his running, a tea shop, under certificates/licences, respectively borne in Ex.PW3/B, and, in Ex.PW3/C, (c) thereupon, no reliance was assignable thereto nor any derivation of income, by the deceased, from, his afore pleaded avocation, enjoys any formidable evidentiary worth or probative vigour. However, the afore contention as addressed, before this Court, (d) is, blunted by the factum qua Mark-A, being tendered, during, the course of examination-in-chief of PW-3, (e) and, when thereafter, the appellant, had, the opportunity to adduce evidence in rebuttal thereto, and, when thereat, it was also befitting for the learned counsel, for the insurer, appearing before the learned tribunal, to, elicit from income tax department, all documents appended therewith, (f) and, also to elicit original of Mark A. However, all, the afore endeavours remained evidently unrecoursed, by the counsel for the insurer, thereupon, an inference, is, sparked qua hence Mark-A, being acquiesced by the appellant. More so, when only upon the afore evidence being elicited, by the counsel for the insurer, a concomitant conclusion, was hence drawable qua Mark-A, rather being doctored, and, invented, (g) and, whereas, omission(s) whereof when construed in coagulation, with, the deceased, being issued licences, borne in Ex.PW3/B, and, in Ex.PW3/C, thereupon, a firm conclusion, is engendered qua the returns of income, enclosed in Mark A, rather appertaining to the income, derived by the deceased, from, his running a tea stall, rather, under the afore valid licences being granted to him, by the authorities concerned, (h) besides, reiteratedly, when hence the reflections borne therein, dehors it, not comprising the original, hence assume an aura of solemnity or sanctity, thereupon, assigning of vigour thereto, is, merit worthy.

5. The learned counsel, appearing for the insurer has contended, that, the, meteing of 50% hikes, vis-a-vis, the afore sum also meriting interference, (a) given it being beyond the domain of the verdict of the Hon'ble Apex Court, rendered in case titled as ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700.*** The afore contention of the learned counsel has strength, given, the Hon'ble Apex Court, in the afore verdict mandating qua rather it being permissible, for meteing, of 40% hikes, vis-a-vis, the deceased, who, was self employed or on a fixed salary, and, was below the age of 40 years. Since the postmortem report reflects, the deceased being aged 29 years, at the relevant time, hence, with, the mandate of the Hon'ble Apex Court, encapsulated in Pranay Sethi's case (supra), mandating, qua accretions towards future incremental prospects, vis-a-vis, the per mensem income of the deceased, being pegged, upto 40% thereof, besides being tenably meteable, vis-a-vis, the apposite per mensem income. Consequently, after meteing 40% increase(s) vis-a-vis the apposite per mensem income, thereupon, the relevant per mensem income, of, the deceased, is, recoknable to be Rs.18,258/-/-, [Rs.13042/-(per mensem income of the deceased)+Rs.5,216/-(40% of the per mensem income). Significantly, the number of dependents, of, the deceased, are, three, hence, 1/3rd deduction is to be visited, upon, a sum of Rs.18,258/-. Consequently, the per mensem dependency, including the future hikes towards future prospects, after meteing the afore 1/3rd deduction, is, worked out, now at Rs.18,258/- – Rs.6086/- = Rs.12,172/-. In sequel whereto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.12,172/-x12= Rs.1,46,064/-. After applying the apposite multiplier of 17, the total

compensation amount, is assessed in a sum of Rs.24,83,088/- (Rs. Twenty four lacs, eighty three thousand and eighty eight only).

6. Furthermore, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lacs each, vis-a-vis, the claimants, (i) under the head, "loss of consortium and loss of estate"", (ii) and, quantification, of compensation, borne in a sum of Rs. 1 lac, vis-a-vis, claimant No.1, under the head, "loss of love and affection", and, further quanitification of compensation, borne in a sum of Rs. One lac, vis-a-vis, petitioners/claimants No.2 and 3, as also, funeral expenses borne in a sum of Rs.25,000/-, is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in **Pranay Sethi's** case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively, (iii) and, with no expostulation occurring therein vis-a-vis the compensation amount(s), being awardable, to the off springs of the deceased, especially under the head, "loss of love and affection", hence reliefs in respect thereto being impermissibly granted. Consequently, the award of the learned tribunal is also interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads vis-a-vis, claimants. Accordingly, in addition to the aforesaid amount of Rs.24,83,088/-, the claimants, are, entitled under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the petitioners are entitled comes to Rs.24,83,088/-+15,000/- +40,000/- 15,000/-= Rs.25,53,088/-(Rs. Twenty five lacs, fifty three thousand and eighty eight only).

7. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants/petitioners, are, held entitled to a total compensation of Rs.25,53,088/--, along with pending and future interest @9 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants in the hereinafter extracted manner:-

Petitioner No.1:-	Rs. 15,53,088/-
Petitioner No.2:-	Rs. 5,00,000/-
Petitioner No.3:-	Rs.5,00,000/-

All pending applications also stand disposed of. Records be sent back forthwith.

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

United India Insurance Company Ltd. .....Appellant.

Versus

Smt. Bana Pati and others .....Respondents.

FAO No. 275 of 2018.
Reserved on : 31st December, 2018.
Decided on : 8th January, 2019.

Motor Vehicles Act, 1988 – Sections 39, 149 & 166 – Motor accident - Claim application- Defences - Non-registration of vehicle - Effect - Accident taking place when vehicle was not duly registered with Licensing Authority - Claims Tribunal fastening liability on insurer - Appeal against - Held, driving vehicle without due registration amounts to fundamental breach of terms of policy of insurance – Insurer cannot be held liable to pay compensation - Appeal allowed - Award modified with direction to insurer to pay compensation and recover amount from insured. (Paras 3 & 5)

Cases referred:
Deedappa v. National Insurance Co. Ltd., (2008)1 SCC (Cri) 517
National Insurance Co. Ltd. v. Baljit Kaur, (2004)2 SCC 1
National Insurance Co. Ltd. vs. Pranay Sethi and others, 2017 ACJ 2700

For the Appellant:	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Sharma, Advocate.
For Respondents No. 1 to 4:	Mr. Mehar Chand, Advocate vice Mr. Jitender P. Ranote, Advocate.
For Respondent No. 5:	Mr. Varun Rana, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Insurer of the offending vehicle, has, instituted the instant appeal before this Court, wherethrough, it, casts, a, challenge, upon, the award pronounced by the learned Motor Accident Claims Tribunal-II, Kinnaur at Rampur Bushehar, H.P., upon, MAC Petition No. 0100069 of 2013, (i) whereunder, compensation amount comprised, in, a sum of Rs.21,06, 312/- alongwith interest accrued thereon, at the rate of 7.5% per annum, and, commencing from, the date of petition till realization thereof, stood, assessed, vis-a-vis, the claimants, and, the apposite indemnificatory liability thereof, was, fastened upon the insurer/appellant herein.

2. The learned counsel appearing or the appellant/insurer, has contended (i) that the fastening of apposite indemnificatory liability, upon, insurer being ill-founded, (ii) given the offending vehicle, hence not, in contemporaneity with the ill-fated occurrence, rather possessing a valid registration certificate, and, fitness certificate, for, hence it being plied on the relevant road, (iii) thereupon, hence fundamental breach, of, the terms and conditions of the insurance policy, obviously surging forth, (iv) and, conspicuously with the temporary registration certificate, as, issued by the licencing authority concerned, vis-a-vis, the offending vehicle, being valid only upto 23.07.2010, and, whereafter the owner of the offending vehicle, not, ensuring hence issuance qua the offending vehicle, a valid registration certificate, rather by the registering authority concerned

3. The afore espousal reared by the learned counsel for the appellant, before this Court, is, embedded, upon, Section 39 of the Motor Vehicles Act, provisions whereof stand extracted hereinafter:-

> "**39. Necessity for registration**.—No person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place unless the vehicle is registered in accordance with this Chapter and the certificate of registration

of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed in the prescribed manner"

(i) and, when apparently, the afore contention is well founded, upon, an imperative statutory necessity cast therein, upon, the owner to after expiry of the temporary registration, number, as, assigned, vis-a-vis, the offending vehicle by the licencing authority concerned, to, hence, apply, for his/hers being granted, a, permanent registration certificate, qua, the, apposite vehilce, (ii) and, with there being no endeavour in the afore regard, by the owner of the offending vehicle, besides when in contemporaneity, vis-a-vis, the ill-fated mishap hence involving the offending vehicle, rather taking place, hence, thereat the apposite temporary registration certificate, rather expiring, (iii) thereupon, the apt indemnificatory liability, vis-a-vis, the compensation amount being not amenable for its being fastened, upon, the insurer.

4. Furthermore, the quantification, of damages, by the learned Tribunal, comprised, in a sum of Rs.1 lac, vis-a-vis, the claimants, (i) under the head "loss of estate", and, quantification, of, compensation, borne in a sum of Rs.50,000/-, under, the head "funeral expense and cost of litigation", as also quantification, of, compensation in a sum of Rs. One lac, under, the head "loss of consortium" vis-a-vis the petitioner No.1, as well as quantification, of compensation in a sum of Rs.One lac, under, the head "Loss of love and affection", and, further quantification of compensation borne in a sum of Rs. One lac, under, the head "expectation of life", is, (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in ***National Insurance Co. Ltd. vs. Pranay Sethi and others,*** reported in ***2017 ACJ 2700.*** (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively, (iii) and, with no expostulation occurring therein vis-a-vis the compensation amount(s), being awardable, to the off springs of the deceased, especially under the heads, "loss of love and affection, and, expectation of life etc." hence reliefs in respect thereto, being impermissibly granted. Consequently, the award of the learned tribunal is also interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads, vis-a-vis, the claimants. Accordingly, in addition to the amount of Rs.16,56,312/-, the claimants, are, entitled under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation, whereto the petitioners/claimants are entitled comes to Rs.16,56,312/- +15,000/- +40,000/- 15,000/-= Rs.17,26,312/-(Rs. Seventy lakhs, twenty six thousand, three hundred and twelve only).

5. For the foregoing reasons, the appeal filed by the insurer is allowed, and, the impugned award, is, in the aforesaid manner, hence modified. Accordingly, the claimants/petitioners, are, held entitled to a total compensation of Rs.17,26, 312/-, along with pending and future interest @7.5 % per annum, from, the date of petition till the date, of, deposit, of the compensation amount. However, the liability to defray the afore compensation amount is fastened, upon, the owner of the offending vehicle i.e. Smt. Dev Patti, respondent No.5 herein, nonetheless, in consonance with the verdicts of the Hon'ble Apex Court rendered in case titled as ***National Insurance Co. Ltd. v. Baljit Kaur,*** reported in ***(2004)2 SCC 1*** as also in a case titled as ***Deedappa v. National Insurance Co. Ltd.,*** reported in ***(2008)1 SCC (Cri) 517***, the insurer company shall initially satisfy the award, and, shall have the right to, in accordance with law, hence recover, the, amount deposited by it, along with interest, from, the owner of the vehicle i.e. respondent No.5 herein. The amount of interim compensation, if awarded, be adjusted in the aforesaid compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the

claimants, in the manner as ordered by the learned tribunal. All pending applications also stand disposed of. Records be sent back forthwith.

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

Smt. Aruna Bedi .....Plaintiff/Applicant.

Versus

Narinder Rana & others .....Defendants/Respondents.

OMP No. 4225 of 2013 in
Civil Suit No. 4059 of 2013.
Reserved on : 31.12.2018.
Date of Decision: 8th January, 2019.

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Act) - Sections 13(4), 17(1), 34 & 35 - **Code of Civil Procedure, 1908 – Order XXXIX Rules 1 & 2 -** Temporary injunction – Grant of – Debt Recovery Tribunal (DRT) taking proceedings under Section 13(4) of Act against immovable property of borrowers (secured assets) - Plaintiff filing suit in High Court and challenging said sale deeds concerning secured assets – Plaintiff alleging sale deeds having been procured by borrowers from her on basis of fictitious and fraudulent GPA - Plaintiff seeking stay of proceedings before DRT till disposal of suit - Facts revealing photographs of plaintiff on sale deeds - Documents registered before Sub-Registrar which carry presumption of valid execution – Held, plaintiff has no prima facie case and balance of convenience in her favour - Not entitled for temporary injunction – Application dismissed. (Paras 6 & 7)

Cases referred:

Allahabad Bank vs. Canara Bank through its Branch Manager, Agra and Ors., AIR 2012 Allahabad 77

Anjana Naggadia vs. Branch Manager, Dena Benk and another, AIR 2011 Chhattisgarh 61

Nahar Industrial Enterprises limited vs. Hong Kong and Shanghai Banking Corporation, (2009)8 SCC 646

For the Plaintiff/Applicant:	Mr. Ajay Kumar, Sr. Advocate, with Mr. Dheeraj K. Vashista, Advocate.
For defendant No.1 to 3:	Mr. Suneel Mohan Goel, Advocate.
For defendant No.5:	Mr. R.L. Sood, Sr. Advocate with Mr. Sanjeev Kumar, Advocate.
For defendant No.6:	Mr. Karan Singh Kanwar, Advocate.
For defendant No.8:	Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.
For defendant No.13:	Mr. Arvind Sharma, Advocate.
For other defendants :	Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The learned counsel appearing for the defendant No.8, seeks an order being rendered, by this Court, for hence, (a) vacating the orders pronounced, by this Court, on 15.10.2013, upon, OMP No. 4225 of 2013, (b) wherethrough an ex-parte order, of, ad interim injunction was made, and, whereunder, the non-applicants/defendants No.5 to 8, are, directed to maintain status quo qua the nature, possession, and, title, vis-a-vis, the suit property, (c) and, the plaintiff/applicant also seeks an order, for, making the afore order, being made absolute. The requisite res constroversia, appertains, to a declaratory decree, being espoused by the plaintiff, hence for setting aside the sale deeds, registered at serial No. 568, of, 20.03.2006, and, for setting aside hence sale deeds registered at serial Nos. 887, 888, and, 889 of 30.04.2009, in, the Office of Sub Registrar, Kullu, (d) sale deeds whereof were executed by the General Power of Attorney, of, the executant concerned. However, the afore general power of attorney, copy whereof stand appended, with, the list of documents, is, contended to be stained, with, a vice of fictitiousness, and, thereafter any loans raised, upon, the properties, embodied in the afore sale deeds, (e) and, in respect whereof proceedings are launched under the Securitization and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002 (hereinafter referred to as "SRFAESI" Act), (f) and, are pending before the Debt Recovery Tribunal, Chandigarh, (g) and, therethrough obviously hence the borrowed money(ies), are, concerted to be realized, through, the afore apposite statutory mechanism, (h) rather, are, concomitantly unrealizable therefrom.

2. The defendants concerned, in, their written statement(s), denied, the factum of any vice of fraudulence, rather gripping the afore documents, (i) and, rather, a, vehement contention stand raised in the apt reply (ii) that given the bar, of, jurisdiction, created under a statutory contemplation, borne in Section 34 of the SRFAESI Act, provisions whereof stand extracted hereinafter, (iii) this Court being barred to entertain the instant suit, (iv) and, also a further contention, is reared, that, the order concerted, to be vacated, rather precluding the further progresses, being made, upon, the lender bank's application, pending, before the DRT, Chandigarh. (v) Initially, the rigor of the statutory bar,as, stands encapsulated, in Sections 34 and 35 of the SRFAESI Act, provisions whereof stands extracted hereinafter, rather casts a strict embargo, against, any civil proceedings being maintained before the Civil Courts, vis-a-vis, any matter falling within the domain of SRFAESI Act, and, the rigor of the afore bar is strengthened by the mandate occurring in Section 35 of the SRFAESI Act, (vi) wherewithin, a categorical prohibition, is, cast qua despite any mandate in consistent therewith occurring any law for the time being in force, and, in any instrument, holding, the afore effect by virtue of such law, (v) also not rendering maintainable, any civil suit, before the Civil Courts, vis-a-vis, any subject matter qua wherewith statutory proceedings, stand, launched before the Debt Recovery Tribunal concerned. The afore view is also encapsulated, in, a judgement rendered, in a case titled as ***Smt. Anjana Naggadia vs. Branch Manager, Dena Benk and another***, reported in ***AIR 2011 Chhattisgarh 61***, wherein, it stands pronounced, that, a declaratory suit for title, maintained before the Civil Court, along with, a espoused relief therein qua rendition of a decree, for, permanent prohibitory injunction, being not maintainable, conspicuously, in the face, of, the afore statutory estoppel(s), borne in Section 34 of the SRFAESI Act. Provisions of Sections 34, and, 35 of the SRFAESI Act, read as under:-

> "**34. Civil court not to have jurisdiction.**—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any

court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

35. The provisions of this Act to override other laws.—The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

3. Be that as it may, in a judgment rendered, in a case titled as ***Allahabad Bank vs. Canara Bank through its Branch Manager, Agra and Ors.,*** reported in AIR 2012 Allahabad 77, a categorical expostulation of law occurs (i) qua the coinage "any person" in Section 17(1) taking, within its fold, borrower, guarantor or any other person, who, may be affected by an action, initiated under section 13(4), (ii) whereupon, it is to be concluded, that, the action instituted by the lender bank, before the Debt Recovery Tribunal, against, the guarantors or against the borrowers, being rather maintainable therebefore. Though, the afore expostulation of law, as, borne in the afore judgments, brings forth, the trite principle of law, qua there being an absolute statutory bar, against, the maintainability of a suit, for declaration of title, and, for permanent prohibitory injunction, vis-a-vis, any property, in respect whereof, borrowings are made from the lender bank concerned, (iii) conspicuously, when in respect whereof also proceedings are reared, for recoveries or realization(s) thereof, before, the Debt Recovery Tribunal concerned, the, statutorily contemplated apposite mechanism. (iv) The ambit and amplitude, of, the recoursing(s) by the lender bank, vis-a-vis, the statutory mechanism(s), embodied in the SRFAESI Act, extending also, vis-a-vis, the guarantors besides obviously, vis-a-vis, the borrowers. Since, apparently the statutory proceedings, are, pending before the Debt Recovery Tribunal, Chandigarh, and, are reared at the instance, of the lender bank, for, its hence therethrough rather realizing the sums borrowed, (v) and, in respect whereof, and, for realization thereof, the afore sale deeds, are constituted, as, the requisite securities, reiterately for hence ensuring the realization of the borrowed sums, (vi) thereupon, prima facie, the, hereat espousal, of, the plaintiff, for, rendition, of, a declaratory decree, for setting aside the afore sale deeds, and, also qua any relief for permanent prohibitory injunction, as, embodied in the plaint, may not maintainable before this Court.

4. The afore conclusions, do support, the contention raised before this Court, by the learned counsel for defendant No.8, who, is obviously striving, to, make a motion, before, this Court, to, rescind or to recall the orders pronounced, by this Court, on 15.10.2013. Though, the learned counsel appearing for the plaintiff/applicant, has contended, with much vigour before this Court, that, the relevant securities, comprised in the afore referred sale deeds, are stained with an inherent vice of fraudulence, (i) whereupon, in case the relief espoused by the defendant No.8, is granted, thereupon, irreparable loss in pecuniary terms, rather being visited upon her, (ii) and, obviously, in, the DRT, proceeding to make an order, for realizing the borrowed sums, from the securities, which are otherwise stripped, with, an inherent malady of fraudulence, would render hence frustrated, the afore endeavour of the plaintiff, and, obviously till an adjudication is made, upon, the extant civil suit, vis-a-vis, the valid execution of the sale deeds, by the GPA thereof, (iii) thereupto, this Court rather not allowing, the, defendants' prayer, for, recalling of the order pronounced, on 15.10.2013, upon, OMP No. 4225/2013, (iv) rather this Court proceeding to make absolute, the, afore order, and, it making a expeditious decision, upon, the civil suit. In making the afore espousal, the learned counsel appearing for the plaintiff, placed reliance, upon, a judgement of the Hon'ble Apex Court, rendered, in a case titled as ***Nahar Industrial Enterprises limited vs. Hong Kong and Shanghai Banking***

Corporation, reported in ***(2009)8 SCC 646***, (v) wherethrough, the Hon'ble Apex Court rather granted relief to the borrower, vis-a-vis, the civil suit concerned, being maintained before the Punjab and Haryana High Court, (vi) and, obviously reversed the latter Court's verdict, for, transfer of the civil suit, from, the civil courts concerned, to, the DRT concerned. The learned counsel appearing for the plaintiff, makes, dependence, upon, paragraphs No.105 and 106, of the verdict rendered by the Hon'ble Apex Court, in, Nahar Industrial case (supra), paragraphs whereof stands extracted hereinafter:-

> "105. The civil court indisputably has the jurisdiction to try a suit. If the suit is vexatious or otherwise not maintainable action can be taken in respect thereof in terms of the Code. But if all suits filed in the civil courts, whether inextricably connected with the application filed before the DRT by the banks and financial institutions are transferred, the same would amount to ousting the jurisdiction of the civil courts indirectly. Suits filed by the debtor may or may not be counterclaims to the claims filed by banks or financial institutions but for that purpose consent of the plaintiff is necessary.
>
> 106. It is furthermore difficult to accept the contentions of the respondents that the statutory provisions contained in Sections 17 and 18 of the DRT Act have ousted the jurisdiction of the civil court as the said provisions clearly state that the jurisdiction of the civil court is barred in relation only to applications from banks and financial institutions."

However, any dependence thereon is misplaced (vii) as the Hon'ble Apex Court, while, construing the import, of, the statutory provisions borne in Sections 17, and, in 18, of, the DRT Act, (viii) wherethrough, the jurisdiction of the civil Courts, is barred, and, hence made, a, further conclusion, qua, the said bar rather holding clout only, vis-a-vis, the appoiste applications maintained by the lender banks or financial institution, before the Debt Recovery Tribunal concerned, (ix) for hence therethrough, theirs realising the debt or borrowings, made therefrom by the debtor concerned. Significantly, the impact, of, the apposite statutory estopple, as, contemplated in the afore provisions, of, the SRFAESI Act, rather visibly remained undwelt upon, nor any adjudication, hence stood meted thereon, (x) hence rendering the afore decision to be inapplicable, vis-a-vis, the hereat prevalent factual scenario, wherein rather the afore relevant statutory provisions, are, squarely attractable.

5. Be that as may, the culling, of, the afore parameter, as, borne in the hereinabove extracted paragraph, does, however, not validate the espousal of the counsel, for, the plaintiff qua the mandate borne therein rather supporting his contention, (i) given the application maintained, before the DRT hence being preferred by the lender bank concerned, (ii) and, when hence the statutory bar, is, attracted, upon, the afore application, being maintained by the financial institution concerned, and, by the lender bank concerned, before the DRT concerned, and, thereupon, dehors, any purported fraudulence, gripping the afore securities, and, wherethrough, rather the realizing, of, borrowings, is/are, strived to be made by the lender bank, render the apposite strivings acceptable to this Court, (iii) given, the, rigid statutory bar, as, encapsulated in Section 34 of the SRFAESI Act, being rather neither belittled or denuded, rather this Court, acting, hence within the domain, of, the afore parameters, as, stand borne therein.

6. Be that as it may, the afore referred, sale deeds, purportedly gripped, with, a vice of fraudulence also the apposite GPA, maintained with the Registrar concerned, were summoned before this Court, for perusal(s) thereof, and, all make evident disclosure, qua all, carrying photographs, of, the plaintiff, along with the Sub Registrar concerned, (i) thereupon, prima facie the afore Act of registration(s), when is performed, by a public

servant, in discharge of his public function(s), (ii) and, when hence a presumption of truth is attributed thereto, (iii) AND, rather with no potent material existing on record or being placed on record, for, dislodging the afore presumption, (iv) thereupon, it hence galvanizes, immense fortification, (v) besides with the receipts, in, respect of the sale consideration, receipt(s) whereof stand appended with the list of documents, filed by the defendants, being not denied to be scribed, in the hands of the plaintiff, and, also when they stand witnessed, by apposite witnesses thereof, (vi) thereupon, even if any stain of any fraudulence, grips the afore documents, rather effects thereof, being subsumed or waned, by the afore scribings, of, receipt(s) qua sale consideration(s), hence, by the plaintiff.

7. For the foregoing reasons, there is no merit in the instant application bearing OMP No.4225 of 2013, and, it is dismissed accordingly. In sequel, the order rendered on 15.10.2013 is vacated. However, it is made clear that the findings recorded hereinabove shall have no bearings on the merit of the case.

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

Bajaj Allianz Insurance Company Ltd. .....Appellant.

Versus

Dev Raj & Others .....Respondents.

FAO No. 322 of 2015 along
with FAO No. 514 of 2015.
Reserved on: 28th December, 2018.
Decided on : 8th January, 2019.

Motor Vehicles Act, 1988 – Section 157(1) & (2) – Motor accident - Claim application – Defences - Transfer of vehicle - Non-intimation of change of ownership to insurer - Effect - Held, with valid transfer of vehicle, certificate of insurance and policy are deemed to stand transferred to transferee from date of transfer - Mere non-intimation of transfer of ownership of vehicle by transferee to insurer within statutory period is immaterial - Insurer cannot avoid its liability on ground that intimation of transfer of ownership was not given to it within stipulated period. (Paras 6 & 7)

For the Appellant(s):	Mr. Aman Sood, Advocate, in FAO No. 322 of 2015, and Mr. Vivek Chandel, Advocate, in FAO No. 514 of 2015.
For Respondent No. 1:	Mr. B.L. Soni, Advocate in both appeals.
For Respondent No.2:	Ms. Tim Saran, Advocate, in FAO No. 322 of 2015, and, Mr. Aman Sood, Advocate, in FAO No. 514 of 2015.
For Respondent No.3:	Nemo in FAO No. 322 of 2015, and, Ms. Tim Saran, Advocate in FAO No. 514 of 2015.
For other respondents:	Nemo in both appeals.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

FAO No. 322 of 2015, stands, directed by the insurer, against, the impugned award, rendered by the learned Motor Accidents Claims Tribunal, Ghumarwin, camp at Bilaspur, upon, MAC No. 15/2 of 2009, (a) wherethrough, compensation amount, borne in a sum of Rs.4,33,400/-, alongwith interest, at, the rate of 7.5% per annum, from, the date of institution of petition, till its final realization thereof, hence stood assessed, vis-a-vis, the disabled claimant, and, the apposite indemnificatory liability thereof, stood fastened, upon, the insurer of the offending vehicle, (b) whereas, FAO No. 514 of 2015, stands, directed by one Pawan Kumar, wherethrough, he assails the findings hence occurring in the operative part of the impugned award, whereunder, joint and several, liability, vis-a-vis, the compensation amount rather stood assessed, upon, the appellant one Pawan Kumar, and, upon the insurer of the offending vehicle.

2. Since, both the afore FAOs hence arise, from, a common verdict, hence, both are amenable, for, a common adjudication being meted thereon.

3. Unflinching, and, categorical evidence hence exists on record qua (i) in sequel to the user of the offending vehicle, at a public place, its developing a mechanical snag, and, for begetting rectification thereof, (ii) the petitioner/claimant while his aiding the mechanic, and, the driver, of the relevant bus, rather for ensuring the replacement, of, the spring leaf/Kamani thereof, his, proceeding, to position himself, underneath the relevant vehicle, (iii) and, during, the course of the afore endeavour, the "jack" giving away,and, in sequel whereto, the bus collapsing upon him, and, hence the disabling injuries standing encumbered, upon, the claimant. The apt disabling injuries, are, borne in Ex. PW3/A (Mark-X), and, the per centum of disability, spelt therein is, 65 %, of, the spine, and, it is also pronounced therein, qua it, being permanent in nature. The afore per centum of permanent disability encumbered, upon, the claimant, in sequel to the afore mishap, also stand uncontrovertedly borne out, by the evidence existing on record, to hence render the claimant rather permanently incapacitated, to, rear any income in future. Obviously, the afore forth right evidence, as existing on record, stands aptly borne in mind by the learned tribunal, for, it to hence conclude, qua, the relevant mishap occurring, during, the course of user of the offending bus, at a public place, (iv) whereupon, the disabled claimant, is, amenable, for, assessment of just compensation, and, the liability thereof being tenably fastenable, upon, the insurer of the offending vehicle.

4. Be that as it may, given, the afore per centum of permanent disability encumbered, upon, the claimant, (I) the compensation assessed, under, various heads by the learned tribunal, vis-a-vis, the claimant, does not suffer from any gross perversity, or, absurdity, of, the appreciation of the material/evidence existing on record, (ii) in sequel, the compensation amount, as, determined by the learned Motor Accidental Claims Tribunal concerned, vis-a-vis, the claimant, does not warrant any interference by this Court.

5. However, the core res controversia, engaging the parties at contest, is, vis-a-vis, Pawan Kumar being the owner of the offending vehicle, and, also the apt insured, of, the offending vehicle, (i) given a valid contract, of, insurance existing on record, and, it being borne in Ex.DA, (ii) and, with the afore contract, of, insurance holding force, and, the relevant legal might, rather significantly in contemporaneity, vis-a-vis, the relevant mishap, hence, taking place, (iii) thereupon, the fastening of the apposite indemnificatory liability, upon, the insurer being both proper or valid, (iv) dehors the RC appertaining to the relevant vehicle, borne in Ex. R-1, making, a, categorical reflection qua the relevant vehicle being owned, by one Jawala Singh, (v) conspicuously, rather apparently with a string of judicial

decisions, making a clear expostulation of law, qua, the registered owner, as reflected, in, the apposite registration certificate, alone being amenable qua the fastening of the apt indemnificatory liability, conspicuously, in, the absence of a valid contract of insurance hence existing in contemporaneity, vis-a-vis, the relevant mishap, involving the vehicle concerned, (vi) thereupon, the transfer, if any, for any sale consideration, and, without the afore reflections, borne in the apposite RC, rather also in tandem therewith, hence getting their requisite correction(s), rather being both unworthwhile and insignificant, importantly, for the afore purpose. Consequently, the operative part of the impugned verdict, in, making, a, disclosure qua one Pawan Kumar being jointly, and, severally liable along with, the, insurer of the offending vehicle, to, hence indemnify the compensation amount, warrants interference, and, it is quashed and set aside.

6. Furthermore, the apt legal conundrum, also enjoining, its, being put to rest by this Court, is, qua (a) whether with, existence, of a valid contract of insurance, and, it holding force, in, contemporaneity, with, the occurrence of the relevant mishap, and, the executants, of the afore contract being the appellant, and, one Jeet Ram Sharma, (b) qua whether, thereupon, upon transfer of the afore vehicle hence occurring, vis-a-vis, one Jawala Singh, (c) whether the afore Jawala Singh, disclosed, in the apt registration certificate, comprised, in Ex. R-1 to be the owner of the offending vehicle, was, validly empowered to hence exclude, the, fastening of the apt indemnificatory liability, upon, him, or (d) whether ipso facto, upon, transfer by one Jeet Ram Sharma, of, the offending vehicle, vis-a-vis, Jawala Singh, also per se hence begetting rather also transfer of the relevant contract, of, insurance, importantly, vis-a-vis, Jawala Singh, (e) hence, the apposite indemnificatory liability being befittingly directed, to be encumbered, upon, the insurer of the offending vehicle. The afore conundrum would be put to rest, upon, a perusal being made, of, the mandate of Section 154, of, the Motor Vehicles Act (hereinafter referred to as the Act), provisions whereof stand extracted hereinafter:-

> "**157. Transfer of certificate of insurance**.—
>
> (1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer. 1[Explanation.—For the removal of doubts, it is hereby declared that such deemed transfer shall include transfer of rights and liabilities of the said certificate of insurance and policy of insurance.]
>
> (2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."

A circumspect, and, surgical reading of sub-section (1), of, Section 157 of the Act, (i) makes categorical unfoldments qua upon occurrence of a valid transfer, of, ownership, of the apposite motor vehicle, (ii) thereupon, also a deemed transfer of the contract of insurance, as, executed, inter se, the insurer, and, with the hitherto insured transferor, of, the offending vehicle, rather also occurring, vis-a-vis, the transferee, (iii) and, the afore deemed statutory occurrence(s) hence taking place from the date, of, the transfer of the vehicle

concerned, by the transferor, to the transferee. The effect thereof being, upon, a valid transfer of the apposite vehicle, thereupon, ipso facto, a, deemed statutory transfer of all the benefits, of, the contract of insurance, being also bestowed upon the transferee, of, the vehicle concerned. A further corollary thereof being, qua, despite, the occurrence, of, the name of Jeet Ram Sharma, in, the insurance policy, yet, when within the ambit of sub-section (1) of Section 157 of the Act, a deemed statutory transfer, of, the contract of insurance also begets, its apt ensual, and, thereupon, hence, the registered owner holds a valid espousal, for, exculpating the apt fastening, of, the apposite indemnificatory liability, upon, him. Even though, sub-section (2) of Section 157 of the Act, enjoins, the transferee, to, within 14 days from the apt transfer, take, all necessary steps, significantly, with the insurer of the offending vehicle, to, beget the necessary changes, in, the contract of insurance. However, even if, the afore mandate remained uncomplied, with, by the transferee, yet, with no default clause hence occurring in sub-section (2) of Section 157 of the Act, qua, upon, the afore derelictions being made, by the transferee, thereupon, the operation and clout of subsection (1) hence being denuded, (b) thereupon, even with the transferee, omitting, to mete compliance therewith, (c) nonetheless, the effect, of, the deemed statutory transfer of the contract of insurance, as, contemplated, to occur, in simultaneity, and, in contemporaneity, vis-a-vis, the apt valid transfer, of the vehicle concerned, (d) significantly, within the domain of sub-section (1) of Section 157, of, the Act, renders, eruption of a firm conclusion, qua, the insurer of the offending vehicle, given, the contract of insurance being alive at the relevant time, hence, being amenable, for, fastening of the apposite indemnificatory liability qua it.

7. For the foregoing reasons, there is no merit in FAO No. 322 of 2015, and, it is dismissed accordingly, whereas, FAO No.514 of 2015 is allowed, to the extent that the findings, in, the operative portion of the impugned award, that, Pawan Kumar being jointly and severally liable, vis-a-vis, the apt compensation amount, along with the insurer, being amenable for reversal, rather, it is concluded that the apt indemnificatory liability, being jointly and severally fastenable, upon Jawala Singh, the person reflected, in the apt RC, to be owner of the offending vehicle, along with, the insurer of the offending vehicle. All pending applications also stand disposed of. Records be sent back forthwith.

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

Tara Dassi .....Appellant/Plaintiff.
Versus
Pyar Chand and others .....Respondents/defendants.

RSA No. 231 of 2018.
Reserved on : 3rd January, 2019.
Decided on : 8th January, 2019.

Code of Civil Procedure, 1908 - Order XXII Rules 3 to 5 & 9 - Death of party - Substitution of legal representatives – Abatement - Held, questions of substitution of legal representatives of deceased party and abatement of suit are to be decided by that court where *lis* was pending at time of death. (Paras 6 &7)

For the Appellant: Mr. I.D. Bali, Sr. Advocate with Mr. Virender Bali, Advocate.

For the Respondents No.1 to 3, 5(iv) and 5(v): Mr. Neeraj Gupta, Advocate.
Respondents No.4, 5(ii) and 5(iii) already ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

During the pendency of the instant appeal before this Court, appeal whereof stands directed, by the plaintiff, against the concurrently recorded verdicts, of, dismissal, made upon, her suit for rendition, of , a declaratory decree, (i) an application bearing CMP No.10486 of 2018, stands instituted before this Court, wherethrough, a prayer is made for deleting, from, the array of performa respondents, the name of Thalu Ram. However, his death certificate, appended with the application, is borne in Annexure A-1, and, it makes disclosures qua his demise, rather occurring during the pendency of the Civil Suit before the learned trial Court.

2. Also, during the pendency of the instant appeal before this Court, another, application bearing CMP No.10487 of 2018, stands instituted before this Court, wherethrough, a relief is canvassed, for, deleting the names, of, Pyar Chand son of Jagat Ram, and, of Pune Ram son of Jagat Ram, from, the array of performa respondents, (i) given theirs, on, demise of their predecessor-in-interest one, Dhali Devi, being ordered to be substituted in her place, as co-defendants No. 1 and 2, (ii) hence, reiteratedly therethrough it is averred, that, their reflection in the array of performa respondents also respectively as respondents No.5(iv), and, 5(v) rather being wholly unnecessary, in, the memo, of, parties, as, occurring in the verdict rendered by the learned First Appellate Court.

3. The learned counsel, appearing for the respondents in CMP No. 10486 of 2018, contends, that, upon the demise of one Thalu Ram, during, the pendency of the civil suit, before, the learned trial Court, uncontrovertedly his estate, being represented by co-respondents, namely Pyar Chand, Pune Ram, Smt. Kesaru, Shri Moti Ram, Smt. Painu Devi, (i) hence, he contends, that, this Court would proceed, to, make a limited remand, vis-a-vis, the learned trial Court, for, making an apposite order of deletion, (ii) and, this Court within the ambit, of provisions of Order 41, Rule 25, of, the CPC, retaining the instant RSA, upon, it docket. Provisions of Order 41, Rule 25 of the CPC read as under:-

> "**25. Where Appellate Court may frame issues and refer them for trial to court whose decree appealed from**.- Where the court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and, refer the issue for trial to the court from whose decree and appeal is preferred and in such case shall direct such court to take the additional evidence required;
>
> and such court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time]."

Naturally, he contends that the afore vice, staining, the impugned verdict, and, sparked by the concurrent verdicts, rendered by the learned trial Court, and, by the learned First Appellate Court, being rendered against the afore deceased litigant, (i) rather, not constraining this Court, to, accept the extant RSA, and, to concomitantly, set aside the

impugned judgment(s) and decrees,(ii) nor this Court thereafter hence relegating, the, entire lis, to the learned trial Court, (iii) and, obviously his afore submission, is rested, upon, the provisions borne in Section 99 of the CPC, provisions whereof stand extracted hereinafter:-

> "99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.
>
> No decree shall be reversed substantially varied, nor shall any case be remanded in appeal on account of any misjoinder [or non-joinder] of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

A mandate stands encompassed, in the afore Section 99, of the CPC, (I) qua no decree being amenable for reversal or variation nor any lis being remanded, by, the ld. First Appellate, (ii) for, misjoinder, and, non joinder of parties, (iii) or causes of action (iv) or for any error or defect or irregularity in any proceedings in the suit, not affecting, the merits of the case or the jurisdiction of the court.

4. However, for reasons to be assigned hereinafter, both the afore submissions are rejected, and, rather this Court, records, a firm conclusion, that, the afore vices being unrectifiable nor CMP No. 10486 of 2018, being maintainable before this Court, (i) and, rather it being preferable only before the learned trial Court, wherebefore, the death of deceased Thalu Ram occurred, (ii) besides the concurrently recorded verdicts by both the learned courts below, being evidently ingrained with a vice, of, nullity, given theirs being rendered, against, the afore deceased litigant, hence warranting, theirs being quashed, and, set aside.

5. The provisions borne in Order 41, Rule 25 of the CPC are restricted in their sway, vis-a-vis, the statutory para meters, as, borne therewithin, (a) and, also are strictly tramelled for, apt application(s), vis-a-vis, omission(s) to frame or try any issue, or to try any question of fact, importantly, by the learned trial Court, (b) whereupon, for ensuring an apt verdict being pronounced, upon, the merits of the lis, thereupon, the Appellate Court, being empowered to, after framing any essential issue, hence direct the remandee court, to render findings, upon the apposite issue(s), (c) AND the apt order, of, remand also embodying therein, a, mandate, upon, the remandee court, to, within a mandated time frame, make its apt verdict, and, obviously hence, the Appellate Court retains, the file of the apt lis, on, its docket. However, the afore parameters, are, restricted in sway, and, clout, reiteratedly, vis-a-vis, emergences, and, eruptions of the afore eventuality(ies), (I) rather making unfoldments in the lis, upon, its travelling upto the Appellate Court, and, conspicuously the lis, is, enjoined to be uningrained, with, any vice of nullity, arising from, it being rendered, against, the deceased litigant, (ii) and, when statutory expostulations are borne in the CPC, rather for curing the afore defects, by hence recoursings, being made, to, the apt statutory mechanism, prescribed, in the CPC, and, when they yet remain unavailed by the litigant concerned, (iii) thereupon, any vitiatory imperfections, borne in the memo of parties, of, the verdicts pronounced by the courts below, and, engendered by existence therein, of, name(s), of, any deceased litigant, hence fall grossly outside the domain, of, the afore parameters, borne in Order 41, Rule 25 of the CPC, rendering hence the recourse(s) thereto, in, the instant case, rather being wholly impermissible.

6. Furthermore, the submission,as, rested by the learned counsel for the respondent herein, upon, the mandate of Section 99 of the CPC, also arise from, his severe mis-contemplation(s), of, the innate nuance thereof, (i) given the coinage "purported error or defect or irregularity, in, the proceedings, drawn in the suit, not, affecting the merits of the case or jurisdiction of the Court", necessarily carrying the signification, of, "drawing of

proceedings" in the apposite suit, being indispensable, (ii) and, obviously thereafter, the, emergences therein, of, error or defect(s) or irregularity(ies), in the afore drawn proceedings, not, affecting the merits, of the case, and, jurisdiction of the court, hence surging forth, (iii) AND thereupon rather the Appellate Court, being disempowered, to, modify or reverse, the, decree, and, also it being rendered dis-empowered, to, order for remand, of, the lis, vis-a-vis, the remandee court. Consequently, when no proceedings purportedly erroneous or defective or ingrained with any purported irregularity, being ever drawn, (iv) and, significantly appertaining to the demise of the afore litigant, nor rather, with, the statutorily contemplated mechanism(s) qua therewith hence remained evidently unrecoursed, (v) thereupon, no assistance, can be derived therefrom, by the counsel for the respondents, rather for want, of, apt statutory recoursing(s), by the counsel, for the litigant concerned, at, the stage contemporaneous, to, the occurrence of the demise, of, the afore litigant(s), (vi) thereupon, the verdicts concurrently pronounced by both the learned courts below, against, the afore deceased litigant, hence, are, rendered nonest, and, void, and, warrant theirs being quashed and set aside.

7. Consequently, the appeal is allowed, and, both the afore CMPs are dismissed being not maintainable before this Court, (a) and, also the impugned verdicts pronounced, upon, Civil Suit No. 55/2010, and, upon Civil Appeal No. 12 of 2017, are quashed and set aside. The records of the learned trial Court be remitted, vis-a-vis, latter, (b) and, records of the learned First Appellate Court be remitted to it, with a direction to the learned trial Court, to, upon an application being preferred therebefore, by the litigant concerned, for, deleting the name of Thalu Ram, from, the array of the defendants, borne in, the memo of parties drawn, in, its verdict, hence make, a decision thereon, (c) obviously without determining the factum of abatement, given, his estate being uncontrovertedly sufficiently represented, by his legal heirs, (d) and, after the learned trial Court, hence meteing its decision, upon, the afore application, and, it hence also making, an order, for, deletion of the name of Pyar Chand, and Pune Ram, from, the array of performa defendants, given, theirs being already arrayed as defendants No.1 and 2, (d) AND, it shall, also within, two months, thereafter, and, without its going into the merits of the case, make a verdict upon, the afore civil suit. The parties are directed to appear before the learned trial Court, on 28th February, 2019. All pending applications also stand disposed of.

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

The Himachal Pradesh State Electricity Board ...Petitioner/Objector
Versus
M/s SAB Industries Ltd. ...Respondent

Arb. Case No. 35 of 2006
Reserved on: November 27, 2018
Decided on: January 10, 2019

Arbitration and Conciliation Act, 1996 – Section 34 (2)(b)(ii) - Award - Objections thereto - Public policy of India, what is ? – Held, public policy connotes some matter which concerns public good and public interest - Award or judgement likely to affect administration of justice is against public policy of India. (Para 9)

Arbitration and Conciliation Act, 1996 - Section 34- Award - Objections thereto - Scope of enquiry - Held, scope of interference by court with award of Arbitrator is very limited -

Interference can only be on grounds of fraud, bias and violation of principles of natural justice - Violation should be so unfair and unreasonable as to shock conscience of court - Arbitrator having framed issues on claims and counter-claims of parties and dealt their contentions and also given reasons for his findings - Award being well reasoned cannot be set aside - Objections dismissed – Award upheld. (Paras 13, 17 & 28)

Arbitration and Conciliation Act, 1996 - Section 34 – Award - Objections thereto – Maintainability on ground of amendments effected before Arbitrator - Objector contending that claimant could not have amended his claim before Arbitrator - Held, claimant as well as counter-claimant entitled to add or amend their claim or counter-claims filed before Arbitrator provided they are arbitrable and within limitation. (Paras 27)

Cases referred:

Delhi Development Authority vs. M/s. Bhardwaj Brothers, 2014 AIR (Delhi) 147

Hindustan Tea Company vs. M/s K. Sashikant& Company and another, AIR 1987 SC 81

M/s Aggarwal and Company vs. State of H.P. 199(3) Shim. L.C. 94

M/s. Hyder Consulting (UK) Ltd. vs. Governor, State of Orissa, (2015) 2 SCC 189

M/s Sudarsan Trading Company v. The Government of Kerala and another, AIR 1989 SC 890

McDermott International Inc. v. Burn Standard Company Limited and others (2006) 11 SCC 181

Oil & Natural Gas Corporation Limited versus Western Geco International Limited (2014) 9 SCC 263

Oil & Natural Gas Corporation Limited versus Saw Pipes Limited (2003) 5 SCC 705

P.R. Shah, Shares and Stock Broker (P) Ltd. vs. M/s. B.H.H. Securities (P) Ltd. and others, (2012) 1 SCC 594

R.K. Sood vs. Dr. Y.S. Parmar, University of Horticulture and Forestry, 2001 SLC 127

Rakesh Kumar and Company vs. Union of India, FAO(OS) No. 273 of 2014 decided on 15.4.2015

State of Goa vs. Praveen Enterprises, (2012) 12 SCC 581

Sutlej Construction vs. Union Territory of Chandigarh, (2018) 1 SCC 718

Swan Gold Mining Ltd. vs. Hindustan Copper Ltd. Civil Appeal No. 9048 of 2014, decided on 22.9.2014

For the petitioner : Mr. J.S. Bhogal, Senior Advocate with Mr. Suneet Goel, Advocate.

For the Respondent : Mr. P.S. Rana, Advocate.

The following judgment of the Court was delivered:

Justice Sandeep Sharma, Judge.

Present objections under S.34 of the Arbitration and Conciliation Act, 1996 have been preferred by the Himachal Pradesh State Electricity Board (hereinafter, "Board") against the award dated 22.9.2006 made by the learned arbitral tribunal consisting of Mr. S.C. Mahajan, Sole Arbitrator, whereby he has allowed the claim petition filed by the respondent and awarded a sum of Rs.1,35,42,681/- alongwith interest at the rate of 18% per annum on the aforesaid amount from 1.4.2000 till the date of award and interest at the rate of 18% per annum from the date of award till payment. While passing the impugned award, the learned arbitrator has dismissed the counter claims of the petitioner.

2. Undisputed facts, as emerge from the record are that vide contract agreement No. GANWI-II/96 dated 23.12.1996, work of "construction of Trench Weir, Intake Structure, Intake Tunnel, Desiliting Tank and Flushing tunnel of Ganwi Hydel Project" was awarded by the Board in favour of the respondent. Clause 25 of the agreement provides for settlement of disputes between the parties, arising out of the contract, by appointing an arbitrator. The clause provides as under:

> "Except where otherwise provided in the contract, all questions and disputes relating to the meaning and interpretation of the terms of contract, specifications, designs, drawings and instructions here in before mentioned, and so to the quality of workmanship or materials used in the work or as to any question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, design, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of work or relating to termination or recession or delay in execution and all consequences thereof of the contract, shall be referred to a sole arbitrator who will be appointed by the HPSEB"

3. It is further borne out from the record that dispute arose between the parties on presentation of 29th/final bill to the Superintending Engineer, Ganwi Construction Circle, HPSEB Jeori, vide letter No. SAB/GANWI/2000/703 dated 14.3.2000, which was not accepted by the Board. The Board, vide office order No. 45 dated 13.7.2000, appointed Shri S.R. Khitta, Arbitrator to adjudicate the claim amounting to Rs.1,35,42,681/- plus interest at the rate of 24% per annum on overall amount from 1.4.2000 to the date of award. Later vide order No. 112 dated 25.9.2001, Shri S.C. Mahajan, was appointed as the sole arbitrator. The details of claims put forth by the claimant are given by the learned arbitrator in his award in para No. 3(b). Upon completion of pleadings, the learned arbitrator below framed following issues for determination:

> "1. Whether the claims of the Claimant are maintainable, if so, the amount to which the Claimant is entitled in respect of each claim? OPC
>
> 2. Whether the counter claims of the respondent are maintainable, if so, the amount to which the Claimant Respondent is entitled in respect of each claim? OPR
>
> 3. Whether the claim No 3,4 & 5 where the finality has been bestowed upon the Engineer Incharge are arbitrable under the contract? OPR
>
> 4. Whether the Claimant/Respondent are entitled to pendentelite interest on awarded amount of claim/counter claim? If so, rate of interest? OPC/ OPR
>
> 5. Whether the Claimant/Respondent are entitled to claim interest from the date of award till actual date of payment? If so, the rate of interest? OPC/OPR
>
> 6. Whether the Claimant/Respondent are entitled to any other relief as deemed fit by the Hon'ble Arbitrator? If so, the amount?

4. The Board also submitted its counter claim on two counts. For the completion of facts, it may be noticed that regarding supply of documents demanded by the Board, petitioner-Board filed CMPMO No. 9 of 2003 which was dismissed by this court on 21.3.2003. Adverting to the facts of the case, the learned arbitrator held 24 hearings and vide impugned award dated 22.9.2006, allowed the claim filed by the claimant and rejected the counter claim filed by the Board. Feeling aggrieved, the Board has filed instant objections, seeking quashment of the award passed by the learned arbitrator.

5. Mr. J.S. Bhogal, learned Senior Advocate duly assisted by Mr. Suneet Goel, Advocate, appearing for the Board, while inviting attention of this court to the impugned award, vehemently argued that the same is not a reasoned award since the learned arbitrator has failed to give reasons for the findings returned by him and impugned award is against the public policy of India. It is further alleged by the Board in the petition that the learned arbitrator remained biased from the very beginning, due to which Board had to approach this court, thereby seeking permission to be represented through a counsel, which was allowed however, second petition filed by it before this court, against requisitioning of the record was rejected and as such, Board was unable to represent its case effectively. It is specifically argued on behalf of the Board that the award under claim No.1 is beyond the scope of reference, which was made for Rs.17,789/- only, which was later amended to Rs.48,322/- by the claimant, and which the learned arbitrator ought not have permitted. It is further argued on behalf of the Board that the learned arbitrator has not even allowed recoveries under Income Tax and Sales Tax, which are statutory in nature, thus, the learned arbitrator has acted in conflict with the public policy of India. It is further argued that the recoveries on account of actual electricity consumption have also not been allowed. Mr. Bhogal, learned Senior Advocate, while pleading on behalf of the Board argued that while allowing claims No. 3 and 4 relating to refund of amount withheld for not achieving milestones and interest on such withheld amounts from the date of withholding the same, till 31.3.2000, the learned arbitrator has failed to appreciate the legal position that such claims were not arbitrable. It is also argued on behalf of the Board that the finding with regard to delay upto 2.6.1999, having been admitted by the Board is factually wrong. It is also wrong that the work was completed on 16.9.1999, since competent authority had not issued relevant certificate in this regard. It is further argued that the learned arbitrator has wrongly held imposition of Rs.7,50,000/- as compensation, to be without jurisdiction and award of interest on withheld amounts is also against public policy of India. It is further argued on behalf of the Board that the learned arbitrator, in fact, except noticing the stands of the respective parties, has not dealt them in the Award and has passed the impugned award without giving cogent findings. It is argued by the learned counsel that under Claim No. 7, relating to damages for loss of profit for alleged misrepresentation of tender cost, learned arbitrator has failed to consider the provisions of contract and has given no reasons for disagreeing with the contentions of the Board. It is specifically argued that the impugned award is against the provisions of Clauses 12 and 13 of the agreement between the parties, which entitled the Board to reduce the scope of work and to make alternations in the original specifications, drawings and designs. Similarly, it is also argued on behalf of the Board that award of Rs.25,72,845/- on the basis of 15% loss on account of overheads and profit is perverse since, the claimant, being a company and maintaining accounts, had failed to prove even the normal profit which it earned and had not produced its accounts inspite of request having been made by the Board to the learned arbitrator. Lastly, it is argued on behalf of the Board that the learned arbitrator while awarding administrative costs and litigation charges at the rate of 7.5% of total cost has acted in conflict with the principles of jurisprudence since no evidence was led by the claimant in respect of such claims, and, despite having taken note of the fact that no evidence was there in support of such claims, learned arbitrator has proceeded to allow the same. With these submissions, it is prayed on behalf of the Board that the award passed by the learned arbitrator may be quashed and set aside.

6. On the contrary, the claimant, by filing reply to the petition at hand, has pleaded that the award has been passed on the basis of pleadings, claims and counter-claims and evidence, be it ocular or documentary, adduced on record by the respective parties. It is further argued by the claimant that the learned arbitrator is the final judge of both, questions of law and facts and this court has no jurisdiction to sit over the findings of

the learned arbitrator, in appeal. It is further argued on behalf of the claimant that choice, selection and appointment of arbitrator was the sole prerogative of the Board. It is further argued by Mr. P.S. Rana, learned counsel representing the claimant that the impugned award is perfectly in accordance with the public policy of India. Learned arbitrator is qualified and an expert in the field to adjudicate upon the claims. Fair and sufficient opportunity to lead defence has been afforded by the learned arbitrator to both the parties. While replying to the grounds of objections, it has been specifically denied by the claimant that the learned arbitrator has acted in a biased manner. Claimant has denied that the award under Claim No.1 is outside the scope of reference. It is argued by the claimant that it had revised the claim from Rs.17,789/- to Rs.48,322/- by giving details, which were not objected to by the Board and as such, learned arbitrator has rightly awarded a sum of Rs.37,626/- under the said claim. It is also argued by the claimant that the learned arbitrator had rightly not allowed the recoveries on account of income and sales taxes since it (Board) had failed to produce any document showing such recoveries deposited by it with the Tax authorities. It is also argued that since on 20.9.1999, the claimant had requested for disconnection of the electricity connection as such, learned arbitrator has rightly disallowed the electricity charges. It is argued on behalf of the claimant that since certificate was issued by the Engineer Incharge on 12.10.1999, as such, work is deemed to have been completed on said date, though the date of completion of work in the certificate has been omitted, but the certificate itself is sufficient to show that on 16.9.1999, work had been completed finally. Requirement of issuance of certified by the competent authority was merely a formality and as such, award of Rs.7,50,000/- has been rightly made by the learned arbitrator alongwith interest thereupon. Similarly, it has been argued on behalf of the claimant that award of Rs.4,89,482/- on account of escalation has been rightly made, which definitely is within the purview of arbitration. While arguing on the question of award on account of loss of profit, it is argued by Mr. Rana, learned counsel representing the clamant that the learned arbitrator, after considering the evidence and taking into consideration all the facts and circumstances of the case, has awarded 15% of anticipated profits. Mr. Rana strongly supported the award on account of grant of 7.5% of the total award amount, as litigation and administrative cost since, on account of the dillydallying attitude of the Board, arbitration proceedings could not be completed in time and the claimant had to attend many hearings and had to face litigation in this court on account of the petitions filed by the Board. With the aforesaid submissions, Mr. Rana, while espousing the cause of the claimant, prayed for dismissal of the arbitration petition with costs.

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

8. Before ascertaining correctness of aforesaid submissions having been made by the learned counsel for the parties vis-à-vis impugned Award passed by the learned Arbitrator, it would be apt to take note of judgment passed by Hon'ble Apex Court in **Oil & Natural Gas Corporation Limited** versus **Western Geco International Limited** (2014) 9 Supreme Court Cases 263, wherein Hon'ble Apex Court taking note of the judgment passed by the Hon'ble Apex Court in Oil & Natural Gas Corporation Limited versus Saw Pipes Limited (2003) 5 Supreme Court Cases 705, has held as under:-

> "34. It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and so also before us was that the award made by the arbitrators was in conflict with the "public policy of India" a ground recognized under Section 34(2)(b)(ii) (supra). The expression "Public Policy of India" fell for interpretation before this Court in ONGC Ltd.

v. Saw Pipes Ltd. (2003) 5 SCC 705 and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in the following words: (SCC pp.727-28)

> "31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case 1994 Supp(1) SCC 644, it is required to be held that the award could be set aside if it is patently illegal. The result would be — award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
>
> (b) the interest of India; or
>
> (c) justice or morality, or
>
> (d) in addition, if it is patently illegal.
>
> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

35. What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in Saw Pipes Ltd. (supra) does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi judicial determination lies in the fact that so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense

> acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge."

9. It clearly emerges from the aforesaid judgment that the concept of "public policy" connotes some matter which concerns public good and the public interest. Similarly, award/judgment/decision likely to adversely affect the administration of justice has been also termed to be against "public policy."

10. Reliance is also placed upon a judgment passed by Hon'ble Apex Court in **Hindustan Tea Company** v. **M/s K. Sashikant& Company and another**, AIR 1987 Supreme Court 81; wherein it has been held as under:-

> "Under the law, the arbitrator is made the final arbiter of the dispute between the parties. The award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate facts.
>
> Where the award which was a reasoned one was challenged on the ground that the arbitrator acted contrary to the provisions of Section 70 of the Contract Act, it was held that the same could not be set aside."

11. Similarly, Hon'ble Apex Court in **M/s Sudarsan Trading Company** v. **The Government of Kerala and another**, AIR 1989 Supreme Court 890, has held as under:-

> "It is not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator as to what impelled him to arrive at his conclusion. In the instant case the arbitrator has merely set out the claims and given the history of the claims and then awarded certain amount. He has not spoken his mind indicating why he has done what he has done; he has narrated only how he came to make the award. In the absence of any reasons for making the award, it is not open to the Court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator, cannot be challenged. Appraisement of evidence by the arbitrator is never a matter which the Court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisement of the evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the arbitrator."

12. Reference is also made to the judgment passed by the Hon'ble Apex Court in **McDermott International Inc**. v. **Burn Standard Company Limited and others** (2006) 11 Supreme Court Cases 181. The relevant paras of the judgment are reproduced as under:-

> "In terms of the 1996 Act, a departure was made so far as the jurisdiction of the court to set aside an arbitral award is concerned vis-a-vis the earlier Act. Whereas under Sections 30 and 33 of the 1940 Act, the power of the court was wide, Section 34 of the 1996 Act brings about certain changes envisaged thereunder. Section 30 of the Arbitration Act, 1940 did not contain the expression "error of law…". The same was added by judicial interpretation.
>
> While interpreting Section 30 of the 1940 Act, a question has been raised before the courts as to whether the principle of law applied by the arbitrator was (a) erroneous or otherwise or (b) wrong principle was applied. If,

> however, no dispute existed as on the date of invocation, the question could not have been gone into by the Arbitrator.
>
> The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.
>
> The arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law;(b) the interests of India; (c) justice or morality; or (d) if it is patently illegal or arbitrary. Such patent illegality, however, must go to the root of the matter. The public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Lastly where the Arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of Section 34 of the Act.
>
> What would constitute public policy is a matter dependant upon the nature of transaction and nature of statute. For the said purpose, the pleadings of the parties and the materials brought on record would be relevant to enable the court to judge what is in public good or public interest, and what would otherwise be injurious to the public good at the relevant point, as contradistinguished from the policy of a particular government."

13. It is quite apparent from the aforesaid exposition of law that scope of interference by Court is very limited while considering objections having been filed by the aggrieved party under S.34 of the Act. Award passed by the learned Arbitrator can be interfered with in case of a fraud or bias or violation of principles of natural justice. Interference, if any, on the ground of 'patent illegality' is only permissible, if the same goes to the root of the case. Violation should be so unfair and unreasonable as to shock the conscience of the Court. In the judgment referred herein above, it has been held by the Hon'ble Apex Court that what is to be constituted as 'public policy' is a matter dependent upon the transaction and nature of the statute, but the same should be so unfair and unreasonable as to shock the conscience of the Court, as has been observed herein above.

14. Similarly, there can not be any dispute, as has been repeatedly held by the Hon'ble Apex Court as well as this Court that the court, while deciding objections, if any, filed by the aggrieved party under S.34 of the Act, against the Award passed by an Arbitrator, does not sit in appeal over the findings returned by the learned Arbitrator and there can not be any reappraisal of evidence on the basis of which learned Arbitrator has passed the Award. Otherwise also, in terms of S. 34 of the Act, objections, if any, filed by the aggrieved party can be considered by the Court, if the Award is in any manner against the public policy, which certainly has to be liberally interpreted in view of the facts of the case.

15. Now, this court shall proceed to consider the facts of the instant case in light of the law discussed herein above and determine whether the impugned award is against the public policy of India as claimed on behalf of the objectors.

16. Careful perusal of the impugned award passed by the learned arbitrator clearly reveals that the arbitrator has carefully dealt with each and every argument advanced by Mr. Bhogal, learned Senior Advocate before this court. There is no force in the argument of Mr. Bhogal, learned Senior Advocate that the arbitrator has passed the award in a most cursory manner without looking into the material placed before him.

17. Having gone through the award passed by the arbitrator, this court has no hesitation to conclude that the arbitrator has dealt with each and every contention raised by either of the parties. Learned arbitrator, in a most meticulous manner before proceeding to decide the contentious issues between the parties, framed issues for deciding the same on the basis of pleadings adduced on record by the respective parties. Award further reveals that the learned arbitrator before adjudicating the claims and counter-claims filed by respective parties decided the issues and then proceeded to decide the claims and counter-claims. Though this court having seen the reasoning returned by the learned arbitrator, while accepting the claims of the respondent-claimant and rejecting the counter-claim filed by the objector-petitioner, sees no reason to elaborate upon the matter any further, but, even if contentions/submissions having been made by Mr. Bhogal, learned Senior Advocate representing the petitioner are tested/analyzed vis-à-vis reasoning assigned by the learned arbitrator in the impugned award, this court is not persuaded to conclude that the award, in any manner, is against the public policy of India, as has been argued by Mr. Bhogal, learned Senior Advocate. Mr. Bhogal, strenuously argued that the arbitrator while deciding claim No. 1 travelled beyond the scope of reference and erroneously allowed the claimant to amend its claim, which was originally made for Rs.17,789/- to Rs.48,322/-. If the reasoning assigned by the learned arbitrator for allowing the amendment is perused, this court finds that the claimant in its original claim had reserved right to revise its claim and accordingly, in the rejoinder, claimant revised the claim from Rs.17,789/- to Rs.48,322/-. Though the petitioner-objector took pleas of estoppel and Order 2 Rule 2 CPC before the learned arbitrator but the learned arbitrator, having carefully gone through the record rightly concluded that the objector-petitioner has not proved that amount of Rs.86,831/- is recoverable from the complainant, whereas evidence in support of claim for an amount of Rs.48,322/- is already on record. Finding returned qua aforesaid claim, further reveals that though the petitioner claimed that the recovery of income tax amount to Rs.15,978/- and sales tax amounting to Rs.14,525 has been done as per tariff and Rules and had denied that these amounts were non-recoverable, however, petitioner was unable to produce any documentary evidence in support of recoveries made by it in the 29th/final bill, and as such, learned arbitrator rightly held that recovery of Rs.15,978/- against income tax and Rs.14,525/- against sales tax have been wrongly made and claimant is entitled to receive the said amounts.

18. Mr. Bhogal, learned Senior Advocate further argued that the arbitrator, while allowing claims No. 3 and 4, relating to revision of amount withheld for not achieving the milestones and interest on amounts withheld for milestones till 31.3.2000, failed to appreciate the legal position that such claim was not arbitrable but, aforesaid argument having been advanced by Mr. Bhogal, is wholly untenable in view of the findings returned by the learned arbitrator. It is not in dispute that letter of intent was issued in favour of respondent-claimant vide No. HPSEB/DP/Ganwi-Tender-96-188-189 dated 4.12.1996, whereafter, agreement for a tender cost of Rs.4,23,22,375/- was executed. It is also not in dispute that time of completion of work was two years and date of completion of work was 6.1.1999. Record reveals that the work could not be completed within the original time period stipulated in the contract agreement, as such, Engineer-in-Chief, granted five extensions of time in favour of claimants from 6.1.1999 to 30.9.1999 and work was actually completed on 16.9.1999, which fact stands duly proved from the deviation statement

prepared by Assistant Engineer, Ganwi Construction Sub Division No. VII, HPSEB, Ganwi. Moreover, in the deviation statement, the Assistant Engineer has specifically mentioned the date of completion of work as "16.9.1999", which fact has not been contradicted by the Board, as has been categorically recorded by the learned arbitrator, while returning findings qua claims No.3 and 4. Since provision for extension of time for completion is provided in Clause 5 of the agreement. Clause 5 i.e. "EXTENSION OF TIME FOR COMPLETION" clearly provides that the time allowed for execution of the entire work as laid down in the scope of work/schedule of quantities shall be strictly observed by the contractor and shall be deemed to be the essence of the contract and completion time shall be 24 months to be reckoned after 15 days from signing of the contract agreement. As per Clause 5 b), no extension of time for the completion of work could be claimed by the contractor as a matter of right, however, if the contractor desires extension of time for completion of work on account of unavoidable circumstances, other than due to the default on the part of contractor in the execution of work or due to *force majeure,* contractor is required to apply in writing to the Engineer-in-Charge, within 15 days of the date of such hindrance, on account of which the contractor desires such extension, and the Board, on the recommendation of Engineer-in-Charge, may grant necessary extension of time, if in its opinion reasonable grounds have been shown therefor.

19. In the case at hand, Engineer-in-Charge i.e. Superintending Engineer, Ganwi Construction Circle, HPSEB, Jeori granted provisional time extension from 7.1.1999 to 30.9.1999, whereas, there is no provision in the contract agreement to provide such provisional time extension. Similarly, there is no provision in the contract agreement for granting of provisional extension of time for completion of work nor any rider could be put while granting extension of time. In the letters granting extensions of time, Engineer-in-Charge has nowhere stated that the delay in achieving the first milestone and second milestone was attributable to the contractor, therefore, observations of the Engineer-in-Charge in the letters granting extension of time, to the extent that, provisional extension of time for completion of work is without prejudice to the right of HPSEBL to recover liquidated damages in accordance with the provisions of Clause 2 of the contract agreement, has been rightly held to be illegal and without any jurisdiction by the learned arbitrator. Since the learned arbitral tribunal held power of petitioner/objector to recover liquidated damages in terms of Clause 2 of the contract agreement to be illegal and without any jurisdiction, Engineer-in-Charge had no jurisdiction to impose compensation of Rs.7,50,000/- for not achieving the milestone, as such, learned arbitral tribunal rightly held that it has jurisdiction to go into the question, whether the compensation imposed by the Engineer-in-Charge is legal or not, because, the learned arbitral tribunal/sole arbitrator, while doing so, has not gone into the question of quantum of compensation, rather, he has decided the question, whether the Engineer-in-Charge had the jurisdiction to impose the compensation. While returning aforesaid findings. Learned arbitral tribunal has rightly placed reliance upon the judgment reported in **M/s Aggarwal and Company** vs. **State of H.P.** 199(3) Shim. L.C. 94, wherein it has been held as under:

> "24. Whet the Apex Court held is that the matter as to amount of compensation to be levied under clause 2 of the agreement cannot be referred to arbitrator. In other words, the quantum of compensation levied under Clause 2 is not Arbitral. However, the competency of the authority imposing and assessing such amount of penalty/compensation can always be looked into by the arbitrator before allowing or disallowing such claim. In this regard, the following observations made by the apex court in **Vishwanath Sood**'s case (supra) are noteworthy:-

> "... the decision of the Superintending Engineer, it seems to us, is in the nature of considered decision which he has to arrive at after considering the various mitigating circumstances that may be pleaded by the contractor or his plea that he is not liable to pay compensation at all under this clause. In our opinion, the question regarding the amount of compensation leviable under Clause 2 has to be decided only by the Superintending Engineer and no one else.""

20. Similarly, this court finds no illegality or infirmity in the award made by the learned arbitrator on account of loss of profits for alleged misrepresentation of tender cost, because work was allotted on a tender cost of Rs.4,23,22,375/-, but, admittedly, petitioner got executed work of Rs.2,51,70,072/- from the claimant, as a result of which, claimant suffered loss of Rs. 42,88,076/- on account of anticipated profits at the rate of 25% of Rs.1,71,52,303/-.

21. Findings returned by the learned arbitrator qua aforesaid aspect of the matter, nowhere compel this court to agree with the contention of Mr. Bhogal, learned Senior Advocate that the contention raised by the petitioner with regard to aforesaid claim raised on behalf of the respondent-claimant has not been appreciated, rather, this court finds that the aforesaid claim has been decided by the arbitrator in light of the law laid down by this court in the judgment rendered in **R.K. Sood**vs. **Dr. Y.S. Parmar, University of Horticulture and Forestry**, 2001 SLC 127.

22. This court is also unable to agree with Mr. Bhogal, learned Senior Advocate that the learned arbitral tribunal, while awarding administrative cost and litigation charges at the rate of 7.5% of the total cost has acted in contravention with the principles of jurisprudence, because the learned arbitral tribunal has held the claimant entitled to 15% of the total claim value contrary to their claim of 20% of the total claim amount. Learned arbitrator, while awarding aforesaid amount has observed that though the claimant has not tendered any documentary evidence pertaining to the claim, yet it has spent a lot of time and money towards submitting documentary evidence and they had to depute senior officers to attend twenty four proceedings held by the learned arbitrator. Learned arbitrator has further held that since the petitioner-objector failed to settle the dispute in normal course and forced the claimant into arbitration proceedings, as such, claimant deserves to be compensated for the expenses incurred on this count. Needless to say, arbitration proceedings have been provided for speedy disposal of the disputes *inter se* parties and in case same are delayed, party responsible for the delay is liable to pay the litigation cost.

23. It would be appropriate to discuss a few of the judgments rendered by Hon'ble Apex Court and this court. In a judgment rendered by the Division Bench of this court in **Madho Singh Ahuja** vs. **H.P. Housing Board and another** decided on 9.5.2012, it has been held that the arbitrator can not assume jurisdiction beyond what has been conferred on him by an agreement and high court has no scope of re-appreciating the evidence.

24. Delhi High Court in **Delhi Development Authority** vs. **M/s. Bhardwaj Brothers**, 2014 AIR (Delhi) 147, has held that power to intervene must and should only be exercised sparingly within the framework of the Arbitration and Conciliation Act and it would be neither appropriate nor consonant for the court to lend assistance to a dissatisfied party by exercising appellate function over the arbitral awards. Delhi High Court in yet another judgment in **Rakesh Kumar and Company** vs. **Union of India**, FAO(OS) No. 273 of 2014 decided on 15.4.2015, refused to intervene since there was nothing manifest on the

face of the award so grave as to move the conscience of the court or resulted in grave miscarriage of justice

25. Hon'ble Apex Court in **P.R. Shah, Shares and Stock Broker (P) Ltd.** vs. **M/s. B.H.H. Securities (P) Ltd. and others**, (2012) 1 SCC 594 has held that court does not sit in appeal over award of arbitral tribunal by reassessing or re-appreciating evidence. In **Swan Gold Mining Ltd.** vs. **Hindustan Copper Ltd.** Civil Appeal No. 9048 of 2014, decided on 22.9.2014, it has been held by the Hon'ble Apex Court that the interpretation of agreement is a matter within the jurisdiction of the arbitrator. It has been specifically held that the court shall not substitute its interpretation for that of the arbitrator. Hon'ble Apex Court in **Sutlej Construction** vs. **Union Territory of Chandigarh**, (2018) 1 SCC 718, has held that since the arbitrator is a chosen judge of the parties, High Court is not justified in re-appreciating the evidence.

26. Hon'ble Apex Court in **M/s. Hyder Consulting (UK) Ltd.** vs. **Governor, State of Orissa,** (2015) 2 SCC 189, has held that interest on interest is not permissible under sub-section (7) of the S. 31 of the Act and as such, interest on interest cannot be awarded.

27. Hon'ble Apex Court in **State of Goa** v. **Praveen Enterprises**, (2012) 12 SCC 581, has also held that the claimant is not bound to restrict its claim to the claims already raised by him in the notice, unless arbitration agreement refers to specific disputes, but, claimant and respondent are entitled to make any claims or counter-claims and they are also entitled to add or amend the claims and counter-claims provided they are arbitrable and within limitation.

28. Having considered the facts of the case in light of the aforesaid exposition of law, this Court has no hesitation to conclude that the impugned Award, as has been assailed before this Court by way of objections under S.34 of the Act, is neither against public policy nor has been passed in violation of principles of jurisprudence. Perusal of the objections filed by the Board/objector suggests that neither there are any specific allegations that Award is against the public policy nor it has been clarified as to which finding or findings made by the learned Arbitrator is/are against the public policy, save and except general allegations that the Award is against express terms of the contract, unjust, unfair and unsustainable and patently illegal.

29. In view of the detailed discussion made herein above, this Court sees no reason to interfere in the impugned Award, which otherwise appears to be based upon proper appreciation of evidence. Needless to say that jurisdiction of the Courts is limited and Award can be set aside only if it is against public policy of India, but, in the case at hand, neither any material has been placed on record, nor any arguments have been raised on behalf of the objector to substantiate the fact that the impugned Award is against the public policy of India. Question of interpretation of agreement and its terms and sufficient evidence is /was well within domain of the learned Arbitrator as such, no grievance, if any, could be raised qua the same by either of the parties, as such, objections having been filed by the objector deserve to be dismissed being unsustainable in the eye of law.

30. Consequently, in view of above, this Court sees no valid reason to interfere with well reasoned award passed by the learned Arbitrator, as such, present petition is dismissed. Award passed by the learned arbitrator is upheld.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Ashwani Kumar …Petitioner
Versus
State of Himachal Pradesh …Respondent

CrMP(M) No. 1768 of 2018
Decided on: 08.01.2019

Code of Criminal Procedure, 1973 – Section 439 – Regular bail – Grant of – Circumstances – Petitioner accused of concealing dead body of wife of main accused 'V' allegedly in conspiracy with him – No allegation that petitioner conspired with 'V' in murdering latter's wife – He being accused of offences under sections 120-B and 201 of Indian Penal Code only – Offences bailable – His role cannot be equated with role of main accused – On facts, petitioner ordered to be released with conditions. (Paras 5 to 9)

For the petitioner: Mr. N.S.Chandel, Advocate.
For the respondent: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. R.P. Singh and Mr. Raju Ram Rahi, Deputy Advocate Generals.
Inspector Mukesh Kumar, SHP/State CID Crime, District Shimla, H.P., present in person.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge. (oral)

Petitioner has preferred present petition under Section 439 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC'), for grant of regular bail in case FIR No. 192 of 2016, dated 7th December, 2016, registered under Sections 302, 201, 120-B of the Indian Penal Code (hereinafter referred to as 'IPC'), registered at Police Station Nagrota Bagwan, District Kangra, H.P.

2. Status report stands filed. Record has also been produced, perusal whereof reveals that the petitioners has been arrested in the present case on 23rd May, 2018, for entering into criminal conspiracy with the main accused Vinay Kumar, for disappearing the dead body of the wife of Vinay Kumar, who was murdered by Vinay Kumar on 29th July, 2016.

3. Prosecution case in brief is that deceased Sharda Devi wife of Vinay Kumar (main accused) was living in her parental house, separate from her husband along with her two children. She was awarded maintenance by the Court from her husband (main accused Vinay Kumar). On 27th July, 2016, she had left her residence to receive the maintenance amount from her husband. Next date of hearing in the maintenance case was 2nd August, 2016, but she went on missing prior to the said date, whereupon her father had lodged the missing report and later on, a case under Section 365 of IPC was registered in Police Station NagrotaBagwan. Later on, the case was handed over to the State CID and during investigation, on suspicion, polygraph test of accused Vinay Kumar was conducted to find clues from him, resulting into interrogation of Ashwani Kumar and Vinay Kumar and it was revealed that on 29th July, 2016, at at about 7/7.30 PM, deceased Sharda Devi was taken by accused, to the cowshed of her sister, located at isolated place MuhaalkadChahadi, where

they consumed country liquor and thereafter, accused Vinay Kumar asked Sharda Devi to bring water from the nearby small canal and when she was fetching water, she was pushed and thrown into the canal by accused Vinay Kumar and after some distance he took out her dead body from canal and called his nephew (present petitioner) Ashwani Kumar and both of them had buried the dead body of Sharda Devi in the field. After some days, present petitioner Ashwani Kumar, again visited the spot and found that wild animals had removed some soil from the spot, as such during that night, both accused again visited the spot and disinterred the body and buried it again at different place after digging another pit.

4. On the basis of evidence collected by the Investigating Agency, challan under Section 302, 201, 120-B of IPC has been presented against the main accused Vinay Kumar, whereas, challan against the present petitioner has been presented under Section 201 read with Section 120-B of IPC.

5. For the commission of offence under Section 201 of IPC, a maximum sentence provided under Code is 7 years. The offence under Section 201 of IPC is cognizable, but bailable and the offence under Section 120-B of IPC would be cognizable or non-cognizable and bailable or non-bailable, according to the offence, which is the object of conspiracy and punishment under Section 120-B of IPC, will also be according to the offence, which is the object of the conspiracy.

6. As is evident from the challan, presented in the Court, by the Investigating Agency, the petitioner has been subjected to the trial, for commission of the offence under Section 201 read with Section 120-B of IPC. Principles applicable to Sections 437 and 438 Cr.P.C. are also applicable for the consideration of a bail petition under Section 439 Cr.P.C. Under Section 437 Cr.P.C., it is provided that the person detained for commission of any non-bailable offence, can be released on bail and the exception against the same has been provided in it, on the ground, if it appears to the Court on reasonable grounds for believing that he has been found guilty of an offence punishable with death or imprisonment of life or he is a previous convict of an offence punishable with death imprisonment or life or imprisonment of 7 years or more or he had been previously convicted for offence or more occasions of a cognizable offence punishable with imprisonment of three years or more. The charge sheet presented against the petitioner does not refer involvement of the petitioner in any case as provided in exceptions under Section 437 Cr.P.C.

7. Undoubtedly, petitioner is involved in henious crime. However, his role cannot be equated with the role of the main accused Vinay Kumar, who has committed a cold-blooded murder of his wife, to avoid the payment of maintenance and has caused the disappearance of evidence in a planned manner, with the help of the present petitioner/accused. Present petitioner/accused is nephew of the main accused and definitely, he was influenced by the main accused. Therefore, the present petitioner is to be treated on different footing, than the main accused.

8. Considering the entire facts and circumstances of the case and role of petitioner and also challan presented in Court against him, petitioner is ordered to be released on bail, in case FIR No. 192 of 2016, dated 7th December, 2016, registered under Sections 302, 201, 120-B of the Indian Penal Code, registered at Police Station NagrotaBagwan, District Kangra, H.P., if not required in any other case, subject to his furnishing personal bond in the sum of ₹ 50,000/- with one surety in the like amount, to the satisfaction of the trial Court.

9. The bail shall be subject to further following conditions:-

(i) *That the petitioner shall make himself available to the police or any other investigating agency or Court in the present case as and when required;*

(ii) *That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to Court or to any police officer or tamper with the evidence. He shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;*

(iii) *That he shall not obstruct the smooth progress of the trial;*

(iv) *That the petitioner shall not commit the offence similar to the offence to which he is accused or suspected;*

(v) *That the petitioner shall not misuse his liberty in any manner;*

(vi) *That the petitioner shall not jump over the bail and also shall not leave the territory of India without information and he shall inform about his mobile/contact number and shall keep on informing about change of address/ mobile/contact number, if any;*

10. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice.

11. In case the petitioner violates any condition imposed upon him, his bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail in accordance with law.

12. Observations made in this petition hereinbefore shall not affect the merits of the case in any manner and will strictly be confined for the disposal of this bail application.

13. Petition stands disposed of in aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Arun Dev Bisht ...Petitioner
Versus
State of H.P. ...Respondent

CrMMO No. 560 of 2018
Decided on: 9.1.2019

Code of Criminal Procedure, 1973 - Sections 169 & 173(2)(ii) – Closure report - Objections thereto by *de facto* complainant- Whether maintainable? – Anti-corruption Bureau registering FIR on information of complainant – Police filing closure report and Special Judge issuing notice to Superintendent of Police (informant) on whose statement FIR was registered – *De-facto* complainant approaching High Court and seeking leave to file objections to closure report pending before Special Judge of which he had knowledge - Held, petitioner should have approached Special Judge and filed objections before him - For filing

objections, leave of High Court not required even no notice of closure report was required to be issued to him by Special Judge - Petition dismissed - **Bhagwant Singh versus Commissioner of Police , 1985 (2) SCC 537** relied upon. (Paras 5-7)

Case referred:
Bhagwant Singh vs. Commissioner of Police and Another (1985) 2 SCC 537

For the petitioner:	Ms. Mr.Vijender Katoch, Advocate.
For the respondent:	Mr.Ashok Sharma, Advocate General, Mr. Shiv Pal Manhans, Additional Advocate General, Mr.R.P.Singh and Mr. Raju Ram Rahi, Deputy Advocate General, for the respondent.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.*(Oral)*

Present petition has been filed, seeking permission to file objection to the closure report, filed by the State Vigilance, in case F.I.R. No.9 of 2013, dated 17th October, 2013, registered in Police Station State Vigilance &Anti CorruptionBureaou, South Range, Shimla, H.P., on the ground that the F.I.R. was lodged by Mr.Kushal Sharma, the then Superintendent of Police, Vigilance, on the information supplied by the petitioner and as per Section 173 (2)(ii) Cr.P.C., the Investigating Officer has also to communicate about the action taken by him on the F.I.R. to the person, if any, by whom the information relating to the commission of offence was first given.

2. In present petition, the petitioner has submitted that on filing of closure report, a notice was issued by learned Special Judge (Forest), Shimla, H.P., to the complainant Kushal Sharma (the then S.P. Vigilance), for 30th November, 2018 and on that day, after recording his statement, the closure report was listed for consideration on 20th December, 2018. Present petition has been filed on 11th December, 2018 i.e. before the date fixed for consideration and closure report, by the Special Judge, Forest, Shimla, H.P.

3. The provisions of Section 173 (2) (ii) Cr.P.C., enjoins duty upon the officer, to communicate the person, by whom the information relating to the commission of offence was first given so as enabling such informant, if intends to do so, may join the proceedings of closure report and file objection, if any, before the concerned Magistrate/Judge.

4. In present case, as evident from the petition filed by the petitioner, he was very much aware about filing of closure report and also about the dates, for which it was listed for recording statement/objection of the complainant as well as consideration thereof. But the petitioner, instead of preferring his objections by joining proceedings before the Special Judge (Forest), Shimla, has opted for filing of present petition, seeking permission to file objections to the closure report filed by the State Vigilance.

5. It is not a case that closure proceedings have been completed or learned Special Judge has declined to hear, the petitioner who claims himself to be first informant. But here is a petitioner who, despite having knowledge of pendency and dates of hearing of closure proceedings, has not preferred to approach the Special Judge. In fact, instead of filing present petition, petitioner should have approached the concerned Court, where the closure report filed by the Investigating Agency is under consideration and should have preferred his objection against closure, if any.

6. For filing objection before the Magistrate/Special Judge by informant, no permission of this Court is required, even if the Magistrate or Special Judge has not issued notice to him. Therefore, petitioner, if advised so and intends to prefer objection, may approach learned Special Judge.

7. The point in issue is no longer *res-integra*, as the apex Court in ***Bhagwant Singh Versus Commissioner of Police and Another (1985) 2 Supreme Court Cases 537***, has held as under:-

> 5. " *The position may however, be a little different when we consider the question whether the injured person or a relative of the deceased, who is not the informant, is entitled to notice when the report comes up for consideration by the Magistrate. We cannot spell out either from the provisions of the Code of Criminal Procedure, 1973 or from the principles of natural justice, any obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased for providing such person an opportunity to be heard at the time of consideration of the report, unless such person is the informant who has lodged the First Information Report. But even if such person is not entitled to notice from the Magistrate, he can appear before the Magistrate and make his submissions when the report is considered by the Magistrate for the purpose of deciding what action he should take on the report. The injured person or any relative of the deceased, though not entitled to notice from the Magistrate, has locus to appear before the Magistrate at the time of consideration of the report, if he otherwise comes to know that the report is going to be considered by the Magistrate and if he wants to make his submissions in regard to the report, the Magistrate is bound to hear him. We may also observe that even though the Magistrate is not bound to give notice of the hearing fixed for consideration of the report to the injured person or to any relative of the deceased, he may, in the exercise of his discretion, if he so thinks fit, give such notice to the injured person or to any particular relative or relatives of the deceased, but not giving of such notice will not have any invaliding effect on the order which may be made by the Magistrate on a consideration of the report*".

8. In view of above discussion, present petition, being unwarranted, is not maintainable and is dismissed accordingly. Record of the trial Court be sent back forthwith for listing the closure proceeding before learned Special Judge (F) Shimla on 18th January, 2019, whereafter he shall proceed further in accordance with Law.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Sandeep ...Petitioner
Versus
State of Himachal Pradesh. ...Respondent

Cr.M.P (M) No. 1608 of 2018
Reserved on: 28.12.2018
Date of decision: 11.01.2019

Code of Criminal Procedure, 1973 – Section 439 – **Narcotic Drugs and Psychotropic Substances Act, 1985 –** Sections 37 & 50 - Regular bail – Grant of – Rigors - Police recovering 2.689 kg charas from bag in possession of accused - Accused seeking bail on grounds of pure resin contents of contraband bringing it into less than commercial quantity - Accused also pointing to discrepancies in prosecution case including non-compliance with Section 50 of Act and complainant police officer himself investigating case - State opposing bail and contending that recovered stuff falling in commercial quantity and rigors of Section 37 of Act are attracted - Held, in absence of evidence as to neutral material present in recovered stuff, entire contraband to be considered for determining its quantity - Contraband recovered from accused falling in commercial quantity – Discrepancies, if any, and effect of complainant himself investigating case not to be looked into at stage of consideration of bail - Recovery since from bag, Section 50 of Act also not applicable - Application rejected - **State Vs. Mahboob Khan reported in 2013 (3) HLR (FB) 1834** relied upon. (Paras 5, 16 -19, 21, 23, 26, 31 & 35)

Cases referred:

Arif Khan @ Agha Khan vs. State of Uttrakhand, 2018 (2) RCR Criminal 931
E Michalraj vs. Intelligence Officer, Narcotic Central Bureau, 2008 (5) SCC 160
Harjeet Singh vs. State of Punjab, 2011(4) SCC 441
Madan Lal vs. State of H.P. Latest HLJ, 2018 HP (98)
Mattulal vs. Radhe Lal, AIR 1974 SC 1596
Mohan Lal vs. State of Punjab, AIR 2018 SC 2853
N.S. Giri vs. Corporation of City of Mangalore, (1999) 4 SCC697
Sita Ram vs. Satvinder Singh & another, Latest HLJ 2008 (HP) 1110
State vs. Mahboob Khan, 2013 (3) HLR (FB) 1834

For the Petitioner:	Mr. Vipin Pandit and Mr.Dinesh Sharma, Advocates.
For the Respondent:	Mr.Shiv Pal Manhans, Additional Advocate General, with Mr.R.P. Singh and Mr.Raju Ram Rahi, Deputy Advocate Generals. ASI Yadav Chand, Police Station, Parwanoo, present in person with record.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Present petition has been filed seeking regular bail under Section 439 Cr.P.C. in case FIR No. 27/16, dated 24.3.2016 under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (herein after referred to as NDPS Act in short) registered at Police Station Parwanoo, District H.P.. The petitioner is in custody since 24.3.2016 for alleged recovery of 2.689 kilograms charas from his conscious possession in Room No. 101, in Hotel Paradise, Sector-3, Parwanoo at 11:43 A.M. on 24.3.2016.

2. Prosecution case in brief is that on 24.3.2016 at about 11:30 A.M. Inspector Minakshi, SHO, Police Station Parwanoo had received information on her mobile phone that a person, namely, Sandeep Kumar involved in business of narcotic drugs, is staying in room No. 101 of Hotel Paradise, Sector-3, Parwanoo. Informant had also given identity of the person along with further details of his wearing and tattoos on his hand. The information was reliable and therefore, reasons to believe were reduced into writing under Section 42(2)

of NDPS Act. As there was possibility of disappearance of the accused as well the contraband during the process of obtaining search warrant on account of distance from the Court, therefore, information was sent to SDPO Parwanoo and in the meanwhile, SHO Meenakshi Shah along with Police party raided the hotel Paradise and before searching room No.101, she had associated Ankit Sharma, Hotel Service Boy and Arvind Jetily owner of the hotel by joining them in the raiding party.

3. On the basis of information, room No 101 was knocked and on opening of the door, four persons, consuming liquor were found there and the person having appearance and wearing in consonance with the information received, was also there, who on inquiry had disclosed his name and address as familiar to identity of petitioner. Other three persons, namely, Ravinder Kumar, Ajay Kumar and Ved Parkash were also present there. Personal search of these three persons were conducted after complying with Section 50 of the NDPS Act, but nothing incriminatory was found from their person.

4. Petitioner Sandeep Kumar was sitting on double bed and one yellow-pink bag with logo AG Basmoti rice having zip to close it was also with him. On searching this bag, one small pink purse bearing logo of Bansal Jeweler was found in it, but no illicit article was found therein. However, in another bag, black sticks of some material were found, which after smelling, were identified as charas. The said contraband was weighed in the electronic balance brought with investigating kit and it was found to be 2.689 kilograms. The same was seized vide memo of seizure. Other investigating formalities including filling up of NCB forms in triplicate and sealing the recovered contraband were completed and thereafter accused persons were arrested. Since then they are in custody.

5. Plea for granting bail to the petitioner has been canvassed on the ground that even if prosecution story is believed in toto, then also contraband alleged to have been recovered from the petitioner, at the best, applying ratio of law laid down by the Apex Court in **E Michalraj Vs Intelligence Officer, Narcotic Central Bureau, *2008 (5) SCC 160***, is a small quantity, as according to the chemical analysis report of State Forensic Science Laboratory, quantity of purified resin in the alleged recovered charas has been found to be 21.31% w/w, meaning thereby that alleged recovered charas is about 574 grams and therefore, rigors of Section 37 are not applicable in the present case.

6. Learned counsel for the petitioner has also relied upon the judgment rendered by co-ordinate Bench of this High Court in Cr.M.P.(M) No. 1505 of 2018 titled Sewak Ram Vs. State of H.P. decided on 22.11.2018, Cr.M.P. (M) No. 1267 of 2018 titled Surender Vs. State of H.P. decided on 5.11.2018, Cr.M.P. (M) No. 667 of 2018 titled as Suresh Kumar @ Shivam Sharma Vs. State of H.P. decided on 20.6.2018, Cr.M.P.(M) No.1765 of 2018 titled as Nageshwar Dipta Vs. State of H.P. decided on 28.12.2018, Cr.M.P.(M) No.1625 of 2018 titled as Narayan Singh Vs. State of H.P. decided on 20.12.2018, Cr.M.P.(M) Nos.1777 and 1778 of 2018, titled as Bresati Devi Vs. State of H.P. and Pawan Kumar Vs. State of H.P. decided on 27.12.2018, Cr.M.P.(M) No. 1328 of 2018 titled as Jaswant Singh Vs. State of H.P. decided on 25.10.2018, wherein after relying upon E. Michalraj case (supra), petitioners therein have been enlarged on bail for alleged commission of similar offence.

7. Relying upon a decision dated 21.8.2018 passed in CRM-M No. 35080 of 2018, titled as Rajvir Singh @ Raju Versus State of Punjab, rendered by High Court of Punjab and Haryana, wherein applying the ratio of law laid down by the Apex Court in ***Mohan Lal Vs. State of Punjab, AIR 2018 SC 2853*** and ***Arif Khan @ Agha Khan Vs. State of Uttrakhand, 2018 (2) RCR Criminal 931,*** it is canvassed that in present case, complainant as well as Investigating Officer is one and the same person, which has vitiated

the trial and there is also non-compliance of Section 50 of the NDPS Act and thus, in view of ratio of Mohan Lal's case and Arif Khan's case, petitioner is entitled for bail.

8. Learned counsel for the petitioner has also pointed out certain discrepancies in the evidence, relied upon the prosecution for framing the petitioner for commission of alleged offence, which are (a) as per recovery memo prepared during search, petitioner Sandeep Kumar was found in possession of a yellow-pink bag bearing logo A.G. Basmati rice having zip, wherefrom the contraband was allegedly recovered and the same bag was seized and was sent for chemical examination in the same bag, however, in the FSL report in description, bag containing charas has been mentioned as yellow-pink and multicolored zip carry bag, which is different from the bag mentioned in the recovery memo; (b) in rapat No. 53 dated 24.3.2016, recorded at 8:47 P.M., MHC has stated that case property along with sample seal "H" was deposited in the malkhana, whereas, as per recovery memo contraband was sealed with seal "V"; (c) as per rapat No. 53, the case property was deposited in Malkhana at 8:47 P.M., whereas in NCB form, date, time and place of seizing is mentioned as 24.3.2016 at 2:50 P.M. in Paradise Hotel, Sector-3 Parwanoo and there is a long gap of 6 hours between the seizure and deposit of the contraband in Malkhana, which renders the prosecution case doubtful; (d) as per logbook of Police vehicle, used during the investigation by Inspector Meenakshi, on 24.3.2016, the said vehicle was used for investigation in the case FIR No. 27/16 (present case) from 11:43 A.M. to 6:28 P.M. and vehicle had reached back in Police Station at 6:28 PM along with Police party, the gap between 6:28 PM and 8:47 PM, i.e. after arrival till deposit of case property in Malkhana is also unexplained; (e) in rapat No. 21, it is mentioned that a person namely Sandeep was staying in Hotel Paradise in Room No. 101, however, in extract of hotel register at entry No. 833, one Ashu from Parwanoo has been shown to be occupant of room No. 101 since 20.3.2016 to 21.3.2016, whereas against entry No. 829 pertaining to Sandeep, there is cutting and rewriting by changing room number from 105 to 101 and date from 20.3.2016 to 21.3.2016. It is contended that all these discrepancies establish that the documents have been fabricated for roping the petitioner in false case.

9. It is also canvassed that in view of reference made to larger bench in Hira Singh and another vs. Union of India and another (2017) 8 SCC 162, petitioner is entitled for bail.

10. Lastly relying upon judgment of coordinate Bench in ***Madan Lal Vs. State of H.P. Latest HLJ, 2018 HP (98)***, it has been canvassed that object of bail is to secure appearance of the accused person at the trial by reasonable amount of bail and the object of bail is neither preventive nor punitive and it is further submitted that the petitioner is permanent resident of Himachal Pradesh, there is no possibility of jumping over the bail by him and thus in the facts and circumstances canvassed herein above, he is entitled for bail.

11. Mr.R.P. Singh, learned Deputy Advocate General has opposed the release of petitioner on bail at this stage on the ground that quantity of the contraband recovered from the petitioner is a huge quantity and Section 37 of NDPS Act, dis-entitle the petitioner from availing the bail and huge quantity recovered from the petitioner establishes that he was indulging in supplying of charas, causing irreparable loss to the society at large, particularly young generation and that the ratio of E Michalraj case is not applicable in present case in view of observations of the Apex Court in **Harjeet Singh vs. State of Punjab reported in 2011(4) SCC 441** case, as contraband involved in E Michalraj's case was opium derivative, whereas in present case recovered contraband is charas and the issue with respect to the charas stands finally determined by the Full Bench of this Court in **State Vs. Mahboob Khan reported in 2013 (3) HLR (FB) 1834**, which has not been overruled or disturbed by any subsequent judgment of the Apex Court and further that trial is at final stage and all

witnesses except two, stand examined and the case is fixed for recording of remaining evidence.

12. It is settled exposition of law that no straight jacket formula can be devised for grant or refusal of bail and each case is to be decided on the basis of its peculiar facts and circumstances, as all circumstances and situations of future cannot be quantified and qualified and therefore, each and every case is to be decided on its own merit.

13. Some of the principles evolved in various pronouncements of the apex Court are as under:

1. Grant of bail is general rule and putting a person in jail or in a prison or in correction home during trial is an exception and presumption of innocence, i.e. person is believed to be innocent until found guilty is fundamental postulate of criminal jurisprudence. But, these principles are not applicable in cases where there is reverse onus and/or statutory presumption with regard to commission of offence. Such cases are to be dealt with differently keeping in view statutory presumption and reverse onus provided under the relevant statute. (See *Dataram Singh versus State of Uttar Pradesh and another, (2018) 3 SCC 22, para 1)*
2. While making a general statement of law that the accused is innocent, till proved guilty, the statutory provisions of relevant Act, like Section 29 of the POCSO Act, have to be taken into consideration which provides for presumption as to commission of any offence under Sections 3, 5, 7 and 9 of the Act. (See *State of Bihar versus Rajballav Prasad alias Rajballav Prasad Yadav alias Rajballabh Yadav, (2017) 2 SCC 178, para 22)*
3. Each criminal case presents its own peculiar factual scenario and, therefore, certain grounds peculiar to a particular case may have to be taken into account by the Court. The Court has only to opine as to whether there is *prima facie* case against the accused. The Court must not undertake meticulous examination of the evidence collected by the police and comment upon the same. Such assessment of evidence and premature comments are likely to deprive the accused of a fair trial. (See *Kanwar Singh Meena versus State of Rajasthan and another, (2012) 12 SCC 180)*
4. A bail application is not to be entertained on the basis of certain observations made in a different context. There has to be application of mind and appreciation of the factual score and understanding of the pronouncements in the field. (See *Virupakshappa Gouda and another versus State of Karnataka and another, (2017) 5 SCC 406, para 14)*
5. It has also to be kept in mind that for the purpose of granting bail, the legislature has used the words “reasonable grounds for believing” instead of “the evidence” which means the court dealing with the grant of bail can only satisfy itself as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt. (See *Virupakshappa Gouda and another versus State of Karnataka and another, (2017) 5 SCC 406, para 16; CBI versus Vijay Sai Reddy, (2013) 7 SCC 452)*

6. The Courts are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bedrock of the constitutional right and accentuated further on human rights principle. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilised society. It is a cardinal value on which the civilisation rests. It cannot be allowed to be paralysed and immobilised. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. [The] society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order. Accent on individual liberty cannot be pyramided to that extent which would bring chaos and anarchy to a society. A society expects responsibility and accountability from its members, and it desires that the citizens should obey the law, respecting it as a cherished social norm. No individual can make an attempt to create a concavity in the stem of social stream. It is impermissible. Therefore, when an individual behaves in a disharmonious manner ushering in the disorderly things which the society disapproves, the legal consequences are bound to follow. At that stage, the court has a duty. It cannot abandon its sacrosanct obligation and pass an order at its own whim or caprice. It has to be guided by the established parameters of law. (See *Neeru Yadav versus State of U.P., (2014) 6 SCC 508, para 16; Rakesh Ranjan Yadav versus CBI, (2007) 1 SCC 70, para 16; Masroor versus State of U.P., (2009) 14 SCC 286, para 15; Ash Mohammad versus Shiv Raj Singh alias Lalla Babu and another, (2012) 9 SCC 446, paras 10 & 25; Chandrakeshwar Prasad alias Chandu Babu versus State of Bihar and another, (2016) 9 SCC 443 paras 10, 11)*

7. Detailed examination of evidence and elaborate documentation of merits of the case are to be avoided. (See *Puran versus Rambilas and another, (2001) 6 SCC 338, para 8; Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528:* (SCC pp. 535-36, para 11); *Vinod Bhandari versus State of Madhya Pradesh, (2016) 15 SCC 389, para 13; Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 2.)* Consideration of details of the evidence is not a relevant consideration. While it is necessary to consider the *prima facie* case, an exhaustive exploration of the merits of the case should be avoided by refraining from considering the merits of material/evidence collected by the prosecution. (See *Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129, para 15; and Criminal Appeal No. 1175 of 2018, titled The State of Orissa versus Mahimananda Mishra, decided on 18th September, 2018)*

8. It is not necessary to go into the correctness or otherwise of the allegations made against the accused as this is a subject matter to be dealt with by the trial Judge. (See *Dataram Singh versus State of Uttar Pradesh and another, (2018) 3 SCC 22, para 16)*

9. Where *prima facie* involvement of the accused is apparent, material contradictions in the charge sheet are required to be tested at the time of

trial and not at the time of consideration of grant of bail. (See *Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 28)*

10. Probability or improbability of the prosecution version has to be judged based on the material available to the court at the time when bail is considered and not on the basis of discrepancies. (See *Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129, para 21)*

11. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course and reasons for grant of bail in cases involving serious offences should be given. (See *Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528:* (SCC pp. 535-36, para 11); *Dipak Shubhashchandra Mehta versus Central Bureau of Investigation and another, (2012) 4 SCC 134, para 32; Vinod Bhandari versus State of Madhya Pradesh, (2016) 15 SCC 389, para13; Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 29)*

12. At the time of assigning reasons in order to grant/refuse bail, there should not be discussion of merits and demerits of the evidence. (See *State of Bihar versus Rajballav Prasad alias Rajballav Prasad Yadav alias Rajballabh Yadav, (2017) 2 SCC 178, para 15)*

13. Giving reasons is different from discussing evidence/merits and demerits. (See *Puran versus Rambilas and another, (2001) 6 SCC 338, para 8; State of Bihar versus Rajballav Prasad alias Rajballav Prasad Yadav alias Rajballabh Yadav, (2017) 2 SCC 178, para 15)*

14. Under Section 439 CrPC, the Sessions Court and the High Court has concurrent jurisdiction to grant bail. Therefore, an application filed before the High Court under Section 439 CPC, after rejection of an application filed before Sessions Court under the said Section, is definitely a successive application and is not a revision or appeal against rejection of bail application by the Sessions Court.

15. An accused has a right to make successive applications for grant of bail, the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications. (See *Lt. Col. Prasad Shrikant Purohit versus State of Maharashtra, (2018) 11 SCC 458, para 30)*

16. The period of incarceration by itself would not entitle the accused to be enlarged on bail. (See *Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129, para 24; GobarbhaiNaranbhaiSingala versus State of Gujarat (2008) 3 SCC 775, para 22 and Ram Govind Upadhyay versus Sudarshan Singh, (2002) 3 SCC 598, para 9)*

17. Filing of charge sheet establishes that after due investigation the investigating agency, having found materials, has placed the charge-sheet for trial of the accused persons. (See *Virupakshappa Gouda and another versus State of Karnataka and another, (2017) 5 SCC 406, para 12)*

14. The relevant factors to be kept in mind at the time of consideration of bail applications are as follows:

(1) Satisfaction of the Court in support of the charge as to whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(2) Nature and gravity of the accusation/ charge;

(3) Seriousness of the offence/crime and severity of the punishment in the event of conviction;

(4) Nature and character of supportive evidence;

(5) Character, conduct, behaviour, means, position and standing of the accused;

(6) The Courts must evaluate the entire available material against the accused very carefully; circumstances which are peculiar to the accused and the Court must also clearly comprehend the exact role of the accused in the case;

(7) The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(8) Position and status of accused with reference to the victim and witnesses to assess the impact that release of accused may make on the prosecution witnesses and reasonable apprehension of the witnesses being influenced or tampered with or apprehension of threat to the complainant/ witnesses and possibility of obstructing the course of justice;

(9) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(10) likelihood and possibility of the accused's likelihood to repeat similar or the other offences;

(11) A reasonable possibility of the presence of the accused not being secured at the trial and danger of the accused absconding or fleeing from justice;

(12) Impact of grant of bail on the society and danger, of course, of justice being thwarted by grant of bail affecting the larger interest of the public or the State;

(13) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(14) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(15) Whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(16) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail;

(17) No doubt, this list is not exhaustive. There are no hard and fast rules regarding grant or refusal of bail, each case has to be considered on its

own merits. The matter always calls for judicious exercise of discretion by the Court.

(See - *Gurcharan Singh v. State (Delhi Admn.) (1978) 1 SCC 118; Gurbaksh Singh Sibbia versus State of Punjab, (1980) 2 SCC 565; Prahlad Singh Bhati v. State (NCT of Delhi) (2001) 4 SCC 280; Puran v. Rambilas (2001) 6 SCC 338; Ram Govind Upadhyay v. Sudarshan Singh (2002) 3 SCC 598; Chaman Lal versus State of U.P. and another, (2004) 7 SCC 525; Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528, para 11); Jayendra Saraswathi Swamigal v. State of T.N., (2005) 2 SCC 13, para 16); State of U.P. v. Amarmani Tripathi, (2005) 8 SCC 21, para 18; Prashanta Kumar Sarkar versus Ashis Chatterjee and another, (2010) 14 SCC 496; SiddharamSatlingappaMhetre versus State of Maharashtra and others, (2011) 1 SCC 694; Prakash Kadam versus Ramprasad Vishwanath Gupta, (2011) 6 SCC 189; Kanwar Singh Meena versus State of Rajasthan and another, (2012) 12 SCC 180; Anil Kumar Yadav versus State (NCT of Delhi) and another, (2018) 12 SCC 129; Criminal Appeal No. 1175 of 2018, titled The State of Orissa versus Mahimananda Mishra, decided on 18th September, 2018)".*

15. In present case, alleged recovery of 2.689 kilograms charas is involved. Section 37 of NDPS Act reads as under:-

> "37. Offences to be cognizable and non-bailable
>
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for [offences under section19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) the limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

16. Section 37(1) (b) starts with negative expression and mandates that no person involving in the offence related to the commercial quantity of contraband shall be released on bail or on his own bond, unless conditions provided therein are fulfilled and one of these conditions is that where Public Prosecutor opposes the application, the Court should satisfy that there are reasonable grounds for believing that the persons is not guilty of such offence. In present case, though counsel for the petitioner has raised issue of certain discrepancies in the evidence relied upon by the prosecution, but at the same time, fact remains that all discrepancies referred by him are on the basis of documents relied upon by the prosecution and supplied with the challan. There is no material before this Court, so as to verify that whether all these discrepancies were put to the concerned

prosecution witnesses or not and further even, had such material been before this Court, in view of principles laid down by the Apex Court to be considered at the time of grant of bail, it would not have been appropriate for this Court to evaluate the merit of the evidence for granting the bail, more particularly keeping in view the stage of the trial, as stated supra, the case is listed for recording of remaining two witnesses. In my opinion, in absence of material to substantiate the false implication on the basis of evidence on record, I do not find these discrepancies to be material so as to enlarge the petitioner on bail at this stage, as discrepancy with regard to description of carry bag from which the contraband has been allegedly recovered, is not contrary, but rather supplementary to each other, as description has been recorded by two different persons having different sense of observation and in description given on chemical analysis report contains additional information. So far as discrepancy with regard to seal, time gap, entries in log book and entries in hotel record, are concerned, I am refraining from making any observation on merit, as the said discrepancies, if any, are to be explained by the concerned prosecution witnesses whose statement are neither before me nor these discrepancies pointed out, in itself, are sufficient to disbelieve the prosecution story.

17. The recovery in present case is from the bag and not from the person of the petitioner, for which purpose Section 50 of the NDPS Act was not applicable. Therefore, discrepancy pointed out in the notice under Section 50 of the NDPS Act given to petitioner Sandeep may not have bearing on the recovery of contraband. However, that question based on rival pleas of prosecution and the accused, referring the pronouncements of the Apex Court, is required to be considered by the trial Court and therefore, applicability of verdict of the Apex Court in Arif Khan's case is an issue to be considered by the trial Court, as the material before me does not contemplate ex-facie that no case is made out.

18. Similarly, applicability and effect of judgement of the Apex Court case law in Mohan Lal's case is to be considered on the basis of evidence on record. This Court at the time of considering the bail application, that too at the fag end of the trial, is not expected to evaluate evidence on merits.

19. In E Michalraj's case, 4.07 kilograms Heroin was recovered from the possession of accused therein and on the basis of percentage of the purity of such heroin, reported by the laboratory, the said quantity was considered to be 60 grams and the accused was punished accordingly on the basis of percentage of purity of heroin which is an opium derivative, as defined under Section 2(xvi) (d) of NDPS Act, which reads as under:-

> "Opium derivative" means-
>
> (a) medicinal opium, that is, opium which has undergone the processes necessary to adapt it for medicinal use in accordance with the requirements of the Indian Pharmacopoeia or any other Pharmacopoeia notified in this behalf by the Central government, whether in powder form or granulated or otherwise or mixed with neutral materials;
>
> (b) prepared opium, that is, any product of opium obtained by any series of operations designed to transform opium into an extract suitable for smoking and the dross or other residue remaining after opium is smoked;
>
> (c) Phenanthrene alkaloids, namely, morphine, codeine, thebaine and their salts;
>
> **(d) Diacetylmorphine, that is, the alkaloid also known as diamorphine or heroin and its salts; and**

(e) all preparations containing more than 0.2 per cent of morphine or containing any diacetylmorphine;"

20. And the opium derivative is a manufactured drug, as evident from definition of manufactured drug in Section 2 (xi), which reads as under:-

"Manufactured drug" means-

(a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) any other narcotic substance or preparation which the Central government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare to be a manufactured drug, but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug;"

21. Charas is included in cannabis (hemp) andhas been defined in Section 2(iii) of NDPS Act, which reads as under:-

"Canabis (hemp)" means:-

(a) charas, that is, the separated resin, in whatever from, whether crude or purified, obtained from the cannabis plant and also included concentrated preparation and resin known as hashish oil or liquid hashish;

(b) ganja, that is, the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops), by whatever name they may be known or designated; and

(c) any mixture, with or without any neutral material, of any of the above forms of cannabis or any drink prepared therefrom;"

22. In case titled as Harjeet Singh's case the Apex Court was dealing with recovery of 7.10 kilograms opium. In this case, the Apex Court had held that the ratio of E. Michal Raj's case is not applicable for opium. Relevant observations of the Apex Court are as under:-

"23. The judgment in E. Micheal Raj has dealt with heroin i.e. diacetylmorphine which is an "opium derivative" within the meaning of the terms as defined in Section 2 (xvi) of the NDPS Act and therefore, a "manufactured drug" within the meaning of Section 2 (xi) (a) of the NDPS Act. As such the ratio of the said judgment is not relevant to the adjudication of the present case.

....

26. Thus, the aforesaid judgment in E.Micheal Raj has no application in the instant case as it does not relate to a mixture of narcotic drugs or psychotropic substances with one or more substances".....

23. Full Bench of this Court in Mehboob Khan's case has held that charas is a resin mass and presence of resin in stuff, unless there being any evidence qua the nature of the natural substance, entire mass has to be taken as charas.

24. The small and commercial quantity was defined by the Government of India, vide notification dated 19.10.2001 specifying small quantity and commercial quantity and vide notification dated 18.11.2009 Note 4 was added below it, whereby it was clarified that for the purpose of determining the small and commercial quantity, entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content shall be taken into consideration. For the purpose of determining the small and commercial quantity of the recovered contraband, entire mass has to be taken into consideration.

25. E Michalraj's case was dealing with the case pertaining to recovery contraband on 5.3.2001, which was decided on 11.3.2008. Notification of small and commercial quantity was issued on 19.10.2001 and clarification for taking into consideration the entire mass was issued vide notification dated 18.11.2009 and E Michalraj's case was decided on 11th March, 2008. In Harjeet Singh's case alleged contraband was recovered on 4.7.2003, wherein it was held that percentage of morphine is not a decisive factor for determination of quantum of punishment as opium is to be dealt with under distinct and separate entry for that of morphine and it was held that E Michal Raj's Case is not applicable in that case, as it does not relate to mixture of narcotic drug or psychotropic substance with one or more substances.

26. At the time of considering the issue with respect to charas in Mehboob Khan's case the Full Bench of this High Court has considered the case pertaining to the period prior to notification dated 18.11.2009 when note 4 was not there below the table specifying small and commercial quantity. However, despite that, keeping in view the definition of charas under Section 2(III), it was held that entire mass of charas has to be taken as charas.

27. Reference made in Hira Singh's case has no impact in the present case, as the said reference is in different context, which reads as under:

> "12. The three-Judge Bench may have to consider, amongst others, the following questions:.
>
> 12.1 Whether the decision of this court in E.Micheal Raj requires reconsideration having omitted to take note of Entry 239 and Note 2 (two) of the Notification dated 19-10-2001 as also the interplay of the other provisions of the Act with Section 21?
>
> 12.2 Does the impugned notification issued by the Central Government entail in redefining the parameters for constituting an offence and more particularly for awarding punishment?
>
> 12.3 Does the Act permit the Central Government to resort to such dispensation?
>
> 12.4 Does the Act envisage that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?

12.5 Whether Section 21 of the Act is a stand-alone provision or intrinsically linked to the other provisions dealing with "manufactured drug" and "preparation" containing any manufactured drug?"

28. Learned Counsel for the petitioner has insisted to follow the judgment passed by the Coordinate Bench of this Court, wherein on the basis of percentage of pure resin contents of 'Charas', instead of considering the entire mass as 'Charas', quantity of recovered contraband has been considered lesser than commercial quantity and the accused has been enlarged on bail, as for a quantity, lesser than commercial quantity, rigors of Section 37 of NDPS Act are not applicable.

29. On the contrary, respondent/State is harping upon the judgment of the full Bench of this Court, passed in Mehboob Khan's case, (supra), findings returned by the Division Bench of this High Court in Cr.MP(M) No.1145 of 2014, titled as Nirmal Singh Versus State of H.P. and order passed by another Coordinate Bench in Cr.MP(M) No.77 of 2018, titled as Harinder Versus State, based on finding returned by the Division Bench in Nirmal Singh's case and also the judgment passed by the Apex Court in Harjeet Singh's case (supra).

30. There are two conflicting views of this High Court, for determining the quantity of recovered 'Charas' on the basis of pure contents of resin found therein during chemical analysis by the State Forensic Science Laboratory. It is settled principle of precedent that when there are two conflicting views of the same Court, the only option available is to follow the judgment rendered by the larger Bench. The Apex Court in case titled as ***Mattulal Versus Radhe Lal, reported in AIR 1974 Supreme Court 1596***, has held that a former decision of larger Bench will prevail over later decision of a smaller Bench (See-Para 11)". Similarly, in case titled as ***N.S. Giri Versus Corporation of City of Mangalore, reported in (1999) 4 Supreme Court Cases 697***, the Apex Court has held that a decision by the Constitution Bench and/or a decision by a Bench of more strength, cannot be over looked to treat a later decision by a Bench of lesser strength as of a binding authority (See-Para 12). Learned Single Judge of our own High Court in case titled as ***Sita Ram Versus Satvinder Singh & another Latest HLJ 2008 (HP) 1110***, has followed the same principle (See-Para 10).

31. On the issue under consideration, in Mehboob Khan's case, the Full Bench of this High Court, keeping in view the definition of 'Charas', in unambiguous terms, has held that unless presence of material substance is established, entire mass of 'Charas' shall be considered as contraband.

32. In E.Michalraj'scase, quantity of recovered heroin, which is a opium derivative, has been determined by the Apex Court, on the basis of percentage of pure content of drug, whereas in Harjeet Singh'scase, supra, the Apex Court has observed that E.Michalraj'scase is applicable only for opium derivative, but not to the mixture of narcotic drugs or psychotropic substances with one or more substances.

33. In answer to similar question referred by learned Single Judge, after noticing the judgments made by the Coordinate Benches of this Court, to the larger bench in Cr.MP(M) No.1145 of 2014 (Nirmal Singh's case), the Division Bench of this High Court has answered that the mater stands already decided by the Apex Court in case titled as ***Harjeet Singh Versus State of Punjab, reported in 2011 (4) SCC 441***. Therefore, the judgment passed by the larger Bench of this Court i.e. Full Bench in Mehboob Khan's case and the Division Bench in Cr.MP(M) No.1145 of 2014, Nirmal Singh'scase, are binding on this Court.

34. Therefore, to consider a commercial quantity, on the basis of purified resin content, as a quantity of less than commercial quantity, is contrary to the judgments passed by the Full Bench and the Division Bench of this Court.

35. In Cr.MP (M) No.77 of 2018, titled as Harinder Singh Versus State of H.P., another Coordinate Bench of this Court after discussing the case law, has observed that the decisions relied upon on behalf of the petitioner therein, which were contrary to the larger Bench, were per incurium, as those decisions did not lay down the correct law. In present case also, the judgments relied upon by and on behalf of the petitioner are to be ignored as ratio of law propagated in these judgments/order are contrary to the judgment passed by the Full Bench in Mehboob Khan's case and judgment passed by the Division Bench in Nirmal Singh's case, supra.

36. As held in Mehboob Khan's case, principle of determination of quantity of recovered contraband, on the basis of pure resin contents, is not applicable in case of 'Charas' for its distinct, well defined and elaborated definition provided in Section 2 (iii) of the NDPS Act. E.Michalraj'scase is also not applicable to 'Charas'. For definition of 'Charas' in Section 2 (iii) of NDPS Act, separated resin, in whatever form, whether crude or purified, obtain from cannabis plant is 'Charas' and therefore, prior to insertion of Note-4 on 18.11.2009 and thereafter, situation for 'Charas' remains the same. In case of 'Charas', entire mass is to be treated as 'Charas' because of its definition under Section 2 (iii) of NDPS Act, but neither because of Entry No.239 of the Notification specifying small quantity and commercial quantity nor because of insertion of Note-4 below it, vide Notification dated 18.11.2009. Therefore, reference of E.Michalraj's case along with validity of insertion of Note-4 by the Central Government, by notification SO 2941 (E) dated 18.11.2009 below a notification, specifying small quantity and commercial quantity, to the larger Bench in Hira Singh's case is of no bearing, in case of 'Charas'. Therefore, decision of larger Bench of the Apex Court in Hira Singh's case, in either way will not have any bearing on the cases related to 'Charas'. Therefore, the judgments of the Coordinate Bench, relied upon by learned counsel for the petitioner are of no help to the petitioner.

37. I am bound to follow the former decision of larger Bench of this High Court, which is inconsonance with the clarification rendered by the Apex Court in Harjeet Singh's case, with respect to applicability of E.Michalraj's case. These judgments have not been set aside or disturbed or over ruled till date by any subsequent Larger Bench of this Court or by the Apex Court as the case may be.

38. Reference of former decision of the Court, to a larger Bench does not mean that the ratio of law, settled in judgment referred will ipso-facto becomes, redundant or stands over ruled. Unless a judgment is over ruled, the ratio laid down therein has a binding force obviously, subject to principles to be followed for determining the precedent. Hence, I am refrain to accept the plea of the petitioner to concur with the judgments of the Coordinate Bench of this Court for considering the quantity of 'Charas' as less than commercial quantity.

39. In view of the above discussion, I am of the opinion that the petitioner is not entitled for bail at this stage, hence, the petition is dismissed.

****

BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Mahesh Kumar ....Appellant

Versus

State of Himachal Pradesh ....Respondent

Cr. Appeal No. 282 of 2006

Date of Decision 21st November, 2018

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) - Section 20 - Recovery of Charas – Proof - Trial court convicting accused of possessing 490 gms of Charas - Charas found having been recovered from person (vest) of appellant/accused, who was an occupant of bus and tried to flee on seeing police checking documents of bus - Appeal against – Accused contending wrong appreciation of evidence by Special Judge - On facts, 'R' a witness to recovery and seizure as well as 'O' and 'A', driver and conductor respectively of bus not supporting prosecution case during trial - Police having prior information of person travelling in bus with contraband - Provisions of Section 50 of Act not adhered to – Held, in circumstances of case, trial vitiated for non-compliance with provisons of Section 50 of Act - Appeal allowed - Conviction set aside. (Paras 7-13 & 18-27)

Narcotic Drugs and Psychotropic Substances Act, 1985 (Act) – Sections 35 & 54 – Presumptions – Applicability - Held, though these provisions speak of reverse onus on accused but these presumptions would attract only when prosecution has proved recovery of contraband from conscious possession of accused. (Para 23)

Case referred:

Vijaysinh Chandubha Jadeja vs. State of Gujarat, (2011)1 SCC 609

For the Appellant:	Shri Rajesh Mandhotra, Advocate.
For the Respondent:	Mr. Anil Jaswal, Additional Advocate General with Mr.R.P.Singh and Mr.R.R.Rahi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. (oral)

Present appeal has been preferred by the appellant/accused against his conviction vide judgment dated 14.7.2006 passed by learned Special Judge, Kangra at Dharamshala in sessions case No. 24-K/VII/2005/Sessions trial No. 10 of 2006, titled State of H.P. vs. Mahesh Kumar in FIR No. 90 dated 23.3.2004 registered in P.S. Kangra under Section 20 of the Narcotic Drugs and Psychotropic Substances Act (in short NDPS Act) whereby the appellant has been convicted for commission of offence under Section 20 of the NDPS Act and sentenced to undergo rigorous imprisonment for five years with fine of Rs.30,000/- and in case of default in making the payment of fine, to further undergo rigorous imprisonment for one year.

2 Prosecution case, in brief, is that police party, headed by PW11 Sanjeev Chauhan SHO P.S. Kangra, during traffic checking, had recovered 490 grams charas from the person of appellant/accused in the presence of witnesses PW2 Rakesh Kumar and PW4 HC Som Raj. After recovery of contraband, the same was taken in possession vide memo Ext.PW2/B after weighing it in the shop of PW7 Ajay Kumar and two samples of 25 grams each were also taken out from the recovered contraband and samples as well as remaining contraband was seized by sealing it in the covers of cloth with seal 'D'.

3 Thereafter ruka Ext.PW11/C was prepared and sent to Police Station Kangra through PW5 HHC Madan Lal, whereupon FIR Ext.PW11/D was registered and after registration of FIR, case file was handed over to Madan Lal to deliver it to PW11 Inspector Sanjeev Chauhan. NCB form Ext.PW11/E in triplicate was filled by PW11 in triplicate in on

the spot and sample impression of seal 'D' was also taken thereon. Special report Ext.PW5/A was prepared and sent to the office of Superintendent of Police through PW5 Madan Lal, who handed over the same to PW8 HC Subhash Chand.

4 During investigation, site plan was prepared and statements of witnesses were recorded and samples of contraband were sent for chemical examination to CTL Kandaghat and after receiving the report Ext.PW11/F from CTL Kandaghat, challan was prepared and presented in the Court.

5 On findings prima facie complicity in commission of offence, charge under Section 20 of NDPS Act was framed against the accused and on conclusion of trial, appellant/accused stands convicted and sentenced by the trial Court.

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

7 PW2 Rakesh Kumar is an independent witness associated by the police during recovery of charas. He has not supported the prosecution case. Contrary to the police version, he has stated that police stopped the bus by parking the police vehicle in front of bus at Hatwas and one policeman came out and boarded the bus and caught hold one passenger and took him out from bus by saying 'mil-gaya-mil-gaya' and that person is accused in the Court. According to him, other police officials came inside the bus and asked the passengers to come out and accused was being beaten by police officials. According to him, thereafter he came to know that police had recovered charas in the form of sticks but he did not know from whose possession the charas was recovered. He was subjected to cross examination, but during lengthy cross examination, nothing material could be elucidated in favour of prosecution case.

8 Another witness of recovery is PW4 HC Som Raj who has supported the prosecution case by saying that during personal search of accused, charas in the form of sticks was recovered from his vest. In cross examination, he has denied that as soon as the bus was stopped they caught hold the accused and started proclaiming 'mil-gaya-mil-gaya'. According to him, all passengers were checked by police and bus was also searched by them. He has admitted the suggestion that he had stated in his statement that police had suspicion against the accused.

9 PW3 Om Parkash is driver of bus. He has also not supported the prosecution case by stating that police vehicle came from opposite side and signalled to stop the bus and after stopping, the police officials entered the bus, searched it and passengers were also searched by police but nothing was recovered from any passenger and when all passengers had come out from bus, then one constable entered the bus and proclaimed that he had recovered the charas from bus. He was declared hostile, but despite lengthy cross examination by learned Public Prosecutor, he has not supported the prosecution case.

10 PW9 Ashok Kumar is conductor of bus. He has also not supported the prosecution case by saying that nothing was recovered from possession of accused. He was also cross examined by prosecution but nothing material could be extracted in his statement in favour of prosecution case.

11 PW11 Sanjeev Chauhan, SHO in his statement, has stated that when he was checking the documents of bus, appellant/accused had tried to escape from spot, but he was chased and apprehended and was unable to give satisfactory explanation for his conduct and therefore, he had suspected that he might be having some contraband in his possession, whereupon he had conducted his personal search and during personal search

charas was recovered from his vest. According to him, personal search of accused was taken in presence of witnesses. In the rest of evidence, he has tried to support the prosecution story based on record.

12 In the cross examination, he has admitted that provisions of Section 50 of NDPS Act was not adhered to. He has explained that he had apprehended the accused for having something in his possession.

13 It emerges from statements of PW2 Rakesh Kumar and PW4 HC Som Raj that police party was having previous information of a person coming with contraband and before personal search of appellant, police party was suspected that appellant was carrying some contraband and therefore, his personal search was conducted. In case their version is believed, then present case cannot be said to be a case of chance recovery as the contraband, alleged to have been recovered from vest of appellant/accused during his personal search conducted for suspicion that he was carrying the contraband with him.

14 Mandate of Section 50 of NDPS Act requires that in cases where Investigating Officer has suspicion or reason to believe that accused is carrying the contraband, he has to comply with Section 50 of NDPS Act and failure to comply mandatory provisions of Section 50 has been held to be causing prejudice to the suspect/accused, rendering the recovery of illicit article illegal and vitiating the proceedings conducted by Investigating Officer.

15 The Apex Court in ***Vijaysinh Chandubha Jadeja vs. State of Gujarat*** reported in ***(2011)1 SCC 609*** has held that conviction based on such recovery of illicit article is vitiated for want of compliance of Section 50 of NDPS Act.

16 The claim of prosecution that it was the case of chance recovery is not sustainable for the reason that PW11 Sanjeev Chauhan in his examination-in-chief has categorically stated that on account of conduct of appellant/accused he suspected that accused might be having some contraband etc. in his possession. PW2 Rakesh Kumar and PW4 HC Som Raj have also substantiated the plea of appellant/accused that it was not a chance recovery but the police party was searching for some one and prior to searching the accused the police had suspicion that accused was carrying contraband and therefore, compliance of Section 50 of NDPS Act was mandatory in the present case. It is undisputed, as admitted by PW11 Sanjeev Chauhan in his cross examination, that no option, as required under Section 50 of the Act, was given to accused.

17 Even if it is accepted that police was not having prior information, even then it has come in evidence of prosecution that before conducting personal search of appellant, PW11 Sanjeev Chauhan had suspected the possession of contraband by appellant/accused. Therefore, it was incumbent upon him to resort to provisions of Section 50 of NPDS Act.

18 In view of settled law of land in numerous pronouncements of the Apex Court as well as the decision rendered by the Constitutional Bench of the Apex Court in ***Vijaysing's case*** (referred supra), the appellant is entitled for acquittal on the ground of non-compliance of Section 50 of the Act.

19 It is the case of prosecution that during traffic checking, the bus in question was stopped and driver of the bus was asked to show the papers and at that time, a passenger got down from the bus and had tried to escape, who was apprehended by PW11 Sandeep Chauhan with the help of his companion police officials and when he could not satisfactorily explained about the reason for running from the spot, his personal search was conducted and contraband was recovered from his vest.

20 PW11 Sandeep Chauhan, in his statement in Court, has reiterated the said story with further addition that he had suspected that accused might be having some contraband etc. in his possession. Whereas, PW2 Rakesh Kumar has different story to tell. He has stated that bus was stopped by parking the police vehicle in front thereof and one policeman came in the bus and caught hold of one passenger and taken him out of the bus by saying *milgaya-milgaya* and thereafter other police officials came inside the bus and asked the passengers to get down from the bus one by one and police had beaten the accused and thereafter, it was proclaimed by the police that charas in the form of sticks has been recovered.

21 PW2 Rakesh Kumar was declared hostile. However, his version has certain corroboration in the deposition of PW3 Om Parkash, who was also declared hostile. PW3 Om Parkash has stated that after stopping the vehicle on the signal of police, coming from opposite side in the police vehicle, police officials had entered the bus and searched every passenger personally and nothing was recovered from any passenger and when all passengers had alighted from the bus one Constable had entered the bus and proclaimed about the recovery of charas from the bus. He has further stated that personal search of accused was not conducted in his presence but accused was beaten by the police.

22 PW4 Som Raj in his examination-in-chief has stated that when passengers were being checked, one passenger, who tried to run away, was apprehended and for want of satisfactory explanation for his conduct, his personal search was conducted. Whereas, it is the case of prosecution that when documents of bus were being checked, one passenger i.e. accused had tried to escape after getting down from the bus.

23 PW9 Ashok Kumar conductor of bus has also stated that police had started searching the passengers including the accused, however nothing was recovered from the possession of accused. The aforesaid evidence on record creates doubt about the prosecution version regarding the manner in which charas was allegedly recovered. There are two versions on record, which cast doubt about fair investigation. It is true that there is 'reverse onus' upon the accused under presumptions provided under Sections 35 and 54 of the Act, but at the same time, it is also cardinal principle of criminal jurisprudence that before attracting these presumptions, the prosecution has to prove the recovery of contraband from conscious possession of accused.

24. As discussed above, the manner, in which the recovery of contraband has been alleged, has become doubtful. Therefore, the appellant is entitled for benefit of doubt on this count.

25. Other witnesses are formal in nature, associated during investigation for completion of procedure and as the appellant is entitled for acquittal for non-compliance of Section 50 of NDPS Act, and for benefit of doubt there is no necessity to discuss their evidence. 26. Learned Special Judge has committed a mistake by not considering the evidence on record in right perspective. For discussion herein above, impugned judgment is set aside and appellant/accused is acquitted of charge. Bail bonds furnished by and on his behalf are discharged. As the appellant/accused has been acquitted, he is also entitled for refund of fine amount, deposited by him in the trial Court, which shall be released in his favour on filing an appropriate application along with copy of this judgment.

27. Appeal stands allowed. Record be sent back forthwith.

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

CrMMO No. 567 of 2018 with
CrMMO No. 568 of 2018
Decided on: January 1, 2019

1. CrMMO No. 567 of 2018
Jaisi Ram and others .....Petitioners
Versus
State of HP and others ...Respondents

2. CrMMO No. 568 of 2018
Raju and others .....Petitioners
Versus
State of HP and others ...Respondents

Criminal Procedure Code 1973 – Section 482 - Inherent Powers - Exercise of – Quashing of FIRs – Parties compromising dispute and filing petitions for quashing of FIRs registered by them against each other **–** Held, in exercise of its inherent power High Court may quash criminal proceedings even in non-compoundable cases where parties settled matter between themselves - Power to be exercised sparingly and with great caution - Power not to be exercised in cases involving heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc as they are not private in nature and have impact on society - On facts, offences not heinous showing extreme depravity nor they are against society - Possibility of conviction in both remote and bleak - Continuation of criminal proceedings would tantamount to abuse of process of law – Petitions allowed - FIRs quashed alongwith pending proceedings. (Paras 8, 9 &12)

Cases referred:
Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497
Gian Singh vs. State of Punjab and anr. (2012) 10 SCC 303
Narinder Singh and others vs. State of Punjab and another (2014)6 SCC 466
Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others vs. State of Gujarat and Another, Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016

For the petitioner: Mr. D.N. Sharma, Advocate, in both the petitions.
For the respondents: Mr. S.C. Sharma, Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General with Mr. Amit Kumar, Deputy Advocate General, for the respondent-State, in both the petitions.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of above captioned petitions filed under Art. 227 of the Constitution of India read with S.482 CrPC, prayer has been made for quashing of FIR Nos. 85/2015 dated 17.6.2015 under Ss. 341, 323 and 451 read with S. 34 IPC (in CrMMO No. 567 of

2018) and 86 of 2015 dated 17.6.2015 under Ss. 451, 323 and 506 read with Section 34 of the Indian Penal Code (in CrMMO No. 568 of 2018) registered at Police Station, Theog, District Shimla, Himachal Pradesh by the parties against each other and consequential proceedings i.e. Case No. 149-1 of 2015 titled State vs. Jaisi Ram and others and Case No. 56-1 of 2015 titled State vs. Raju and others, pending before the Additional Chief Judicial Magistrate, Theog, District Shimla.

2. Briefly stated the facts, as emerge from the record are that the petitioners in both the petitions, are residents of same village and on account of some misunderstanding and verbal altercation, FIR's as referred to above, came to be lodged against each other at the behest of the petitioners at Police Station, Theog, District Shimla, Himachal Pradesh. FIR No. 85 of 2015 dated 17.6.2015 came to be lodged at the behest of Raju son of Shri Pania Ram, who is petitioner in CrMMO No. 568 of 2018 and FIR No. 86 of 2015 dated 17.6.2015, came to be registered at he behest of Jaisi Ram, who is petitioner in CrMMO No. 567 of 2018. Both the FIR's pertain to one incident and came to be lodged on the same day at Police Station, Theog, District Shimla, Himachal Pradesh.

3. After completion of investigation, police presented challans in the competent Court of law, which have culminated into criminal cases and are pending adjudication in the court of leaned Additional Chief Judicial Magistrate, Theog. However, during the pendency of the cases, as referred to herein above, parties, with the intervention of the respectable members of the society, have decided to resolve their disputes amicably, as is evident from the affidavits/compromises of the petitioners annexed as Annexure P-2, in both the petitions.

4. Careful perusal of record clearly suggests that the parties have resolved to settle their disputes amicably and with a view to live peacefully and to maintain cordial relations with each other, they have decided to withdraw the cases lodged against each other. Both the persons, namely Jaisi Ram and Raju, who have filed cross-FIR's against each other, have approached this court in the instant petitions, praying therein for quashment of the FIR's as well as consequential proceedings.

5. Mr. D.N. Sharma, learned counsel representing both the petitioners, stated on the instructions of his clients, who are present in the court, that they do not intend to continue with the FIR's/criminal cases lodged at their behest against each other and they have no objection in case, on the basis of compromise arrived *inter se* them, this court, while exercising powers under S.482 CrPC, proceeds to quash both the FIR's alongwith consequential proceedings i.e. Case Nos. 149-1 of 2015 titled State Vs. Jaisi Ram and 56-1 of 2016 titled State vs. Raju, pending before learned Additional Chief Judicial Magistrate, Theog, District Shimla, Himachal Pradesh.

6. Though, having carefully perused the affidavits placed on record, this court is convinced and satisfied that the parties have resolved to settle their disputes amicably, but, with a view to ascertain the genuineness and correctness of the documents/affidavits/compromises placed on record, this court also recorded statements of both the petitioners i.e. Jaisi Ram and Raju, on oath, in the court itself. Both the persons, named above, stated on oath before this court that they, of heir own volition and without any external pressure or coercion, have entered into compromise with each other, whereby they have resolved to withdraw the cases lodged by them against each other. They further stated that with the intervention of the respectable members of society, they have resolved to settle their disputes once for all, as such, they do not wish to continue with the cases lodged by them and they shall have no objection in case FIR's lodged by them alongwith

consequential proceedings i.e. cases pending before learned Additional Chief Judicial Magistrate, Theog, District Shimla, Himachal Pradesh, are quashed and set aside.

7. Mr. Amit Kumar, learned Deputy Advocate General, having perused the affidavits placed on record and statements made by the petitioners named above, fairly stated that in view of the compromise arrived *inter se* parties, prayer made in the petitions at hand, can be accepted, because no fruitful purpose would be served in continuing with the criminal cases lodged by the petitioners.

8. Since the instant petitions have been filed under Section 482 Cr.P.C, this Court deems it fit to consider the same in light of the judgment passed by Hon'ble Apex Court in **Narinder Singh and others** versus **State of Punjab and another** (2014)6 SCC 466, whereby the Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred to above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash criminal proceedings even in those cases which are not compoundable and where the parties have settled the matter between themselves, however, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:
>
> 29.1 Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.
>
> 29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:
>
> (i) ends of justice, or
>
> (ii) to prevent abuse of the process of any Court.
>
> While exercising the power under Section 482 Cr.P.C the High Court is to form an opinion on either of the aforesaid two objectives.
>
> 29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

9. Careful perusal of para 29.3 of the judgment suggests that such a power is not to be exercised in the cases which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Apart from this, offences committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly arising out of commercial transactions or arising out of matrimonial relationship or family disputes may be quashed when the parties have resolved their entire disputes among themselves.

10. The Hon'ble Apex Court in case **Gian Singh** v. **State of Punjab and anr.** (2012) 10 SCC 303 has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors**. vs. **Union Territory through Administrator, UT, Chandigarh and Ors**. (2013(11 SCC 497 has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
>
> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
>
> 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly

and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

11. Recently the Hon'ble Apex Court in its latest judgment dated 4th October, 2017, titled as **Parbatbhai Aahir @ Parbatbhai Bhimsinhbhai Karmur and others** versus **State of Gujarat and Another**, passed in Criminal Appeal No.1723 of 2017 arising out of SLP(Crl) No.9549 of 2016, reiterated the principles/ parameters laid down in **Narinder Singh's** case supra for accepting the settlement and quashing the proceedings. It would be profitable to reproduce para No. 13 to 15 of the judgment herein:

"13. The same principle was followed in Central Bureau of Investigation v. Maninder Singh (2016)1 SCC 389 by a bench of two learned Judges of this Court. In that case, the High Court had, in the exercise of its inherent power under Section 482 quashed proceedings under Sections 420, 467, 468 and 471 read with Section 120-B of the Penal Code. While allowing the appeal filed by the Central Bureau of Investigation Mr Justice Dipak Misra (as the learned Chief Justice then was) observed that the case involved allegations of forgery of documents to embezzle the funds of the bank. In such a situation, the fact that the dispute had been settled with the bank would not justify a recourse to thepower under Section 482:

"…In economic offences Court must not only keep in view that money has been paid to the bank which has been defrauded but also the society at large. It is not a case of simple assault or a theft of a trivial amount; but the offence with which we are concerned is well planned and was committed with a deliberate design with an eye of personal profit regardless of consequence to the society at large. To quash the proceeding merely on the ground that the accused has settled the amount with the

bank would be a misplaced sympathy. If the prosecution against the economic offenders are not allowed to continue, the entire community is aggrieved."

14. In a subsequent decision in State of Tamil Nadu v R Vasanthi Stanley (2016) 1 SCC 376, the court rejected the submission that the first respondent was a woman "who was following the command of her husband" and had signed certain documents without being aware of the nature of the fraud which was being perpetrated on the bank. Rejecting the submission, this Court held that:

"... Lack of awareness, knowledge or intent is neither to be considered nor accepted in economic offences. The submission assiduously presented on gender leaves us unimpressed. An offence under the criminal law is an offence and it does not depend upon the gender of an accused. True it is, there are certain provisions in Code of Criminal Procedure relating to exercise of jurisdiction Under Section 437, etc. therein but that altogether pertains to a different sphere. A person committing a murder or getting involved in a financial scam or forgery of documents, cannot claim discharge or acquittal on the ground of her gender as that is neither constitutionally nor statutorily a valid argument. The offence is gender neutral in this case. We say no more on this score..."

"...A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system..."

15. The broad principles which emerge from the precedents on the subject may be summarized in the following propositions:

(i) Section 482 preserves the inherent powers of the High Court to prevent an abuse of the process of any court or to secure the ends of justice. The provision does not confer new powers. It only recognizes and preserves powers which inhere in the High Court;

(ii) The invocation of the jurisdiction of the High Court to quash a First Information Report or a criminal proceeding on the ground that a settlement has been arrived at between the offender and the victim is not the same as the invocation of jurisdiction for the purpose of compounding an offence. While compounding an offence, the power of the court is governed by the provisions of Section 320 of the Code of Criminal Procedure, 1973. The power to quash under Section 482 is attracted even if the offence is non-compoundable.

(iii) In forming an opinion whether a criminal proceeding or complaint should be quashed in exercise of its jurisdiction under Section 482, the High Court must evaluate whether the ends of justice would justify the exercise of the inherent power;

(iv) While the inherent power of the High Court has a wide ambit and plenitude it has to be exercised; (i) to secure the ends of justice or (ii) to prevent an abuse of the process of any court;

(v) The decision as to whether a complaint or First Information Report should be quashed on the ground that the offender and victim have settled the dispute, revolves ultimately on the facts and circumstances of each case and no exhaustive elaboration of principles can be formulated;

vi) In the exercise of the power under Section 482 and while dealing with a plea that the dispute has been settled, the High Court must have due regard to the nature and gravity of the offence. Heinous and serious offences involving mental depravity or offences such as murder, rape and dacoity cannot appropriately be quashed though the victim or the family of the victim have settled the dispute. Such offences are, truly speaking, not private in nature but have a serious impact upon society. The decision to continue with the trial in such cases is founded on the overriding element of public interest in punishing persons for serious offences;

(vii) As distinguished from serious offences, there may be criminal cases which have an overwhelming or predominant element of a civil dispute. They stand on a distinct footing in so far as the exercise of the inherent power to quash is concerned;

(viii) Criminal cases involving offences which arise from commercial, financial, mercantile, partnership or similar transactions with an essentially civil flavour may in appropriate situations fall for quashing where parties have settled the dispute;

(ix) In such a case, the High Court may quash the criminal proceeding if in view of the compromise between the disputants, the possibility of a conviction is remote and the continuation of a criminal proceeding would cause oppression and prejudice; and

(x) There is yet an exception to the principle set out in propositions (viii) and (ix) above. Economic offences involving the financial and economic well-being of the state have implications which lie beyond the domain of a mere dispute between private disputants. The High Court would be justified in declining to quash where the offender is involved in an activity akin to a financial or economic fraud or misdemeanour. The consequences of the act complained of upon the financial or economic system will weigh in the balance."

12. In the case at hand also, the offences alleged against the petitioners do not involve offences of mental depravity or of heinous nature like rape, dacoity or murder and as such, with a view to maintain harmony and peace in society, this court deems it appropriate to quash the FIR's as well as consequential proceedings thereto, especially keeping in view the fact that the parties have compromised the matter and they are no longer interested in carrying on with the criminal cases lodged on the basis of FIR's lodged by them against each other. Otherwise also, possibility of conviction in both the cases is bleak and remote.

13. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court (supra), FIR Nos. 85/2015 dated 17.6.2015 under Ss. 341, 323 and 451 read with S. 34 IPC and 86 of 2015 dated 17.6.2015 under Ss. 451, 323 and 506 read with Section 34 of the Indian Penal Code registered at Police Station, Theog, District Shimla, Himachal Pradesh and consequential proceedings i.e. Case No. 149-1 of 2015 titled State vs. Jaisi Ram and others and Case No. 56-1 of 2015 titled State vs. Raju and others, pending before the Additional Chief Judicial Magistrate, Theog, District Shimla, are quashed and set aside.

14. The petitions stand disposed of in the aforesaid terms, alongwith all pending applications.

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

The Executive Director (Pers), Himachal Pradesh State Electricity Board Limited and another
....Petitioners

Versus

M/s Virgo Aluminum Ltd. ...Respondent

CWP No. 886 of 2018
Decided on: December 3, 2018

Constitution of India, 1950- Article 226 - **HP Electricity Regulatory Commission (Consumer Grievances Redressal Forum and Ombudsman) Regulations, 2013** - Regulation 17 - Company depositing huge amount with HPSEBL (Board) for installing dedicated feeder for it - Board failing to complete job in time despite several requests of company - Company approaching HP Electricity Regulatory Commission (Commission) for redressal of grievances - Commission directing Board to refund amount received by it from company along with interest - Petition against - Board submitting that it could not complete work because company did not provide right of way to it - Material indicating that (i)company had not only deposited requisite money but also supplied entire material well within stipulated time to Board - (ii) right of way was also arranged by company for purpose of erection of poles and laying of cables, - Held, petition filed by Board is mere abuse of process of law - And company has been harassed by officials of Board - Petition dismissed with costs assessed at Rs.1.00 Lakh (Paras 2 to 9)

For the petitioners: Mr. Tara Singh Chauhan, Advocate.
For the respondent: Mr. O.C. Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 31.7.2017 passed by the Consumers Grievances Redressal Forum at Kasumpti, Shimla-9, Himachal Pradesh (hereinafter, "Forum"), whereby complaint under Regulation 17 of the HP Electricity Regulatory Commission (Consumer Grievances Redressal Forum and Ombudsman) Regulations, 2013 (hereinafter, "Regulations"), having been filed by the respondent-complainant (hereinafter, "complainant") against the wrongful, illegal and arbitrary act of withholding and retention of a sum of Rs.56,66,869/- deposited against the proposed expenditure of works to construct 33 KV dedicated feeder on AB Cable alongwith 33 KV bay at 132/33 KV Sub-station to take off point M/s Virgo Aluminum Ltd. alongwith interest at the rate of 12% per annum accrued thereupon, came to be allowed, petitioner-Board (hereinafter, "Board") has approached this court in the instant proceedings filed under Art. 226/227 of the Constitution of India, seeking therein following relief:

> "In view of submissions made herein above and in the interest of justice, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to allow the petition and the impugned order dated 31.7.2017 passed by the ld. Consumers' Disputes Redressal Forum at Kasumpti, Shimla-9 may kindly be quashed and set aside and the complaint may kindly be dismissed"

2. For having a bird's eye view, facts, as emerge from the record, are that the complainant, which is a private limited company duly incorporated under the Companies Act and is a consumer of the Board, applied for the release of electricity connection. Pursuant to its request, the complainant was provided with electricity connection with the connected load of 4500 KW on a common feeder. As per record, initially 4500 KW load was sanctioned in favour of the complainant by the Chief Engineer (OP) Shimla on the request having been made by the complainant (Annexure P-1), however, subsequently, the complainant, on account of interrupted supply, voltage fluctuation, tripping of common feeder and shut down etc., applied and requested to the Board for construction of separate 33 KV dedicated feeder. The Chief Engineer (Comm.), HPSEBL, Shimla, approved load of 4500 KW on 33 KV supply voltage through 33 KV dedicated feeder on AB Cable alongwith 33 KV bay at 132/33/11 KV Sub-station, Johron, Kala Amb. Necessary sanction for the aforesaid load was accorded by the C.E. (OP) Sought, Shimla on 8.3.2010. (Annexure P-2). After having prepared necessary estimates, for laying necessary cables etc., C.E. (OP), South, HPSEBL, vide letter dated 30.3.2010 (Annexure P-3), required the complainant to supply the material worth Rs.16,73,493 and deposit the balance cost of Rs.39,93,376/- with the Board. As per Board, since there were corridor constraints in Kala Amb industrial area, it proposed to string 120 mm 2 AB Cable on existing 33 KV Double Ckt. Line from Kala Amb to the proposed site of complainant Unit. Board made a provision of 8 metres long PCC poles of 200 kg working load to provide additional support AB Cable, where spans were lengthy and further provision of conversion of 2 pole structure to 4 pole was made at the take off point of the complainant. It is averred in the petition that the Board issued demand notice on 20.4.2010 for a sum of Rs.39,93,376/- as consumer share and also required it to deposit all the approved materials. The complainant deposited Rs.39,93,376/- with the Board on 3.6.2010.. It is also not in dispute that the Superintending Engineer (OP) Circle Nahan wrote a letter dated 11.6.2010 to the C.E. (OP) South, Shimla and requested for technical sanction of estimates under Serial No. 2(1) of revised DOCP 1997 and CE (OP) South, accorded the sanction on 24.6.2010. (Annexure P-6) It is also not in dispute that the complainant purchased 1722 Metres long AB Cables on 13.2.2011 and 14.2.2011 from M/s Disha Agencies, Chandigarh for Rs.15,19,540/- and deposited the same with the Board on 23.4.2011, which was duly acknowledged by the Board vide letter dated 23.4.2011. As per averments contained in the petition as well as documents annexed with the same, process of tendering of work for erection of 9 eight metre PCC poles and EXLPE Cable etc. was awarded to M/s Shakil Ahmed ("A" Class Contractor) vide letter dated 24.1.2013 (Annexure P-7), with the direction to complete the awarded work within a period of two months. Board has further averred in the petition that since the complainant was pressing hard for completion of work, therefore, Board repeatedly requested the contractor to complete the work. Board has further averred that the right of way was to be provided/arranged by the complainant for the purpose of erection of poles and laying cables but since the complainant failed to do so, work could not be completed within stipulated time, which fact was seriously disputed by the complainant.

3. Since Board failed to accede to the request of the complainant for more than six years, complainant was compelled to file a complaint under Regulation 17 of the Regulations before the Forum below, praying therein for the following main relief:

> "An order directing the respondents to refund the amount of Rs.56,66,869/- i.e. Rs.39,93,376/- deposited on 03.06.2010 in cash and Rs.16,73,493/- being cost of material deposited on 23.04.2011, alongwith compound interest @ 12% p.a. till its realization in favour of the complainant."

4. Board contested the claim of the complainant, citing therein reasons for non-execution of the work (Annexure P-10). Forum below vide order dated 31.7.2017, allowed the complaint and directed the Board to refund Rs.39,93,736/-to the complainant alongwith interest at the rate of 12% per annum since 4.6.2010 till the date of making the payment. Forum below further directed the Board to make payment of Rs.15,19,540/- on account of cost of cables provided by the complainant. However, the complainant was not held entitled to interest on this amount as this cable was not used for any purpose and observed that this cable could be used by the Board for use at any other location. Forum below also struck down the execution of deposit work and directed Board not to continue with the work. In the aforesaid background, Board has approached this court in the instant proceedings, praying therein to set aside the impugned order.

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

6. Having heard the learned counsel representing the parties and perused material available on record vis-à-vis reasoning assigned by the learned Forum below in the impugned order, this court is not persuaded to agree with the contention raised by Mr. Tara Singh Chauhan, learned counsel representing the Board that the impugned order passed by the learned Forum below is not based upon correct appreciation of material available before it, rather this court has no hesitation to conclude that the Board has been callous and negligent while prosecuting the work and as such, learned Forum below has rightly observed that high-headed attitude of the Board is very dangerous for the system and consumers. It is not in dispute that request for providing separate corridor was made in the year 2013 but approval qua the same stood accorded on 8.3.2010. Similarly, there is no dispute that in response to the demand made by the Board, a sum of Rs.57,31,870/- was deposited in the year 2010, which is evident from Annexure P-4, but, astonishingly, till the filing of the complaint in the year 2016, no steps, whatsoever, were taken by the Board to ensure that a separate 33 KV dedicated feeder is provided to the complainant in terms of the demand made by it. Though, Mr. Tara Singh Chauhan, learned counsel representing the Board made a serious attempt to persuade this court to agree with his contention that right of way was to be arranged by the complainant for the purpose of erection of poles and laying of cables, but this submission made by Mr. Chauhan, is not supported by any documentary evidence, if any, available on record, rather, the record available on file, itself suggests that the work in question was awarded to contractor, who despite repeated reminders failed to execute the work. Otherwise also, there is no document on record adduced by the Board to demonstrate that at any point of time, complainant was asked to provide/arrange for the way or place for erection of poles. Order passed by the learned Forum below clearly suggests that the complainant had not only deposited the money as was called for by the Board, rather, entire material, as was supposed to be supplied by the complainant, was also made available, well within stipulated time to the Board, but the Board, on one pretext or the other, failed to complete the job. Impugned order passed by the learned Forum below further suggests that even the learned Forum below, during the pendency of the complaint, provided ample opportunities to the Board to complete the work on the site, but it failed to avail of such opportunities as such, this court sees no illegality or infirmity in the order passed by the learned Forum below, which appears to be based upon proper appreciation of the material available on record.

7. It is very strange and shocking that the Board which is otherwise responsible for providing energy to the consumers failed to pay heed to the requests of its consumer, for almost eight years that too after having received a substantial amount i.e. Rs.57,31,870/-,

as such, learned Forum below rightly held the Board guilty of unfair trade practices and allowed the complaint.

8. In the case at hand, complainant, which had applied to the Board for 33 KV dedicated feeder in the year 2010 and had deposited a sum of `39,93,376, at the first instance on the demand of the petitioner-Board in the year 2010 itself, whereafter, it also supplied material worth `16,73,493/-, which fact has not been disputed by the Board, was compelled to file a complaint before the learned Forum below in the year 2016, when despite best efforts put in by it, it failed to have the dedicated line. Complaint came to be decided by the learned Forum below after a period of one year, whereafter, Board, without there being any justifiable ground to lay challenge, approached this court in the instant proceedings and as such, complainant was again compelled to engage counsel to defend itself before this court.

9. Having perused the material, which has been otherwise discussed in detail and the reasoning recoded in the impugned order, this court has no hesitation to conclude that the present petition filed by the Board is a sheer abuse of process of law and complainant has been harassed to the hilt by the officials of the Board, taking undue advantage of their position and as such, present is a fit case, wherein costs deserve to be imposed upon the Board. Accordingly, cost of `1.00 Lakh is imposed upon the Board, to be paid to the complainant, within a period of a week from today, which in turn, shall be recovered from the salaries of the officials, in the helm of affairs and responsible for the harassment caused to the complainant.

10. In view of the detailed discussion made herein above, I find no merit in the present petition, which is accordingly dismissed alongwith all pending applications. Interim direction, if any, is vacated.

****

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

The Charog Non- agricultural Thrift and
Credit Co-operative Society Limited. .....Petitioner
Versus
State of H.P. & others .....Respondents

CWP No. 4052/2015
Decided on: 11th September, 2017

Administrative law – Executive function - Reasoned order – Necessity of - Held, recording of reasons is essential feature of dispensation of justice – Litigant is entitled to know reasons for grant or rejection of his prayer – Non recording of reasons could lead to dual infirmities, first it may cause prejudice to affected party and secondly, more particularly, hamper proper administration of justice - If decision reveals inscrutable face of Sphinx, it can by its silence render it impossible for courts to exercise power of judicial review in adjudging validity of decision. (Paras 7 &11)

Constitution of India, 1950 - Article 226 - Executive function - Refusal to grant license - Non speaking order - Writ jurisdiction – Held, all authorities exercising power to determine rights and obligations must give reasons in support of their orders – Decision of Public Distribution Committee declining grant of license to Society for sale of controlled and

uncontrolled commodities to ration card holders within its jurisdiction being without any reason, set aside - Petition disposed of - Public Distribution Committee directed to reconsider request of Society within time specified in view of guidelines of Government. (Paras 13 & 14)

Cases referred:

Director, Horticulture, Punjab and others vs. Jagjivan Parshad (2008) 5 SCC 539

Kanti Associates Private Limited and another vs. Masood Ahmed Khan and others (2010) 9 SCC 496

Maya Devi (dead) through LRs. vs. Raj Kumari Batra (dead) through LRs and others (2010) 9 SCC 486

Ravi Yashwant Bhoir vs. District Collector, Raigad and others (2012) 4 SCC 407

For the petitioner: Mr. Vijay Chaudhary, Advocate.

For the respondents: Ms. Meenakshi Sharma, Addl. A.G. with
Mr. Neeraj K. Sharma, Dy.A.G. for respondents No. 1 to 5.
Mr. O.C. Sharma, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J. (oral).

This is for the second time that the petitioner-Society has been driven to this Court for filing a writ petition, wherein it has prayed for the following reliefs:-

> *a) That the findings given by the respondent No.3 vide its order dated 11.2.2015, Annexure P-7 may kindly be quashed and set aside.*
>
> *b) That the respondents may kindly be directed to issue licence to petitioner society to distribute ration articles to the card holders of Gram Panchayat Charog.*

2. The facts lie in a narrow compass. The petitioner is a registered Cooperative Society having been registered on 4.8.2010 with the Assistant Registrar, Cooperative Societies, Solan. At that time, the aim and object of the society was to encourage thrift and saving amongst its members by accepting deposits and offering and further to provide credit facilities to its members on convenient and easy terms as well as to arrange for the purchase and sale of the household requirements of members.

3. However, later on the petitioner-Society amended its bye-laws and object and the provision was made to provide controlled or non-controlled commodities in the areas of operation of the Society and such amendment was approved by the aforesaid Assistant Registrar on 7.7.2011.

4. It appears that the petitioner passed resolution requesting respondent No.2 to allot in its favour ration depot and work of distribution of kerosene oil. It further appears that such request of the petitioner was favourably recommended by respondents No. 4 and 5 to respondent No.2, however, when no further progress was being made on the recommendations so made, the petitioner filed a writ petition being CWP No. 10004/2014, which came up for consideration before this Court on 1.1.2015 and following order came to be passed:-

> *"It is a moot question - whether the writ petition is maintainable? We leave this question open.*
>
> *2. However, we deem it proper to dispose of this writ petition with liberty to the writ petitioner to file a representation before respondent No. 2 within one week, who shall examine the same and make a decision within two weeks thereafter.*
>
> *3. The writ petition is disposed of accordingly alongwith all pending applications."*

5. In compliance to the aforesaid directions, the petitioner filed a detailed representation dated 7.1.2015, which was considered by respondent No.2 and disposed of on 11.2.2015 by directing respondent No.3-Public Distribution Committee, headed by the Deputy Commissioner, Solan, to examine the case of the petitioner for the issuance of licence within a period of one month as per latest guidelines for the selection of fair price shop. 4. The matter was accordingly placed before the Public Distribution Committee, who after taking note of the entire facts that led to the filing of the representation dated 7.1.2015, dismissed the same vide order dated 9.3.2015 by observing as under:

6. Evidently, the order dated 9.3.2015 rejecting the claim of the petitioner is bereft of any reason and, therefore, is not sustainable in the eyes of law.

7. Recording of reasons is an essential feature of dispensation of justice. A litigant who approaches the authority with any grievance in accordance with law is entitled to know the reasons for grant or rejection of his prayer. Reasons are the soul of orders. Non-recording of reasons could lead to dual infirmities; firstly, it may cause prejudice to the affected party and secondly, more particularly, hamper the proper administration of justice. These principles are not only applicable to administrative or executive actions, but they apply with equal force and, in fact, with a greater degree of precision to judicial pronouncements.

8. An order without reasons causes prejudice to the person against whom it is pronounced, as the litigant is unable to know the ground which weighed with the authority in rejecting his claim or accepting the claim of the opposite party. It also causes impediments in his taking adequate and appropriate grounds before the higher authority in the event of challenge to that order.

9. The Hon'ble Supreme Court in ***Kanti Associates Private Limited and another Vs. Masood Ahmed Khan and others (2010) 9 SCC 496***, elaborately discussed the necessity of recording reasons in the following manner:

> *12. The necessity of giving reason by a body or authority in support of its decision came up for consideration before this Court in several cases. Initially this Court recognized a sort of demarcation between administrative orders and quasi-judicial orders but with the passage of time the distinction between the two got blurred and thinned out and virtually reached a vanishing point in the judgment of this Court in A.K. Kraipak and others vs. Union of India and others AIR 1970 SC 150.*
>
> *13. In Keshav Mills Co. Ltd. and another vs. Union of India and others AIR 1973 SC 389, this Court approvingly referred to the opinion of Lord Denning in R. vs. Gaming Board for Great Britain ex p Benaim (1970) 2 WLR 1009 and quoted him as saying "that heresy was scotched in Ridge v. Boldwin, 1964 AC 40".*

14. The expression `speaking order' was first coined by Lord Chancellor Earl Cairns in a rather strange context. The Lord Chancellor, while explaining the ambit of Writ of Certiorari, referred to orders with errors on the face of the record and pointed out that an order with errors on its face, is a speaking order. (See pp.1878-97 Vol. 4 Appeal Cases 30 at 40 of the report).

15. This Court always opined that the face of an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties, must speak. It must not be like the "inscrutable face of a Sphinx".

16. In Harinagar Sugar Mills Ltd. vs. Shyam Sunder Jhunjhunwala and others, AIR 1961 SC 1669, the question of recording reasons came up for consideration in the context of a refusal by Harinagar to transfer, without giving reasons, shares held by Shyam Sunder. Challenging such refusal, the transferee moved the High Court contending, inter alia, that the refusal is mala fide, arbitrary and capricious. The High Court rejected such pleas and the transferee was asked to file a suit. The transferee filed an appeal to the Central Government under Section 111 (3) of Indian Companies Act, 1956 which was dismissed. Thereafter, the son of the original transferee filed another application for transfer of his shares which was similarly refused by the Company. On appeal, the Central Government quashed the resolution passed by the Company and directed the Company to register the transfer. However, in passing the said order, Government did not give any reason. The company challenged the said decision before this Court.

17. The other question which arose in Harinagar was whether the Central Government, in passing the appellate order acted as a tribunal and is amenable to Article 136 jurisdiction of this Court.

18. Even though in Harinagar the decision was administrative, this Court insisted on the requirement of recording reason and further held that in exercising appellate powers, the Central Government acted as a tribunal in exercising judicial powers of the State and such exercise is subject to Article 136 jurisdiction of this Court. Such powers, this Court held, cannot be effectively exercised if reasons are not given by the Central Government in support of the order (AIR pp 1678-79, para 23).

19. Again in Bhagat Raja vs. Union of India and others, AIR 1967 SC 1606, the Constitution Bench of this Court examined the question whether the Central Government was bound to pass a speaking order while dismissing a revision and confirming the order of the State Government in the context of Mines and Minerals (Regulation and Development) Act, 1957, and having regard to the provision of Rule 55 of Mineral and Concessions Rules. The Constitution Bench held that in exercising its power of revision under the aforesaid Rule the Central Government acts in a quasi-judicial capacity (AIR para 8 p. 1610). Where the State Government gives a number of reasons some of which are good and some are not, and the Central Government merely endorses the order of the State Government without specifying any reason, this Court, exercising its jurisdiction under Article 136, may find it difficult to ascertain which are the grounds on which Central Government upheld the order of the State Government (See AIR para 9 page 1610). Therefore, this Court insisted on reasons being given for the order.

20. In Mahabir Prasad Santosh Kumar vs. State of U.P AIR 1970 SC 1302, while dealing with U.P. Sugar Dealers License Order under which the license was cancelled, this Court held that such an order of cancellation is quasi-

judicial and must be a speaking one. This Court further held that merely giving an opportunity of hearing is not enough and further pointed out where the order is subject to appeal, the necessity to record reason is even greater. The learned Judges held that the recording of reasons in support of a decision on a disputed claim ensures that the decision is not a result of caprice, whim or fancy but was arrived at after considering the relevant law and that the decision was just. (See AIR para 7 page 1304).

21. In Travancore Rayons Ltd. vs. The Union of India, AIR 1971 SC 862, the Court, dealing with the revisional jurisdiction of the Central Government under the then Section 36 of the Central Excise and Salt Act, 1944, held that the Central Government was actually exercising judicial power of the State and in exercising judicial power reasons in support of the order must be disclosed on two grounds. The first is that the person aggrieved gets an opportunity to demonstrate that the reasons are erroneous and secondly, the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power (See AIR para 11 page 865 -866).

22. In Woolcombers of India Ltd. vs. Woolcombers Workers Union, AIR 1973 SC 2758, this Court while considering an award under Section 11 of Industrial Disputes Act insisted on the need of giving reasons in support of conclusions in the Award. The Court held that the very requirement of giving reason is to prevent unfairness or arbitrariness in reaching conclusions. The second principle is based on the jurisprudential doctrine that justice should not only be done, it should also appear to be process and opined that such reasons should be communicated unless there are specific justification for not doing so (see SCC Para 10, page 284-85).

23. In Union of India vs. Mohan Lal Capoor, AIR 1974 SC 87, this Court while dealing with the question of selection under Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations held that the expression "reasons for the proposed supersession" should not be mere rubber stamp reasons. Such reasons must disclose how mind was applied to the subject matter for a decision regardless of the fact whether such a decision is purely administrative or quasi-judicial. This Court held that the reasons in such context would mean the link between materials which are considered and the conclusions which are reached. Reasons must reveal a rational nexus between the two (See AIR paras 27-28 page 97-98).

24. In Siemens Engineering and Manufacturing Co. of India Ltd. vs. The Union of India , AIR 1976 SC 1785, this Court held that it is far too well settled that an authority in making an order in exercise of its quasi-judicial function, must record reasons in support of the order it makes. The learned Judges emphatically said that every quasi-judicial order must be supported by reasons. The rule requiring reasons in support of a quasi-judicial order is, this Court held, as basic as following the principles of natural justice. And the rule must be observed in its proper spirit. A mere pretence of compliance would not satisfy the requirement of law (See AIR para 6 page 1789).

25. In Maneka Gandhi vs. Union of India., AIR 1978 SC 597, which is a decision of great jurisprudence significance in our Constitutional law, Chief Justice Beg, in a concurring but different opinion held hat an order impounding a passport is a quasi-judicial decision (AIR Para 34, page 612). The learned Chief Justice also held when an administrative action involving any

deprivation of or restriction on fundamental rights is taken, the authorities must see that justice is not only done but manifestly appears to be done as well. This principle would obviously demand disclosure of reasons for the decision.

26. Y.V. Chandrachud, J. (as His Lordship then was) in a concurring but a separate opinion also held that refusal to disclose reasons for impounding a passport is an exercise of an exceptional nature and is to be done very sparingly and only when it is fully justified by the exigencies of an uncommon situation. The learned Judge further held that law cannot permit any exercise of power by an executive to keep the reasons undisclosed if the only motive for doing so is to keep the reasons away from judicial scrutiny. (See AIR para 39 page 613).

27. In Rama Varma Bharathan Thampuran vs. State of Kerala AIR1979 SC 1918, V.R. Krishna Iyer, J. speaking for a three-Judge Bench held that the functioning of the Board was quasi-judicial in character. One of the attributes of quasi-judicial functioning is the recording of reasons in support of decisions taken and the other requirement is following the principles of natural justice. Learned Judge held that natural justice requires reasons to be written for the conclusions made (See AIR para 14 page 1922).

28. In Gurdial Singh Fijji vs. State of Punjab,(1979) 2 SCC 368, this Court, dealing with a service matter, relying on the ratio in Capoor (supra), held that "rubber-stamp reason" is not enough and virtually quoted the observation in Capoor (supra) to the extent that: (Capoor Case, SCC p.854, para 28)

> *"28....Reasons are the links between the materials on which certain conclusions are based and the actual conclusions" (See AIR para 18 page 377).*

29. In a Constitution Bench decision of this Court in Shri Swamiji of Shri Admar Mutt etc. etc. vs. The Commissioner, Hindu Religious and Charitable Endowments Dept. and Ors., AIR 1980 SC 1, while giving the majority judgment Y.V. Chandrachud, CJ, referred to(SCC p.658, 29) Broom's Legal Maxims (1939 Edition, page 97) where the principle in Latin runs as follows:

> "Cessante Ratione Legis Cessat Ipsa Lex"

30. The English version of the said principle given by the Chief Justice is that:(H.H. Shri Swamiji case, SCC p.658, para 29) "29..... 'reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself'." (See AIR para 29 page 11)

31. In Bombay Oil Industries Pvt. Ltd. vs. Union of India , AIR 1984 SC 160, this Court held that while disposing of applications under Monopolies and Restrictive Trade Practices Act the duty of the Government is to give reasons for its order. This court made it very clear that the faith of the people in administrative tribunals can be sustained only if the tribunals act fairly and dispose of the matters before them by well considered orders. In saying so, this Court relied on its previous decisions in Capoor (supra) and Siemens Engineering (supra), discussed above.

32. In Ram Chander vs. Union of India, AIR 1986 SC 1173, this Court was dealing with the appellate provisions under the Railway Servants (Discipline and Appeal) Rules, 1968 condemned the mechanical way of dismissal of appeal in the context of requirement of Rule 22(2) of the aforesaid Rule. This Court held that the word "consider" occurring to the Rule 22(2) must mean the

Railway Board shall duly apply its mind and give reasons for its decision. The learned Judges held that the duty to give reason is an incident of the judicial process and emphasized that in discharging quasi-judicial functions the appellate authority must act in accordance with natural justice and give reasons for its decision (AIR Para 4, page 1176).

33. In Star Enterprises and others vs. City and Industrial Development Corporation of Maharashtra Ltd.,(1990) 3 SCC 280, a three-Judge Bench of this Court held that in the present day set up judicial review of administrative action has become expansive and is becoming wider day by day and the State has to justify its action in various field of public law. All these necessitate recording of reason for executive actions including the rejection of the highest offer. This Court held that disclosure of reasons in matters of such rejection provides an opportunity for an objective review both by superior administrative heads and for judicial process and opined that such reasons should be communicated unless there are specific justification for not doing so (see SCC Para 10, page 284-85).

34. In Maharashtra State Board of Secondary and Higher Secondary Education vs. K.S. Gandhi, (1991) 2 SCC 716, this Court held that even in domestic enquiry if the facts are not in dispute non-recording of reason may not be violative of the principles of natural justice but where facts are disputed necessarily the authority or the enquiry officer, on consideration of the materials on record, should record reasons in support of the conclusion reached (see SCC para 22, pages 738-39).

35. In M.L. Jaggi vs.MTNL (1996) 3 SCC 119, this Court dealt with an award under Section 7 of the Telegraph Act and held that since the said award affects public interest, reasons must be recorded in the award. It was also held that such reasons are to be recorded so that it enables the High Court to exercise its power of judicial review on the validity of the award. (see SCC para 8, page 123).

36. In Charan Singh vs. Healing Touch Hospital, AIR 2000 SC 3138, a three-Judge Bench of this Court, dealing with a grievance under CP Act, held that the authorities under the Act exercise quasi-judicial powers for redressal of consumer disputes and it is, therefore, imperative that such a body should arrive at conclusions based on reasons. This Court held that the said Act, being one of the benevolent pieces of legislation, is intended to protect a large body of consumers from exploitation as the said Act provides for an alternative mode for consumer justice by the process of a summary trial. The powers which are exercised are definitely quasi-judicial in nature and in such a situation the conclusions must be based on reasons and held that requirement of recording reasons is "too obvious to be reiterated and needs no emphasizing". (See AIR Para 11, page 3141 of the report)

37. Only in cases of Court Martial, this Court struck a different note in two of its Constitution Bench decisions, the first of which was rendered in the case of Som Datt Datta vs. Union of India , AIR 1969 SC 414, where Ramaswami, J. delivering the judgment for the unanimous Constitution Bench held that provisions of Sections 164 and 165 of the Army Act do not require an order confirming proceedings of Court Martial to be supported by reasons. The Court held that an order confirming such proceedings does not become illegal if it does not record reasons. (AIR Para 10, pageS 421-22 of the report).

38. About two decades thereafter, a similar question cropped up before this Court in the case of S.N. Mukherjee vs. Union of India, AIR 1990 SC 1984. A unanimous Constitution Bench speaking through S.C. Agrawal, J. confirmed its earlier decision in Som Datt in S.N.Mukherjee case, SCC p.619,para 47 of the report and held reasons are not required to be recorded for an order confirming the finding and sentence recorded by the Court Martial.

39. It must be remembered in this connection that the Court Martial as a proceeding is sui generis in nature and the Court of Court Martial is different, being called a Court of Honour and the proceeding therein are slightly different from other proceedings. About the nature of Court Martial and its proceedings the observations of Winthrop in Military Law and Precedents are very pertinent and are extracted herein below:

> "*Not belonging to the judicial branch of the Government, it follows that courts -martial must pertain to the executive department; and they are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in* properly commanding the Army and Navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."

40. Our Constitution also deals with Court Martial proceedings differently as is clear from Articles 33, 136(2) and 227(4) of the Constitution.

41. In England there was no common law duty of recording of reasons. In Marta Stefan vs. General Medical Council, (1999) 1 WLR 1293, it has been held (WLR page 1300) the established position of the common law is that there is no general duty imposed on our decision makers to record reasons. It has been acknowledged in the Justice Report, Administration Under Law (1971) at page 23 that :

> *"No single factor has inhibited the development of English administrative law as seriously as the absence of any general obligation upon public authorities to give reasons for their decisions".*

42. Even then in R. vs. Civil Service Appeal Board, ex p Cunningham (1991) 4 All ER 310, Lord Donaldson, Master of Rolls, opined very strongly in favour of disclosing of reasons in a case where the Court is acting in its discretion. The learned Master of Rolls said: (All ER page 317)

> *"... '.... It is a corollary of the discretion conferred upon the board that it is their duty to set out their reasoning in sufficient form to show the principles on which they have proceeded. Adopting Lord Lane CJ's observations (in R vs. Immigration Appeal Tribunal, ex p Khan (Mahmud) [1983] 2 All ER 420 at 423, (1983) QB 790 at 794-795), the reasons for the lower amount is not obvious. Mr. Cunningham is entitled to know, either expressly or inferentially stated, what it was to which the board were addressing their mind in arriving at their conclusion. It must be obvious to the board that Mr. Cunningham is left with a burning sense of grievance. They should be sensitive to the fact that he is left with a real feeling of injustice, that having been found to have been unfairly dismissed, he has been deprived of his just desserts (as he sees them).' "*

43. The learned Master of Rolls further clarified by saying: (Civil Service Appeal Board Case, All ER 317) "..... '....Thus, in the particular circumstances

of this case, and without wishing to establish any precedent whatsoever, I am prepared to spell out an obligation on this board to give succinct reasons, if only to put the mind of Mr. Cunningham at rest. I would therefore allow this application.' "

44. But, however, the present trend of the law has been towards an increasing recognition of the duty of Court to give reasons (See North Range Shipping Limited vs. Seatrans Shipping Corporation, (2002) 1 WLR 2397). It has been acknowledged that this trend is consistent with the development towards openness in Government and judicial administration.

45. In English vs. Emery Reimbold and Strick Limited, (2002) 1 WLR 2409, it has been held that justice will not be done if it is not apparent to the parties why one has won and the other has lost. The House of Lords in Cullen vs. Chief Constable of the Royal Ulster Constabulary, (2003) 1 WLR 1763, Lord Bingham of Cornhill and Lord Steyn, on the requirement of reason held:(WLR p.1769, para 7)

> *"7.....First, they impose a discipline ... which may contribute to such decisions being considered with care. Secondly, reasons ncourage transparency ... Thirdly, they assist the Courts in performing their supervisory function if judicial review proceedings are launched."*

46. The position in the United States has been indicated by this Court in S.N. Mukherjee in SCC p.602, para 11 of the judgment. This Court held that in the United States the Courts have always insisted on the recording of reasons by administrative authorities in exercise of their powers. It was further held that such recording of reasons is required as "the Court cannot exercise their duty of review unless they are advised of the considerations underlying the action under review". In S.N. Mukherjee this court relied on the decisions of the U.S. Court in Securities and Exchange Commission vs. Chenery Corporation, (1942) 87 Law Ed 626 and Dunlop vs. Bachowski, (1975) 44 Law Ed 377 in support of its opinion discussed above.

47. Summarizing the above discussion, this Court holds:

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior Courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and uccinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-37).

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v.Spain (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

10. The necessity of recording reasons even by the administrative authorities was emphasized by the Hon'ble Supreme Court in ***Ravi Yashwant Bhoir Vs. District Collector, Raigad and others (2012) 4 SCC 407***, wherein it has been held as under:-

"38. It is a settled proposition of law that even in administrative matters, the reasons should be recorded as it is incumbent upon the authorities to pass a speaking and reasoned order.

39. In Shrilekha Vidyarthi Vs. U.P.(1991) 1 SCC 212 this Court has observed as under: (SCC p. 243, para 36).

> *"36.....Every State action may be informed by reason and it follows that an act uninformed by reason, is arbitrary. The rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is the trite law that 'be you ever so high, the laws are above you'. This is what men in power must remember, always."*

40. In LIC Vs. Consumer Education and Research Centre (1995) 5 SCC 482 this Court observed that the State or its instrumentality must not take any irrelevant or irrational factor into consideration or appear arbitrary in its

decision. "Duty to act fairly" is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty must be received and guided by the public interest. A similar view has been reiterated by this Court in Union of India Vs. Mohan Lal Capoor (1973) 2 SCC 836 and Mahesh Chandra Vs. U.P. Financial Corpn.(1993) 2 SCC 279.

41. In State of W.B. Vs. Atul Krishna Shaw 1991 Supp (1) SCC 414, this Court observed that : (SCC p. 421, para 7)

> *"7....Giving of reasons is an essential element of administration of justice. A right to reason is, therefore, an indispensable part of sound system of judicial review."*

42. In S.N. Mukherjee Vs . Union of India(1990) 4 SCC 594, it has been held that the object underlying the rules of natural justice is to prevent miscarriage of justice and secure fair play in action. The expanding horizon of the principles of natural justice provides for requirement to record reasons as to it is now regarded as one of the principles of natural justice, and it was held in the above case that except in cases where the requirement to record reasons is expressly or by necessary implication dispensed with, the authority must record reasons for its decision.

43. In Krishna Swami Vs. Union of India (1992) 4 SCC 605, this Court observed that the rule of law requires that any action or decision of a statutory or public authority must be founded on the reason stated in the order or borne out from the record. The Court further observed: (SCC p. 637, para 47).

> *"47.....Reasons are the links between the material, the foundation for their erection and the actual conclusions. They would also demonstrate how the mind of the maker was activated and actuated and their rational nexus and synthesis with the facts considered and the conclusions reached. Lest it would be arbitrary, unfair and unjust, violating Article 14 or unfair procedure offending Article 21".*

44. This Court while deciding the issue in Sant Lal Gupta Vs. Modern Coop. Group Housing Society Ltd.(2010) 13 SCC 336, placing reliance on its various earlier judgments held as under: (SCC pp. 345-46, para 27).

> *"27. It is a settled legal proposition that not only administrative but also judicial orders 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.*
>
> > *'3....The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the court concerned had really applied its mind'.*
>
> *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 the higher forum. Recording of reasons is the 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."

45. In Institute of Chartered Accountants of India Vs. L.K. Ratna (1986) 4 SCC 537, this Court held that on charge of misconduct the authority holding the inquiry must record reasons for reaching its conclusion and record clear findings. The Court further held: (SCC p. 558, para 30).

"30.....In fairness and justice, the member is entitled to know why he has been found guilty. The case can be so serious that it can attract the harsh penalties provided by the Act. Moreover, the member has been given a right of appeal to the High Court under Section 22-A of the Act. To exercise his right of appeal effectively he must know the basis on which the Council has found him guilty. We have already pointed out that a finding by the Council is the first determinative finding on the guilty of the member. It is a finding by a Tribunal of first instance. The conclusion of the Disciplinary Committee does not enjoy the status of a 'finding'. Moreover, the reasons contained in the report by the Disciplinary Committee for its conclusion may or may not constitute the basis of the finding rendered by the Council. The Council must, therefore, state the reasons for its finding."

46. The emphasis on recording reason is that if the decision reveals the "inscrutable face of the sphinx", it can by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the authority before the court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out the reasons for the order made, in other words, a speaking out. The inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi-judicial performance."

11. The emphasis on recording reasons is that, if the decision reveals the inscrutable face of the sphinx, it can, by its silence, render it virtually impossible for the Courts to exercise powers of judicial review in adjudging the validity of the decision. This was so held by the Hon'ble Supreme Court in ***Director, Horticulture, Punjab and others versus Jagjivan Parshad (2008) 5 SCC 539,*** the relevant paragraphs read thus:-

"*7. Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, all the more when its order is amenable to further avenue of challenge. The absence of reasons has rendered the High Court's judgment not sustainable.*

8. We find that the writ petition involved disputed issues regarding eligibility. The manner in which the High Court has disposed of the writ petition shows that the basic requirement of indicating reasons was not kept in view and is a

classic case of non-application of mind. This Court in several cases has indicated the necessity for recording reasons.

9. "15…….Even in respect of administrative orders Lord Denning, M.R. in Breen v. Amalgamated Engg. Union (1971) 1 All ER 1148 observed: (All ER p. 1154h) 'The giving of reasons is one of the fundamentals of good administration.' In Alexander Machinery (Dudley) Ltd. v. Crabtree (1974 1 CR 120) it was observed:

"Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at."

Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking-out. The 'inscrutable face of the sphinx' is ordinarily incongruous with a judicial or quasi- judicial performance (See: Chairman and Managing Director, United Commercial Bank v. P.C. Kakkar (2003) 4 SCC 364 (SCC p.377, para 15)."

12 The juristic basis underlying the requirement that the Courts and indeed all such authorities as exercise the power to determine the rights and obligations of individuals must give reasons in support of their orders has been examined in detail by the Hon'ble Supreme Court in ***Maya Devi (dead) through LRs. Versus Raj Kumari Batra (dead) through LRs and others (2010) 9 SCC 486,*** wherein it has been held as under:-

"22…….. In Hindustan Times Limited v. Union of India & Ors. 1998 (2) SCC 242 the need to give reasons has been held to arise out of the need to minimize chances of arbitrariness and induce clarity.

23. In Arun v. Inspector General of Police 1986 (3) SCC 696 the recording of reasons in support of the order passed by the High Court has been held to inspire public confidence in administration of justice, and help the Apex Court to dispose of appeals filed against such orders.

24. In Union of India . v. Jai Prakash Singh 2007 (10) SCC 712, reasons were held to be live links between the mind of the decision maker and the controversy in question as also the decision or conclusion arrived at.

25. In Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity 2010 (3) SCC 732, reasons were held to be the heartbeat of every conclusion, apart from being an essential feature of the principles of natural justice, that ensure transparency and fairness, in the decision making process.

26. In Ram Phal v. State of Haryana 2009 (3) SCC 258, giving of satisfactory reasons was held to be a requirement arising out of an ordinary man's sense of justice and a healthy discipline for all those who exercise power over others.

27. In Director, Horticulture Punjab & Ors. v. Jagjivan Parshad 2008 (5) SCC 539, the recording of reasons was held to be indicative of application of mind specially when the order is amenable to further avenues of challenge.

28. It is in the light of the above pronouncements unnecessary to say anything beyond what has been so eloquently said in support of the need to give reasons for orders made by Courts and statutory or other authorities exercising quasi judicial functions. All that we may mention is that in a system governed by the rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the repository of such power. There is nothing like a power without any limits or constraints. That is so even when a Court or other authority may be vested with wide discretionary power, for even discretion has to be exercised only along well recognized and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity.

29. What then are the safeguards against an arbitrary exercise of power? The first and the most effective check against any such exercise is the well recognized legal principle that orders can be made only after due and proper application of mind. Application of mind brings reasonableness not only to the exercise of power but to the ultimate conclusion also. Application of mind in turn is best demonstrated by disclosure of the mind. And disclosure is best demonstrated by recording reasons in support of the order or conclusion.

30. Recording of reasons in cases where the order is subject to further appeal is very important from yet another angle. An appellate Court or the authority ought to have the advantage of examining the reasons that prevailed with the Court or the authority making the order. Conversely, absence of reasons in an appealable order deprives the appellate Court or the authority of that advantage and casts an onerous responsibility upon it to examine and determine the question on its own. An appellate Court or authority may in a given case decline to undertake any such exercise and remit the matter back to the lower Court or authority for a fresh and reasoned order. That, however, is not an inflexible rule, for an appellate Court may notwithstanding the absence of reasons in support of the order under appeal before it examine the matter on merits and finally decide the same at the appellate stage. Whether or not the appellate Court should remit the matter is discretionary with the appellate Court and would largely depend upon the nature of the dispute, the nature and the extent of evidence that may have to be appreciated, the complexity of the issues that arise for determination and whether remand is going to result in avoidable prolongation of the litigation between the parties. Remands are usually avoided if the appellate Court is of the view that it will prolong the litigation."

13. In view of the law as expounded in the aforesaid judgments, the order dated 9.3.2015 passed by respondent No.3 being a non-speaking one is *ex facie* illegal and, therefore, cannot withstand legal scrutiny and is, therefore, liable to be set aside. Ordered accordingly.

14. The respondent No.3-Public Distribution Committee headed by the Deputy Commissioner, Solan is directed to consider afresh the representation dated 7.1.2015 made by the petitioner in terms of the order passed by this Court in CWP No.10004/2014 strictly in accordance with law, more particularly, in terms of the guidelines framed by the Government for opening a new fair price shop vide notification dated 2.8.2014 (Annexure R-2).

15. Needless to say that the decision shall be taken after hearing all the stake holders i.e. the petitioner and respondent No.6. It further goes without saying that the order

so passed shall be self speaking and self contained one and shall be passed as expeditiously as possible and in no event later than **31.10.2017**.

16. The writ petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s), if any also stands disposed of.

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